

The Case for Dynamic Provisions in Constitutional Design

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This paper makes the case for “dynamic” constitutional provisions, which are distinctive because they stipulate a future change in the formal “rules of the game” without requiring a constitutional amendment. Using examples from the choice of electoral system and choice of regime type, I show that there are persuasive reasons why such provisions might be expected to improve outcomes.

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The purpose of this paper is to make the case for “dynamic” constitutional provisions,² which differ from “static” provisions because they stipulate a future change in the formal rules of a democratic system of government. The rules change at a stipulated date, or when specific conditions are met, unless a constitutional amendment is passed to maintain the status quo. The change that occurs as a result of a dynamic provision may be achievable in a constitution that does not contain such a provision; through that constitution’s regular amendment process at a moment that approximates the turning point entrenched in the dynamic provision. However, a dynamic provision is distinctive because it mandates such a change *unless* an amendment is passed to prevent it. The result is a change in the *politics* surrounding constitutional change: the burdens of mobilization fall on those who desire to maintain the status quo rather than those who seek to overturn it. Because of this, the dynamic provision enables a change of governing rules in a direction and at a time that may not be possible otherwise.

Empirical studies show time and again the extreme difficulties associated with constitutional reform (e.g. Boix 1999; Pilet and Bol 2011; Renwick 2010), even when a proposed reform is likely to satisfy the Pareto principle: that society as a whole would be better off. For reasons such as politicians’ self-interest and citizens’ reverence of ancient constitutional laws, reform advocacy normally ends in failure – constitutional stasis and sometimes even democratic collapse. Thus, constitutional reform is often “impossible” politics even when change appears necessary or desirable. For these “impossible” politics to be overcome, we are typically told, an exceptional mix of circumstance and action needs to emerge: permissive “structures” that supply reform opportunities must combine with skilful political “agents” who can exploit a rare chance to achieve constitutional change. But this reliance on exceptional situations is inefficient when it is possible to anticipate that a future rules change is likely to be desirable and when it is possible to design a dynamic provision to achieve this transition. Of course, it may be impossible to anticipate future political problems with a high degree of certainty, and any dynamic provision that we may be able to design may be Pareto-inferior to a well-chosen static one. Compounding these problems of *policy* are problems of *politics*. Are there any situations when rational politicians may choose dynamic provisions ahead of static ones? Can the dynamic provision survive when confronted with politicians who seek to gain and remain in power and who are well placed to enact or reform rules to achieve these ends? This paper aims to show that we can design dynamic provisions in ways that satisfy these policy and political requirements. Therefore, I conclude, such provisions are not just theoretically interesting but may also be practically useful. I do not argue that a dynamic perspective should be the dominant approach to constitutional design. The suitability of dynamic provisions is too limited, the range of constitution-related problems too large, and their manifestations in different countries too varied for this more general argument to hold. My goals are the more modest ones of explaining how dynamic provisions differ from static ones and establishing why a dynamic perspective can complement existing (static) approaches to the problems of constitutional design.

The design of constitutions stands out as a practical topic that has benefited greatly from political science research on regime types, electoral systems and other constitutional issues. Experts on constitutional design (often academic lawyers) have become increasingly interested in using this knowledge to debate – and sometimes to prescribe – ideal constitutional arrangements. Yet this integration of political realities into debates over

² I use the term “constitution” to describe the formal rules that provide the framework for government. Some “rules of the game” may not be constitutional, such as the electoral system in some countries, and for other countries, such as the UK, there is no codified constitution.

constitutional design remains incomplete. The argument advanced in this paper reveals that while we know a great deal about the effects of constitutional structures, on the one hand, and the politics of constitutional change (especially its near-impossibility) on the other, these insights are rarely connected in theoretical analyses or practical prescriptions. “Comparative constitutional engineering,” as Sartori labels this research tradition, pays scant attention to how constitutions should be designed given that they hardly ever change. This reflects a broader neglect of political actors’ incentives *after* a constitution has been written and its institutions established. In contrast, research on the US Congress focusing on politicians’ incentives in established institutional settings has encouraged scholars to explain how existing institutions supply optimal arrangements for rational politicians who are affected by those institutions, and to account for the absence of institutional change when such institutions are sub-optimal (e.g. Mayhew 1974; Shepsle and Weingast 1981; Tullock 1981). A similar line of research is absent from the literature on constitutional design; this paper takes steps in this underdeveloped direction.³

This paper is organized as follows. In the next section I elaborate the difference between static and dynamic constitutional provisions. Then I set out criteria for establishing when the use of dynamic provisions may be feasible. Two examples of feasible dynamic provisions follow, one for the choice of electoral system and the other for the choice of regime type. I conclude with a brief discussion of some potential extensions of the framework established in this paper.

Understanding the Choice of Constitution: Static versus Dynamic Provisions

Why do countries end up with the constitutions that they do? Constitution-making is, on the one hand, an extreme example of “political” activity. If, following Laswell (1950), politics is about “who gets what, when, and how” then constitution-making is a uniquely important form of politics because its outcomes supply the context – or the “rules of the game” – for all future political contests. Given its high stakes it is unsurprising that constitution-making is frequently described in terms that are very familiar to scholars of politics: as a fierce struggle between rival factions or the result of a negotiated settlement. Yet despite it being a focal case of “politics,” constitution-making also provides a uniquely hospitable setting for institutional “engineering” where this is understood as the attempt to design Pareto-optimal institutions.⁴ How do we account for the paradox that in this most political of settings there are opportunities for lengthy debates about the effects of institutions on general welfare and not just on sectional interests? Five reconciliations can be suggested. First, discussions of general welfare may be “cheap talk,” deceptive frames to hide the pursuit of sectional interests. Second, as in post-war Japan, the constitution is imposed by external actors with the capacity and incentives to downplay sectional concerns when these conflict with national interests (e.g. Ward 1965). Third, because constitution-making is such a significant activity, participants worry about what the history books will say about their role in the process (e.g. Elster 1995). This concern for historical legacies encourages constitutional politicians to think in more general, and less sectional, ways than is typically the case. Fourth, constitution-

³ The notable exception in this regard is Riker’s work on the US constitutional convention (e.g. Riker 1996). See also McLean (2001) for a similar treatment of some of Britain’s constitutional “moments.” But Riker focuses on the unique politics of that convention rather than the broader characteristics of constitutional law and politics, which is the focus of researchers following in the footsteps of Woodrow Wilson, Juan Linz, Arend Lijphart, and Giovanni Sartori.

⁴ Constitutional experts are often hired as advisers to, and sometimes attend, constitutional conventions (see e.g. Proksch 2008).

making attracts an unusual surge in popular participation that compels politicians to prioritize citizens' preferences (e.g. Partlett 2012). Fifth, constitution-making occurs at moments of heightened political uncertainty, as in Eastern Europe (e.g. Elster 1993). It may be foolhardy for a politician to try to predict whether a particular constitution is likely to favour his particular "group" when political parties are new, and their reputations and competitive standings highly fluid, and economic and social structures are undergoing rapid transformation. The more sensible approach for such politicians may be to collectively pursue the "utilitarian" or "Rawlsian" strategies of creating a regime that maximizes overall welfare assuming that no politician can predict his future prospects. Detailed studies of real-world constitution-making suggest cases that resemble each of these five scenarios. It is reasonable to assume, therefore, that each scenario captures some part of the empirical reality of constitution-making, even if it remains unclear from these case studies which scenarios tend to be more common or more dominant and which are rarer or less significant.

Experts may play a key role in the design of constitutions in four of the five scenarios. (The exception is the "cheap talk" scenario where experts' advice is used as fodder or cover by politicians pursuing sectional interests). Experts' recommendations inform external actors' and domestic political elites' assessments of different institutional setups and may influence their final constitutional choices. How, then, do experts decide which are the best constitutional structures for a new democracy? The problem is one of optimizing under constraints. The expert's choice can be presented as a simple formula, which requires that we introduce some symbolic notation. Assume the following:

- w represents total citizen welfare;
- c represents a subset of constitutional structures chosen from a broader set, C ;
- x is a vector of general (i.e. non-country-specific) constraints that depends on the body of empirical knowledge concerning the effects of constitutional structures;
- y is a vector of country-specific constraints: the particular mix of problems that the constitution should help the democracy to solve;
- z gives the expert's preferences for particular institutions.

The expert's problem is to maximize welfare through the choice of constitution given the mix of general and country-specific constraints and her idiosyncratic preferences:

$$c(x, y, z) = \max_{c \in C} w(c *)$$

Understood in these terms, an expert's recommendation of a constitution may change as a result of new knowledge regarding the general effects of constitutional structures and she will recommend different optimal constitutions to countries facing different problems. Assuming that two experts are tasked with recommending a new constitution to the same country, and assuming also that these experts are equally well-versed in the general research on constitutional dilemmas, they may still recommend different constitutional structures. Their divergent choices should be interpreted as a preference for one set of constitutional structures instead of an alternative (but equally optimal) set.

This depiction of the expert's problem embodies the static perspective that is prevalent in the literature. Consistent with this view, the constitutional choice is an attempt to maximize welfare for a single state-of-affairs. But if any of the parameters change then a previously optimal constitutional choice may become sub-optimal. In particular, if the vector of country-

specific problems is fluid rather than fixed then a constitution that had been efficient may become outdated and inefficient.⁵ It seems sensible to expect that what a country requires of its constitutional structures is likely to evolve. Compare, for example, the requirements of new and established democracies. New democracies typically have less institutionalized – that is, more “fluid” – party systems (e.g. Mainwaring and Torcal 2005). New democracies also face particularly acute governance challenges as they may need to establish complex institutions – including perhaps the rule of law, secure property rights, and a merit-based civil service – from scratch. Research on electoral systems shows that the proportionality of an electoral system affects the co-ordination incentives of voters and candidates at election-time and elected officeholders between elections. The choice of electoral formula may therefore influence a country’s chances of, and speed in, developing institutionalized inter-party competition and enacting sweeping institutional reforms. Majoritarian formulas, which tend to reduce the number of parties more aggressively than PR formulas, encourage greater co-ordination of voters and candidates in electoral politics. The result is a smaller number of parties and more regularized patterns of inter-party competition, both of which are indicators of party system institutionalization. Majoritarian formulas also enhance governing capacity because they make “[s]ingle-party governments, with an overall parliamentary majority” much more likely. Such governments “can enact whatever policies they feel are necessary during their terms of office, making difficult or unpopular decisions they believe are in the country’s long-term interests” (Norris 2004, p. 72). Thus, a majoritarian electoral formula may be a sound choice for a new democracy challenged by the problems of party system institutionalization and major institutional reforms. Established democracies are unlikely to face these problems (at least not to the same extent). Representation of the diversity of citizens’ views is likely to be a higher priority for established democracies compared to new ones, and PR formulas are the better choice to achieve this goal. If these characterizations of new and old democracies are broadly accurate, it follows that a democracy’s ideal requirements for its constitutional structure will evolve; a majoritarian formula is optimal in the early stages following the transition to democratic government but later, when democracy is entrenched, a PR formula is optimal.

The constitution must change if it is to remain optimal when a democracy’s specific requirements evolve. However, constitutional change following normal amendment processes is very rare; it depends on exceptional situations; when it does occur it may not be in the direction that moves a democracy closer to its ideal constitutional arrangements, or it may do so only after decades of effort. It is more likely that, rather than a transition between efficient institutions, a democracy will function with a sub-optimal constitutional arrangement. Examples might be: a new democracy with consolidation and governance challenges operating under PR or an old democracy with representation challenges operating with a majoritarian formula. Sub-optimal constitutional structures may be only a minor handicap and the democracy may progress in spite of them.⁶ For example, “[d]emocracies can become consolidated under institutional arrangements that are less than ideal,” as Larry Diamond (1999, p. 100) points out, but doing so is inefficient. Both Italy and Israel achieved consolidation even though “compelling cases were made that the quality of democratic functioning could be enhanced by reducing the fragmentation of the party system...” (p.

⁵ By “fluid” I mean that change occurs in the elements comprising vector y or in the ordering of these elements as priorities. Experts’ preferences are likely to be “sticky.” The stock of general knowledge, vector x , may also be fluid, but it is not possible to cater for such fluidity using the dynamic provisions proposed in this paper because the new general knowledge is unknowable before it is generated.

⁶ The opposite is also true: a democracy may fail even if operates under the best possible constitutional arrangements.

100). Similarly, established democracies operating with majoritarian electoral systems, such as the UK and US, function reasonably well despite periodic “crises” of representation and generally lower “quality” representation than old democracies, such as the Netherlands, that operate with more proportional systems.

Dynamic provisions are an attempt to ensure – by purposeful design instead of depending on chance occurrence – that a democracy’s constitution remains optimal as its needs change. In the simplest case, constitutional structures should, ideally, transition once from an initial state-of-affairs (e.g. “politics in a new democracy”) to a second state-of-affairs (“politics in an established democracy”).⁷ The expert’s optimization problem now consists of three parts: the optimal constitutions for the first and second states-of-affairs and the optimal moment for the transition to occur. The expert’s dynamic optimization problem can be summarized as follows:

$$c_1, c_2, t(x, y, z) = \max_{\substack{c_1^*, c_2^* \in C \\ t^* \in T}} w(c_1^*, c_2^*, t^*)$$

Rather than maximizing welfare assuming that a country’s constitutional priorities will be unchanging, the expert now assumes that there will come a time when it is better to move to an alternative set of formal rules instead of maintaining the initial constitutional structure. A dynamic provision is fully specified when the expert identifies the two optimal states-of-affairs, c_1^* and c_2^* , and the best moment to shift between them, t^* .

The Feasibility of Dynamic Provisions

A dynamic provision that optimizes for multiple states-of-affairs may lead to better overall outcomes than a static provision that optimizes for only a single state-of-affairs. The dynamic provision is better because it may be impossible to alter the static provision in the desired direction at the desired moment. But do these theoretical observations have practical value? I argue that they do and, on this basis, that there are conceivable real-world situations where constitutional designers may find it useful to consider dynamic provisions. In this section I identify the conditions that must be satisfied for a dynamic provision to be a feasible solution to a constitutional dilemma. In the two subsequent sections I show that for at least two major constitutional dilemmas – the choice of electoral system and the choice of regime type – we can design dynamic provisions that satisfy these feasibility conditions.

For a dynamic constitutional provision to be feasible three conditions must hold concurrently:

- **Dynamic optimality.** The dynamic provision must provide benefits that cannot be achieved using only static provisions. If we assume that a first set of static provisions is likely to remain in place then this requirement has three implications. First, the constitutional arrangements that would best suit a democracy must change over time.⁸ If the democracy’s requirements of its constitution remain constant (i.e., the vector of y elements is unchanging) then only static provisions are needed.⁹ Second, we must be able to anticipate the change in the democracy’s optimal constitutional arrangements.

⁷ Ostrom and Crawford (1995) use the term “action station” to describe a particular set of formal rules.

⁸ This is identical to one of the two definitions of time inconsistency. I avoid explicit use of the term “time inconsistency” because both definitions are used in this paper. (For the second definition see footnote 12).

⁹ If vector y is partly fluid *and* its fluid elements do not satisfy path predictability then only static provisions should be used.

If we cannot anticipate the evolution in the democracy's requirements then the best constitutional arrangements for a future state-of-affairs is indeterminable. Third, the dynamic provision is a better choice than (i.e., "Pareto-superior" to) any static provision. Since a dynamic provision combines static states-of-affairs dynamically, the resulting dynamic provision must be better than: (i) any single static set of rules if these were always used; and (ii) any static mix of rules (i.e., when formal rules are combined to produce a mixed type, such as the run-off electoral formula or the semi-presidential regime type).

- **Attractiveness.** The dynamic provision must be a desirable choice for domestic political elites.¹⁰ In the previous section I suggested five categories of constitution-making that differ depending on whether experts are likely to be influential advisers and, when they are, the conditions that lead them to play this role. Three of these categories pose no problems for the attractiveness condition. Thus, a dynamic provision can be imposed by an external actor whether or not it is attractive to domestic elites.¹¹ If popular pressures force politicians to introduce the dynamic provision then the attractiveness problem is trivial. If politicians are concerned mainly about their historical legacies, and the dynamic optimality condition is satisfied, then the attractiveness problem is again trivial. However, there are two scenarios where attractiveness is a potentially serious problem. First, in the "cheap talk" scenario where experts' are uninfluential, for a dynamic provision to be attractive it must not change the political balance between rival groups. We can label this scenario the case of structured competition between well-defined rival groups. In this case, the rival groups will prefer a dynamic provision if it produces higher overall welfare *and* leaves no group worse off than under a static provision. Second, in the uncertainty scenario where politicians do not know the state of future party politics, a dynamic provision is attractive if it produces higher expected benefits for "Rawlsian" politicians than a static provision. This second scenario can be called the case of fluid party politics. If a dynamic provision is attractive in both the structured and fluid scenarios then its introduction can be justified on rational grounds. The dynamic provision does not depend on the configuration of contingencies (including often political "irrationality") that is normally required for desirable constitutional reforms. If the dynamic provision is attractive in only one of the two cases – either the structured competition scenario or the fluid competition scenario – then the claim of attractiveness must be bounded accordingly; the dynamic provision is attractive only in a specific circumstance, otherwise its introduction depends on exceptional contingency.
- **Robustness.** The dynamic provision must be stable. That is, it must be capable of withstanding pressure from politicians who have an interest in overturning it.¹² This means that the dynamic provision should be resistant to efforts to maintain the status quo instead of allowing the rules to change as stipulated by the provision.

¹⁰ I do not consider the attractiveness of dynamic provisions to external actors or to "ordinary people" (Bermeo 2003). Instead, I simply assume that, for whatever reasons, an external actor and ordinary people prefer the dynamic provision.

¹¹ I do not consider the question: what constitutional structures do external actors find attractive to impose? Instead I simply assume that, for whatever reasons, an external force chooses the dynamic provision.

¹² This condition corresponds to the second definition of time inconsistency.

In the subsequent section I consider two dynamic provisions, which, I argue, satisfy these conditions. Specifically, I show that:

- 1) An evolving electoral system that changes from a majoritarian formula to a proportional formula satisfies the feasibility conditions if constitutional negotiations take place between a moderate number of groups (i.e., between three and five) and the dynamic provision is constitutionally entrenched (i.e., a special law-making process is required to remove it).
- 2) An alternating presidential regime that may change from a parliamentary default to a “strong” presidency satisfies the feasibility conditions if the dynamic provision is constitutionally entrenched.

Example 1: Evolving Electoral System

The purpose of the evolving electoral system is to facilitate a transition from a “strong” electoral formula to a weaker one that is more permissive of small parties with dispersed support. Thus, the dynamic provision in this case has two states-of-affairs corresponding to c_1^* and c_2^* . The first state-of-affairs, the strong electoral system, provides powerful incentives for political actors – voters and politicians – to co-ordinate in ways that reduce the number of political parties in the polity. The purest example of an electoral formula that has these effects is the plurality formula. Ceteris paribus, the plurality formula should enhance the chances that a new democracy will develop an institutionalized party system, and thereby facilitate an important aspect of democratic consolidation. Additionally, because this electoral system tends to produce single-party governments, the use of a plurality formula in new democracies enhances governability at a time when it is most needed (and when it is often lacking). The second state-of affairs is a more “feeble” electoral formula that exerts weaker co-ordination incentives on politicians. This formula, which should be one of the “proportional representation” formulas, can be expected ceteris paribus to improve representation at the expense of governability. Full specification of this dynamic provision requires that we identify the optimum transition between these two settings (t^*). In this case, t^* should be a time-based measure; that is, the first state-of-affairs should persist for a specified period. How long should this period of time be? The answer is difficult and likely to depend on the characteristics of the democracy, in particular how far along it appears to be on the road to democratic consolidation. A rough gauge is provided by Milan Svobik’s (2008) study of the dynamics of democratic consolidation. He identifies two important time markers: (1) there is a 90% likelihood that a democracy is consolidated if the regime has persisted for 52 years; (2) the first 20 years are the most crucial because this is the period of the greatest increase in the probability that democracy is consolidated – “our belief that a democracy is consolidated depends most crucially on its survival during these initial two decades” (p. 164). Thus, we can say in general terms that t^* is likely to lie somewhere between 20 and 50 years.

Dynamic Optimality

The evolving electoral system is principally designed to assist the process of democratic consolidation, and then, after consolidation is complete or at least well advanced, to foster the development of more representative party politics.

Political parties, in modern theories of representative government, are typically presented as the critical institutions of intermediation between state and society (e.g. Huntington 1968; Sartori 1976). The party system captures the range of diverse citizen views. Through inter-

party competition the preferences of citizens are aggregated, tested against each other, ordered in terms of their popularity and priority, and converted into public policy outputs. The expectation that political parties and the party system will perform in this manner depends on a number of factors. Perhaps the most important of these is the institutionalization of the party system (Mainwaring and Torcal 2005; Sartori 1976). When a party system is institutionalized – or “structured” (Sartori 1976) – it is firmly lodged in the space between society and the state. In an institutionalized party system the parties take stances which, in combination, capture the spread of popular preferences. The parties’ policy reputations are sufficiently stable that voters know the relationship between voting for a particular party and the policy direction that is likely to follow if that party enters government. The institutionalization of the party system is therefore a key step in a new democracy’s overall consolidation.

However, the institutionalization process can be more or less supportive of a new democracy’s survival chances. In his well-known party systems theory, Sartori (1976) distinguishes five types of democratic inter-party competition: predominant; two-party; limited (or moderate) pluralism; extreme (or polarized) pluralism; and atomized. All of these types are institutionalized party systems, yet they are not all equally supportive of the stability and performance of a democratic system. The crucial distinction is between those party systems that foster centripetal competition, on the one hand, and those that permit centrifugal competition, on the other hand. Centripetal competition arises when political parties compete for the centre ground. Centripetal competition leads over time to a party system with “moderating” tendencies. The parties capture the range of citizens’ preferences and aggregate them in ways that moderate pure or extreme tendencies.¹³ Centripetal competition is observed in the two-party and the moderate pluralism party systems.

In contrast to centripetal competition, centrifugal competition is associated with “the enfeeblement of the center, a persistent loss of *votes* to one of the extreme ends (or even to both)” (Sartori 1976, p. 136). Instead of the moderating process of preference aggregation that occurs with centripetal competition, centrifugal mechanics have the potential to pull apart the underlying consensus on values and trust in the legitimacy of the democratic system. Such competitive dynamics therefore pose severe problems for any democratic system, both in terms of its survival and its functioning. Indeed, Sartori goes so far as to say that “if a polity is centrifugal at all levels – electoral, parliamentary, and party leadership level – then it is doomed: It can only, and quickly, end in deflagration,” as shown by the experience of the Weimar Republic in its final three years (p. 145). While centrifugal tendencies among both ordinary citizens and party elites creates a perfect storm, these two levels are not equally important for the prospects of democratic survival. Elite dynamics are more important than mass competitive interactions. Thus, despite the centrifugal drives of the Italian party system of the 1970s, “centripetal convergence that may be said to exist among Communist and bourgeois party leaders at the invisible levels” enabled democracy to survive (p. 145).¹⁴

Thus, the institutionalization of the party system enhances the chances that it will perform its role as intermediary between state and society, and the institutionalization of a party system

¹³ Ironically, centripetal competition is less likely when there is a center party. “[T]he very existence of a center party (or parties) discourages “centrality,” i.e., the centripetal drives of the political system” (p. 135). This is because the center party interferes with “bipolar interactions” and instead encourages “triangular interactions” (p. 134).

¹⁴ See also Bermeo (2003).

with centripetal competition makes it most likely that this intermediation will strengthen the performance of the democratic system as a whole. The key question for constitutional designers is whether the prospects of a new polity's party politics crystallizing into centripetal inter-party competition can be enhanced through institutional design. Clearly, the structure of society is a crucial factor but "[c]leavages are not 'givens' coming out of the blue sky" (p. 291). It is here that institutional structures, and especially the electoral system, play a key role, by providing incentives for elites to co-ordinate to a greater or lesser extent. When elites co-ordinate to a greater extent, existing cleavages are "polity restrained." When elites co-ordinate to a lesser extent, and instead pursue niche strategies to gather votes, then cleavages will tend to be "reflected" in party politics. Majoritarian institutions provide a strong incentive for elites to co-ordinate in electoral politics, while the more proportional is an electoral system the weaker are these incentives. Majoritarian electoral systems, when used with single member districts, maximize the likelihood that a large number of diverse groups will coalesce to form two major political parties or two opposing party blocs. Centripetal competition in the form of a two-party or moderate pluralism party system is the likely consequence of a plurality electoral formula. Thus, Sartori (1994b, p. 63) argues that a majoritarian electoral system provides "the optimal waiting and/or facilitating condition for the development of structured party systems of the bipolar kind (two-party mechanics and moderate multipartyism), and an obstructive condition as regards the development of extreme and polarized multipartyism."

A majoritarian electoral system also provides another important benefit for a new democracy: governability. While some new democracies retain highly statist economies, most move sharply toward decentralized market arrangements after transitioning to democracy. This transition has been vividly apparent in the new democracies of Eastern Europe (e.g. Williamson 1992). To undertake the significant transition from a planned economy to a market-based one, these countries had to implement sweeping legal and economic reforms. Legal frameworks had to be reconstituted, which included establishing the rule of law, contract regulations, and accounting standards. A package of substantial economic reforms then needed to be introduced, involving price liberalization, opening the economy to international trade, and giving autonomy to business organizations. These are difficult for any government, and particularly challenging for governments operating in a new regime. Reforms are more likely to succeed when they exhibit coherence (that is, the parts contribute directly to the broader goal), and such coherence is more likely when a single party is empowered to enact its reform agenda, knowing that it will be held accountable for the results of its choices.

While a majoritarian electoral system may be uniquely valuable for a new democracy, it is often a second-best arrangement when democracy is consolidated. Consolidated democracies that have overcome the challenges of party system institutionalization and large-scale institutional transformation typically perform better when their party systems approximate the moderate pluralism type (see especially Lijphart 1999). PR systems have the advantage of enabling richer citizen participation in elections, by presenting voters with a greater range of options, and ensuring that government policies are more accommodating of sectional concerns. Compared to majoritarian systems, this enhanced representativeness and sensitivity comes at the expense of governability. But "trading" some governability for these additional benefits appears to be beneficial for consolidated democracies. This claim has been most forcefully advanced by Arend Lijphart, who shows that across a wide number of indicators consolidated "consensual" democracies, which normally govern with coalitions consisting of a small number of parties elected by a PR formula, perform better than consolidated single-

party democracies, which operate with majoritarian formulas. However, majoritarian electoral institutions persisted in most of Lijphart's consensual democracies until the first decades of the twentieth century. In the Netherlands – the focal case of consensus democracy – the plurality formula was used until 1917. The argument for dynamic provisions in the case of electoral systems is that the high performance of these democracies was, in large part, the result of this transition. These transitions depended on uniquely configured situations that cannot be “engineered” by constitutional designers. However, with dynamic provisions an approximation of this optimal path may be possible.

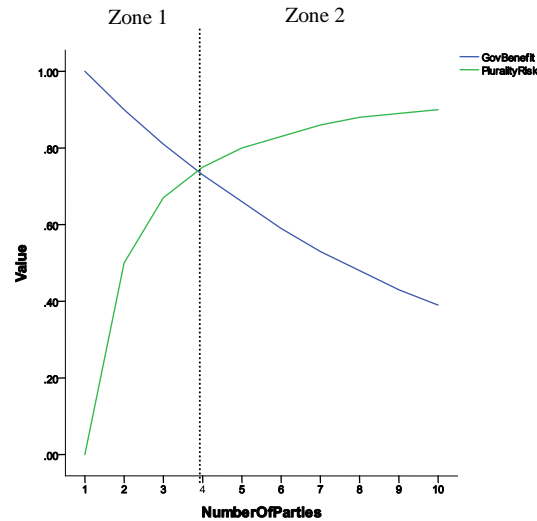
Attractiveness

There are persuasive reasons for suggesting that the transition from majoritarian institutions to proportional institutions is an optimal transition path for a new democracy. This path facilitates the consolidation of the party system and provides enhanced governability when it is most needed. When democracy has taken root, however, institutions that are associated with more pluralistic politics become preferable. If this optimal transition path is accepted then a key question is this: are there any circumstances when its introduction in the form of a dynamic provision may be optimal for political actors? The experience of consolidated democracies attests to the difficulty of transitioning from majoritarian to plurality institutional setups. As Carles Boix (1999) shows, this transition, which occurred across continental Europe in the early decades of the twentieth century, was largely due to the strategic response of establishment parties to the new threat of socialist parties following industrialization and the expansion of voting rights. Since these reforms major electoral changes have been extremely rare in these democracies. However, the special circumstances that led to the transition from plurality to PR in continental Europe cannot be expected to generally occur. Voting franchises are no longer extended in staggered sequence and the effects of industrial growth are unlikely to reproduce similar social dynamics to those that were observable in Europe at the turn of the twentieth century.

Attempting to solve this conundrum using a dynamic electoral provision is potentially problematic if we assume, quite reasonably, that no group involved in negotiations on a new constitution has an incentive to support a future arrangement that jeopardises its chances of gaining office and maximizing its influence over government policy when it is in office. If there are two major groups negotiating the constitution they will likely choose a plurality setup. This arrangement means that each party risks being out of power, and therefore having no input into government policy, but – on the other hand – it gets to govern relatively unchecked during those periods in which it wins office. If there are many groups involved in constitutional negotiations then the strategic benefits from introducing a PR electoral formula are likely to outweigh the benefits from majoritarianism. In this scenario, the benefits of regularity in office outweigh the costs of having to compromise as part of a coalition. The larger are the number of groups the greater are the benefits of proportionality, and therefore the less attractive is the plurality system. The logic behind this is as follows. If we assume that the groups are roughly similar size and that each group is aware of the number of other groups then, *ceteris paribus*, if the plurality rule is used the chances of a group winning power can be given as $1/x$, where x gives the number of social groups. The likelihood of winning office decreases geometrically as the number of social groups increases. Therefore, the risks associated with the plurality rule rise in a similar manner. The other relevant consideration is the benefits gained from winning power. These we have assumed diminish as the number of coalition members increases. However, it is reasonable to assume that the rate of diminution is considerably lower than the rate of change of the previous function, because the

implementation of the coalition parties' programmatic commitments is not an entirely zero-sum calculation,¹⁵ unlike their pursuit of office under the plurality rule. The decrease in office benefits from having to negotiate with other coalition members can be presented as a linear function, instead of the geometric function suitable for mapping the chances of gaining election under plurality rule. These two relationships are plotted in the figure below.

Figure 1: Attractiveness under Evolving Electoral System



In Zone 1 the chances of winning power under the plurality rule are high, and therefore the risks associated with this electoral system are tolerable. In the figure the benefits from office outweigh these risks. The area between the curves captures the net benefit for a party from operating under the plurality system. However, the risks rise quickly and these benefits are exhausted even while the number of parties remains relatively small. A party that believes the likely competitive scenario will approximate Zone 2 will typically prefer a more proportional electoral system. However, at approximately the intersection of these two curves a party, fully aware of its competitive situation, is indifferent between the use of a plurality rule or a proportional rule. This intersection is likely to be around 3-4 political parties (though this will depend on factors such as the relative prospects of the different parties). The dynamic electoral provision may be attractive to the parties at this point of indifference between plurality and proportional systems. Interestingly, this number of parties approximates the borderline that Sartori indicates between moderate and polarized pluralism. If the dynamic provision does prove attractive it may enable inter-party competition between these groups to crystallize as moderate pluralism, instead of as polarized pluralism, before the more permissive electoral system is introduced.

Robustness

Can the dynamic provision survive after its initial enactment? This is a serious question because of the incentive that an initial winner has to overturn the provision. In particular, if a party fares unexpectedly well in electoral contests during the period of majoritarianism, or if two parties end up dominating during this period, they may be tempted to maintain the majoritarian electoral system and prevent the move to a more proportional setup. Thus, to

¹⁵ For one thing, parties enter coalitions with competitors who have similar – and not opposite – goals. I assume that the benefits from office diminish by 10% for every new party added to a coalition.

ensure that the dynamic provision is not overturned in this scenario it must be constitutionally entrenched; that is, the procedure for amending it must be different to, and more demanding than, the procedure for enacting regular non-constitutional laws.

Example 2: Alternating Presidentialism

Giovanni Sartori proposed alternating presidentialism as a regime type that is capable of avoiding the liabilities associated with pure presidentialism and pure parliamentarism. His proposal has a parliamentary default. “So long as the parliamentary system works,” he explains, “it is allowed to endure. But if it fails to meet given standards, then the parliamentary engine is switched off and a presidential engine supplants it” (p. 153). Sartori adds that: (1) parliamentary and presidential elections should be held concurrently every four years; (2) the president is empowered to finish the term of a parliamentary government if it “fails,” and is free to appoint and dismiss cabinet members at her discretion without parliamentary approval; and (3) parliamentarians are barred from serving as cabinet members in presidential governments, to remove the temptation to collapse a parliamentary government as part of an exchange for a cabinet position in a future presidential administration.

Alternating presidentialism combines presidentialism and parliamentarism but in a way differs from semi-presidentialism. In semi-presidentialism executive powers are *continuously* divided, whereas in alternating presidentialism executive powers are *discontinuously* divided. Both are “double-engine” regimes, but both engines run concurrently in a semi-presidential regime while only one engine runs at any time under alternating presidentialism. Suppose a democracy operates under a constitution for a given period of time, say from t_1 through to t_n , where $\{t_1, t_2, t_3 \dots t_n\}$ are elections and $\{t_2 - t_1, t_3 - t_2 \dots t_n - t_{n-1}\}$ are the periods of government between elections. If this constitution is semi-presidential then for every period of government (e.g. $t_2 - t_1$) “the head of state [i.e., president] shares the executive power with a prime minister.” Thus, the constitution stipulates that for every period of government there is always a “dual authority structure” (p. 132). For instance, the president may be dominant in one arena (e.g. foreign policy) and the prime minister dominant in another (domestic policy). This division of formal powers does not preclude one of the two executives from dominating the other in every sphere *in practice*, but in such situations the “autonomy potential” of the other executive continues to exist even if it is not exercised (p. 132). As instances of cohabitation in the French Fifth Republic show, the functioning of a semi-presidential system may depend on whether the executive’s potential for independent action is activated. In an alternating presidential regime the division of executive powers is discontinuous. President and prime minister do not share powers simultaneously. Instead, at any single point in time executive power belongs entirely to either the prime minister or the president. Over the course of a period of government the prime minister and president may have shared powers but only because the whole of the executive authority shifted from one (prime minister) to the other (president) at some point during this period.

Sartori’s proposal is ground-breaking because alternating presidentialism is self-transforming: it permits change in the formal rules of government formation and in the holder of executive authority without a constitutional amendment.¹⁶ Ordinary (i.e. non-constitutional) laws often stipulate conditions under which one set of rules hold, alternative

¹⁶ Sartori describes it as “self-redressing” (p. 154) but this assumes that an “alternation” will have beneficial effects.

conditions when a second set of rules hold, and details of the movement between these situations. But this kind of flexibility is not normally considered by constitutional designers; changes to constitutional matters – such as the process of government formation or the locus of executive authority – invariably require constitutional amendments. By proposing his alternating presidentialism type Sartori suggests that a dynamic logic may be suitable for constitutional laws. It should be possible for the entrenched framework embodied in a constitution to change endogenously, in ways that are limited and clearly stipulated, without a constitutional amendment always being necessary.

While Sartori is clear on the states-of-affairs relevant to his dynamic proposal (i.e., c_1^* and c_2^*) – a parliamentary default with a “strong” presidential alternative – he is less clear on the transition between these settings (t^*). He does not explicitly answer the question of what circumstances are sufficient to precipitate the move from the parliamentary default to the presidential setting. In *Comparative Constitutional Engineering* he alludes to the “failure” of the parliamentary setting as being the necessary trigger, but this may be difficult to define. Partisan policy will be viewed as a success by the sponsoring party but a failure by its opponents; even when it is generally accepted that policy or politics are “failing” politicians may face incentives to ignore such issues or to provide “placebo” responses. Yet a clear instance of “failure” can be identified: when the parliamentary government collapses and no new government can be formed given the existing balance of power among parliamentary parties. In a regular parliamentary regime new elections would be called, but this is ruled out in alternating presidentialism, which has fixed terms for both president and parliament. In this circumstance, therefore, there is a clear proviso for initiating the presidential setting. Full specification of Sartori’s dynamic provision should therefore include this condition and the precise period of time that would be permitted after parliamentary government collapse before the presidential setting is initiated. This elaboration would be sufficient to ground Sartori’s expectation that “I do not see how a do-nothing government could be kept alive for four years when a do-something alternative knocks at its door” (p. 157).

Dynamic Optimality

Sartori recommended alternating presidentialism as a practical solution for Latin American countries “searching for an alternative” to American-styled presidentialism and for the new democracies of Central and Eastern Europe operating under “largely unworkable constitutions hastily concocted” (154). But his proposal has not achieved prominence or influence in real world constitutional debates in these regions or elsewhere. This stands in stark contrast to the semi-presidentialism type, which has received considerable attention and has emerged as a popular choice for new democracies. This is despite Sartori’s arguments that alternating presidentialism is “more solid and efficient” (p. 137) than semi-presidentialism, and that the latter type is “an insufficient remedy for countries like Brazil and, more generally, for any polity characterized by parliamentary atomization and fluid or excessive multipartism” (p. 154).

Why is it that Sartori’s dynamic regime type has remained at the margins of constitutional debates while variants of semi-presidentialism – which are static combinations of parliamentarism and presidentialism – have become highly influential? A key reason may be because of the underspecification of the dynamic provision, because in terms of its optimality Sartori’s proposal can be expected to embody a solution that is better than those attainable using only static provisions. Assessing regime types is notoriously difficult because various criteria can be used and actual performance depends heavily on factors, such as the party

system, that are beyond the regime type itself. Any comparisons involving a regime type that has not been used in practice are even more uncertain. Yet despite this we can reach tentative conclusions concerning alternating presidentialism by analysing the “mechanics” of Sartori’s proposal, or those characteristics that determine “how it works” (1976, p. 128). Two mechanical properties need to be analysed. First, the parliamentary setting operates unless the parliamentary government collapses and no new government can be formed given the make-up of parliament. Second, if the presidential setting is activated the president exercises “strong” executive authority that enables him to govern even without parliamentary support. Together these properties outperform the mechanics of either pure presidentialism or pure parliamentarism, or the static mix embodied in semi-presidentialism.

A substantial body of empirical evidence now exists showing that in most respects, and controlling for potential confounds, parliamentary regimes outperform presidential regimes (e.g. Linz 1990; Mainwaring and Shugart 1993). As Sartori’s alternating presidentialism has a parliamentary baseline, then its default setting matches the regime type that empirical scholars have identified as optimal for overall democratic performance. Presidentialism with two disciplined parties operating under “unified” government, so that the president’s party is also the majority party in the legislature, is a potentially high performing regime type. Such a party system configuration enables coordination that may be woefully absent when these conditions are not met. But the party system configuration is largely beyond the scope of constitutional engineers. Electoral system characteristics such as the aggregation formula and the timing sequence of elections influence but do not determine the outcome of inter-party competition. A range of non-constitutional factors – the governing performance of the incumbent party, the appeal of the parties’ leaders, parties’ election strategies – also influence the structure of the party system. The result is that the party system configuration that is most conducive to functioning presidentialism cannot be guaranteed. Presidential regimes almost always perform badly when combined with multipartism (Mainwaring and Shugart 1993). With a two-party system the general performance of presidential regimes depends on whether or not there is divided government. Weak, undisciplined political parties – for a long time the American “solution” to divided government – may be sufficient to overcome this problem but they undermine the performance of the regime under conditions of unified government.

Within the class of semi-presidential regimes those that more closely resemble parliamentarism perform better than those that lean toward presidentialism (Elgie 2007). However, even these “premier-presidential” regimes appear, on average, to perform worse than pure parliamentary forms. Thus, the parliamentary setting that operates as the default in an alternating presidential regime should be expected to perform better than static semi-presidentialism combinations.

While parliamentary regimes typically perform better than presidential ones their obvious weakness, and the key reason why presidentialism continues to tempt, is that government formation in parliamentary systems may be difficult and sometimes seemingly impossible. The risk that it may take months to form a proper government may make the problem of divided government seem manageable by comparison. However, Sartori’s alternating presidentialism avoids this problem because of its presidential setting. This second setting is initiated when the “no government” risk becomes reality. The regime’s first “engine” is switched off and its second one is switched on. In the presidential setting, the powers of the president are such that the problem of divided government does not arise.

Sartori proposes a president with sweeping executive and legislative powers. The president is not required to govern by legislating and can govern by decree as a “last resort.” A president must first submit his proposed legislation to parliament for its approval, amendment, or rejection.¹⁷ Only if the president is unwilling to accept parliament’s amendments or its rejection of his proposal can he then issue a decree, which must be accompanied by a “document that explains why he did not accept the changes demanded by the parliamentary committee” (p. 167). While these powers are sufficient to “dispose of gridlock” (p. 166) the presidential office cannot morph into a dictatorship – the major fear in constitutional debates about presidential powers.¹⁸ This is because the presidential setting is the alternative engine; it only comes into play when the other engine has clearly stopped working. It should be expected that any presidential term will be short in duration, as the constitution stipulates that the “presidential mechanism takes over for the remaining duration of the legislature.” (p. 155). Presidential and parliamentary elections must then occur at the same time, after which the system reverts to its parliamentary default. And legislation by a future parliamentary government can overturn any presidential decree. In practice, therefore, the decree possibility is likely to “remain a dormant deterrent” but its existence provides incentives for even stubborn parliaments to engage in meaningful legislative bargaining with the president rather than wholesale blocking tactics (p. 170).

Attractiveness and Robustness

Structured Competition

In the case of structured competition between two major parties two scenarios must be considered in the alternating presidentialism regime type: unified government and divided government. Both scenarios lead to the parliamentary setting. The assumption of structured competition means that the party discipline of the majority party in the legislature ensures that this party continues to form governments while it has an electoral majority. Internal party disputes, it can be safely assumed, will be managed by leadership contests rather than by party collapse.

The expected welfare outcomes in these scenarios mirror those that are obtained in the case of a regular parliamentary regime: the governing party is empowered to enact its legislative agenda relatively free from checks. Compared to a presidential (or semi-presidential) regime, the key difference is that there is no opportunity for the minor party to achieve policy influence in a divided government situation. But if this minor party was ever to become the major party, in a presidential regime this party might be challenged by the obstructionism of a minor party that manages to win control of the presidential branch. Thus, the comparative benefits that accrue to two major parties engaged in structured competition in any of the regime types (presidentialism, parliamentarism, semi-presidentialism, or alternating presidentialism) are very well balanced. The advantage of total government control for the majority party in parliamentarism and alternating presidentialism is countered by the risk of total marginalization if that party is an election loser. A strict preference between these regime types can therefore be made on the grounds of their expected effects on citizen

¹⁷ If parliament is bicameral then this process applies only to one house. Thus bills “will not need a double approval” (p. 167). Sartori justifies this condition on the grounds that it “allows a president to circumvent the adverse circumstance of a different majority in the two branches of parliament.” Secondly, it doubles parliament’s processing capacity.

¹⁸ For this to be true requires that the president is unable to change the constitution by decree, an implication of Sartori argument that he does not state explicitly.

welfare. Since we assume that alternating presidentialism will perform over time better than these other regime types (i.e. dynamic optimality) we can say that this regime type satisfies the attractiveness condition in the case of structured competition between two parties. The logic is as follows. With structured competition between two parties the alternating presidential regime functions exactly as a parliamentary regime. However, the regime maintains the capacity to function effectively in the case of major party system change that results in party system fragmentation. In this case the regime is able to turn to the presidential setting and thereby avoid the gridlock that might cripple a simple parliamentary regime. This possibility remains latent while the two parties remain strong, and indeed its possibility may help a governing party to maintain its cohesion as its politician members know that party collapse could lead to the presidential setting.

With structured competition between two rival parties the alternating presidential regime is also robust. Robustness follows from the expectation that no party in power has an incentive to overturn the system. Since a party with a parliamentary majority faces no institutional competition it has no reason to seek to overturn the existing regime in order to achieve its policy goals. A minor party may wish to do so; perhaps a party that is able to win the presidency but not a majority in the legislative branch. But this party will be unable to achieve this objective because of its minority status.

Fluid Competition

In the scenario where the party system is highly fragmented and competition between the parties is fluid, one of four scenarios will occur in each election after the new constitution comes into effect. For a rational, forward-looking politician contemplating the choice of constitution, alternating presidentialism is at least as attractive as the alternatives in all but one of the scenarios and, in one case, more attractive than any other alternative. Assuming that the rational politician gives equal weight to each of these scenarios, alternating presidentialism is the most attractive regime choice.

As shown in Table 1 below, in each of the scenarios A through D the party system is fragmented and inter-party competition is fluid. In two scenarios, A and B, a coalition of parties is able to form a government after elections; therefore the parliamentary setting is initiated. In scenarios C and D, however, government formation is impossible; either a governing coalition could not be formed after elections or one that was formed has collapsed (and a new one cannot be formed). In these scenarios the presidential setting is initiated. In scenario C, the party has managed to win the presidency and is therefore empowered to enact its agenda for the remainder of the legislative term. In scenario D, the party in focus holds no governing powers because the presidency is held by another party.

Table 1: Attractiveness of Alternating Presidentialism for a Typical Party in a Fluid Party System

Scenario	Party System	Parliamentary government formation	In power (either parliamentary or presidential government)	Expected payoff for typical party
A	Fragmented / fluid	Possible	Yes	AP = Parl > SP > Pres
B	Fragmented /	Possible	No	Pres > SP > AP

	fluid			= Parl
C	Fragmented / fluid	Impossible	Yes	AP > Pres > SP > Parl
D	Fragmented / fluid	Impossible	No	AP = Parl = Pres = SP

The expected benefits for the party in scenario A are identical to the benefits that they would accrue in a parliamentary regime. In both parliamentarism and alternating presidentialism the party is a member of a governing coalition that is able to enact its agenda unchecked, unlike in the case of pure presidentialism or semi-presidentialism where the governing coalition may face a check from an opponent in charge of the executive branch. In scenario B, however, the party is worse off than it would be in an equivalent position in a presidential regime (though in an identical position as under parliamentarism). In a presidential regime the out-of-power party would stand a chance of exercising power through the presidential branch. In scenario C, the party in an alternating presidential regime would be better off than in any other regime. In scenario D, the party, out of power in an alternating presidential regime, gets a (minimal) payoff that is identical to being out of power in the other regimes.

If these scenarios are equally likely the alternating presidentialism regime provides the highest expected benefit to a party in the scenario of fluid competition. Note that for the dynamic provision to be robust in these scenarios it must be constitutionally entrenched: a minor party president must be unable to overturn it through a decree.

Conclusions

This paper aimed to flesh out the notion of “dynamic” constitutional provisions. First, I distinguished static and dynamic provisions, arguing that while static provisions cater for one objective set of problems dynamic provisions cater for multiple states-of-affairs. Additionally, we know that constitutional change, after the initial constitutional settlement, is extremely difficult to achieve. These two propositions provide the prima facie basis for claiming that dynamic provisions may sometimes be the better choice for the constitutions of new democracies. However, for dynamic provisions to be anything more than a theoretical benchmark, it must be desirable and possible to introduce them in real-world scenarios. I suggested three conditions to assess whether a proposed dynamic provision satisfies these criteria: dynamic optimality, attractiveness, and robustness. When these conditions are satisfied we can claim, with some justification, that a dynamic provision is feasible. After setting out this framework I suggested two dynamic provisions that satisfy these feasibility conditions. First, an evolving electoral system that requires movement from a majoritarian to a proportional electoral system. Second, Sartori’s alternating presidential regime type combines dynamically characteristics of parliamentarism and presidentialism.

This paper’s treatment of dynamic provisions is preliminary. Several aspects of this proposal need to be considered in more detail. While the attractiveness condition considers the appeal of a dynamic provision in the case of structured competition between two rival groups and fluid competition between many groups, can a dynamic provision be attractive to a dominant group that expects, under the new constitution, to become a dominant party? The scope of possibilities of dynamic provisions also remains unclear. Do the two examples provide an exhaustive set of possibilities or are there other potential applications of the dynamic perspective suggested in this paper? One other possibility may be in the case of federalism,

with a dynamic provision that establishes a loose confederation with a weak centre, which over time is strengthened. This provision would be based on the expectation that governance problems eventually become more national over time. Yet, despite this, state governments are reluctant to cede powers to the national government. The problems raised in this scenario, and perhaps others, may be better handled with dynamic provisions, but more research is required to confirm this.

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