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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

¹ BENJAMIN CONSTANT, *THE LIBERTY OF THE ANCIENTS COMPARED WITH THAT OF MODERNS* 1 (Jonathan Bennett ed., trans. 2017) (1819), <https://www.earlymoderntexts.com/assets/pdfs/constant1819.pdf>.

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.”⁵

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

⁴ *See id.* at 10.

⁵ STEPHEN HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 33 (1984).

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.⁹ Parties allowed citizen participation on the ground floor, while preserving mechanisms of accountability for those that served as the governing elite.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵

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

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.*

¹¹ See, e.g., JOHN KENNETH WHITE & MATTHEW R. KERBEL, AMERICAN POLITICAL PARTIES: WHY THEY FORMED, HOW THEY FUNCTION, AND WHERE THEY'RE HEADED xv (2022).

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.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.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.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.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

¹⁶ See Skach, *supra* note 9, at 876.

¹⁷ See *id.* at 875–76.

¹⁸ See, e.g., Skach, *supra* note 9, at 875.

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).

highlight a less understood risk of failure. Constitutions ventured without room for existing political organizations are likely to fail at the *activation* stage.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.²¹ Its 388 Articles and fifty-seven transitory rules, organized in a 178-page PDF that the enabling Convention distributed online,²² included over 100 Articles devoted to enumerated rights.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.²⁴ Even after the proposal was rejected, some defended its substantive merits and even offered

²⁰ See, e.g., Skach, *supra* note 9, at 887.

²¹ CONVENCION 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_Rep%C3%BAblica_de_Chile_2022.pdf.

²² *Id.*

²³ *Id.*

²⁴ See, e.g., Gautam Bhatia, *Chile Marks a Notch in Global Constitutionalism*, THE HINDU (July 21, 2022, 4:58 PM), <https://www.thehindu.com/opinion/lead/chile-marks-a-notch-in-global-constitutionalism/article65659006.ece> (arguing that the constitutional proposal was, “in many ways, a model for how Constitutions in the modern world ought to be drafted, and a lesson to the rest of the world”); David Landau, *The New Chilean Constitutional Project in Comparative Perspective*, INT’L J. CONST. L. BLOG (July 16, 2022), <http://www.icconnectblog.com/the-new-chilean-constitutional-project-in-comparative-perspective> (suggesting that the proposal was “reasonable”); Diego Gil & Gabriel Negretto, *Las Razones para Aprobar La Propuesta de Nueva Constitución*, LA TERCERA (Aug. 23, 2022, 9:28 AM), <https://www.latercera.com/opinion/noticia/las-razones-para-aprobar-la-propuesta-de-nueva-constitucion/XXSLSE77ORDGXLFN45LANXCNGM> (defending the democratic nature of the constitutional proposal); see also Eduardo Thompson & Valentina Fuentes, *Chaotic Chile Convention Defies Odds on New Charter, Experts Say*, BLOOMBERG (May 20, 2022, 7:00 AM), <https://www.bloomberg.com/news/articles/2022-05-20/chaotic-chile-convention-defies-odds-on-new-charter-experts-say>.

a romanticized approach to the Convention.²⁵ Even those that were skeptical of its content still supported approving it when the time came for an up or down vote,²⁶ and only a few non-Chilean observers criticized the proposal before the referendum took place.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.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.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.³⁰ While *caudillos* or social movements can easily appeal to descriptive or symbolic forms

²⁵ See, e.g., Armin von Bogdandy, *Chilean Insights for Progressive Constitutionalism*, 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”).

²⁶ See, e.g., Roberto Gargarella, *El Proyecto de Dejar Atrás La “Constitución de Pinochet,”* 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).

²⁷ For some critical views, see Hartmut Rank, *Chile: ¿Sí o No? Una Constitución Que Divide al País*, DIÁLOGO POLÍTICO (Aug. 18, 2022), <https://dialogopolitico.org/agenda/chile-constitucion-divide-pais>; *Voters Should Reject Chile’s New Draft Constitution*, THE ECONOMIST (July 6, 2022), <https://www.economist.com/leaders/2022/07/06/voters-should-reject-chiles-new-draft-constitution>.

²⁸ THE ECONOMIST, *supra* note 27.

²⁹ See Skach, *supra* note 9, at 887.

³⁰ See PITKIN, *supra* note 7, at 209 (discussing types of political representation).

of representation,³¹ 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.³²

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 ideas³³—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.³⁴ 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.³⁵

³¹ See, e.g., Díaz de Valdés & Verdugo, *supra* note 19, at 488.

³² Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

³³ Rawls addressed the idea of an overlapping consensus in several works. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 387–88 (1999); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234 (1989).

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).

³⁵ See Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT’L J. CONST. L. 988, 996, 1004 (2018); see also Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409, 435–36 (2014).

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.

³⁷ See, e.g., Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps,'* 4 CONST. CT. REV. 1, 13 (2011).

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).

⁴¹ See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394–95 (1995).

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>.

⁴⁵ See Sergio Verdugo, *The Paradox of Constitution-Making in Democratic Settings. A Tradeoff between Party Renewal and Political Representation?*, INT'L J. CONST. L. BLOG (Sept. 24, 2022), <http://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-the-paradox-of-constitution-making-in-democratic-settings-a-tradeoff-between-party-renewal-and-political-representation>.

⁴⁶ See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 178 (2015).

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 1946,⁵⁶ the Kenyan constitutional proposal of 2005,⁵⁷ the Icelandic constitution-making process of 2011,⁵⁸ and the first Nepalese constituent assembly of 2012.⁵⁹ 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)⁶⁰ and the Tunisian Constitution of 2014—replaced in 2022⁶¹—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,⁶² and most of the work on political parties comes from political science,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

⁵⁶ See, e.g., Jon Cowans, *French Public Opinion and the Founding of the Fourth Republic*, 17 FRENCH HIST. STUD. 62, 69–70 (1991).

⁵⁷ See Varol, *supra* note 35, at 433–34.

⁵⁸ Verdugo, *supra* note 45.

⁵⁹ See Varol, *supra* note 35, at 433–34.

⁶⁰ See, e.g., Cowans, *supra* note 56, at 69–70.

⁶¹ See Elster, *supra* note 41, at 371.

⁶² See some exceptions in Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314 (2006); see also Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEGAL PROBS. 89, 89–91 (2020).

⁶³ See, e.g., Skach, *supra* note 9, at 883–84; Alexander Hudson, *Political Parties and Public Participation in Constitution Making: Legitimation, Distraction, or Real Influence?*, 53 COMPAR. POL. 501 518–19 (2021).

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,⁶⁴ 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 ascendancy?

One clue was immediately provided by Constant's countryman, Alexis de Tocqueville, in his wide-eyed travels to America.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.⁶⁸ But critically, over time, parties proved key to democratic governance.⁶⁹ 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

⁶⁴ See CONSTANT, *supra* note 1, at 1–2.

⁶⁵ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA xxxix, 3 (Harvey C. Mansfield & Delba Winthrop eds., trans., University of Chicago Press 2000) (1835).

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.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.”⁷¹

Moreover, parties allow long-term politics of “redistribution” as opposed to “distribution,”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.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.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.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.⁷⁶

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

⁷⁰ Fernando Bizzarro et al., *Party Strength and Economic Growth*, 70 *WORLD POL.* 275, 280–84 (2018).

⁷¹ *Id.* at 290.

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).

⁷³ See Khaitan, *supra* note 62, at 97.

⁷⁴ See MANUEL ANSELMINI, *POPULISM: AN INTRODUCTION* 106 (2018).

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

⁷⁶ *See id.* at 48–49, 336–37.

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

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. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 1–2.

⁸¹ ALBERT WEALE, THE WILL OF THE PEOPLE: A MODERN MYTH 17–18 (2018).

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 ANSELMINI, *supra* note 74, at 28, 57, 59, 66, 69–70.

producing contacts, funding, and gaining support without organizational infrastructure.⁸⁵ Prime examples could be Nayib Bukele in El Salvador, who is becoming hegemonic in El Salvador's compromised political arena,⁸⁶ or the tumultuous and short-lived reign of Pedro Castillo in Peru.⁸⁷

All raise the question, once thought unimaginable by political scientists and constitutional scholars, of democracies without parties.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.⁸⁹ By contrast, populists claim to speak eternally and exclusively for the people as the majority empowered to rule.⁹⁰ This is a form of politics organized around individuals, movements, and momentary alliances among various aspiring *caudillos* that also seek to delegitimize the opposition.⁹¹

⁸⁵ See SADURSKI, *supra* note 13, at 154, 170.

⁸⁶ See Manuel Meléndez-Sánchez, *Latin America Erupts: Millennial Authoritarianism in El Salvador*, J. DEMOCRACY, July 2021, at 21, 23.

⁸⁷ See Laura Cervi et al., *TikTok and Political Communication: The Latest Frontier of Politainment? A Case Study*, 11 MEDIA & COMMUN 203, 204, 206 (2023).

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 corporatist politics typically associated with fascism but also present in more modern right-wing dictators such as Pinochet in Chile and Fujimori in Perú.

⁸⁹ See Khaitan, *supra* note 62, at 97–98.

⁹⁰ JAN-WERNER MÜLLER, WHAT IS POPULISM? 3 (2016).

⁹¹ See Díaz de Valdés & Verdugo, *supra* note 19, at 480 (discussing *caudillos*). The literature on populism is too wide to cite here. See some examples of these ideas in ANSELMINI, *supra* note 74, at 88; MÜLLER, *supra* note 90, at 34–35, 37; CAS MUDDE, ARE POPULISTS FRIENDS OR FOES OF CONSTITUTIONALISM? 2 (2013), https://www.fljs.org/sites/default/files/migrated/publications/Mudde_0.pdf; 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?

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.

¹⁰² See Lawrence Hunter, *Why James Madison Was Wrong About a Large Republic*, FORBES (Oct. 30, 2011, 6:09 PM), <https://www.forbes.com/sites/lawrencehunter/2011/10/30/why-james-madison-was-wrong-about-a-large-republic>.

¹⁰³ See Aaron Smith et al., *Publics Think Technology Impacts the Political Environment in Both Positive and Negative Ways*, PEW RSCH. CTR. (May 13, 2019), <https://www.pewresearch.org/internet/2019/05/13/publics-think-technology-impacts-the-political-environment-in-both-positive-and-negative-ways>.

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*,¹⁰⁵ and the update of that impulse in the recent Harvard *Foreword* by Cristina Rodríguez.¹⁰⁶ For Kagan, heightened administrative authority can draw its democratic bona fides from its link to the ultimate national electoral mandate of the president.¹⁰⁷ Separation of powers and the role of intermediary institutions recede before the properly constructed presidential oversight of an executive-centered decisional state.¹⁰⁸

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,”¹⁰⁹ 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.”¹¹⁰ Rodríguez joins Kagan in looking to the internal workings of the executive branch as guiding political legitimacy following an electoral mandate.¹¹¹ 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.¹¹²

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.¹¹³ As presented by Mair, the “democratic deficit” of the EU is not so much the fact of an unelected bu-

¹⁰⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2245 (2001).

¹⁰⁶ Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1, 1 (2021).

¹⁰⁷ Kagan, *supra* note 105, at 2331–32.

¹⁰⁸ *Id.* at 2248–49.

¹⁰⁹ Rodríguez, *supra* note 106, at 108 (2021).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Kagan, *supra* note 105, 2248–49; *id.*

¹¹³ PETER MAIR, RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY 99 (2013).

reocracy 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 output¹¹⁶ 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.

¹¹⁶ *See* Martín Caparrós, *Spain: A Country With No Government*, N.Y. TIMES (Aug. 28, 2016), <https://www.nytimes.com/2016/08/29/opinion/spain-a-country-with-no-government.html> (discussing Spain); Michael Beinbaum, *Without a Government for a Year, Belgium Shows What Happens to Politics Without Politicians*, WASH. POST (Dec. 20, 2019, 8:00 AM), https://www.washingtonpost.com/world/europe/without-a-government-for-a-year-belgium-shows-what-happens-to-politics-without-politicians/2019/12/19/5c13cb48-20de-11ea-b034-de7dc2b5199b_story.html (discussing Belgium).

¹¹⁷ *See* Caparrós, *supra* note 116.

¹¹⁸ *See id.*

¹¹⁹ The argument of popular sovereignty is so strong that it 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 legitimize 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

siderations. See Ignatius Yordan Nugraha, *Popular Sovereignty and Constitutional Referendum: Can "The People" Be Limited by Human Rights?*, 23 GERMAN L.J. 19, 40–43 (2022).

¹²⁰ Richard Stacey, *The Unnecessary Referendum: Popular Sovereignty in the Constitutional Interregnum*, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 88, 89–90 (Richard Albert & Richard Stacey eds., 2022).

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.

¹²³ Bruce Ackerman, *Charismatic Leadership and Rule of Law*, in REVOLUTIONARY CONSTITUTIONS 177, 179, 181 (2019); Richard Albert, *Discretionary Referendums in Constitutional Amendment*, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 63, 66–67 (Richard Albert & Richard Stacey eds., 2022).

¹²⁴ Sergio Verdugo, *The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution*, 17 INT'L J. CONST. L. 1098, 1099 (2019).

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

¹²⁶ Verdugo, *supra* note 124, at 1099; Laura Alessandra Nocera, *Contradicciones Constitucionales: el Tribunal Constitucional Plurinacional Boliviano y la Reelección de Morales. ¿Una Práctica de Abusivismo?*, 23 ANUARIO IBEROAMERICANO JUSTICIA CONSTITUCIONAL 491, 493–94 (2019); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1355–56 (2020).

¹²⁷ See Yanina Welp & Alicia Lissidini, *Democracia Directa, Poder y Contrapoder*, 22 REVISTA DE ESTUDIOS BOLIVIANOS 161, 162 (2016).

¹²⁸ See Maxime Blanchard, *Who Said No? Voting Behaviour in the 2016 Bolivian Constitutional Referendum*, 41 REVISTA CIENCIA POLÍTICA 449, 453–54 (2021).

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”).

¹³¹ Margarita López Maya & Luis E. Lander, *Venezuela 2009: En Medio de Dificultades Avanza el Modelo Socialista del Presidente Chávez*, 30 REVISTA DE CIENCIA POLÍTICA 544–45 (2010).

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.¹³³ 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.¹³⁴

Referenda are also subject to the associated risks of “bribing” voters with apparent gains in exchange for enhancing the power of the populist executive.¹³⁵ 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.¹³⁶ Even though some measure of taking the good with the bad is present in all democratic give-and-take,¹³⁷ the stakes in constitutional referenda can be higher.¹³⁸ 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

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_Eng_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.

¹³⁵ Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 791–802 (2018).

¹³⁶ ROBERTO GARGARELLA, *THE LAW AS A CONVERSATION AMONG EQUALS* 111–13 (2022).

¹³⁷ Joel Colón-Ríos, *Plebiscitos de Salida y Democracia*, IACL-AIDC BLOG (Sept. 20, 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/9/20/plebiscitos-de-salida-y-democracia>.

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 extortion).

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).

¹⁴² Leah Trueblood, *Brexit and Two Roles for Referendums in the United Kingdom*, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 183, 189–92 (Richard Albert & Richard Stacey eds., 2022).

¹⁴³ See Roberto Gargarella, *Rejection of the New Chilean Constitution: Some Reflections*, OXFORD HUM. RTS. HUB (Sept. 14, 2022), <https://ohrh.law.ox.ac.uk/rejection-of-the-new-chilean-constitution-some-reflections>; Roberto Gargarella, *El “Plebiscito de Salida” Como Error Constituyente*, IACL-AIDC BLOG (Sept. 6, 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/9/6/plebiscito-salida-error-constituyente>; Sergio Verdugo, *On the Democratic (but Limited) Virtues of the Chilean Exit Referendum*, IACL-AIDC BLOG (Oct. 4, 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/10/4/on-the-democratic-but-limited-virtues-of-the-chilean-exit-referendum>.

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

But here, referenda serve as a means of securing buy-in to the work conducted by representative actors.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.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.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.¹⁴⁸ Increasingly the modern invocation of the putative

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.

¹⁴⁵ See Angélica Durán-Martínez, *Presidents, Parties, and Referenda in Latin America*, 45 *COMPAR. POL. STUD.* 1159, 1174–79 (2012).

¹⁴⁶ See, e.g., *id.* (arguing that the role of parties can help to mediate the effect of referenda on executive power).

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).

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 legislators¹⁵²—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

MODERN STATE 10–11 (1992), reprinted in 15 THEORY OUT OF BOUNDS (Sandra Buckley et al. eds., Maurizia Boscagli trans., 1999); Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223, 225 (2005); Yaniv Roznai, “We the People”, “Oui, the People” and the Collective Body: Perceptions of Constituent Power, in COMPARATIVE CONSTITUTIONAL THEORY 295, 303–05 (Gary Jacobsohn & Miguel Schor eds., 2018); JOEL I. COLÓN-RÍOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 88–94 (2012).

¹⁴⁹ Kalyvas, *supra* note 148, at 226–27.

¹⁵⁰ See, e.g., Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365, 369–72 (2011).

¹⁵¹ *Id.* at 376–79.

¹⁵² In particular, see how Jon Elster has introduced these topics into the discussion: Elster, *supra* note 41, at 386–96; Jon Elster, *Clearing and Strengthening the Channels of Constitution Making*, in COMPARATIVE CONSTITUTIONAL DESIGN 15, 16–18 (Tom Ginsburg ed., 2012); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 UNIV. PA. J. CONST. L. 345, 369–71 (2000); Jon Elster, *Legislatures as Constituent Assemblies*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 181, 195–96 (Richard W. Bauman & Tsvi Kahana eds., 2006).

¹⁵³ See, e.g., David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 938–58 (2013); William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT’L L. 193, 209–19 (2012).

superior to constituent assemblies across all these dimensions.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

Despite some success stories in constitution-making through a constituent assembly—Colombia being the case in chief¹⁵⁷—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.¹⁵⁸ The constituent process may also fail to ensure buy-in from organized political parties.¹⁵⁹ 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.¹⁶⁰ Consider two of the more prominent proposals for a new axis of politics and governance.

¹⁵⁴ Gabriel L. Negretto, *Democratic Constitution-Making Bodies: The Perils of a Partisan Convention*, 16 INT'L J. CONST. L. 254, 263–67 (2018).

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”).

¹⁵⁶ See, e.g., Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6, 9–10 (2016); Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 GERMAN L.J. 161, 165 (2019).

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.

¹⁶⁰ See, e.g., James Fishkin, *Democracy When the People Are Thinking: Liberation and Democratic Renewal*, 163 AM. PHIL. SOC'Y 108, 108 (2019); Hélène Landemore, *Democratic Reason*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 251, 251–53 (Hélène Landemore & Jon Elster eds.).

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.”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.”¹⁶² In turn, these individuals would emerge as opinion leaders for those citizens not selected or unable to devote the intensive time required.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.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.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.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.¹⁶⁷ Condorcet formulated his theory as a maxim for jury determinations of guilt or innocence.¹⁶⁸ There, the

¹⁶¹ Fishkin, *supra* note 160, at 117.

¹⁶² *Id.*

¹⁶³ *What is Deliberative Polling?*, STAN. CTR. FOR DELIBERATIVE DEMOCRACY, <https://deliberation.stanford.edu/what-deliberative-pollingr> (last visited Oct. 6, 2023).

¹⁶⁴ *Id.*

¹⁶⁵ Landemore, *supra* note 160, at 265, 275.

¹⁶⁶ *Id.* at 252.

¹⁶⁷ *Id.* at 265.

¹⁶⁸ *Id.* at 257.

jury is convened for only one task, and its decisional framework is preset.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,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,¹⁷¹ there is no prospect of what Condorcet would have termed “juror independence.”¹⁷² Nonetheless, the Condorcet model continues to have support in the fact that there is wisdom in more rather than less.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.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.¹⁷⁵ As Landemore explains, the proposal is not unlike jury duty:

¹⁶⁹ *Id.*

¹⁷⁰ Jason Brennan, *Response to Landemore*, in *DEBATING DEMOCRACY: DO WE NEED MORE OR LESS?* 251, 257 (2022).

¹⁷¹ See Pablo Barberá, *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).

¹⁷² See David M. Estlund, *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”).

¹⁷³ See Ville A. Satopää et al., *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).

¹⁷⁴ See HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* 53 (2020).

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. See

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 bonsai [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

Samuel Bagg, *Sortition as Anti-Corruption: Popular Oversight Against Elite Capture*, AM. J. POL. SCI. (forthcoming 2022) (arguing that a lottery’s power “lies in obstructing elite capture at critical junctures: a narrower task of oversight that creates fewer opportunities for elite manipulation”).

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-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).¹⁸⁰ 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.¹⁸¹

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,¹⁸² the 2016–2018 Irish Citizens’ Assembly,¹⁸³ the “French Citizens’ Convention for Climate” that President Macron convoked,¹⁸⁴ the European citizens’ panel of the conference for the future of Europe,¹⁸⁵ 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.¹⁸⁶

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

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).

¹⁸³ *About the 2016–2018 Citizens’ Assembly*, CITIZENS’ ASSEMBLY, <https://citizensassembly.ie/overview-previous-assemblies/2016-2018-citizens-assembly> (last visited Oct. 6, 2023).

¹⁸⁴ *The Citizens’ Convention on Climate, What is It?*, CONVENTION CITOYENNE POUR LE CLIMAT, <https://www.conventioncitoyennepourleclimat.fr/en> (last visited Oct. 6, 2023).

¹⁸⁵ *EU Project to Engage Citizens, and What They Came Up With*, REUTERS (May 9, 2022, 7:00 AM), <https://www.reuters.com/world/europe/eu-project-engage-citizens-what-they-came-up-with-2022-05-09>.

¹⁸⁶ See Katrín Oddsdóttir, *Iceland: The Birth of the World’s First Crowd-Sourced Constitution?*, 3 *CAMBRIDGE J. INT’L & COMPAR. L.* 1207, 1213 (2014); see also Hélène Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 *J. POL. PHIL.* 166, 169 (2015).

bottom-up citizens meetings and party-initiated top-down gatherings.¹⁸⁷ Though Bachelet’s process did not include a lottocratic form of direct participation and had an important problem of self-selection,¹⁸⁸ her process succeeded in gathering hundreds of thousands of non-partisan citizens to discuss the content of the new constitution in small, guided meetings.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ Even though the number of people participating can be impressive,¹⁹² the ultimate impact of these crowdsourcing techniques remains difficult to track or measure.¹⁹³

Yet, politics without parties—or with a diminished or weak party 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.¹⁹⁴ 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.¹⁹⁵ Thus, the Icelandic process failed after Parliament declined to advance key provisions of the citizens’

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.

¹⁹⁰ ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS 571–73 (2022).

¹⁹¹ ANTONI ABAT I NINET, CONSTITUTIONAL CROWDSOURCING: DEMOCRATISING ORIGINAL AND DERIVED CONSTITUENT POWER IN THE NETWORK SOCIETY 49 (2021).

¹⁹² See *id.* at 59.

¹⁹³ See *id.* at 50.

¹⁹⁴ Todd A. Eisenstadt & Tofigh Maboudi, *Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy*, 52 COMPAR. POL. STUD. 2135, 2136 (2019).

¹⁹⁵ See *id.* at 2137.

draft.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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 referendums¹⁹⁹—an impressive achievement in a Catholic country.²⁰⁰ Yet, the two Irish constitutional reforms are, for now, still the exception.²⁰¹ By and large, these constitutional efforts without political party buy-in have come to naught.²⁰²

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).

¹⁹⁷ Sergio Verdugo & Jorge Contesse, *Auge y Caída de un Proceso Constituyente: Lecciones del Experimento Chileno y del Fracaso del Proyecto de Bachelet*, 4 DERECHO Y CRÍTICA SOCIAL 139, 142–43 (2018).

¹⁹⁸ Gaspard d’Allens et al., *Convention pour le Climat: Seules 10% des Propositions ont été Reprises par le Gouvernement*, REPORTERRE LE MEDIA DE L’ÉCOLOGIE (Mar. 31, 2021, 9:11 AM), <https://reporterre.net/Convention-pour-le-climat-seules-10-des-propositions-ont-ete-reprises-par-le-gouvernement>.

¹⁹⁹ See a review of the arguments in Eoin Carolan, *Ireland’s Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change*, 13 INT’L J. CONST. L. 733, 739, 745 (2015); see also Oran Doyle & Rachael Walsh, *Deliberation in Constitutional Amendment: Reappraising Ireland’s Deliberative Mini-Publics*, 16 EUR. CONST. L. REV. 440, 440–41 (2020).

²⁰⁰ On the debate about abortion and how the Irish experiment helped to shape the public debate, see Oran Doyle & Rachael Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, 20 INT’L J. CONST. L. 398, 412 (2022); Jane Suiter et al., *When Do Deliberative Citizens Change Their Opinions? Evidence from the Irish Citizens’ Assembly*, 37 INT’L POL. SCI. REV. 198, 208 (2016).

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

²⁰² See DAVID M. FARRELL & JANE SUITER, REIMAGINING DEMOCRACY: LESSONS IN DELIBERATIVE DEMOCRACY FROM THE IRISH FRONT LINE 28 (2019).

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

²⁰³ See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 82–83 (2010).

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).

²⁰⁸ The question of the American “imposition” is subject to debate. See, e.g., David S. Law, *The Myth of the Imposed Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 241 (Denis J. Galligan & Mila Versteeg eds., 2013); Yota Negishi, *The Constituent Power of the ‘Imposed’ Constitution of Japan*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS* 189, 189 (Richard Albert et al. eds., 2019); Chaihark Hahm & Sung Ho Kim, *To Make “We the People”*: *Constitutional Founding in Postwar Japan and South Korea*, 8 *INT’L J. CONST. L.* 800, 801 (2010).

²⁰⁹ See James C. Fisher, *The Quasi-Constitutionality of Non-Statutory Law: Executive Constitutional Interpretation in Japan*, in *QUASI-CONSTITUTIONALITY AND CONSTITUTIONAL STATUTES* 261, 266, 274 (Richard Albert & Joel I. Colón-Ríos eds., 2019).

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

²¹⁰ The debate on whether the EU needs a new constitution is too large to fully cite. See, e.g., J. H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219, 232 (1995); Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 247, 247 (Martin Loughlin & Neil Walker eds., 2007); J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 222–24 (1999); SIGNE REHLING LARSEN, THE CONSTITUTIONAL THEORY OF THE FEDERATION AND THE EUROPEAN UNION 1 (2021); Aliénor Ballangé, *Why Europe Does Not Need a Constitution: On the Limits of Constituent Power as a Tool for Democratization*, 28 RES PUBLICA 655, 667 (2021).

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

²¹² See, e.g., Lucia Rubinelli, *Elites, Democracy, and Parties in the Italian Constituent Debates, 1946–1947*, 27 CONSTELLATIONS 199, 199 (2020).

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.”²¹⁶

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.²¹⁷ 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.²¹⁸ Intermediation was rejected in favor of direct appeals by the maximum leader to popular approbation.²¹⁹ The process involved an institutional attack against the parliament²²⁰ and the call of a referendum in 1999.²²¹ 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.²²² 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.²²³ There was nothing about Chávez that would invite the concepts of rotation in office and renewal of majority consent.²²⁴ 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*.²²⁵ But politics got personalized, and “*Chavismo*” as a larger

²¹⁶ SCHATTSCHEIDER, *supra* note 211, at 1.

²¹⁷ See RAFAEL BADELL MADRID, ASALTO AL PARLAMENTO 13 (2021).

²¹⁸ See Carlos García Soto et al., *Winds of Change: Comparing the Early Phases of Constitutional Redrafting in Chile and Venezuela*, 13 HAGUE J. ON RULE L. 315, 322 (2021).

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

²²⁶ See *id.* at 316.

²²⁷ Ana María Bejarano & Renata Segura, *Reforma Constitucional en Tiempos de Crisis: Lecciones de Colombia y Venezuela*, 1 REVISTA LATINOAMERICANA DE POLÍTICA COMPARADA 151, 155 (2008); Ana María Bejarano & Renata Segura, *The Difference Power Diffusion Makes: Explaining Divergent Outcomes in Colombia (1990-1991) and Venezuela (1998-1999)*, in REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES 131, 145 (Gabriel L. Negretto ed., 2020).

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 CONSTIYUNTE 24–25 (2022).

negotiations.²³¹ Second, political parties are repeat players that expect to play a role in the future democratic system.²³² 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.²³³ 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.²³⁴ 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.²³⁵ 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.²³⁶ 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

²³¹ See Skach, *supra* note 9, at 875.

²³² See *id.* (discussing the role of political parties); see also Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 COMPAR. POL. 293, 299, 306 (2010).

²³³ See Ríos-Figueroa & Pozas-Loyo, *supra* note 232, at 301, 306.

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).

²³⁵ Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES L. 49, 53–54 (2002).

²³⁶ See generally *id.* at 49; TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003); JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S 13 (2008); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 587–89 (2013); THE POLITICAL ORIGINS OF CONSTITUTIONAL COURTS: ITALY, GERMANY, FRANCE, POLAND, CANADA, UNITED KINGDOM 9 (Pasquale Pasquino & Francesca Billi eds., 2009) (providing an alternative approach).

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

²³⁷ See Colón-Ríos, *supra* note 150, at 372–73 (discussing Colombia); Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principals and Elements of Democratic Constitution-Making*, 1 GLOB. CONSTITUTIONALISM 173, 183 (2012) (discussing South Africa); *Brazil 1988*, PRINCETON CONST. WRITING & CONFLICT RESOL., <http://pcwcr.princeton.edu/reports/Brazil1988.html> (last visited Oct. 9, 2023) (discussing Brazil).

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).

²⁴⁰ See Gabriel Negretto, *Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites*, 18 INT'L J. CONST. L. 206, 211–12, 224 (2020); Gabriel L. Negretto & Mariano Sánchez-Talanquer, *Constitutional Origins and Liberal Democracy: A Global Analysis, 1900–2015*, 115 AM. POL. SCI. REV. 522, 522, 530, 535 (2021) (discussing data on how compromises among plural political elites can help preserve role of opposition against possible executive branch uses of arbitrary power).

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

²⁴² See Bård Anders Andreassen & Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution* 6–7 (Chr. Michelsen Inst., Working Paper No. 13, 2006); David Fickling, *Kenya's Say No to New Constitution*, THE GUARDIAN (Nov. 22, 2005), <https://www.theguardian.com/world/2005/nov/22/kenya.davidfickling>.

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 2014²⁴⁴ ultimately succumbed in 2022 to an authoritarian presidential overhaul in the context of a weak parliament and powerless courts.²⁴⁵

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.²⁴⁶ Sovereign constitution-making processes are incapable by themselves of promoting consensus in societies that are diverse and heterogeneous.²⁴⁷ Appeals to the unformed will of the people can easily justify narratives that turn authoritarian or populist.²⁴⁸ In turn, such appeals can destabilize the entire constitution-making process.²⁴⁹ By contrast, a focus on forging the institutions of governance, including buy-in from potential contenders for power, may yield elements of consensus;²⁵⁰ it may also stabilize governance in the context of fractured societies.²⁵¹

²⁴⁴ Despite this, some argue that the 2014 Constitution gave too many emergency powers to the president. See Patrick Gardiner, *Conflating the Powers of the Commissarial and the Sovereign Dictator in Tunisia*, VERFASSUNGSBLOG (Nov. 29, 2022), <https://verfassungsblog.de/conflating-the-powers-of-the-commissarial-and-the-sovereign-dictator-in-tunisia>.

²⁴⁵ See Int'l Comm'n of Jurists, *Codifying Autocracy: The Proposed Tunisian Constitution in Light of International Law and Standards*, at 1–4 (July 2022).

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.

²⁴⁹ See Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 INT'L J. CONST. L. 14, 20 (2023); see also William Partlett, *The American Tradition of Constituent Power*, 15 INT'L J. CONST. L. 955, 959–60 (2017); David Landau, *Constituent Power and Constitution-Making in Latin America*, in COMPARATIVE CONSTITUTION MAKING 568 (Hanna Lerner & David Landau eds., 2019).

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

²⁵¹ See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1861 (2004).

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.²⁵² If the sample is well selected, the processes can represent different classes, ages, genders, etc.²⁵³ And if there is an advantage in cognitive diversity, as Landemore suggests, then a large and diverse sample can offer a reasonable outcome.²⁵⁴

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,²⁵⁵ there is no escaping that its founding strokes occurred

²⁵² See *id.* at 1865.

²⁵³ See Landemore, *supra* note 160, at 269.

²⁵⁴ See *id.* at 252–53.

²⁵⁵ See, e.g., *Introducción*, in *EL MODELO CHILENO: DEMOCRACIA Y DESARROLLO EN LOS NOVENTA* 12 (Paul W. Drake & Iván Jaksic eds., 1999).

under the Pinochet dictatorship (1973–1989),²⁵⁶ and that some of its current provisions still trace to the military regime.²⁵⁷ 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 2005²⁵⁸ and during the second presidency of Michelle Bachelet.²⁵⁹ 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.²⁶⁰ The Bachelet constitutional proposal was also never accepted by the parties, either from the left or the right.²⁶¹ What remains in place after piecemeal reforms²⁶² is a fragmented

²⁵⁶ See, e.g., JUAN LUIS OSSA, CHILE CONSTITUCIONAL (2020). The criticisms against the Constitution date back to the 1980s and were put together by a group of constitutional scholars from the opposition to the Pinochet regime. Jorge Quinzio, *El Grupo de Los 24 y Su Crítica a La Constitución Política de 1980*, in XXIII REVISTA DE DERECHO (VALPARAÍSO) 15 (2002); Grupo de los 24, *Informe Del Grupo de “Los 24,”* (1979); Grupo de los 24, *Las Críticas Del Grupo de Los 24* (1981); GRUPO DE LOS 24, LAS PROPUESTAS DEMOCRÁTICAS DEL GRUPO DE LOS 24 (Patricio Chaparro ed., 1992).

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 HUNEEUS, 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).

²⁵⁹ On the constitution-making process promoted by the Bachelet process, see Tomás Jordán Díaz & Pamela Figueroa Rubio, *El Proceso Constituyente Abierto a La Ciudadanía: El Modelo Chileno de Cambio Constitucional*, 16 HEMICICLO. REVISTA DE ESTUDIOS PARLAMENTARIOS 46 (2017).

²⁶⁰ Compare Ricardo Lagos Escobar, *Una Constitución Para El Bicentenario*, in REFORMA CONSTITUCIONAL 19 (Francisco Zúñiga Urbina ed., 2005), with PATRICIO ZAPATA LARRAÍN, LA CASA DE TODOS: LA NUEVA CONSTITUCIÓN QUE CHILE MERECE Y NECESITA 59 (2015) (explaining how the 2005 reform failed despite its approval and the successful removal of the authoritarian enclaves).

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.²⁶³ Whatever its shortcomings, the current structure has moved far from its original role in stabilizing the Pinochet dictatorship.²⁶⁴

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.²⁶⁵ A group of students took over the underground stations of Santiago and called for people not to pay subway fares.²⁶⁶ The protests quickly escalated, sparking a diverse set of social demands.²⁶⁷ 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).²⁶⁸ But the protests were quickly joined by heterogeneous groups lacking a unifying theme or common leadership.²⁶⁹ Those groups included feminist movements,

²⁶³ One of the most important explanations, though not the only one, is the new electoral system. See Ricardo Gamboa & Mauricio Morales, *Chile's 2015 Electoral Reform: Changing the Rules of the Game*, 58 LAT. AM. POL. & SOC'Y 126, 142 (2016); Kenneth Bunker, *La elección de 2017 y el fraccionamiento del sistema de partidos en Chile*, REV. CHILENA DERECHO C. POLÍTICA 202 (2018); Facundo Cruz & Carlos Varetto, *Crónica de un cambio anunciado. Las elecciones de 2017 en Chile frente al cambio de sistema electoral*, ESTUD. POL. 233 (2019); see also Pablo Villalobos Dintrans, *Why Health Reforms Fail: Lessons from the 2014 Chilean Attempt to Reform*, 5 HEALTH SYS. & REFORM 134, 140 (2019); Sergio Verdugo, *On the Protests and Riots in Chile: Why Chile Should Modify Its Presidential System*, INT'L J. CONST. L. BLOG (Oct. 29, 2019), <http://www.iconnectblog.com/2019/10/on-the-protests-and-riots-in-chile-why-chile-should-modify-its-presidential-system>; Rosalind Dixon & Sergio Verdugo, *Los derechos sociales y la reforma constitucional en Chile: hacia una implementación híbrida, legislativa y judicial*, 162 CEP 31 (2021).

²⁶⁴ On the original 1980 Constitution, see generally ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 3 (2002).

²⁶⁵ Indira Palacios-Valladares, *Chile's 2019 October Protests and the Student Movement: Eventful Mobilization?*, 40 REVISTA DE CIENCIA POLÍTICA 215, 220 (2020).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 221–22.

²⁶⁸ *Id.* at 223–26.

²⁶⁹ *Id.* at 228.

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

²⁷⁰ Lea Sasse, *Chile despertó – The Reasons for the Mass Protests in Chile 2019/2020*, at 19–20 (Berlin Inst. for Int’l Pol. Econ., Working Paper No. 166, 2021).

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-quien-quemo-el-metro-carta-a-boric> (discussing that seven metro stations were completely burned, eighteen were partially burned, and ninety-three suffered serious damage).

²⁷³ See Press Release, U.N. Hum. Rts. Off. of the High Comm’r, UN Human Rights Office Report on Chile Crisis Describes Multiple Police Violations and Calls for Reforms (Dec. 13, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25423> (“[T]he police and army failed to adhere to international human rights norms and standards relating to management of assemblies and the use of force.”).

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.²⁷⁶ 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.²⁷⁷ This was the first time that the mainstream conservative parties had agreed to ask voters in a referendum whether the Constitution should be replaced.²⁷⁸ 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.²⁷⁹

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 Julieta 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.²⁸⁰ The process was going to be opened by referendum (Chileans called it an “entry” plebiscite) aimed at asking citizens to decide two questions.²⁸¹ 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.²⁸²

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.²⁸³ Disputes regarding procedural issues would be solved by a committee of randomly selected Supreme Court Justices.²⁸⁴ Undoubtedly, these rules were designed to maintain the power of incumbent forces: While the constitution would be subject to reexamination,²⁸⁵ every major political coalition would in effect hold veto rights.²⁸⁶ The hope was to avoid two extremes: the neo-Bolivarian

²⁸⁰ 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.

²⁸¹ Couso, *supra* note 277, at 243.

²⁸² *Id.*

²⁸³ 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.

²⁸⁴ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] May 4, 2023, art. 136.

²⁸⁵ See Marcela Prieto & Sergio Verdugo, *How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions*, 13 HAGUE J. ON RULE L. 265, 269, 277 (2021).

²⁸⁶ 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.²⁸⁷ A final referendum with mandatory citizen voting was supposed to confirm the constitutional proposal.²⁸⁸

Under pressure for greater participation and from the distinct anti-party nature of the massive demonstrations,²⁸⁹ the initial multi-party agreement was then modified to include gender parity and to lower the entry costs for independent candidates.²⁹⁰ Congress modified the rules to allow independents to create parallel electoral pacts to have a competitive space on the ballot,²⁹¹ lower the number of sponsorship required to submit independent candidates' nominations,²⁹² build an electronic system making it easier and cheaper to register those candidacies,²⁹³ and make sure that free television advertising time would be provided to independent candidates.²⁹⁴ Under continued pressure, additional congressional modifications allowed the creation of seventeen reserved seats for indigenous peoples,²⁹⁵ a slight overrepresentation of the 12.8% of the population that had self-identified as indigenous in the last census.²⁹⁶

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

²⁸⁷ Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile's Constitution Making Process: Between Bolivarian Constitutionalism and the Pinochet Constitution*, 19 INT'L J. CONST. L. 149, 153 (2021).

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).

²⁹⁶ Instituto Nacional de Estadísticas - Chile, SÍNTESIS DE RESULTADOS CENSO 2017, at 16 (2018).

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.i-connectblog.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.

²⁹⁹ *Plebiscito 2020*, DECIDECHILE, <https://2020.decidechile.cl> (last visited Oct. 6, 2023).

³⁰⁰ Carlos Meléndez et al., *Chile 2020: Pandemia y Plebiscito Constitucional*, 41 REVISTA DE CIENCIA POLÍTICA 263, 273 (2021).

³⁰¹ *Cadem: La mayoría votó Apruebo para garantizar derechos sociales en salud, educación y pensiones*, CNN CHILE (Oct. 26, 2020, 9:25 AM), https://www.cnnchile.com/plebiscito2020/cadem-apruebo-garantizar-derechos-sociales_20201026.

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.³⁰³ Only 43.4% of registered voters participated in the selection of the Convention delegates.³⁰⁴ 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.³⁰⁵ 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,³⁰⁶ only got two representatives.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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.³¹¹ These often were pro-

³⁰³ See *id.* at 132; *id.* at 137 fig. 2 (mapping relative ideological positions of Convention members).

³⁰⁴ See *Elección 2021 Constituyentes*, DECIDECHILE, <https://2021.decidechile.cl/#/ev/2021/ct/2021.N/> (last visited Oct. 6, 2023).

³⁰⁵ Fábrega, *supra* note 302, at 130.

³⁰⁶ *Id.*

³⁰⁷ DECIDECHILE, *supra* note 304.

³⁰⁸ See *id.*

³⁰⁹ Fábrega, *supra* note 302, at 130.

³¹⁰ Couso, *supra* note 277, at 247.

³¹¹ See Sahli, *supra* note 297.

noted 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 GARIN GONZÁLEZ, *EL FRACASO CÓMO SE INCENDIÓ LA CONVENCION* 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.³¹⁸ Only 22% of the eligible voters chose to vote on the indigenous lists.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.³²⁰ Some indigenous candidates from the less-populated indigenous groups were elected with fewer than 100 votes.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 *Lista del Pueblo*.³²² In effect, the Communist Party played an outsize role in giving voice to the left agenda at the Convention,³²³ and more moderate leftist groups were pressured to follow suit.³²⁴ The right and some centrist members were completely excluded from the negotiations.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.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

³¹⁸ Guillermo Pérez, *The Illusion of Indigenous Representation*, INT'L J. CONST. L. BLOG (Sept. 29, 2022), <http://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-the-illusion-of-indigenous-representation>.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Constituyentes 2021*, DECIDECHILE (May 17, 2021), <https://2021.decidechile.cl/#/ev/2021/ct/2021.N/detail/indigenous>. One member got 95 votes; another got 61 votes. *Id.*

³²² Fábrega, *supra* note 302, at 140.

³²³ SQUELLA, *supra* note 230, at 143.

³²⁴ *Id.* at 78.

³²⁵ See FERNANDO ATRIA, EL PROCESO CONSTITUYENTE Y SU FUTURO DESPUÉS DEL PLEBISCITO 5 (2022), https://www.lacasacomun.cl/_files/ugd/0626d9_8d40ab447d4e444d8cc93310d4cab8fb.pdf.

³²⁶ *Indigenous woman heads Chile's new Constitutional Assembly*, DEUTSCHE WELLE (July 5, 2021), <https://www.dw.com/en/chile-chooses-indigenous-woman-as-president-of-new-constitutional-assembly/a-58157983>.

ended up suspending the event.³²⁷ 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.³²⁸ Loncón—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).³²⁹ She announced that their aim was to reboot (“refundar”) the country, widening the democratic regime and building a “plurinational and intercultural Chile.”³³⁰ She also referred to the Convention as the “dream of our ancestors.”³³¹ The implied rejection of Chile as a nation and the clear alliance with the protesters, violence and all,³³² was an unmistakable rejection of the established political order.

The Convention was as unbalanced in terms of political ideology as it was socially inclusive.³³³ 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.³³⁴ In practice, this meant that the Convention was programmatically driven by an unstable leftwing coalition stitched together from various identity-based sets of demands.³³⁵ A group of thirty-three independents and indigenous representatives called “the spokespersons of the peoples” (*vocería de los pueblos*) 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.*

³²⁹ *Elisa Loncon y su emocionante primer discurso como presidenta de la Convención*, EL MOSTRADOR (July 4, 2021), <https://www.elmostrador.cl/destacado/2021/07/04/elisa-loncon-y-su-emocionante-primer-discurso-como-presidenta-de-la-convencion-este-sueno-se-hace-realidad-es-posible-refundar-este-chile>.

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.

³³⁴ Couso, *supra* note 277, at 247–48.

³³⁵ *Id.* at 248.

procedural rules.³³⁶ Invoking theories of a constitutional assembly as an ultimate exposition of constituent power,³³⁷ the Convention infringed its foundational rules³³⁸ 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.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.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 discord³⁴¹—a process that failed in practice but set the tone for the Convention.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,³⁴³ meaning there were no

³³⁶ *Vocería 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-Voceria-de-los-Pueblos.pdf>.

³³⁷ See Prieto & Verdugo, *supra* note 285, at 269.

³³⁸ Benjamín Alemparte & Joshua Braver, *Constitutional Boot-Strapping in Chile?*, INT'L J. CONST. L. BLOG (Nov. 2, 2021), <http://www.icconnectblog.com/constitutional-boot-strapping-in-chile>.

³³⁹ SQUELLA, *supra* note 230, at 80, 109, 161.

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.").

³⁴¹ REGLAMENTO DE MECANISMOS, ORGÁNICA Y METODOLOGÍAS DE PARTICIPACIÓN Y EDUCACIÓN POPULAR CONSTITUYENTE DE LA CONVENCION 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).

³⁴² González B., *supra* note 341, at 84–85.

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.³⁴⁴ Unlike the Brazilian process of 1988, where the committees served to forge bipartisan agreements,³⁴⁵ in Chile, the moderating force could only be achieved in the plenary, when it was too late to find common ground.³⁴⁶ In practice, this meant that most Convention and committee decisions were by simple majority,³⁴⁷ reserving the supermajority votes for only the final output of the Convention as a whole.³⁴⁸ 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.³⁴⁹ But perhaps that is the fate of constitutional foundings 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

id. art. 65; *id.* art. 66; *id.* art. 67; *id.* art. 68; *id.* art. 69; *id.* art. 70; *id.* art. 71; *id.* art. 72; *id.* art. 73; *id.* art. 74; *id.* art. 75.

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.³⁵⁰ 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.³⁵¹ 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 processes³⁵²—which is arguably one of the most critical problems giving rise to the nonresponsiveness of the political system to social-rights demands.³⁵³ 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.³⁵⁴

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

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).

³⁵¹ See José Francisco García, *Reshaping the Chilean Political Regime: Three Acts and a Funeral*, CONST.NET (May 25, 2022), <https://constitutionnet.org/news/reshaping-chilean-political-regime-three-acts-and-funeral> (recounting the complicated story of the negotiations over the political system).

³⁵² See, e.g., CONVENCION 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%ABlica_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 law-making and balance of power).

parties.³⁵⁵ Instead, committee members sought to formalize the role of social movements rather than parties.³⁵⁶ Ultimately, the draft did not attempt to address the core aspects of the electoral system itself, leaving that to later statutory or administrative control.³⁵⁷ 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.”³⁵⁸ This language is taken from a secondary provision of the Spanish constitution, but is stripped of the accompanying recognition of constitutional status for parties.³⁵⁹ 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 democracy³⁶⁰ that can weaken the agenda-setting powers of the parties and harm the electoral accountability of

³⁵⁵ COMISIÓN SOBRE SISTEMA POLÍTICO, GOBIERNO, PODER LEGISLATIVO Y SISTEMA ELECTORAL, *Informe De La Comisión Sobre Sistema Político, Gobierno, Poder Legislativo y Sistema Electoral recaído en las iniciativas convencionales, populares e indígenas constituyentes, que establecen las normas para regular el Estado Plurinacional, el Poder Legislativo, el Poder Ejecutivo, el Sistema Electoral y las Organizaciones Políticas* (2021), https://www.cconstituyente.cl/comisiones/verDoc.aspx?prmID=3266&prmTipo=DOCUMENTO_COMISION.

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.³⁶¹ It proposed limiting the re-election of legislators,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.³⁶³

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.³⁶⁴ Explanations on why Chileans rejected the proposal abound, and social scientists will no doubt spill much

³⁶¹ See Sergio Verdugo, *Régimen de Partidos Políticos En La Nueva Constitución*, in ANÁLISIS Y NUDOS CRÍTICOS DE LA PROPUESTA DE NUEVA CONSTITUCIÓN 98, 102 (2022).

³⁶² See CONVENCIÓN CONSTITUCIONAL, *supra* note 352, art. 262 (allowing for only one re-election of legislators).

³⁶³ Pablo Argote Tironi, *Propuestas Para Mejorar El Presidencialismo Multi-Partidista*, in PARTIDOS POLÍTICOS EN CHILE: APORTES Y PROPUESTAS PARA SU FORTALECIMIENTO Y MODERNIZACIÓN 115, 123–24 (Claudio Pérez Lillo & Camila Rivas Castillo eds., 2022).

³⁶⁴ María Carrasco, *Why We Failed to Approve the New Chilean Constitution: The Need for a Cultural Transformation*, LONDON SCH. ECON. & POL. SCI. (Sept. 15, 2022), <https://blogs.lse.ac.uk/latamcaribbean/2022/09/15/why-we-failed-to-approve-the-new-chilean-constitution>.

ink in trying to disentangle results that, given the margin of rejection, are no doubt attributable to many overlapping causes,³⁶⁵ including explanations blaming parts of the procedure³⁶⁶ or the internal polarization that existed within the Convention.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,³⁶⁸ the existence of legal pluralism,³⁶⁹ the removal of the “state of emergency” (a crucial tool in the face of severe unrest),³⁷⁰ the grant of veto rights to indigenous peoples on matters affecting regional policies,³⁷¹ the changes to the judicial system,³⁷² the indeterminacy of the requirements for expropriation of property rights,³⁷³ the status of water resources outside the customary boundaries of property rights,³⁷⁴ and the ambiguity over whether citizens would have guaranteed individual choice over access to private providers regarding education,³⁷⁵ healthcare,³⁷⁶ and social security,³⁷⁷ among others.³⁷⁸ Guaranteed

³⁶⁵ For some early explanatory attempts, see Javier Couso, *Making Sense of Chile’s Failed Constituent Process*, INT’L J. CONST. L. BLOG (Oct. 4, 2022), <http://www.icconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-making-sense-of-chiles-failed-constituent-process>; Camila Vergara, *Chile’s Rejection*, NEW LEFT REV. (Sept. 9, 2022), <https://newleftreview.org/sidecar/posts/chiles-rejection>; Camila Vergara, *The Oligarchic Takeover of the Constituent Process*, 54 NACLA REP. ON AMS. 453, 453–56 (2022); Gargarella, *Rejection of the New Chilean Constitution*, *supra* note 143; Gargarella, *Plebiscito de Salida*, *supra* note 143; Verdugo, *supra* note 143, at 245; Jaime Bassa, *Un Proceso Constituyente Que No Se Detiene*, EL MOSTRADOR (Sept. 13, 2022), <https://www.elmostrador.cl/noticias/opinion/2022/09/13/un-proceso-constituyente-que-no-se-detiene>; ATRIA, *supra* note 325, at 2–3.

³⁶⁶ Larraín et al., *supra* note 344, at 240.

³⁶⁷ GARIN GONZÁLEZ, *supra* note 312, at 145.

³⁶⁸ See CONVENCIÓN CONSTITUCIONAL, *supra* note 352, art. 1.

³⁶⁹ See *id.* arts. 307, 309, 322.

³⁷⁰ *Id.* arts. 300–06.

³⁷¹ *Id.* art. 191, s.2.

³⁷² *Id.* arts. 307–49.

³⁷³ See *id.* art. 78.

³⁷⁴ CONVENCIÓN CONSTITUCIONAL, *supra* note 352, art. 142, trans. rule 35.

³⁷⁵ See *id.* arts. 35–41.

³⁷⁶ See *id.* art. 44.

³⁷⁷ See *id.* art. 45.

³⁷⁸ See Sergio Verdugo, *El Poder Constituyente Impopular*, 46 ACTUALIDAD JURÍDICA 207, 231, 233 (2022) (Chile).

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.

³⁸⁰ Compare Jennifer M. Piscopo & Peter M. Siavelis, *Chile's Constitutional Chaos*, 34 J. DEMOCRACY 141, 142, 152 (2023), with Eduardo Alemán & Patricio Navia, *Chile's Failed Constitution: Democracy Wins*, 34 J. DEMOCRACY 90, 92 (2023).

³⁸¹ See, e.g., *49% prefiere 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>.

³⁸² See Paula Bustamante, *As US Undoes Abortion Rights, Chile Works To Enshrine Them*, BARRON'S (June 27, 2022), <https://www.barrons.com/news/as-us-undoes-abortion-rights-chile-works-to-enshrine-them-01656303908>.

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).

³⁸⁴ See *Encuesta CEP Especial N° 87, Febrero-Julio 2022*, CENTRO DE ESTUDIOS PÚBLICOS (Aug. 3, 2022), <https://www.cepchile.cl/encuesta/encuesta-cep-especial-n-87-febrero-julio-2022> (showing that the Convention's proposal

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.³⁸⁵ 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 Chilean 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.³⁸⁶ 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.³⁸⁷ In the first multiparty agreement of 2019 aimed at rejecting both the Pinochet and the neo-Bolivarian models,³⁸⁸ the subsequent agreement of 2022 attempted at rejecting the experience of the Convention.³⁸⁹ 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.³⁹⁰ That is then followed by electing a “Council”

differed from the interests of indigenous groups); Guillermo Pérez, *The Illusion of Indigenous Representation*, INT'L J. CONST. L. BLOG (Sept. 29, 2022), <http://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-the-illusion-of-indigenous-representation>.

³⁸⁵ See Eloise Barry, *Why Chileans Rejected a New, Progressive Constitution*, TIME (Sept. 5, 2022, 6:57 AM), <https://time.com/6210924/chile-rejects-new-constitution-referendum>.

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.

³⁸⁹ See Gonzalo García Pino et al., *Third Time's a Charm? Chile Embarks on a New Constitution-Making Process*, CONSTITUTIONNET (Feb. 3, 2023), <https://constitutionnet.org/news/third-times-charm-chile-embarks-new-constitution-making-process> (comparing and contrasting the new process with the failed one).

³⁹⁰ *Id.*

modeled on the rules of the Senate and with a reduced number of reserved seats for indigenous peoples—they got only one.³⁹¹ 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.³⁹² Moreover, the Council cannot infringe twelve foundational and binding principles that the parties agreed upon.³⁹³ In the election for the Council in May 2023, a right-wing coalition got a majority of seats.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶ The contrast to South Africa is telling, as is the process of negotiation of the constitutional project. The actual South African constitution was founded

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Consejo Constitucional*, DECIDECHILE (May 17, 2023, 9:11 AM), <https://2023.decidechile.cl/2023/consejeros>.

³⁹⁵ Sergio Verdugo, *Chile's New Constitutional Proposal: A Balance Between Change and Continuity?*, CONSTITUTIONNET (June 30, 2023), <https://constitutionnet.org/news/chiles-new-constitutional-proposal-balance-between-change-and-continuity>.

³⁹⁶ See Hudson, *supra* note 63, at 504, 519 (discussing Tunisia and Iceland).

on the negotiated thirty-four principles from the Kempton Park accords.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 negotiated 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 majoritarianism in the exercise of legislative power and found the proposed constitution deficient in the key constitutional role of constraining momentary 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 constitutionalism; for all its faults, it was, in many ways, the culmination 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 political 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 THE ERA OF CONSTITUTIONAL COURTS* 179 (2015).

³⁹⁸ Dixon & Ginsburg, *supra* note 35, at 996, 1004–05.

³⁹⁹ Certification of the Const. of the Republic of S. Afr., 1996, *Case CCT 23/96*, Judgment 481–84 (Const. Ct. of S. Afr. Sept. 6, 1996).

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.