The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond

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ARTICLES

The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond

SAMUEL ISSACHAROFF* & SERGIO VERDUGO**

Largely missing from the extensive discussions of populism and illiberal democracy is the emerging question of 21st century constitutionalism. Nowadays, it is hard to see relevant constitutional changes without a strong appeal to direct popular political participation. Institutional mechanisms such as referenda, citizens’ assemblies, and constitutional conventions emerge as near-universal parts of the canon of every academic and political discussion on how constitutions should be enacted and amended. This Article’s aim is to offer a cautionary approach to the way participatory mechanisms can work in constitution-making and to stress the difference between the power to ratify constitutional proposals and the forms of governance that must follow.

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Constitutions are necessarily the product of political and historical moments. Ours is a time of populist challenge to the restraining institutions of governance. We show how constitution-making processes taking place under existing political contexts can fail not simply despite the existence of participatory mechanisms, but in large part because of them. We identify two types of failures. First, the authoritarian failure, which consists of constitution-making processes that lead to authoritarian outcomes or become part of democratic backsliding or abusive processes. Second, the activation failure, by which constitutions are not passed. This failure is likely to take place when reforms attempt to bypass established, functioning institutional actors, whatever their flaws.

This Article will turn to the recent failure of the Chilean constitutional effort in 2022 to focus on the historic roles of non-state organizations, most notably political parties, in stabilizing and legitimizing successful democratic governance. The current trend in constitutional formation, reflecting the ascending populist ethos of our times, is to bypass the representative institutions that do exist in favor of a pact between the state and an ill-defined entity known as “the people.” The tendency of political power without structural checks and balances to lead to autocracy is reasonably well understood. But Chile, together with other recent examples of failed constitutional processes, highlights the risks of activation failure in democratic settings—i.e., contexts in which representative institutions exist and function, though flawed. We argue that a relevant condition to prevent the activation failure is to use the constitution-making processes as an opportunity to strengthen the political party system by including the existing parties in the process. Success stories of constitution-making have widely shown the advantages that political compromises among rival actors bring in terms of procedural legitimacy—wide acceptance of the constitution’s content—and substantive legitimacy—the inclination
of those processes in promoting politically liberal institutions; but little has been said about activation failures lacking those features. This Article seeks to fill that gap.

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INTRODUCTION

Two hundred years ago, Benjamin Constant presented his famous lecture in Paris on The Liberty of the Ancients Compared with that of Moderns.1 Writing in the aftermath of the French Revolution, Constant framed the concept of liberty around the form of governance that differentiated the relation of the governed to the direction of society.2 For Constant, the “liberty of the ancients consisted in carrying out collectively but directly many parts of the over-all functions of government, coming together in the public square” for common deliberation and decision.3 By contrast, the modern conception

2 Id.
3 Id. at 2.
of liberty was premised centrally on the autonomy of the individual, the freedom from arbitrary use of state authority, and the capacity to participate in the selection of those to whom governance is entrusted. \(^4\) Modern citizens “no longer experience political participation as an intrinsically rewarding form of action.”

This contrast in the relation of the citizen to governing institutions continues to define the struggles of democracies. To the extent that democracy can permit direct participation, the problem of political elites imposing their will is reduced. \(^6\) But citizens confront the limitations of experience and time. Decisions ranging from long-term fiscal integrity to military preparedness will likely prove beyond the capacity of lay generalists. Representative government filters decision-making through institutional actors that can draw on broader knowledge, but in so doing invariably introduce the costs that arise between principals and their agents. \(^7\) For Madison, writing in Federalist 10, the intermediation of representation was an added virtue that allowed the expanded geographic scale of the Republic to overcome the passion and parochialism associated with the small domain of direct decision-making. \(^8\) But the distance between the governors and the governed risks estrangement. If citizens are not going to take up the responsibility of governing directly, some other form of engagement in democracy must be found. Elections alone do not suffice.

We take as our point of departure the institutional form by which successful democracies have bridged the divide between the liberty of the ancients and that of the moderns. For most of the two centuries of democratic ascendancy that followed the American and French

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\(^4\) See id. at 10.


\(^6\) See id. at 31.

\(^7\) Hanna Fenichel Pitkin, The Concept of Representation 219 (1967).

\(^8\) The Federalist No. 10, at 52 (James Madison) (Ian Shapiro ed., Yale University Press 2009) (“[T]he greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government . . . renders factious combinations less to be dreaded in the former than in the latter.”).
revolutions, the institutional mechanism of choice has been the political party. Parties allowed citizen participation on the ground floor, while preserving mechanisms of accountability for those that served as the governing elite. The parties existed not only in the halls of legislative and executive power, but were rooted in the mass institutions of society, ranging from trade unions to local business associations to churches, and beyond. Parties engaged the citizenry with newspapers, educational functions, sports leagues, orchestras, and countless other points of activity that defined the identity of citizenship beyond the formal juridical categories of the state.

But that was then. We live in an era defined by rampant populist distrust of all institutional expressions of an elite order perceived as alien and self-serving. In a time centered on social media, the mediating and moderating effects of repeat play by institutional actors yield to a demand for immediacy. Dominant political parties of yesteryear—the Christian Democrats and Social Democrats in Germany, the Gaullists and Socialists in France, the Congress Party in India, and on across the democratic plane—have receded dramatically, in many instances verging on the brink of oblivion. Even where the parties persist in form, as with the Democrats and Republicans in the U.S., the parties can emerge as hollow electoral platforms susceptible to capture by outsiders, such as Donald Trump and Bernie Sanders.

Our Article addresses an emerging domain of populist recasting—the design of constitutions for democratic regimes. We focus on how skepticism over political parties has prevented constitution-making procedures from enjoying the benefits of established forms

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9 See, e.g., Cindy Skach, Political Parties and the Constitution, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 874, 875 (Michel Rosenfeld & András Sajó eds., 2012) (discussing the institutionalization elements of the party systems).

10 See id.


12 See, e.g., id.

13 See, e.g., WOJCIECH SADURSKI, A PANDEMIC OF POPULISTS 48 (2022).

14 See, e.g., Skach, supra note 9, at 882.

15 See SADURSKI, supra note 13, at 49–50.
of effective political representation. Our focus is not the formal way in which various legal systems define political parties. Specific jurisdictions can have narrow or wide approaches to what a political party is.\textsuperscript{16} Our concern is instead the function played by organized and institutionalized political associations that serve as intermediaries between citizens and state institutions. Political parties that serve as long-lived representative associations bring coherence and responsiveness to democratic politics.\textsuperscript{17} They typically seek to set a broad public policy agenda (not only a specific single area), negotiate electoral strategies and compete in periodic elections, provide electoral and governance identity to public officials, and maximize the power of their members, among other critical functions in the process of democratic governance.\textsuperscript{18} The key is the function, not the formal question of whether a party is denominated as such. Successful parties of democracy must expect to become repeat players and to offer a holistic platform for elections in a fashion that distinguishes them from rival contestants for office.

What then is the relation between political parties and constitutional reform in the modern era? The simple response we offer is that democratic jurisdictions seeking to replace or amend their constitutions with inclusive and participatory mechanisms—such as referenda, elected constituent assemblies, and citizen assemblies—frequently are constituted to the exclusion of political parties from the constitution-making processes. In turn, and perhaps not surprisingly, these new constitutions are designed to discourage the emergence of a robust party system.\textsuperscript{19} We are skeptical that these processes will yield the characteristics of democratic stability, including separation of powers and civil society institutions capable of constraining state authority, particularly in light of the modern propensity for executive aggrandizement. While there is a strong risk of what we term authoritarian failure in efforts to cut out the middlemen of intermediary organizations—the Venezuela of Chávez and Maduro or the Nicaragua of Ortega come readily to mind—we

\begin{itemize}
\item[\textsuperscript{16}] See Skach, supra note 9, at 876.
\item[\textsuperscript{17}] See id. at 875–76.
\item[\textsuperscript{18}] See, e.g., Skach, supra note 9, at 875.
\item[\textsuperscript{19}] See, e.g., José M. Díaz de Valdés & Sergio Verdugo, The ALBA Constitutional Project and Political Representation, 17 INT’L J. CONST. L. 479, 481–82 (2019).
\end{itemize}
highlight a less understood risk of failure. Constitutions ventured without room for existing political organizations are likely to fail at the activation stage.\textsuperscript{20} Quite simply, they are unlikely to get off the ground.

Much of the commentary on recent constitution-making reads as a catalogue of rights proclamations. The recent Chilean effort of 2022, to which we return as the most important of contemporary undertakings, was striking not only for its great length, but for its litany of rights across every possible dimension.\textsuperscript{21} Its 388 Articles and fifty-seven transitory rules, organized in a 178-page PDF that the enabling Convention distributed online,\textsuperscript{22} included over 100 Articles devoted to enumerated rights.\textsuperscript{23} The proposal seemed to fit well with the tenor of the times, and was defended by many foreign comparative constitutional scholars swept up by its aspirational language and its apparent ground-up origins.\textsuperscript{24} Even after the proposal was rejected, some defended its substantive merits and even offered

\textsuperscript{20} See, e.g., Skach, supra note 9, at 887.
\textsuperscript{21} CONVENCIÓN CONSTITUCIONAL, Propuesta Constitución Política de la República de Chile (July 4, 2022), https://upload.wikimedia.org/wikipedia/commons/5/5a/Propuesta_Constituci%C3%B3n_Pol%C3%ADtica_de_la_Repub%3C%2F&l%3Bica_de_Chile_2022.pdf.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
a romanticized approach to the Convention.\textsuperscript{25} Even those that were skeptical of its content still supported approving it when the time came for an up or down vote,\textsuperscript{26} and only a few non-Chilean observers criticized the proposal before the referendum took place.\textsuperscript{27}

Lost in this favorable commentary on the constitutional proposal, however, is the sense of constitutions as being a blueprint for governance. A series of rights guarantees coupled with plebiscitary governance structures is poorly suited to the give and take of politics and the ability to plan across longer time horizons.\textsuperscript{28} One of the problems overlooked in the comparative constitutional law literature is precisely the need to produce political compromises in order to stabilize governance.\textsuperscript{29}

As we shall develop over time, as a historical matter, compromise and stability require effective political representation, something that has most directly developed as political parties mature. We do not necessarily mean descriptive or symbolic representation—which focuses on how the features and behaviors of those elected reflect the features of the voters—but on substantive or ideological representation in which the representatives are supposed to promote the preferences of their voters and seek their votes by trying to appeal to the median voter to win elections.\textsuperscript{30} While caudillos or social movements can easily appeal to descriptive or symbolic forms

\begin{footnotesize}
\textsuperscript{25} See, e.g., Armin von Bogdandy, \textit{Chilean Insights for Progressive Constitutionalism}, \textit{83 HEIDELBERG J. INT'L L.} 1, 6 (2023) (suggesting that the Convention “had sterling democratic legitimacy” and valuing its “legacy” for “projects of progressive constitutionalism”).

\textsuperscript{26} See, e.g., Roberto Gargarella, \textit{El Proyecto de Dejar Atrás La “Constitución de Pinochet.”} \textit{LA NACIÓN} (July 16, 2022, 12:05 AM), https://www.lanacion.com.ar/opinion/el-proyecto-de-dejar-atras-la constitucion-de-pinochet-nid16072022 (suggesting that the benefits of approving the constitutional proposal outweighed the proposal’s flaws).


\textsuperscript{28} \textit{THE ECONOMIST}, \textit{supra} note 27.

\textsuperscript{29} See Skach, \textit{supra} note 9, at 887.

\textsuperscript{30} See PITKIN, \textit{supra} note 7, at 209 (discussing types of political representation).
\end{footnotesize}
of representation, as we will explain, the historic democratic experience with political parties has been the glue that held together politics under democratic constitutions. Parties are the institutional vehicle through which citizens may learn “to pull, haul, and trade to find common political ground,” as expressed by Justice David Souter.

By contrast, direct appeals to the citizens on a series of one-off, yes/no inquiries prove poor substitutes for the dynamics that political organizations can achieve during the bargaining processes. If a democratic and inclusive constitution is the result of a pact that can identify a sort of overlapping consensus—to use one of John Rawls’s ideas—then constitution-making procedures should stimulate the cooperation of rival political groups that can help to express the main preferences of the society, even if that implies aggregating preferences, canceling each other’s preferences, or finding a common ground. This is what happened, for example, in South Africa, where the interim Constitution of 1993 succeeded in the first instance as a negotiated pact between the National Party (“NP”) and the African National Congress (“ANC”) that sounded out the processes and boundaries of a transition to full democracy.

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31 See, e.g., Díaz de Valdés & Verdugo, supra note 19, at 488.
34 The constitution-making literature often emphasizes the need to achieve incomplete or vague pacts as a technique for consensus-building. Even if the technique can be criticized ex-post by legal scholars seeking constitutional consistency, the practice is useful to improve the conditions of successful constitution-making. See, e.g., Rosalind Dixon & Tom Ginsburg, Deciding Not to Decide: Deferral in Constitutional Design, 9 INT’L J. CONST. L. 636, 650 (2011); see also Tarunabh Khaitan, Directive Principles and the Expressive Accommodation of Ideological Dissenters, 16 INT’L J. CONST. L. 389, 408 (2018). For a criticism against constitution making processes aggregating preferences, see Roberto Gargarella, Constitution Making in the Context of Plural Societies: The “Accumulation Strategy,” in CONSTITUENT ASSEMBLIES 13, 22–25 (Jon Elster et al. eds., 2018).
South Africa further clarifies why institutional representation is key to forging a stable constitutional compromise. The transition was negotiated between the NP, which could not pretend that it would ever prevail electorally once the black population was enfranchised, and the ANC, which was not formally organized as a political party.\(^{36}\) Nonetheless, the NP saw, in the formalities of constitutionalism, insurance to protect white interests going forward.\(^{37}\) Meanwhile, the ANC’s status as the leader of the anti-apartheid struggle allowed it to play the role of chief negotiator with a representational mandate.\(^{38}\) Similarly, in postwar Italy, the three main competing political parties from the antifascist struggle—the Christian Democrats, the Communists, and the Socialists—resumed their pre-Mussolini leadership of contending factions to forge the compromises and workarounds of conflicting issues that were essential for the new constitutional pact.\(^{39}\) The accord allowed a plebiscite to determine the future of Italy as a monarchy or a republic, but allowed a party-led constituent assembly to design the novel constitutional framework that laid the foundation for multiparty democracy, flaws and all.\(^{40}\)

Constitution-making is a fraught balance of the immediate political objectives and the need for long-term institutional stability, most frequently occurring in moments of tremendous political stress.\(^{41}\) Jon Elster famously addressed the paradox that constitution-making should require the greatest form of sober, dispassionate reason about the structures needed for future governance.\(^{42}\) Yet the paroxysms that typically accompany moments of constitutional

\(^{36}\) See Dixon & Ginsburg, supra note 35, at 996.


\(^{38}\) Id. at 13–15.

\(^{39}\) See Dixon & Ginsburg, supra note 35, at 1006–07.

\(^{40}\) For the compromises made when discussing whether Italy should include a constitutional court, see Pasquale Pasquino, The Debates of the Italian Constituent Assembly Concerning the Introduction of a Constitutional Court (1947-1948), in The Political Origins of Constitutional Courts 04, 107 (Pasquale Pasquino & Francesca Billi eds., 2009); see also MARTA CARTABIA & NICOLA LUPO, THE CONSTITUTION OF ITALY 8–11 (2022).


\(^{42}\) See id. at 383.
founding appear designed for passion and partisanship to prevail, not reasoned order.43

The Elster paradox is compounded by the distrust evident toward established institutions, including political parties, in contemporary democracies. The perceived failure of the established political parties—in Chile they had public support of between 2% and 4% in polls leading up to the Constitutional Convention44—means the parties are unlikely to be the movers behind constitutional reform, nor likely seen as indispensable to a workable political order.45 Still, whatever procedure for constitution-making is designed in a democratic setting that has functioning representative institutions, that constitutional process is unlikely to generate stability without ensuring that multiparty collaboration can achieve a wide compromise.46

South Africa remains the modern model, where a political negotiation between the rival powers—the thirty-four principles of the Kempton Park accords—was subsequently submitted for popular approval through the constituent assembly process.47

Unfortunately, many constitution-making processes do not build upon the paths that generated the South African success. South Africa would not have peacefully transitioned to democratic rule if a constitution were generated without the participation of the National Party, the embodiment of the apartheid old order, and without a set of negotiated guarantees of guardrails of governance.48 Much of the

43 See id. at 394–95.
44 The pollster associated to the Centro de Estudios Públicos reported that, in April–May of 2022, only 4% of public opinion trusted political parties. The same pollster had reported that, in December of 2019—after the social outbreak took place in Chile—only 2% of public opinion declared to trust political parties. See Estudio Nacional de Opinión Pública N°86, Abril-Mayo 2022, CENTRO DE ESTUDIOS PÚBLICOS (June 9, 2022), https://www.cepchile.cl/encuesta/estudio-nacional-de-opinion-publica-n86-abril-mayo-2022.
47 See id. at 179.
48 See id. at 172–75.
academic literature focuses on the processes and substance of the relatively successful stories of constitution-making—such as the U.S. (1787), 49 Italy (1947), 50 India (1949), 51 and South Africa (1996), 52 to name a few—but failed constitution-making processes need more attention. We consider success and failure to be defined by two features: first, the ability to enact a new constitution capable of strengthening or creating stable political institutions; and second, the ability to secure the existence of a relatively competitive democracy.

There are two types of constitution-making failures. First, authoritarian failures, which occur when the process is captured by an authoritarian or illiberal agenda that seeks to erode the competitiveness of the democratic system in favor of a political group that aims at consolidating its hegemonic nature. Constitution-making processes that are affected by these authoritarian failures are typically used as opportunities to entrench those in power or replace a political elite with leaders notably lacking a commitment to genuine democratic values. 53 Hungary (2012) and Venezuela (1999) provide cautionary examples of how ill-channeled appeals to the people can allow for the process of constitutional reform or regeneration to lead to concentrated illiberal power. 54 By contrast, success stories of countries such as South Africa (1996) show that after-the-fact consultative mechanisms can promote multi-partisan agreements that feature established institutional actors and create a reasonably stable democratic governance. 55

The second type of failure is the activation failure. This type of failure is produced when the new constitution is not passed or when the new constitution fails to produce enduring and stable institutions. In this type of failure, the first goal of the constitution-making process is not achieved. Examples include constitutions that were

49 See, e.g., Elster, supra note 41, at 365–67.
50 See, e.g., Pasquino, supra note 40, at 104–12.
51 See, e.g., Khaitan, supra note 34, at 399–404.
52 See, e.g., ISSACHAROFF, supra note 46, at 168–76.
53 See Varol, supra note 35, at 433; Dixon & Ginsburg, supra note 35, at 1011.
54 See Varol, supra note 35, at 433, 462–63.
55 See ISSACHAROFF, supra note 46, at 178–79.
not passed: the French Constitution proposed in May of 1946,\textsuperscript{56} the Kenyan constitutional proposal of 2005,\textsuperscript{57} the Icelandic constitution-making process of 2011,\textsuperscript{58} and the first Nepalese constituent assembly of 2012.\textsuperscript{59} Examples also include constitutions that are initially passed but that fail to stick and generate a stable institutional framework: the French Constitution of the Fourth Republic (1946)\textsuperscript{60} and the Tunisian Constitution of 2014—replaced in 2022\textsuperscript{61}—are good illustrations. This type of failure is less likely to garner much academic attention since, by definition, it fails to produce a new constitutional order.

We engage the modern debates over constitution formation through a focus on the role of political parties as the firmament for stable democratic governance. First, we will address the importance of political intermediation and how parties are typically in a privileged position. As political parties have not received much attention in constitutional theory,\textsuperscript{62} and most of the work on political parties comes from political science,\textsuperscript{63} this first section is particularly important. We will then summarize the main alternatives to political parties and identify their limits: empowering presidents, referenda, elected constituent assemblies, and deliberative fora. We consider the fact that most constitution-making processes combine some of these stages. We then go back to the idea of constitutional failures and show how the lack of rival political parties engaging in cross-party agreements may end up in an authoritarian failure or in an activation failure. Finally, we turn to the recent—and failed—Chilean Constitutional Convention to illustrate the problems of organizing a

\textsuperscript{57} See \textit{Varol, supra} note 35, at 433–34.
\textsuperscript{58} See \textit{Verdugo, supra} note 45.
\textsuperscript{59} See \textit{Varol, supra} note 35, at 433–34.
\textsuperscript{60} See, e.g., Cowans, \textit{supra} note 56, at 69–70.
\textsuperscript{61} See \textit{Elster, supra} note 41, at 371.
constitution-making process in a democratic setting without a robust and influential political party system.

I. INTERMEDIATION

To address constitutional formation in the modern era, it is best to begin with a foundational account of how democratic governance has succeeded. Following Benjamin Constant, the question is, how did successful democracies mediate the tension between the liberty of the ancients and the liberty of the moderns during the 19th and 20th centuries, the period of democratic ascendency?

One clue was immediately provided by Constant’s countryman, Alexis de Tocqueville, in his wide-eyed travels to America. Recall that Tocqueville had originally come to America to observe the penal system of the young Republic but quickly pivoted to observe citizen life and engagement in a democratic society. Immediately noteworthy to him was the propensity of the American citizenry to join associations, ones formed for seemingly any purpose, grand or transitory, and with a freedom unknown under the more encrusted hierarchies of Europe. Of these new private associations, none was more important than the incipient political parties that began to form in the early 19th century.

Parties allowed for the competing aims of self-government and effective representation to be substantially realized, if not completely reconciled. They did so by offering mechanisms of citizen participation, addressed in the next section. But critically, over time, parties proved key to democratic governance. In short form, parties played key roles in stabilizing legislatures, providing coherence to the legislative process, avoiding cycling and fragmentation, fleshing out Madison’s observation that the legislature should be the

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64 See Constant, supra note 1, at 1–2.
66 See id. at xxxix–xl, 3.
67 See de Tocqueville, supra note 65, at 489.
68 See discussion infra Section II.B.
69 Skach, supra note 9, at 875.
heart of republican government, and permitting cross-temporal planning.\textsuperscript{70} Also, in the words of Fernando Bizzarro and his development economist collaborators, discussing some high-performing economies, “[The] economies were governed by dominant parties that enjoyed long time horizons, had the power to maneuver around potential veto points, could shield the bureaucracy from special interests, and could effectively oversee policy implementation.”\textsuperscript{71}

Moreover, parties allow long-term politics of “redistribution” as opposed to “distribution,”\textsuperscript{72} and permit long-term welfarist commitments even if power shifts, as in Britain, Australia, or the United States. Parties offer an institutional format for the two key features of democratic government: repeat play and winners do not get all.\textsuperscript{73} Like corporations, parties have an institutional life that extends beyond the bounds of human mortality. Parties serve not simply to rationalize electoral choice, but to transmit that into governance and, in doing so, offer mechanisms of retrospective accountability for citizen assessment of results.\textsuperscript{74}

But parties exist not just in the domain of government, the key to the challenge from Constant. The modern political parties were the interactive product of large independent associations, labor unions, churches, local business associations, civic groups such as Rotaries and Kiwanis in the United States, or the Freemasons in another era.\textsuperscript{75} Parties were the transmission belt for these organizations into the political arena and, in turn, for the political domain to draw from civil society.\textsuperscript{76}

Parties were the overlay where democratic self-government met the inability to devote one’s life to the tasks of direct participation.\textsuperscript{77}

\footnotesize{\textsuperscript{70} Fernando Bizzarro et al., Party Strength and Economic Growth, 70 WORLD POL. 275, 280–84 (2018).}

\footnotesize{\textsuperscript{71} Id. at 290.}

\footnotesize{\textsuperscript{72} A useful distinction from Jeffrey D. Sachs, Social Conflict and Populist Policies in Latin America 10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 2897, 1989).}

\footnotesize{\textsuperscript{73} See Khaitan, supra note 62, at 97.}

\footnotesize{\textsuperscript{74} See MANUEL ANSELMI, POPULISM: AN INTRODUCTION 106 (2018).}

\footnotesize{\textsuperscript{75} ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 48–49, 85, 336–37, 388–89 (2001).}

\footnotesize{\textsuperscript{76} See id. at 48–49, 336–37.}

\footnotesize{\textsuperscript{77} See id. at 336–37.}
What gauge of sewer pipe should be used; how many cloverleaf exits should be put on the highway; what is the cost-benefit optimal level of sulfur dioxide emissions? There are answers, and contestable claims, but they demand expertise and experience, something unlikely to be realized through unfiltered forms of direct citizen control.78

Unfortunately, the reality of our time is that parties no longer draw on mass constituencies. Increasingly they are vestiges of a participatory past, now dependent on state subsidies, as in Europe.79 Or they exist as shells that can be captured by someone marginally related to the party (e.g., Donald Trump) or nearly captured by someone not in the party at all (e.g., Bernie Sanders).80 Or they are created as a personal platform of a specific leader.81 Sometimes it can be a moderate leader who pushes centrist policies, such as Macron in France, though this appears to be rare.82 Macron-type leaders also come at a high price of harming mainstream parties and paving the way for outsiders to become their successors, even from the hard right.83 Such extreme challenges are all the more likely when parties are seen as the locus of corruption, and this can take place in competitive settings such as Italy, or in less competitive ones such as in Argentina’s Peronismo or in the previous Mexican PRI-style politics.84 This is compounded by the ease of lone-venture candidates fueled through social media, which lowers the transaction costs of

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78 See id.
79 See Jon Pierre et al., State Subsidies to Political Parties: Confronting Rhetoric with Reality, 23 W. EUR. POL., no. 3, 2000, at 1, 22.
80 See SADURSKI, supra note 13, at 50; Tom Gerald Daly & Brian Jones, Parties versus Democracy: Addressing Today’s Political Party Threats to Democratic Rule, 18 INT’L J. CONST. L. 509, 528–29 (2020); JOHN G. MATSUKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 1–2.
82 See id.
83 See Griff Witte et al., Macron Wins Presidency as France Rejects Le Pen and Her Right-Wing Populist Tide, WASH. POST (May 7, 2017, 10:08 PM), https://www.washingtonpost.com/world/europe/with-europe-on-the-line-polarized-french-voters-choose-between-macron-and-le-pen/2017/05/07/ccf8e5e2-31d9-11e7-9534-00e4656c22aa_story.html (discussing Macron’s new party and his start-up approach).
84 See ANSELMI, supra note 74, at 28, 57, 59, 66, 69–70.
producing contacts, funding, and gaining support without organizational infrastructure.\textsuperscript{85} Prime examples could be Nayib Bukele in El Salvador, who is becoming hegemonic in El Salvador’s compromised political arena,\textsuperscript{86} or the tumultuous and short-lived reign of Pedro Castillo in Peru.\textsuperscript{87}

All raise the question, once thought unimaginable by political scientists and constitutional scholars, of democracies without parties.\textsuperscript{88} Quite bluntly, what will democratic politics and governance look like without the organizational and participatory structure offered by parties in the two centuries of democratic ascendancy? Increasingly, we see this as the central question for democracies in our era.

In particular, the weakness of parties’ ties to the current populist challenge. Populism rejects the key premises reinforced through the longer-term vision of parties—i.e., as mentioned before, commitment to repeat play and acceptance that the winners have a right to prevail, but not too much. In simple terms, democracy between repeat actors imperfectly instructs that what goes around, comes around.\textsuperscript{89} By contrast, populists claim to speak eternally and exclusively for the people as the majority empowered to rule.\textsuperscript{90} This is a form of politics organized around individuals, movements, and momentary alliances among various aspiring \textit{caudillos} that also seek to delegitimize the opposition.\textsuperscript{91}

\textsuperscript{85} See \textsc{Sadurski}, supra note 13, at 154, 170.


\textsuperscript{87} See Laura Cervi et al., \textit{TikTok and Political Communication: The Latest Frontier of Politainment? A Case Study}, 11 MEDIA & COMM’N 203, 204, 206 (2023).

\textsuperscript{88} Of course, non-democratic views had long advocated for a sort of democracy without parties or, at least, with a limited scope for parties. This is the case of corporativist politics typically associated with fascism but also present in more modern right-wing dictators such as Pinochet in Chile and Fujimori in Perú.

\textsuperscript{89} See Khaitan, supra note 62, at 97–98.

\textsuperscript{90} JAN-WERNER MÜLLER, \textit{WHAT IS POPULISM?} 3 (2016).

\textsuperscript{91} See Diaz de Valdés & Verdugo, supra note 19, at 480 (discussing \textit{caudillos}). The literature on populism is too wide to cite here. See some examples of these ideas in \textsc{Anselmi}, supra note 74, at 88; MÜLLER, supra note 90, at 34–35, 37; \textsc{Cas Mudde}, \textit{Are Populists Friends or Foes of Constitutionalism?} 2 (2013), https://www.fljs.org/sites/default/files/migrated/publications/Mudde_0.pdf; \textsc{Sadurski}, supra note 13, at 5.
Populism contrasts with the filtration offered by parties. To be sure, populists may find political parties useful. Populists may not need a party to find a connection with the voters, but many of them know that parties still offer an instrumental value of which they might take advantage.92 And, certainly as well, some parties may threaten democratic principles. They can be harmful, for example, when they advocate totalitarian ideologies and promote the use of political violence—the idea of militant democracy has been used to fight these threats.93 Our argument is premised on a vision of parties that are institutionalized and depersonalized and that accept the basic democratic principles that allow for political competition. In the first phases of an aspiring constitutional democracy, some constitution-making processes may well take place in the absence of institutionalized parties. Think, for example, of the young factions that participated during the constitution-making process of the United States94 or South Africa.95 But in the long run, the democratic experiment thus far has depended on the emergence of stable institutional forms of politics.96

II. ALTERNATIVES TO PARTY INTERMEDIATION

The past several centuries of Western democracy have largely been organized around institutional forms of channeling citizen input, primarily political parties and other instruments of civil society that intermediate between the individual and the state.97 These intermediaries represent the citizens before the representatives, as it

92 See SADURSKI, supra note 13, at 51–52.
93 The idea of militant democracy is typically attributed to Karl Loewenstein, Militant Democracy and Fundamental Rights, I, 31 AM. POL. SCI. R. 417, 430–31 (1937). For a useful review of this problem, and the limits to the remedy of party bans, see Daly & Jones, supra note 80, at 520–22.
94 See MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 596, 599–600 (2016) (showing both how fragile and controversial the constitution-making process of the US was and the role of the different groups that participated in it).
95 See Hudson, supra note 63, at 515.
96 See Bizzarro et al., supra note 70, at 276.
97 See Khaitan, supra note 62, at 97.
were. This role is rarely formalized, and the American founding generation unwisely thought that separation of authority would exist only at the level of formal government institutions.98

What then of an era in which these intermediaries are themselves in a state of serious disrepair? The erosion of participatory endeavors, what Robert Putnam captured as “bowling alone,”99 is reflected in decreasing membership in unions, churches, civic associations, and other places where citizens reach beyond themselves and interact directly.100 The corresponding dissatisfaction with political parties is a global phenomenon that affects democratic countries and makes them vulnerable to the threat of populism.101

Without input from civil society, there is an increasingly plebiscitary air to even formally representative democracies. Time has also not been kind to the Madisonian insight that the scale of the Republic would defeat factional interests.102 Technology shrunk the geographic divide and allowed modern political parties to exist across broad territories,103 but the rise of digital communication has allowed a plebiscitary world to engage the citizens directly and frequently.104 If such politics without parties sounds fanciful, as it no doubt will after centuries of democracy centered on non-state political institutions, the question is, what is the alternative?

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98 See Levinson & Pildes, supra note 62, at 2313.
99 See generally PUTNAM, supra note 75, at 25 (describing the disintegration of social structures in the United States).
100 Id. at 54, 57, 60–61, 71, 81, 84, 112.
101 See Khaitan, supra note 62, at 89.
104 See id.
A. Empowering Presidents

One answer might be given on one side of the participation/representation divide. Consider the seminal contributions of now-Justice Elena Kagan in her work *Presidential Administration*, and the update of that impulse in the recent Harvard Foreword by Cristina Rodríguez. For Kagan, heightened administrative authority can draw its democratic bona fides from its link to the ultimate national electoral mandate of the president. Separation of powers and the role of intermediary institutions recede before the properly constructed presidential oversight of an executive-centered decisional state.

Rodríguez, no doubt tempered by the specter of the intervening Trump presidency, follows suit with an account of the “decentered presidency” that offers “a conception of politics and politically driven decision-making that justifies executive policymaking,” a justification that ultimately rests on the need for action and is “much less tied to the Madisonian separation of powers and flawed assumptions about presidential accountability.” Rodríguez joins Kagan in looking to the internal workings of the executive branch as guiding political legitimacy following an electoral mandate. Each evades the question of participation, not so much by rejecting it, but by finding it either satisfied by the electoral process or not a consideration in light of the enhanced capacity for decision-making.

The risk of an exclusive focus on competence-driven management is best presented in the trenchant critique of EU-style management offered by Peter Mair. As presented by Mair, the “democratic deficit” of the EU is not so much the fact of an unelected bu-

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108 Id. at 2248–49.
110 Id.
111 Id.
reacademic but the resulting European upstreaming of decision-making away from popular accountability.\[^{114}\] The consequence is that national-level elections are not about the reality of governance but of ideology, opening the door to the fragmentation and polarization that have decidedly taken hold in the decade since Mair’s death.\[^{115}\] Spain and Belgium’s abilities to go extended periods without a government—the former for nearly a year and the latter for nearly two—and to improve in such domains as gross domestic output\[^{116}\] are a testament that governance has been moved decidedly elsewhere. Most significantly, nothing much changed in the life of the citizenry in the absence of an elected government of their own.\[^{117}\] In effect, these countries had democratic election processes, but governmental power resided elsewhere, beyond the reach of electoral accountability.\[^{118}\]

B. Referenda and Constituent Assemblies

On the other side of the spectrum, the ease of communication has revitalized claims favoring direct forms of citizen participation. The appearance of popular support mechanisms, such as can be provided by referenda, has proven hard to resist for many political leaders attempting to consolidate their agendas,\[^{119}\] even though the claim

\[^{114}\] Id. This is not to say, of course, that other explanations are false or incompatible. Many explanations offer elite-based reasons that look at specific parts of the elite, such as judges, “euro-lawyers,” legal networks, and unelected political organizations. See, e.g., Alec Stone Sweet, The Judicial Construction of Europe 15 (2004); Tommaso Pavone, The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe 39 (2022).

\[^{115}\] Mair, supra note 113, at 110.


\[^{117}\] See Caparrós, supra note 116.

\[^{118}\] See id.

\[^{119}\] The argument of popular sovereignty is so strong that is has led some scholars to claim that their output cannot be limited even by ex-post human rights con-
to popular sovereignty is not necessary—nor sufficient—to legitimate referenda.120

This has opened the gates for plebiscitary narratives favored by leaders with authoritarian tendencies that seek the direct consent of the people. Examples include the referenda pushed by Putin (2020) and Erdogan (2017),121 and also of democratic leaders seeking to advance populist narratives to shape constitutional orders to their advantage.122 A landmark example is Charles de Gaulle’s referendum seeking to approve a constitutional reform that both circumvented parliament and allowed him to be elected directly by the public.123 At times, a populist leader will miscalculate and assume that popular approbation will be forthcoming, only to discover that elections are not always so easily controlled.124 That may lead to end runs to avoid election results.125 This is what happened in Bolivia when Evo Morales lost a referendum in 2016 that would have amended the constitution to authorize him to seek another term—although Morales managed to circumvent the referendum results by

121 This issue has fascinated scholars. See, e.g., Anna Fruhstorfer, Referendums and Autocratization: Explaining Constitutional Referendums in the Post-Soviet Space, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 157, 157–58, 177–78 (Richard Albert & Richard Stacey eds., 2022) (discussing the hypothesis that the strength of party institutions is a determinant of the reliance of authoritarian on referenda).
122 See, e.g., id. at 173.
125 Of course, some find alternatives to a referendum by relying on other state mechanisms. For examples, this recently occurred in El Salvador, where the court ruled that President Bukele was allowed to run for re-election despite an explicit constitutional prohibition. Bukele’s allies had packed the court nearly a year before the judicial decision.
having the docile constitutional court find that term limits violated higher-order constitutional rights.126

Not all appeals to the popular will yield success. Morales assumed his appeal to the people would prevail,127 but his increasing autocratic commands stoked voter rejection and,128 in the end, forced him to turn to a judicial power grab—an autocratic “Plan B,” as it were.129 Similarly in Venezuela, voters in 2007 rejected Hugo Chávez’s constitutional reform package—which included, among other amendments aimed at entrenching him in power, the removal of presidential term limits130—yet, two years later, the same basic reforms passed after a substantial and improper deployment of state resources to overwhelm the opposition.131

Brexit is but the most high-profile of the push to referenda, in that case, mandating a British withdrawal from the EU, but without any form of corresponding policy mandate as to how that was to be done.132 Other examples include the referenda that confirmed Latin

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129 Verdugo, supra note 124, at 1099.

130 See Javier Corrales, For Chávez, Still More Discontent, 108 CURRENT HIST. 77, 78 (2009) (suggesting that the reform plan “would have been the most generous blank check ever given to an executive branch in the democratic history of Latin America”).


132 For example, see the criticisms by Weale, supra note 81, at 106–15 (criticizing how the idea of the people’s power was used and manipulated in the case of the Brexit referendum and describing its main problems).
American constitution-making processes dominated by neo-Bolivarian agendas with dubious democratic goals. In the case of Ecuador, Venezuela, and Bolivia, those processes, combined with elected constituent assemblies, ended up weakening the opposition and building up submissive or irrelevant legislative bodies while consolidating the personal power of the executive.

Referenda are also subject to the associated risks of “bribing” voters with apparent gains in exchange for enhancing the power of the populist executive. Or they may be presented as a package of “electoral extortion” where citizens are obliged to acquiesce to things with which they disagree as the cost for approving those things with which they agree. Even though some measure of taking the good with the bad is present in all democratic give-and-take, the stakes in constitutional referenda can be higher. As referenda seeking to replace a constitution are more likely to be approved than referenda aimed at merely amending a constitution, and constitutions include packages regulating several heterogeneous

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133 See, e.g., Phoebe King, Neo-Bolivarian Constitutional Design, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 366, 372–92 (Denis J. Galligan & Mila Versteeg eds., 2013); Javier Couso, Radical Democracy and the “New Latin American Constitutionalism” 5–11 (June 6, 2013) (unpublished essay), https://law.yale.edu/sites/default/files/documents/pdf/sela/SELA13_Couso.CV_20130516.pdf (describing the radical democratic features of the constitution-making processes of Venezuela, Ecuador, and Bolivia, and identifying the uses of referenda); see also Díaz de Valdés & Verdugo, supra note 19, at 483–84 (suggesting that political representation in those countries was associated with the descriptive and symbolic elements of the main political leader, which is relevant to socially legitimize the use of referenda).

134 See King, supra note 133, at 372–92; Couso, supra note 133, at 5–11.


138 This is not so say, of course, that the problem of electoral extortion cannot be reduced or controlled. See Sergio Verdugo, Referéndum y Proceso Constituyente: ¿Extorsión Electoral o Veto Ciudadano?, 47 ACTUALIDAD JURÍDICA 245, 256–61 (2023) (recognizing the inherent risk of broad negotiation across first principles raising the possibility of electoral extorsion).
matters, the problem of electoral extortion can become particularly acute.139

Some nuance needs to be taken in assessing the role of constitutional referenda.140 In contrast to the risk of cram-down autocratic reforms, referenda appear more warranted, not as a substitute form of government,141 but as a check on self-interested behavior by representatives (i.e., the inevitable agency cost emerging from the distance of the governors from the governed).142 When the end product of constitutional negotiation is put to the voters for approval, the consultation can provide incentives for representatives to try to get close to the median voter during the negotiation process itself.143 In

139 The evidence is overwhelming. See Zachary Elkins & Alexander Hudson, The Constitutional Referendum in Historical Perspective, in COMPARATIVE CONSTITUTION MAKING 142, 162 (David Landau & Hannah Lerner eds., 2019) (showing data suggesting that 40% of referenda on constitutional amendments fail); see also Zachary Elkins & Alexander Hudson, The Strange Case of the Package Deal: Amendments and Replacements in Constitutional Reform, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 37, 47 (Richard Stacey & Richard Albert eds., 2022) (arguing that 11 out of 179 referenda have rejected a constitutional proposal).

140 For a nuanced approach to referenda and their different types and contexts, see DAVID ALTMAN, DIRECT DEMOCRACY WORLDWIDE 188–202 (2011). Even contemporary defenders of direct democracy offer nuances and cautious approaches to their recommendation. See, e.g., MATSUSAKA, supra note 80, at 162–91.

141 See Pasquale Pasquino, Constituent Power and Authorization: Anatomy and Failure of a Constitution-Making Process, in ICELAND’S FINANCIAL CRISIS: THE POLITICS OF BLAME, PROTEST, AND RECONSTRUCTION 230, 232–34 (Valur Ingimundarson et al. eds., 2016) (suggesting that the people are not the authors of the constitutional proposal, but merely play a role in authorizing it and therefore have veto power on it).


turn, the emerging “package deal” may properly garner support across diverse political constituencies.\textsuperscript{144}

But here, referenda serve as a means of securing buy-in to the work conducted by representative actors.\textsuperscript{145} Used in this fashion, the consultative process of voter approval ratifies a political agreement—as in South Africa—rather than serving as an attempt to craft a bottom-up constitutional order when political actors are unable to find common ground.\textsuperscript{146}

Taken to its extreme, the use of the referendum to bypass political institutions hearkens to older theories that the people themselves must be the holders of the ultimate power to decide on their constitutional order. Even in its initial formulation as the “constituent power” by the Abbé Emmanuel Joseph Sieyès in the founding era of modern democratic governance, there is a distinction drawn between the authority to decide on a constitutional order and the manner in which that power is exercised.\textsuperscript{147} As populist currents challenge inherited democratic governance, the idea of the people as reservoirs of constituent power gains new currency, but with altered substance.\textsuperscript{148} Increasingly the modern invocation of the putative

\begin{itemize}
\item \textsuperscript{144} This is the reason why they tend to be approved, unlike more focused constitutional amendments that may reflect the interests of only one sector of society. See Elkins & Hudson, The Constitutional Referendum in Historical Perspective, supra note 139, at 52–55.
\item \textsuperscript{145} See Angélica Durán-Martínez, Presidents, Parties, and Referenda in Latin America, 45 COMPAR. POL. STUD. 1159, 1174–79 (2012).
\item \textsuperscript{146} See, e.g., id. (arguing that the role of parties can help to mediate the effect of referenda on executive power).
\item \textsuperscript{147} Emmanuel Joseph Sieyès, What Is the Third Estate? (1789), reprinted in Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791, at 92, 136 (Michael Sonenscher ed., trans., 2003) (distinguishing between constituent power, which resides in the nation itself and exists free of constitutional limits, and constituted power, which emanates from the will of the nation and is therefore limited by the Constitution); Ulrich K. Preuss, Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution, 14 CARDOZO L. REV. 639, 651–56 (1992).
\item \textsuperscript{148} The literature on constituent power is too large to cite. See some contemporary defenders of the theory in Ernst-Wolfgang Böckenförde, The Constituent Power of the People: A Liminal Concept of Constitutional Law (1986), reprinted in Constitutional and Political Theory: Selected Writings 169, 172–75 (Mirjam Künkler & Tine Stein eds., Thomas Dunlap trans., 2017); Antonio Negri, Insurgencies: Constituent Power and the
constituent power of the people is claimed as a source of a power beyond simply approving a constitutional proposal, but reaches all the way to designing the constitutional project and even determining how it is to be implemented.\(^{149}\) Claims of the inherent constituent authority of “the people” abound in countries such as Venezuela, as populists in office claim a superior authority to that of any institutional constraints.\(^{150}\) In turn, arguments inhering in the ultimate power of the people increasingly overwhelm the constitutional process itself.\(^{151}\)

Once embodied in a constitutional assembly, and despite the claimed advantages—compared to sitting legislators\(^{152}\)—the theory of constituent power opens the door to political excess. Members of those bodies have short-term political goals and are subject to capture problems, and the political processes involving these assemblies can serve as a tool for authoritarian agendas to emerge and consolidate.\(^{153}\) There are reasons to think that legislatures may be

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\(^{149}\) Kalyvas, supra note 148, at 226–27.


\(^{151}\) Id. at 376–79.


superior to constituent assemblies across all these dimensions. As constituent assemblies typically take place during periods of crisis, when existing institutions are weak or even broken, constituent assemblies can become a fertile ground for strongman manipulation and democratic erosion. It is perhaps no coincidence that the constituent power theory—the main theoretical way to justify constituent assemblies—draws from the same wellspring as populist politics.

Despite some success stories in constitution-making through a constituent assembly—Colombia being the case in chief—the risk of autocratic capture remains. Unguided constituent assemblies may lack sufficient incentives for inclusive cross-party collaboration, procedures aimed at producing a constitution that all relevant political organizations can agree upon, and electoral mechanisms that resist one-party capture. The constituent process may also fail to ensure buy-in from organized political parties. Chile will serve as the final illustration of this point.

C. Deliberative Fora

Not surprisingly, disenchantment with contemporary democracies has led to renewed attention to not only citizen engagement in the process of constitutional formation, but also the exercise of governmental power itself. Consider two of the more prominent proposals for a new axis of politics and governance.

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155 See Partlett, supra note 153, at 236 (discussing how post-Communist constitutionalism allowed leaders to “deploy the mechanisms and rhetoric of constituent power to dismantle existing institutions and expand their personal power”).


157 See Colón-Ríos, supra note 150, at 372–76 (discussing the Colombian reform).

158 See Landau, supra note 153, at 934.

159 Verdugo, supra note 143.

For the past thirty years, American political scientist James Fishkin has not just advocated—but put into practice in a number of countries—a program of what he terms “deliberative polling.”\textsuperscript{161} The practice involves gathering random citizens to spend days in the study of contemporary governance issues with the aim “not just to ask them their impression of sound bites and headlines as in conventional polling, but rather to engage them in many moderated small group discussions with trained moderators who help them engage with balanced and evidence-based materials.”\textsuperscript{162} In turn, these individuals would emerge as opinion leaders for those citizens not selected or unable to devote the intensive time required.\textsuperscript{163} Rather than trusting institutional actors, such as political parties, to educate the rationally uninformed voters, the proposals by Fishkin and his collaborators would trust that process to expert facilitators, a difficult proposition in a polarized political environment.\textsuperscript{164}

By contrast, political theorist Hélène Landemore bypasses any concept of expert education in favor of the inherent “wisdom of the masses,” an application of the mathematical principles of large numbers yielding more reliable results, as first formulated in the 18th century by the Marquis de Condorcet.\textsuperscript{165} For Landemore, the power of this statistical principle is inherent in democracy and majority rule, allowing a well-constructed system of government to maximize the chances that a country picks the “best” political answer.\textsuperscript{166} The Condorcet rule requires a single dimension (go to war or remain at peace) and also that individuals have a more-likely-than-not chance of knowing the right answer, and that they do so in isolation from each other.\textsuperscript{167} Condorcet formulated his theory as a maxim for jury determinations of guilt or innocence.\textsuperscript{168} There, the

\begin{footnotesize}
\begin{enumerate}
\item Fishkin, supra note 160, at 117.
\item Id.
\item Id.
\item Landemore, supra note 160, at 265, 275.
\item Id. at 252.
\item Id. at 265.
\item Id. at 257.
\end{enumerate}
\end{footnotesize}
jury is convened for only one task, and its decisional framework is preset.\textsuperscript{169}

None of these conditions can be assumed in the real world of political governance. Few political choices, other than selecting one of two candidates, come prepackaged as a binary choice,\textsuperscript{170} and the assumption of a greater than 50% chance of individuals having accurate knowledge is fanciful, particularly when the issues are ones of contested policy, rather than true/false fact. And in a world of echo chambers driven by social media,\textsuperscript{171} there is no prospect of what Condorcet would have termed “juror independence.”\textsuperscript{172} Nonetheless, the Condorcet model continues to have support in the fact that there is wisdom in more rather than less.\textsuperscript{173}

Perhaps more interesting is that Landemore goes further by taking up the concept of direct citizen governance, in the style of the Greeks of old.\textsuperscript{174} If the wisdom truly resides in the citizens in the aggregate, why not let them govern directly, also without intermediation? Hence, the resurrection of the lottery as a randomized draw upon the time of individual citizens to assume the role of state officials.\textsuperscript{175} As Landemore explains, the proposal is not unlike jury duty:

\begin{quote}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} Jason Brennan, \textit{Response to Landemore, in Debating Democracy: Do We Need More or Less?} 251, 257 (2022).
\textsuperscript{171} See Pablo Barberá, \textit{Social Media, Echo Chambers, and Political Polarization, in Social Media and Democracy: The State of the Field, Prospects for Reform} 34, 35 (Nathaniel Persily & Joshua A. Tucker eds., 2020) (noting empirical studies finding that “most” political exchanges on social media are between people with “similar ideas,” though noting more “cross-cutting” interactions than expected).
\textsuperscript{172} See David M. Estlund, \textit{Opinion Leaders, Independence, and Condorcet’s Jury Theorem, 36 Theory & Decision} 131, 138 (1994) (explaining that the “question of independence” in the Jury Theorem is “whether the several individuals’ votes are independent events”).
\textsuperscript{173} See Ville A. Satopää et al., \textit{Decomposing the Effects of Crowd-Wisdom Aggregators: The Bias-Information-Noise (BIN) Model, 39 Int’l J. Forecasting} 470, 473–75 (2023) (providing a bevy of citations confirming Wisdom of the Crowds and building models to aggregate predictions and opinions of many individuals).
\textsuperscript{175} Though, some suggest that sortition’s strength shines, not in its application as a governance model, but in the more limited role of government oversight. \textit{See}
\end{quote}
Lottocratic representatives are selected by lot and frequently rotated. The combination of sortition and rotation ensures that lottocratic assemblies are accessible and “open” to all, not spatially speaking, since those not selected are excluded, but over time . . . . One might think of the open mini-public as a supersized version of the criminal jury in the American system . . . . [T]he open mini-public is meant to be to the criminal jury what a full-grown tree is to a bonzai [sic]: a much larger, less constrained, and more empowered entity, fully expressing the democratic potential of trusting a larger, descriptively representative group of ordinary citizens.176

Whatever the practicalities of these claims to direct citizen involvement,177 it is notable that both Fishkin and Landemore begin with individuals untethered to any form of institutional participation.178 Both begin with random lotteries that bring together diverse cuts of the public: Fishkin, in order to improve sample voters as an example,179 and Landemore, to tap their already existing collective

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176 LANDEMORE, supra note 174, at 11–13; see also Nathan Heller, Politics Without Politicians, NEW YORKER (Feb. 19, 2020), https://www.newyorker.com/news/the-future-of-democracy/politics-without-politicians (summarizing Landemore’s argument as akin to jury duty in that “every now and then, your number comes up, and you’re obliged to do your civic duty—in this case, to take a seat on a legislative body. For a fixed period, it is your job to work with the other people in the unit to solve problems and direct the nation. When your term is up, you leave office and go back to your normal life and work.”); see generally Daniel Steinmetz-Jenkins, Can “Lottocracy” Save Democracy From Itself?, THE NATION (Sept. 1, 2021), https://www.thenation.com/article/politics/helene-landemore-more-open-democracy.

177 But see Jason Brennan, Response to Landemore, in DEBATING DEMOCRACY: DO WE NEED MORE OR LESS? 251, 251 (2022) (criticizing Landemore’s argument).

178 See Fishkin, supra note 160, at 113.

179 See id. at 109, 111.
wisdom (and as a sort of second-best mechanism). Each represents a vision of politics shorn of institutional engagements. Each has found small measures of support as political parties are seen as diminished entities.

Specific real-world experiments that seem to fit with the ideas advanced by Fishkin or Landemore have taken place in different forms in recent years. They include limited experiments with popular consultation, the 2012 Irish mixed Convention, the 2016–2018 Irish Citizens’ Assembly, the “French Citizens’ Convention for Climate” that President Macron convoked, the European citizens’ panel of the conference for the future of Europe, and the 2010–2013 Icelandic constitution-making process—which included a large number of independents and opened with a large forum composed of randomly selected citizens.

Similarly, an earlier Chilean constitutional experiment inaugurated by President Michele Bachelet drew upon both self-convoked

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180 See Hélène Landemore, The Argument for Democracy, in DEBATING DEMOCRACY: DO WE NEED MORE OR LESS? 142, 153–54 (2022) (“[T]he more inclusive the deliberation process is, the smarter the solutions resulting from it should be, overall. Numbers, in other words, function as a proxy for cognitive diversity... Where full inclusiveness proves unfeasible, representation by random selection is the next best solution.”).
181 See Fishkin, supra note 160, at 110.
182 This Convention was composed by sitting legislators and randomly selected citizens. See David M. Farrell et al., The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014, 68 POL. STUD. 54, 56–57 (2020).
bottom-up citizens meetings and party-initiated top-down gatherings. Though Bachelet’s process did not include a lottocratic form of direct participation and had an important problem of self-selection, her process succeeded in gathering hundreds of thousands of non-partisan citizens to discuss the content of the new constitution in small, guided meetings. This more limited role for citizen engagement, in keeping with the more modest claims of Roberto Gargarella in his work on *The Law as a Conversation Among Equals*, is for ways in which the citizenry can be engaged in discourse over governance, what Gargarella terms the search “here and there” for poles of direct citizen participation. Some of those experiments have been accompanied by constitutional crowdsourcing techniques aimed at widening the participation of citizens and increasing the depth of the deliberations. Even though the number of people participating can be impressive, the ultimate impact of these crowdsourcing techniques remains difficult to track or measure.

Yet, politics without parties—or with a diminished or weak political system—can be risky in democratic settings with compromised democratic institutions and/or diminished state capacity. One problem is that politics without parties risks outright failure. If democratic institutions exist, parties and representative institutions can oppose changes that do not serve their interests and act as a brake on proposed reforms. Thus, the Icelandic process failed after Parliament declined to advance key provisions of the citizens’

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187 **Francisco Soto & Yanina Welp**, *Los <<Diálogos Ciudadanos>> Chile ante el giro deliberativo* 15–16 (2017).
188 See **Lucas Sierra I.**, *Críticas a la metodología y sistematización del proceso constitucional*, 21 **DEBATES DE POLÍTICA PÚBLICA CEP** 2, 9 (2017) (identifying a number of methodological issues that arose during this process).
189 See id. at 3.
192 See id. at 59.
193 See id. at 50.
195 See id. at 2137.
The Chilean process promoted by Bachelet failed after she left the government without passing the constitutional proposal—which never got support even from the leftwing parties that were her electoral base. Some of the French mini-public’s recommendations have faced President Macron’s veto, and others were rejected or modified by political negotiations among ministers and lobbyists—only 10% have been approved without modifications.

To be fair, there are isolated success stories, such as the two Irish experiments that succeeded in getting political approval for abortion and same-sex marriage proposals passed by later referendums—an impressive achievement in a Catholic country. Yet, the two Irish constitutional reforms are, for now, still the exception. By and large, these constitutional efforts without political party buy-in have come to naught.

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196 For some possible explanations, see Tom Ginsburg, *Iceland: End of the Constitutional Saga?*, INT’L J. CONST. L. BLOG (Apr. 6, 2013), http://www.iconnectblog.com/iceland-end-of-the-constitutional-saga; see also Oddsdóttir, supra note 186, at 1219; Pasquino, supra note 141, at 232–33 (mentioning the absence of legal experts as among the possible factors and also emphasizing the lack of a serious dramatic circumstance that could activate the need for constitutional replacement).


201 See Doyle & Walsh, supra note 199, at 442.

III. CONSTITUTION-MAKING FAILURES

All constitutions bear the mark of their political origin, an observation that dates back at least as far as Aristotle.\(^{203}\) For example, the French Fourth Republic was created by the remnants of the parliament of the pre-World War II Third Republic.\(^{204}\) True to its parliamentary origins, it concentrated power in the legislative branch and diminished executive authority.\(^{205}\) This regime did not last long, and it was eventually replaced when, after the debacle, French reaction consolidated around the leader of the free French forces in World War II: Charles de Gaulle.\(^{206}\) Along with Michel Jean-Pierre Debré, de Gaulle spearheaded the emergence of the Fifth Republic, which, in turn, gave rise to modern French presidentialism; and it was again forged in the image of its preeminent figure.\(^{207}\) Another example is the Japanese Constitution, imposed by the Americans after Japan’s defeat in World War II.\(^{208}\) It includes, to this day, the imposed Article 9, which restricted Japan’s legal capacity to build a strong army—at least before that article was interpreted in a narrower way.\(^{209}\) A final example could be the proposed European Union constitution of a generation ago, which was a constitutional effort undertaken from within the EU administrative structure, and


\(^{204}\) See John Bell, French Constitutional Law 10 (1992).

\(^{205}\) See id. at 11.

\(^{206}\) See id. at 12–13.

\(^{207}\) See F.L. Morton, Judicial Activism in France, in Judicial Activism in Comparative Perspective 133, 135 (Kenneth M. Holland ed., 1991); Bell, supra note 204, at 19–20; see also Ackerman, supra note 123, at 180–82 (using the example of de Gaulle to show how institutions can be legitimized when they are associated with the charisma of specific leaders).


which, in great part, read like a labor code for entrenching the civil service prospects of the Brussels apparatus. 210

That constitutions reflect their origins is not a negative, at least not necessarily. One of the striking features of modern constitutionalism in the democratic world is the foundational role assigned to political parties, even though that role is, many times, not explicit in constitutions. 211 Throughout the 20th century, political parties enjoyed privileged constitutional status, even if not always formalized. 212 Whereas parties were not recognized in the constitutions of the 18th and 19th centuries, it became common to observe protections of the party’s ability to organize, mobilize, and advocate both inside and outside government. 213 The same was true even in those post-World War II constitutions that said little about parties due to disagreements about the parties’ roles—e.g., the Italian Constitution. 214 Particularly, in the post-1989 Third Wave of democratization, basically all new constitutions at least tacitly accepted that democratic politics would run through political parties. 215 In this

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211 See E.E. SCHATTESCHNEIDER, PARTY GOVERNMENT 1 (1942).


213 See id.

214 See id. at 210.

215 The one partial exception appears to be Bosnia and Herzegovina. See Dixon & Ginsburg, supra note 35, at 641. This may reflect the particular circumstances of the Bosnian peace agreement and the creation of consociational power sharing rather than electoral accountability as the foundations of government. Our thanks to Tom Ginsburg for confirming the empirical results from his extensive data set of constitutional provisions.
sense, the constitutional discourse dovetailed with the political science view that “political parties created democracy and that modern democracy is unthinkable save in terms of the parties.”

The trend toward increasing recognition of the core functions of parties ran into its first roadblock in the 1999 reforms of the Venezuelan constitution, the “Bolivarian” revolution of Hugo Chávez. For the first time, parties were removed from constitutional status in favor of mechanisms of direct popular consultations through referenda and various forms of assemblies. Intermediation was rejected in favor of direct appeals by the maximum leader to popular approbation. The process involved an institutional attack against the parliament and the call of a referendum in 1999. The referendum results showed that the anti-party plans were popular: According to the results, 88% of voters agreed on convening a constituent assembly, and 82% were in favor of empowering Chávez to establish the electoral processes. The declining role of institutionalized political parties reflected the overall anti-institutionalism of populist movements and its rejection of both repeat play and limitations on reigning majorities. There was nothing about Chávez that would invite the concepts of rotation in office and renewal of majority consent. To be sure, the issue was not that Chávez removed all parties, as he still saw a value in creating a party to coordinate his supporting coalition—i.e., the Partido Socialista Unido de Venezuela. But politics got personalized, and “Chavismo” as a larger

216 SCHATTSCHNEIDER, supra note 211, at 1.
219 On the popular narratives that prevailed during the process, see Jorge González-Jácome, Authoritarianism and the Narrative Power of Constitutionalism in Venezuela, in AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE 136, 141 (Helena Alviar García & Günter Frankenberg eds., 2019).
220 See MADRID, supra note 217, at 21.
221 Id.
222 García Soto et al., supra note 218, at 322–23.
223 See id. at 320, 323, 326–27.
224 See MADRID, supra note 217 at 25.
225 See García Soto et al., supra note 218, at 329.
movement in the end imposed a vision of the unified Venezuelan people, under what was termed “Bolivarian” leadership.226

Had the constitution-making process of Venezuela included the parties of the opposition—93% of the seats in the Venezuelan constitutional assembly were controlled by Chávez’s coalition227—the outcome of the process would have been far different. Most likely, the presence of political parties would have diminished the risk of the constitutional process ending in authoritarian failure. But the risk of constitutional failure persists even where authoritarianism is not on the agenda.228 Had the Icelandic process included the parties, the resulting activation failure would likely not have ensued. Had the Bachelet process in Chile included the parties, her 2018 constitutional proposal would have had more chances to survive the opposition coming to office. By contrast, the scant number of approved recommendations of the French and Irish assemblies were those that were negotiated with the parties.229

Before turning to Chile to drive home our central thesis, two hypotheses should be considered. First, political parties help strengthen the representative nature of the process by reducing the information costs for voters trying to understand what is at stake in the process of constitution formation—as we shall see, the Chilean draft proposal had hundreds of articles, often expressed in cryptic language.230 The presence of experienced institutional actors introduces delegates who understand the give-and-take of politics and imposes some discipline on those that will handle the constitutional

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226 See id. at 316.
228 See Carolan, supra note 199, at 740.
229 Doyle & Walsh, supra note 199, at 444; see also Jane Suiter & Min Reuchamps, A Constitutional Turn for Deliberative Democracy in Europe?, in CONSTITUTIONAL DELIBERATIVE DEMOCRACY IN EUROPE 1, 3 (Min Reuchamps & Jane Suiter eds., 2016) (showing the effectiveness of the Irish mini-publics); Carolan, supra note 199, at 746.
230 See Skach, supra note 9, at 875 (discussing the interrelatedness of political parties and the founding documents of a nation); AGUSTÍN SQUELLA, APUNTES DE UN CONSTITUYENTE 24–25 (2022).
negotiations. Second, political parties are repeat players that expect to play a role in the future democratic system. Bargaining across the aisle is both more familiar and more likely anticipated for those that have experience in parliamentary settings.

The participation of rival parties promotes respect for liberal institutional arrangements aimed at protecting minorities and preserving a competitive democracy. For that reason, consensual constitution-making processes are more likely to preserve or promote such critical features as the independence of the judiciary and public prosecutors. The process of negotiation combines with future electoral uncertainty to render experienced political actors risk averse, uncertain of who will prevail, and to what extent, in the transition to a new constitutional order. Operating behind a wall of uncertainty, organized political negotiators are more inclined to design meaningful forms of judicial review as a way to ensure the rights of prospective electoral losers whose interests were present at the constitution-making stage. Seen in retrospect, the constitutional success stories—the Colombian constituent assembly (1991), the South African constitution-making process (1996), and the Brazilian constituent assembly (1988)—were the product, not so much of the direct participatory mechanisms, but of a combination of stages that

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231 See Skach, supra note 9, at 875.
234 See id. at 306 (showing evidence from Latin America to support the claim that “[m]ultilateral constitution-making processes,” unlike unilateral processes advanced by a single political organization, are more likely to design more powerful and independent judicial institutions).
allowed roundtable negotiations to take place in which organized political associations pulled the laboring oar.237 These constitutional success stories, such as South Africa (1996) and Spain (1978),238 used legislatures239 or elite pacts to lay the constitution’s foundation.240 Only subsequently did these efforts garner legitimacy through means of popular approbation.241 On the contrary, constitutional efforts that are perceived as a power grab by a single faction or constituency may—for that reason alone—fail to gather public approbation. Failed constitution-making efforts that were perceived as unilateral political efforts failed under opposition pressure: Examples include Kenya in 2005, where the proposal was seen as a cram-down by the dominant party in the ruling coalition,242 and the initial French constitutional referendum in May of 1946, which resulted in a plan that was only defended by the Communists and the Socialists against the opposition of other parties.243 Even where

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238 Arato, supra note 237; ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY 107 (2016).

239 See, e.g., Negretto, supra note 154, at 255 (arguing that advantages many scholars have associated with elected constitutional conventions separated from legislatures are unsupported from both normative and empirical perspectives).


241 See Arato, supra note 237, at 105–06 (describing the success of South African constitution-making despite an arguably illegitimate government).


243 Cowans, supra note 56, at 69–70.
multiparty support exists initially, constitutional efforts may ultimately fail if political buy-in fails to hold. Thus, the widely heralded Tunisian Constitution of 2014 ultimately succumbed in 2022 to an authoritarian presidential overhaul in the context of a weak parliament and powerless courts.

We are not the first to argue that processes of constitutional formation that assume some preexisting organic expression of the popular will risk incoherence or a descent into demagoguery. Sovereign constitution-making processes are incapable by themselves of promoting consensus in societies that are diverse and heterogeneous. Appeals to the unformed will of the people can easily justify narratives that turn authoritarian or populist. In turn, such appeals can destabilize the entire constitution-making process. By contrast, a focus on forging the institutions of governance, including buy-in from potential contenders for power, may yield elements of consensus; it may also stabilize governance in the context of fractured societies.

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246 See Negretto, supra note 154, at 264; Negretto & Sánchez-Talanquer, supra note 240, at 535.

247 See Negretto & Sánchez-Talanquer, supra note 240, at 524.

248 See, e.g., Landau, supra note 153, at 925–26, 932–33; Partlett, supra note 153, at 196, 234. The connection and tension between constitutionalism and populism supports this proposition. See David Landau, Personalism and the Trajectories of Populist Constitutions, 16 ANN. REV. L. & SOC. SCI. 293, 294 (2020); Corrias, supra note 156, at 7–8; Doyle, supra note 156, at 161–62.


250 See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 239, 267 (2011).

The advantages of intermediation do not only reach the prospect of approval for constitutional projects; it is also a matter of improving the proposals themselves by forcing them through the crucible of political controversy and compromise. Constitutional processes that are independent of established political parties may be descriptively and symbolically representative. If the sample is well selected, the processes can represent different classes, ages, genders, etc. And if there is an advantage in cognitive diversity, as Landemore suggests, then a large and diverse sample can offer a reasonable outcome.

But nothing guarantees that those independents will be able to represent the interests of the diverse political organizations that exist in the country, their power-related interests, and their ability to reach out to wider interest groups. Nor is there anything in the scattershot selection of these representatives that translates into a capacity for productive and stable governance. It is also unlikely that those independents will be able to possess a unifying and known ideology that can be used to lower the information costs of the citizens in appreciating the constitution-making body’s composition, or to signal the allies and the adversaries during the starting points of the negotiations. Paradoxically, framing the constitutional project through political independents may raise the transaction costs of any constitutional negotiations. Put another way, without a preset series of alternatives, a Condorcet-informed wisdom of the masses is unlikely to take hold.

IV. THE FAILED CHILEAN CONSTITUTIONAL CONVENTION

A. The Chilean Constitutional Crisis

First, a bit of background. Even though the 1980 Chilean Constitution has been amended more than sixty times, and despite the fact that many have considered Chile’s transition to democracy to be a model, there is no escaping that its founding strokes occurred

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252 See id. at 1865.
253 See Landemore, supra note 160, at 269.
254 See id. at 252–53.
under the Pinochet dictatorship (1973–1989), and that some of its current provisions still trace to the military regime. Ever since the restoration of civilian rule in 1989, the question of the continued legitimacy of the constitution has hung over Chilean politics, leading to the efforts at constitutional reform during Ricardo Lagos’s administration in 2005 and during the second presidency of Michelle Bachelet. Both processes failed, though in different ways. The Lagos reform was passed—and the authoritarian enclaves removed—but Lagos’s symbolic effort to present the reform as a “new constitutional order” was never accepted by the parties nor public opinion. The Bachelet constitutional proposal was also never accepted by the parties, either from the left or the right. What remains in place after piecemeal reforms is a fragmented

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257 Many observers claim that some of those criticisms hold today. See, e.g., Javier Couso & Alberto Coddou, Las Asignaturas Pendientes de la Reforma Constitucional Chilena, in EN NOMBRE DEL PUEBLO 191 (Claudio Fuentes ed., 2010); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA (2013); CARLOS HUN-EEUS, LA DEMOCRACIA SEMISOBERANA CHILE DESPUÉS DE PINOCHET (2014).

258 On President Lagos’s 2005 reform, see Fredrik Uggla, “For a Few Senators More”? Negotiating Constitutional Changes During Chile’s Transition To Democracy, 47 LAT. AM. POL. SOC’Y 51, 51 (2005); CLAUDIO FUENTES SAAVEDRA, EL PACTO (2012).


261 Verdugo & Contesse, supra note 197, at 139.

262 For a comparison of the constitution since 1980, see JAIME ARANCIBIA MATTAR, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (2020).
and competitive multiparty democracy with high levels of legislative gridlock. Whatever its shortcomings, the current structure has moved far from its original role in stabilizing the Pinochet dictatorship.

The most recent round of constitutional agitation came from an unlikely source, well outside the domain of institutional reform of a decaying constitutional structure. Social upheaval came to Santiago in 2019, after a prescribed rise in Santiago metro fares. A group of students took over the underground stations of Santiago and called for people not to pay subway fares. The protests quickly escalated, sparking a diverse set of social demands. Some of the sentiment spurring the 2019 protests connected to the long-festering demands that existed in the massive protests of 2018 (against the private companies that manage pension savings) and 2011 (against a highly unequal educational system). But the protests were quickly joined by heterogeneous groups lacking a unifying theme or common leadership. Those groups included feminist movements,
indigenous organizations, environmental activists, and student federations, among others.270 Taken together, these protests expressed broad economic and political discontent.271

As the protests escalated into violence, supermarkets and stores were sacked, and 118 metro stations were torched.272 The conservative government of President Piñera declared a state of emergency and unleashed military and police responses that gave rise to new charges of human rights violations.273 Chile was rocked by street confrontations that left civilian passersby at risk.274

Amid the violence and disorder, the largely sidelined major political parties275 decided to organize a constitution-making process to channel those demands and simultaneously end the Pinochet-era

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271 For an overview, see Palacios-Valladares, supra note 265, at 216. On the way the political system might connect to the discontent, see FERNANDO ATRIA ET AL., EL OTRO MODELO 12 (2013); Juan Pablo Luna, Delegative Democracy Revisited: Chile’s Crisis of Representation, 27 J. DEMOCRACY 129, 129 (2016); Peter M. Siavelis, Crisis of Representation in Chile? The Institutional Connection, 3 J. POL. LAT. AM. 61, 66 (2016); Verdugo, supra note 263; Aldo Madariaga & Cristóbal Rovira Kaltwasser, Right-Wing Moderation, Left-Wing Inertia and Political Cartelisation in Post-Transition Chile, 52 J. LAT. AM. STUD. 343, 350, 353 (2019).
272 Kirsten Sehnbruch & Sofia Donoso, Social Protests in Chile: Inequalities and Other Inconvenient Truths about Latin America’s Poster Child, 11 GLOB. LAB. J. 52, 52 (2020); see also Patricia Crispi, Alguien sabe quién quemó el Metro? Carta al Presidente Gabriel Boric, EL MOSTRADOR (Mar. 7, 2022), https://www.elmostrador.cl/noticias/opinion/2022/03/07/alguien-sabe-quiuen-queomo-el-metro-carta-a-boric (discussing that seven metro stations were completely burned, eighteen were partially burned, and ninety-three suffered serious damage).
274 Id.
275 In May of 2019, 73% of the population had declared that it did not identify with any political parties, and the trust on the party system lowered to 2% in December of 2019. See CARMEN LE FOULON & VALERIA PALANZA, ELECCIONES A LA CONVENCION CONSTITUYENTE: INNOVACION Y RENOVACION 4 (2021).
Constitution. The idea was not only to put constitutional reform on the agenda, but also to secure order in a way that would placate the protests and keep President Piñera in power. This was the first time that the mainstream conservative parties had agreed to ask voters in a referendum whether the Constitution should be replaced. The process was driven by both a top-down agreement made by the political parties and by bottom-up pressure from social movements and public opinion.

276 See the November agreement in FUAD CHAHÍN ET AL., ACUERDO POR LA PAZ SOCIAL Y LA NUEVA CONSTITUCIÓN (2019), https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf. The far right and the far left did not sign the agreement. The only far left politician that signed was Gabriel Boric, the soon-to-be president, who signed in his personal capacity and not representing the parties of his “Frente Amplio” coalition. See Octavio Avendaño Pavez, Partidos Tradicionales y Emergentes En El Chile Actual: Tensiones y Desafíos, in PARTIDOS POLÍTICOS EN CHILE: APORTES Y PROPUESTAS PARA SU FORTALECIMIENTO Y MODERNIZACIÓN 29, 33–34 (Claudio Pérez Lillo & Camila Rivas Castillo eds., 2022).

277 Javier Couso, Chile’s ‘Procedurally Regulated’ Constitution-Making Process, 13 HAGUE J. ON RULE L. 235, 243 (2021) (“Dealing with a level of social mobilization and rioting without precedent . . . and with the clock ticking to be forced to ask the opposition-controlled Congress to renew the constitutional state of emergency decreed at the start of the social outbreak . . . President Piñera eventually caved-in to the pressure put on him by the most moderate side of his government coalition and called for a national agreement for a new Constitution. This move, it was expected, would institutionally channel a crisis that was thought could end in a bloodbath.”).

278 See a useful interest-based account on why parties endorsed the constitution-making process in María Cristina Escudero, Making a Constituent Assembly Possible in Chile: The Shifting Costs of Opposing Change, 41 BULL. LAT. AM. RSCH. 641, 641 (2022).

279 On how the social movements succeeded in putting pressure for constitutional change with “leaderless and inorganic protests,” see Juliesta Suarez-Cao, Reconstructing Legitimacy After Crisis: The Chilean Path to a New Constitution, 13 HAGUE J. ON RULE L. (2021).
B. Designing and Modifying the Design of the Constitution-Making Process

The multiparty agreement that took place in November 2019 included a highly regulated constitution-making process that the parties tried to control. The process was going to be opened by referendum (Chileans called it an “entry” plebiscite) aimed at asking citizens to decide two questions. First, whether the constitution should be replaced (Approve or Reject); and second, what mechanism was supposed to write the new constitution: either an elected Constitutional Convention of 155 delegates or a mixed body that included sitting legislators and elected citizens.

The Convention was supposed to be elected following the rules for the selection of the chamber of deputies and to be subject to the same two-thirds majority requirement for approval of amendments. Disputes regarding procedural issues would be solved by a committee of randomly selected Supreme Court Justices. Undoubtedly, these rules were designed to maintain the power of incumbent forces: While the constitution would be subject to reexamination, every major political coalition would in effect hold veto rights. The hope was to avoid two extremes: the neo-Bolivarian

See Benjamin Alemparte, The Institutional Interest of Political Parties in Chile’s Constitution-Making Process, INT’L J. CONST. L. BLOG (Nov. 17, 2020), http://www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process (arguing that the design of the rules—especially of the electoral rules—was aimed at preserving the parties’ interests); see also Couso, supra note 277, at 244–45.

Id. note 277, at 243.

Law No. 21200, Diciembre 24, 2019, DIARIO OFICIAL [D.O.] (Chile); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] May 4, 2023, arts. 130–43.


See Diego Pardo Álvarez, Constitucionalismo Calificado: La Regla de La Mayoría Calificada Del Art. 133 Inc. 3° de La Constitución Política de Chile, REVISTA DE DERECHO, enero–junio 2020, at 13, 14 (2020) (criticizing the two-thirds majority rule of the Chilean Convention).
constitutional processes inaugurated in Venezuela in 1999 and continuing in the Nicaraguan constitution of 2014, and the top-down command of the Pinochet-type constitutional model. A final referendum with mandatory citizen voting was supposed to confirm the constitutional proposal.

Under pressure for greater participation and from the distinct anti-party nature of the massive demonstrations, the initial multi-party agreement was then modified to include gender parity and to lower the entry costs for independent candidates. Congress modified the rules to allow independents to create parallel electoral pacts to have a competitive space on the ballot, lower the number of sponsorship required to submit independent candidates’ nominations, build an electronic system making it easier and cheaper to register those candidacies, and make sure that free television advertising time would be provided to independent candidates. Under continued pressure, additional congressional modifications allowed the creation of seventeen reserved seats for indigenous peoples, a slight overrepresentation of the 12.8% of the population that had self-identified as indigenous in the last census.

Combined, the amendments pushing for gender parity, independent candidates, and representatives from the indigenous peoples were aimed at allowing for new forms of representation that could

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288 Id. at 165.
289 See Suarez-Cao, supra note 279, at 256.
290 Law No. 21216, Marzo 20, 2020, DIARIO OFICIAL [D.O.] (Chile). The process was also modified to adjust the rules to the logistical challenges of the pandemic, among other reasons. See, e.g., Law No. 21221, Marzo 25, 2020, DIARIO OFICIAL [D.O.] (Chile); Law No. 21257, Agosto 25, 2020, DIARIO OFICIAL [D.O.] (Chile); Law No. 21317, Marzo 14, 2021, DIARIO OFICIAL [D.O.] (Chile).
291 Law No. 21216, Marzo 20, 2020, DIARIO OFICIAL [D.O.] (Chile).
292 Law No. 21296, Diciembre 4, 2020, DIARIO OFICIAL [D.O.] (Chile).
293 Id.
294 Law No. 21315, Marzo 4, 2021, DIARIO OFICIAL [D.O.] (Chile).
295 Law No. 21298, Diciembre 21, 2020, DIARIO OFICIAL [D.O.] (Chile).
go beyond what parties had offered to the voters and permit a distancing from the political elites that people distrusted.297 Even if parties could represent the different ideologies present in the Chilean society (from communists to Pinochetists), their elitist nature had prevented them from descriptively representing all sectors of the society at large,298 and the Convention results reflected the fact that the Constitution became an ill-formed focus for many forms of discontent lacking clear ideological or organizational form.

C. The Constitutional Convention

A sweeping 78.27% of the votes in the 2020 Referendum were cast to “Approve” the replacement of the Constitution, with turnout of about 50%.299 Polling data suggests that citizens from all sides of the political spectrum—the right, the center, the left, liberals, and conservatives—supported the “Approve” option, though a social class divide could explain part of the cleavage.300 Polls also suggest that the “Approve” vote was connected to social rights demands.301 A similarly clear majority voted in favor of the elected Convention—against the alternative of establishing a mixed convention composed of elected citizens and sitting legislators.302

297 See Maria Isabel Aninat Sahli, New Forms of Representation and the Failure of the Chilean Constitutional Convention, INT’L J. CONST. L. BLOG (Oct. 8, 2022), http://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-new-forms-of-representation-and-the-failure-of-the-chilean-constitutional-convention (“The Chilean constitutional process . . . had to distance itself from the political system. Since the outburst was read as a moment to fully restart the institutional system[,] this process had to be seen as an alternative to political parties, the Government and Congress.”).

298 The dissatisfaction of the society at large in the role of the parties has a longer and more nuanced story in Chile, of course. See Juan Pablo Luna & David Altman, Uprooted but Stable: Chilean Parties and the Concept of Party System Institutionalization, LATIN AM. POL. & SOC’Y, Summer 2011, at 1.


302 See Jorge Fábrega, Ordenamiento Ideológico en la Convención Constitucional Chilena, 42 REVISTA DE CIENCIA POLÍTICA 127, 129 (2022).
What emerged was a Convention comprised heavily of independents following single-issue or partial agendas, with only minor representation for the established political parties. Only 43.4% of registered voters participated in the selection of the Convention delegates. Of the 155 delegates—a number chosen to match the composition of the Chamber of Deputies—the conservative and center-right parties obtained only thirty-seven, even though they held just under half the seats in the Chamber of Deputies. The Christian Democrats, the most important party of the old *Concertación*, the successful center-left alliance that ruled the country during the post-authoritarian era (between 1990 and 2010) and got two presidents elected in that period, only got two representatives. Traditional forces from the other side of the aisle fared no better. The center-left, comprised of the mainstream parties that had supported President Bachelet in the very recent past, only got twenty-five members of the Convention. Even the further left forces, the *Frente Amplio* and its partners which included President Boric as well as the Communist Party, got only twenty-eight members in the Convention. Delegate selection set the stage for a constitution as political platform rather than as political pact.

In reality, the Convention well reflected the anti-institutionalism of the times. The majority of delegates (103, to be exact) did not have affiliation with any political party. They were elected from a spectrum of particularistic constituencies, a large number devoted to partial agendas connected to the rights or interests of specific groups (feminism, indigenous rights, water resources), some of which controlled specialized drafting committees and succeeded to propose principles for the new constitution. These often were pro-

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303 *See id.* at 132; *id.* at 137 fig. 2 (mapping relative ideological positions of Convention members).
305 Fábrega, *supra* note 302, at 130.
306 *Id.*
307 DECIDECHILE, *supra* note 304.
308 *See id.*
309 Fábrega, *supra* note 302, at 130.
311 *See Sahli, supra* note 297.
moted by single-issue delegates and proved to be highly controversial.312 These specific agenda items could then be the basis for fleeting coalitional support, including from the Lista del Pueblo, a new bloc of independents that campaigned on the idea that former President Piñera should literally die.313 This grouping got twenty-seven members of the Convention, about the same as the followers of President Boric or the conservative slate.314 By and large, these independents hewed strongly to the left, though without an identifiable political identity that would unify a series of particularistic, and sometimes eccentric, platforms.315 The result was a slew of partial or single-issue platforms, including the endorsement of demands connected to environmentalism, feminism, healthcare, and regionalist or indigenous agendas.316 Overall, even if anti-partisan, the Convention’s fragmented composition was perceived as “biased towards the left or the radical left.”317

A harbinger of the ultimate result was the large number of reserved seats for the indigenous population of Chile. Selection of these delegates was by vote of indigenous populations alone, but indigenous voters could choose to self-designate as such or simply

312 For a discussion of perhaps the most important example, see RENATO GARÍN GONZÁLEZ, EL FRACASO CÓMO SE INCENDIÓ LA CONVENCIÓN 143–46 (Arturo Infante Reñasco, ed., 2022) (recounting how environmental activists, or “eco-constituyentes,” took over a drafting committee and produced environmental and economic proposals that not all the left was willing to accept).
313 Parlamentarios oficialistas criticaron franja de la Lista del Pueblo: “Es una incitación al odio que no vamos a aceptar,” CNN Chile (Mar. 13, 2021, 7:03 PM).
314 Fábrega, supra note 302, at 130.
315 See id. at 137 fig. 2.
316 See Sahli, supra note 297.
317 Couso, supra note 277, at 247 (“[T]he results of the election felt like an ‘earthquake’ for the right-wing coalition, that only a few weeks before thought it would get at least one third of the seats of the Convention. Furthermore, the right was appalled by the fact that the left of center coalition experienced such an unmitigated electoral disaster . . . .”).
vote on the regular electoral lists as, in effect, ordinary Chilean citizens.\textsuperscript{318} Only 22\% of the eligible voters chose to vote on the indigenous lists.\textsuperscript{319} A possible reason for this is that most of these voters viewed themselves also as Chilean citizens. In any case, the low turnout in the election of the reserved seats made it possible for indigenous leaders to be elected with very few votes.\textsuperscript{320} Some indigenous candidates from the less-populated indigenous groups were elected with fewer than 100 votes.\textsuperscript{321} They all turned out to support agendas from the left or the far left, and they made unstable alliances with members of the Communist Party and the \textit{Lista del Pueblo}.\textsuperscript{322} In effect, the Communist Party played an outsize role in giving voice to the left agenda at the Convention,\textsuperscript{323} and more moderate leftist groups were pressured to follow suit.\textsuperscript{324} The right and some centrist members were completely excluded from the negotiations.\textsuperscript{325}

The Convention’s inauguration ceremony signaled what was going to come. Gathered in the garden of the old Santiago Congress building, the members of the Convention had to agree on who was going to become President and Vice-President, but a chaotic scene, including a confrontation with the police, would precede the election.\textsuperscript{326} A controversy about singing the national anthem started while Convention members insulted each other; some demanded the liberation of those who were detained during the protests and kept interrupting the officer in charge of initiating the ceremony, who

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\textsuperscript{319} Id.

\textsuperscript{320} Id.


\textsuperscript{322} Fábrega, supra note 302, at 140.

\textsuperscript{323} SQUELLA, supra note 230, at 143.

\textsuperscript{324} Id. at 78.

\textsuperscript{325} See FERNANDO ATRIA, EL PROCESO CONSTITUYENTE Y SU FUTURO DESPUÉS DEL PLEBISCITO 5 (2022), https://www.lacasacomun.cl/_files/ugd/0626d9_8d40ab447d4e444d8ce93310d4cab8fb.pdf.

ended up suspending the event. When the election could actually take place, and after a failed first attempt to get a majority, Elisa Loncón was elected as the Convention’s President. A Mapuche woman and a scholar from Universidad de Santiago—gave an emotional speech referring to the “Mapuche nation” (the largest indigenous group in Chile). She announced that their aim was to reboot (“refundar”) the country, widening the democratic regime and building a “plurinational and intercultural Chile.” She also referred to the Convention as the “dream of our ancestors.” The implied rejection of Chile as a nation and the clear alliance with the protesters, violence and all, was an unmistakable rejection of the established political order.

The Convention was as unbalanced in terms of political ideology as it was socially inclusive. In other words, the Convention was far from representative of Chile’s ideological spectrum, but it fared well in terms of descriptive representation, a fact that was celebrated by many observers. In practice, this meant that the Convention was programmatically driven by an unstable leftwing coalition stitched together from various identity-based sets of demands. A group of thirty-three independents and indigenous representatives called “the spokespersons of the peoples” became the symbolic driving group at the beginning and promptly declared that the Convention was sovereign and not bound by the

327 Id.
328 Id.
330 Id.
331 Id.
332 For a description of the inauguration, see GARIN GONZÁLEZ, supra note 312, at 143–47.
333 See, e.g., LE FOULON & PALANZA, supra note 275, at 24; see also SQUELLA, supra note 230, at 49.
335 Id. at 248.
procedural rules.\textsuperscript{336} Invoking theories of a constitutional assembly as an ultimate exposition of constituent power,\textsuperscript{337} the Convention infringed its foundational rules\textsuperscript{338} and claimed the right to set a national agenda, while often using the language of the constituent power theory to diminish the authority of other political institutions.\textsuperscript{339} Not even the internal procedural rules of the Convention could withstand the claim that the Convention stood above all restraints as the embodiment of the inherent constituent power of the people themselves.\textsuperscript{340} One extreme example was an effort to bypass the Convention’s two-thirds supermajority requirement through direct “override plebiscites” (“plebiscitos dirimentes”), an effort to overwhelm, rather than appease, political discord\textsuperscript{341}—a process that failed in practice but set the tone for the Convention.\textsuperscript{342}

Most tellingly, the Convention allowed the creation of specialized drafting committees whose product would bypass the give-and-take of negotiations and would be presented for approval from the Convention by simple majority rule,\textsuperscript{343} meaning there were no

\textsuperscript{336} Voccería de Los Pueblos de La Revuelta Popular a La Constituyente, EL MOSTRADOR (June 8, 2021), https://media.elmostrador.cl/2021/06/Declaracion-punto-de-Prensa-Vocceria-de-los-Pueblos.pdf.

\textsuperscript{337} See Prieto & Verdugo, supra note 285, at 269.


\textsuperscript{339} SQUELLA, supra note 230, at 80, 109, 161.

\textsuperscript{340} Aprueba Reglamento General de la Convención Constitucional, art. 1, Octubre 8, 2021, DIARIO OFICIAL [D.O.] (Chile) (“La Convención Constitucional es una asamblea representativa, paritaria y plurinacional, de carácter autónomo, convocada por el pueblo de Chile para ejercer el poder constituyente originario.”).

\textsuperscript{341} REGLAMENTO DE MECANISMOS, ORGÁNICA Y METODOLOGÍAS DE PARTICIPACIÓN Y EDUCACIÓN POPULAR CONSTITUYENTE DE LA CONVENCIÓN CONSTITUCIONAL, arts. 37–41 (Oct. 21, 2021), https://www.plataformaconstitucional.cep.cl/monitor/reglamento-de-mecanismos-organica-y-metodologias-de-participacion-y-educacion-popular-constituyente; see also Natalia González B., Los Reglamentos de La Convención Constitucional. Compleja Antesala Para La Discusión Sustantiva de Las Propuestas Constitucionales, 45 ACTUALIDAD JURÍDICA 75, 77 (2022) (criticizing the way the voting requirements were included in the Convention rules of procedure).

\textsuperscript{342} González B., supra note 341, at 84–85.

\textsuperscript{343} Aprueba Reglamento General de la Convención Constitucional, art. 61, Octubre 8, 2021, DIARIO OFICIAL [D.O.] (Chile); id. art. 62; id. art. 63; id. art. 64;
mechanisms for interest group negotiations before draft proposals were subject to an up-or-down vote. Unlike the Brazilian process of 1988, where the committees served to forge bipartisan agreements, in Chile, the moderating force could only be achieved in the plenary, when it was too late to find common ground. In practice, this meant that most Convention and committee decisions were by simple majority, reserving the supermajority votes for only the final output of the Convention as a whole. As a practical matter, this further dampened the need for consensus in the constitutional project, notwithstanding the rules established by the multiparty agreement that opened the process.

Not surprisingly in an improvised system without many experienced political actors, there were gaffes and some moments that, on reflection, count as amusing—such as a Convention member that lied about his cancer to get elected on his healthcare reform platform, a Convention member who was found to be voting remotely during a Convention session while taking a shower, and proposals that sought to end or endanger keeping the traditional Chilean national emblems such as the flag, the anthem, and the national shield. But perhaps that is the fate of constitutional founding in the era of social media.

D. The Constitutional Proposal

The proposal that emerged was a prodigious undertaking. The extensive rights provisions deserve serious attention and respect in

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344 See Guillermo Larraín et al., How Not to Write a Constitution: Lessons from Chile, 194 PUB. CHOICE 233, 238–39 (2023) (describing the “highly decentralized” drafting process).

345 PRINCETON CONST. WRITING & CONFLICT RESOL., supra note 237.

346 See Larraín et al., supra note 344, at 246.

347 Aprueba Reglamento General de la Convención Constitucional, art. 19, Octubre 8, 2021, DIARIO OFICIAL [D.O.] (Chile).

348 Aprueba Reglamento General de la Convención Constitucional, art. 96, Octubre 8, 2021, DIARIO OFICIAL [D.O.] (Chile); id. art. 97; id. art. 103.

349 Jack Nicas, Chile Says ‘No’ to Left-Leaning Constitution After 3 years of Debate, N.Y. TIMES (Sept. 4, 2022), https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html. Additionally, all of these events, and others, are summarized in GARIN GONZÁLEZ, supra note 312.
trying to sort through a complex set of social divides in Chile, even if some participants later concluded they went too far. But our focus and our concern is on the governance mechanisms. By and large, the Convention could not agree on a coherent political regime that could take up the oft-debated questions of parliamentarism versus presidentialism. Nor could delegates agree on establishing basic electoral and organizational rules that could help fix the gridlock problems that the proportional representation system and the timetable of the elections had produced in the Chilean legislative processes—which is arguably one of the most critical problems giving rise to the nonresponsiveness of the political system to social-rights demands. Even the half-hearted effort to dismantle the Senate and replace it with a weak second legislative chamber (likely retribution for the conservative composition of the existing Senate) failed to specify how and when the upper house delegates would be elected.

Not surprisingly, the draft constitution had little to say about political parties. Initially, the specialized committee in charge of proposing the rules of the political system sought to include only generalized “political organizations” without any mention of political

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350 See SQUELLA, supra note 230, at 24–25 (opining that the proposal was too extensive, contained more provisions than were necessary, and invaded the province of not only the legislators, but also the president’s regulatory powers, and suggesting that these things happened at least partly as a result of the assembly’s great distrust of Chile’s established institutions: the President, the Congress, the judiciary, and the Constitutional Court).


352 See, e.g., CONVENCIÓN CONSTITUCIONAL, Propuesta Constitución Política de la República de Chile arts. 160–64 (July 4, 2022), https://upload.wikimedia.org/wikipedia/commons/5/5a/Propuesta_Constituci%C3%B3n Pol% C3%ADtica_de_la_Rep%C3%BAtica_de_Chile_2022.pdf (listing proposed norms on the right to vote and the electoral system).

353 See Dixon & Verdugo, supra note 263, at 35; Verdugo, supra note 263.

354 See Nick Burns, Chile’s Proposed Constitution: 7 Key Points, AMS. Q. (July 7, 2022), https://www.americasquarterly.org/article/chiles-proposed-constitution-7-key-points (describing effect of proposed “Chamber of Regions” on lawmaking and balance of power).
Instead, committee members sought to formalize the role of social movements rather than parties. Ultimately, the draft did not attempt to address the core aspects of the electoral system itself, leaving that to later statutory or administrative control. But in the early renditions, there appeared to be no attention to political autonomy, to the ability to organize independently from the state, or even to the establishment of a right to form and participate in political parties. In short, the draft had much to say about rights but little to say about governance.

As to “political organizations,” at the prodding of one Socialist Party delegate to the Convention, the last draft finally included Article 151, its only reference to the political process: “Organized political activity contributes to the expression of the popular will, and its functioning shall respect the principles of independence, probity, financial transparency and internal democracy.” This language is taken from a secondary provision of the Spanish constitution, but is stripped of the accompanying recognition of constitutional status for parties. By contrast, the draft recognizes a broad range of initiative powers, easily invoked with petitions of as few as 3% of the voters—including calling a referendum for constitutional reform that does not need the approval of Congress—and a number of other mechanisms of direct democracy that can weaken the agenda-setting powers of the parties and harm the electoral accountability of


356 Id.

357 See CONVENCIÓN CONSTITUCIONAL, supra note 352, arts. 160–64 (referring to features of the right to vote and the main principles of the electoral system—such as substantive equality and gender parity—and describing some institutions).

358 CONVENCIÓN CONSTITUCIONAL, supra note 352, art. 151 (translated from Spanish).

359 C.E., B.O.E. n. 311, Dec. 27, 1978, art. 6 (Spain).

360 See CONVENCIÓN CONSTITUCIONAL, supra note 352, arts. 155, 157–58, 269, 283.
representatives by mechanisms that are unprecedented in the Chilean political system.

Moreover, the draft enacted some norms that could arguably push against the idea of strengthening political parties.\textsuperscript{361} It proposed limiting the re-election of legislators,\textsuperscript{362} implementing a procedure that would weaken the ability of parties to discipline their members in the Congress, and cabining the repeat-play advantage that parties have over other organizations. At the end, the proposal would have left weakened political parties, but made no attempt to address the problem of legislative gridlock and the fragmentation of Congress.\textsuperscript{363}

\textbf{E. The Failure of the Constitutional Convention}

In the end, this came to naught. The final proposal was overwhelmingly rejected in the mandatory September referendum by 61.86\% of the votes—a vote that included turnout of 85.82\%, the highest in Chile’s history.\textsuperscript{364} Explanations on why Chileans rejected the proposal abound, and social scientists will no doubt spill much

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{361} \textit{See} Sergio Verdugo, \textit{Régimen de Partidos Políticos En La Nueva Constitución}, \textit{in ANÁLISIS Y NUDOS CRÍTICOS DE LA PROPUESTA DE NUEVA CONSTITUCIÓN} 98, 102 (2022).
\item \textsuperscript{362} \textit{See CONVENCION CONSTITUCIONAL}, supra note 352, art. 262 (allowing for only one re-election of legislators).
\item \textsuperscript{363} Pablo Argote Tironi, \textit{Propuestas Para Mejorar El Presidencialismo Multipartidista}, \textit{in PARTIDOS POLÍTICOS EN CHILE: APORTES Y PROPUESTAS PARA SU FORTALECIMIENTO Y MODERNIZACIÓN} 115, 123–24 (Claudio Pérez Lillo & Camila Rivas Castillo eds., 2022).
\end{itemize}
\end{footnotesize}
ink in trying to disentangle results that, given the margin of rejection, are no doubt attributable to many overlapping causes,\textsuperscript{365} including explanations blaming parts of the procedure\textsuperscript{366} or the internal polarization that existed within the Convention.\textsuperscript{367}

However, early polling data show the deep skepticism over many of the proposed constitutional reforms, such as the declaration that Chile is a plurinational and regional state,\textsuperscript{368} the existence of legal pluralism,\textsuperscript{369} the removal of the “state of emergency” (a crucial tool in the face of severe unrest),\textsuperscript{370} the grant of veto rights to indigenous peoples on matters affecting regional policies,\textsuperscript{371} the changes to the judicial system,\textsuperscript{372} the indeterminacy of the requirements for expropriation of property rights,\textsuperscript{373} the status of water resources outside the customary boundaries of property rights,\textsuperscript{374} and the ambiguity over whether citizens would have guaranteed individual choice over access to private providers regarding education,\textsuperscript{375} healthcare,\textsuperscript{376} and social security,\textsuperscript{377} among others.\textsuperscript{378} Guaranteed

\begin{itemize}
\item Larrain et al., \textit{supra} note 344, at 240.
\item GARIN GONZÁLEZ, \textit{supra} note 312, at 145.
\item See CONVENCIÓN CONSTITUCIONAL, \textit{supra} note 352, art. 1.
\item See id. arts. 307, 309, 322.
\item Id. arts. 300–06.
\item Id. art. 191, s.2.
\item Id. arts. 307–49.
\item See id. art. 78.
\item CONVENCIÓN CONSTITUCIONAL, \textit{supra} note 352, art. 142, trans. rule 35.
\item See id. arts. 35–41.
\item See id. art. 44.
\item See id. art. 45.
\end{itemize}
rights to abortion also appear to have been well beyond what a political consensus would have supported. 379 By contrast, claims that the overwhelming result was the product of a possible misinformation campaign or false news seem unlikely to hold. The debates appear to be the normal contestation of controversial political proposals. All parties, the government included, campaigned aggressively, and every electoral campaign has contenders that no doubt try to cast their rivals in their worst possible light—that is the norm of democratic politics. 380

We do not claim that all the grounds of opposition unearthed by public opinion polling are coherent. 381 What is clear is that in the absence of a representative process, the draft constitution could not survive the challenge of marshalling public support. On hot-button issues such as abortion, the Convention sought to mandate a categorical right to terminate pregnancies without really engaging the median preference for more limited access to abortion. 382 Without buy-in from parties committed to the constitutional process, there was little political pushback to the predictable religious opposition. 383 Similarly, on the commitment to plurinationalism and indigenous rights, it appears that even the indigenous populations did not rally to the draft constitution. 384

379 See Carrasco, supra note 364.


381 See, e.g., 49% prefieren hacer un nuevo plebiscito de entrada y 44% está por un acuerdo político para tener una nueva convención constituyente, AD Prensa (Sept. 20, 2022), https://www.adprensa.cl/cronica/49-prefiere-hacer-un-nuevo-plebiscito-de-entrada-y-44-esta-por-un-acuerdo-politico-para-tener-una-nueva-convencion-constituyente.


383 See id. (noting Chile’s lag on LGBT and abortion rights—due, in part, to Catholic Church influence). This is, after all, the current law in Chile, approved during the second Bachelet administration. See Law No. 21030, Regula La Despenalización De La Interrupción Voluntaria Del Embarazo En Tres Casuales, Septiembre 14, 2017, Diario Oficial [D.O.] (Chile).

At the end of the day, it appears that the Convention lost sight of the median voter, in whose name it had proclaimed a constituent power. This may be due in part to missteps at the Convention, but the failure was set in motion by the idea that interests—and not parties—should be the foundation of the new political order. By the time the Convention was seated, the political skew made the ultimate constitutional proposal look less like a South African-style political pact, and more like an act of political fiat. In the end, the Chil-ean effort failed as a matter of activation. Paradoxically, a constitution that was born of the authoritarian commands of the right flirted with a new authoritarianism of the left. Whether process or substance led to the demise of the effort may be debated. What seems clear is that a constitutional process shorn of established political forces invites both types of failure.

F. What Next?

The constitution-making process goes on. The opposition parties had pledged that if the proposal were rejected, another effort would follow. In the first multiparty agreement of 2019 aimed at rejecting both the Pinochet and the neo-Bolivarian models, the subsequent agreement of 2022 attempted at rejecting the experience of the Convention. Most notably, the new process rejects the bottom-up approach of the failed constitutional process and instead gives drafting authority to an experts’ committee appointed by all the parties in the Congress. That is then followed by electing a “Council”

386 Id.
387 Sergio Verdugo, Constitutions as Moving Targets, GLOBAL CONSTITUTIONALISM (forthcoming 2023) (on file with authors).
388 Verdugo & Prieto, supra note 287, at 149–50.
390 Id.
modeled on the rules of the Senate and with a reduced number of reserved seats for indigenous peoples—they got only one. That Council is then the body that will present a final proposed draft for popular approval or rejection, but without the designated role of independents. Moreover, the Council cannot infringe twelve foundational and binding principles that the parties agreed upon. In the election for the Council in May 2023, a right-wing coalition got a majority of seats. Within the right-wing coalition, the Partido Republicano—a party that had defended the current Constitution and did not sign the multiparty agreements of 2019 and 2022—dominates, and its support for constitutional reform is, at best, shaky. We have yet to see what the end result will be.

CONCLUSION

As the most high-profile constitutional process of the 21st century, the question is whether Chile is the harbinger of how democratic politics will be organized going forward, even if the effort in Chile ultimately cratered. Will this form the basis for democratic governance? Here, we enter a domain where past is not prologue. We have no experience with a modern charter for governance without the institutional foundations that have characterized successful democratic governance for the past two centuries.

Chile is the most open, sophisticated, fascinating process of constitution formation since South Africa, even allowing for the extensive constitutional debates in Tunisia and Iceland. The contrast to South Africa is telling, as is the process of negotiation of the constitutional project. The actual South African constitution was founded

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391 Id.
392 Id.
393 Id.
396 See Hudson, supra note 63, at 504, 519 (discussing Tunisia and Iceland).
on the negotiated thirty-four principles from the Kempton Park ac-
cords.397 These, in turn, reflected extensive bargaining between two
institutional actors deeply contesting the power of governance—the
National Party and the African National Congress.398 The parties ne-
gotiated both the appointments process and the role of the newly
created Constitutional Court, whose first major act was the 1996
Certification Decision which struck down various provisions of the
initial constitution as unconstitutional, as it were.399 The decision
looked to the thirty-four principles as a constraint on majoritarian-
ism in the exercise of legislative power and found the proposed con-
stitution deficient in the key constitutional role of constraining mo-
mentary majority power.400

South Africa also provided for proportional representation and
other mechanisms of separation of powers organized around party
structures.401 It was the fruition of a century of party-dominated con-
stitutionalism; for all its faults, it was, in many ways, the culmi-
nation of the democratic experience in governance. Chile’s bottom-up
effort was animated by a different constitutional vision, one
grounded in sectional autonomy, rights-based dissolution of politi-
cal power, and a confidence in the executive as the tribunal of the
people.402 In the contrast between South Africa and Chile, we may
be seeing the politics of democratic decline being played out on the
constitutional plane.

397 SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN
398 Dixon & Ginsburg, supra note 35, at 996, 1004–05.
399 Certification of the Const. of the Republic of S. Afr., 1996, Case CCT
400 Id.
401 Certification of the Const. of the Republic of S. Afr., supra note 399, at 45,
54, 113, 180, 186.
402 See discussion supra Part IV.