

CHILE'S FAILED ATTEMPT TO GET A NEW CONSTITUTION: OR THE CHALLENGES OF DEMOCRATIC CONSTITUTION MAKING IN A POLARIZED ERA

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INTRODUCTION

Over the last decade or so, the academic literature on constitution making has experienced something of a boom,¹ in parallel to the intensification of the activity of international entities devoted to providing expert advice and assistance on what—until not long ago—was an understudied and undertheorized field.² In

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¹ Recent contributions to this literature include: CAMBRIDGE UNIV. PRESS, UNIV. OF CAMBRIDGE, REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES, (Gabriel L. Negretto ed., 2020); Cheryl Saunders, *Constitution-making in the 21st Century*, 4 INT'L REV. L. 1 (2012); Claude Klein & Andrés Sajó, *Constitution-Making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419 (Michel Rosenfeld & Andrés Sajó eds., 2012); HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (Cambridge Univ. Press 2011); Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201-23 (2009).

² Among the many initiatives of constitution making assistance and advice that have intensified over the last couple of decades, see Int'l Inst. for Democracy and

the midst of these developments, best practices have been identified and prescriptions issued on how the constituent process should be conducted.³ Perhaps because constitutional replacement—as opposed to constitutional amendments—are exceptional events, there are relatively few cases to analyze. In this context, when the start of a constituent process was announced in Chile (a country generally considered to be a successful case of a transition to democracy among those referred to as the “third wave of democratization”) it generated a disproportionate amount of attention for a peripheral country. The interest sparked by Chile’s constitution making process was driven, I submit, by the fact that, as opposed to instances of populist-authoritarian constitution making (such as the ones that have taken place over the last couple decades in Venezuela, Hungary, Ecuador, Bolivia, and other countries), Chile offered an interesting “laboratory” of democratic constitution making in this time and age.

After the end of a four-year long attempt to deliver a new constitution, Chile failed to do so. As we shall see in this piece, some of the factors behind the frustrated attempts for a democratically enacted charter are highly specific to the political contingencies experienced by Chile over the last few years. However, there are some general lessons that can be drawn from this country’s experience for democratic constitution making in this era. The first is that it is a mistake to expect that, when the political stakes are as high as they are in constitution making, the polarization which characterizes much of the democratic world these days would be somehow interrupted just because a country is embarked on a constituent process. The second is that the strongly encouraged participatory processes during constitution making endeavors may lead to distortions that are far from the opinion of the electorate because constitutional preferences of highly mobilized groups may occasionally be in sharp contrast with that of the electorate’s majority. Finally, Chile’s troubling experience of failed constitution making sounds the alarm regarding the preconditions for the viability of the appealing notion that the legitimacy of a constitution making process requires it to be done through an especially elected body and not by panels of experts or *ad hoc* congressional committees (as was often the case during the nineteenth and early twentieth century). Furthermore, Chile’s two failed attempts to get a new charter approved in a ratifying referendum, poses the question of the inadequacy of such mechanism to conclude a constitution making effort.

In what follows, this article describes the following: I) The Chilean social uprising and the call for a new constitution; II)

Electoral Assistance, *Constitution-Building*, INT’L IDEA, <https://www.idea.int/theme/constitution-building> (last visited Oct. 20, 2023); *Constitutional Assistance*, UNITED NATIONS PEACEMAKER, <https://peacemaker.un.org/constitutions-project> (last visited Oct. 20, 2023).

³ One good example of this type of advice can be seen in MARKUS BÖCKENFÖRDE ET AL., A PRACTICAL GUIDE TO CONSTITUTION BUILDING (Int’l IDEA 2011).

Negotiating a constituent process as a way to institutionally-channel a social uprising; III) The main features of Chile's first constituent process; IV) A partisan Constitutional Convention; V) The political dynamics of the first constituent process; VI) Explaining the failure of Chile's first constituent process; VII) The negotiations leading to Chile's second constituent process; and VIII) The unexpected turn to the far right in the election of the Constitutional Council.

I. THE CHILEAN SOCIAL UPRISING AND THE CALL FOR A NEW CONSTITUTION.

Despite being considered one of Latin America's most stable and economically-successful countries, with a relatively orderly transition from dictatorship to democracy,⁴ which brought economic progress and a significant reduction of the poverty rate,⁵ on October 18, 2019, Chile began to experience its most massive, and violent demonstrations in decades. With an intensity resembling the riots that erupted in Europe and the United States in the late 1960s, millions of Chileans took to the streets to protest against an economic model which, for all its success in bringing about economic growth and poverty reduction, was unable to significantly reduce inequality.⁶

The riots and demonstrations were triggered by a small increase in the cost of Santiago's subway system, but a few days later, the demands of protesters shifted toward key aspects of the country's neoliberal model (such as an individualistic pension scheme and an economically-segregated healthcare system).⁷ While the social uprising took place at a time (right before the Covid-19 pandemic) when protests were happening in cities as disparate as Paris, Quito, and Hong Kong, Chile's manifestations of discontent were striking because it included something abstract

⁴ See COUNCIL ON HEMISPHERIC AFFAIRS, CHILE IN TRANSITION PROSPECTS AND CHALLENGES FOR LATIN AMERICA'S FORERUNNER OF DEVELOPMENT (Roland Benedikter & Katja Siepmann eds., 2015); Philip Oxhorn, *Recent research on Chile: The Challenge of Understanding "Success"* 34 LAT. AM. RSCH. REV. 255 (1999).

⁵ For accounts of Chile's economic growth during its transition to democracy, see Klaus Schmidt-Hebbel, *Chile's Economic Growth*, 43 CUADERNOS DE ECONOMIA 5 (2006); Kurt Weyland, *Economic Policy in Chile's New Democracy*, 41 J. OF INTERAMERICAN STUD. AND WORLD AFFAIRS 67 (1999). See also Claudio A. Agostini & Philip H. Brown, *Cash Transfers and Poverty Reduction in Chile*, 51 J. OF REG'L SCI. 604 (2011); Mauricio Olavarria-Gambi, *Poverty and Social Programs in Chile*, 13 J. OF POVERTY 99 (2009), and EMANUELA GALASSO, "With their effort and one opportunity": *Alleviating extreme poverty in Chile*, in DEVELOPMENT RESEARCH GROUP WORKING PAPER (2006) for an analysis of Chile's successful poverty reduction policies in the post-authoritarian period.

⁶ For an analysis of the persistence of income inequality in Chile, see Ashley Davis-Hamel, *Successful Neoliberalism? State Policy, Poverty, and Income Inequality in Chile*, 87 INT'L SOC. SCI. REV. 79 (2012); Osvaldo Larrañaga & Juan Pablo Valenzuela, *Estabilidad en la desigualdad. Chile 1990-2003 [Stability in inequality Chile 1990-2003]*, 38 ESTUDIOS DE ECONOMIA 295 (2011) (Chile).

⁷ See Mario Garcés, *October 2019: Social Uprising in Neoliberal Chile*, 28 J. LATIN AM. CULTURAL STUD. 483 (2019).

for the average citizen: the demand for a new constitution.⁸ This peculiar aspect of the country's uprising led then President, Piñera, to declare with exasperation that, "In civilized countries, discussions are held within the framework of the Constitution; in unstable countries, the Constitution is permanently discussed."⁹

Contrasting with Piñera's remarks, for many constitutional scholars the demand for a new charter was expected, as many of them have been advocating it for over a decade, arguing that the 1980 Constitution not only exhibits serious legitimacy problems (having been imposed by the only criminal dictatorship in the country's history) but, especially, because the constitutional order had proven to be an obstacle to introduce significant changes to Chile's radical variant of neoliberal economics.¹⁰ While this is not the place to engage in a detailed analysis of the way in which the 1980 charter constitutionalizes key aspects of the neoliberal model imposed by the military regime, the following examples can illustrate this point: a) Article 19, no. 18, which constitutionalizes the private provision of social security;¹¹ b) Article 19, no. 9, which does the same in the domain of health care;¹² and c) Article 19, no.

⁸ See Rogelio Luque-Lora, *Chile's Social Uprising and Constituent Process: Toward a More-than-human Understanding*, 13 INTERFACE: J. FOR & ABOUT SOC. MOVEMENTS 323 (2021).

⁹ Piñera's statement was issued on November 7, 2019, to a television news program. See Nuevo Poder, *Piñera: Eventual cambio constitucional debe hacerse dentro de institucionalidad* [Piñera: "Eventual constitutional change must be made within institutional framework"], NUEVOPODER.CL (Nov. 5, 2019) (Chile) (author's translation), <https://www.nuevopoder.cl/pinera-eventual-cambio-constitucional-debe-hacerse-dentro-de-institucionalidad/>.

¹⁰ For other academics that have advocated for a new Constitution since 2009, see Javier Couso & Carolina Tohá, *El Sistema Político Chileno Y Sus Desafíos: Un Nuevo Arreglo Constitucional Para El Bicentenario* [The Chilean Political System and Its Challenges: A New Constitutional Arrangement for the Bicentennial], in EL CHILE QUE VIENE DE DÓNDE VENIMOS, DÓNDE ESTAMOS Y A DÓNDE VAMOS [THE CHILE THAT COMES FROM WHERE WE COME FROM, WHERE WE ARE AND WHERE WE ARE HEADED] 167 (Ediciones Universidad Diego Portales, 2009); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA [THE CHEATING CONSTITUTION] (Lom Ediciones 2013); FERNANDO ATRIA ET AL., EL OTRO MODELO DEL ORDEN NEOLIBERAL AL RÉGIMEN DE LO PÚBLICO [THE OTHER MODEL OF THE NEOLIBERAL ORDER TO THE PUBLIC REGIME] (Random House Mondadori S.A. 2013); Alberto Coddou Mc Manus & Pablo Contreras, *Nueva Constitución y Asamblea Constituyente: La Experiencia De "Marca Tu Voto"* [New Constitution and Constituent Assembly: The "Mark Your Vote" Experience] 1 ANUARIO DE DERECHO PÚBLICO UDP 121, 130 (2014); Huneus C (2014), *La democracia semisoberana: Chile después de Pinochet* (Taurus); Claudia Heiss, *Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism*, 24 CONSTELLATIONS 470 (2017).

¹¹ Constitución Política de la República de Chile art. 19, no. 18 ("The right to social security The action of the State shall be aimed at guaranteeing the access of all inhabitants to the enjoyment of uniform basic benefits, *whether granted through public or private institutions*").

¹² *Id.* at art. 19, no. 9 ("The right to health protection. The State protects the free and equal access to actions for the promotion, protection and recovery of health and rehabilitation of the individual. It shall also be responsible for the coordination and control of health-related actions. It is the State's preferential duty to guarantee the execution of health actions, whether they are provided through public or private institutions, in the form and conditions determined by law, which may establish compulsory contributions. *Each person shall have the right to choose the health system they wish to benefit from, whether it is state or private.*").

21, which prohibits the creation of state-owned companies unless approved by legislation passed with a super-majoritarian quorum.¹³

In addition to the clauses of the charter that constitutionalize parts of the neoliberal model, the powerful Constitutional Tribunal established by the former has played an important role in preventing the dismantling of some elements of the economic model. This has been especially apparent during the second administration of Michele Bachelet (2014-2018), by declaring the unconstitutionality of a number of progressive bills approved by Congress.¹⁴ Recourse of conservative forces to the 1980 Constitution and the Constitutional Tribunal to block social and economic change was apparent when just six weeks before the social uprising, President Piñera's government announced that it would ask the Tribunal to declare unconstitutional seventeen bills being discussed in Congress at the time (including a popular one reducing the working week from 45 to 40 hours).¹⁵

The link between the social and economic demands at the root of the 2019 social uprising and the 1980 Constitution was not a coincidence. Four decades previously, Pinochet's main legal adviser, Jaime Guzmán, recognized in a piece published shortly before the imposition of the said charter that its very purpose was to serve as a shield against the dismantling of the neoliberal economic model once democracy eventually returned. In Guzmán's own words, the actual point of the Constitution of 1980 was:

[T]o constrain our adversaries . . . to follow an action not so different from the one that oneself would yearn for, because -if you excuse the metaphor - the range of alternatives that the Constitution imposes is small enough to make the opposite extremely difficult.¹⁶

It is hard to find a more candid acknowledgement of the main goal of the Constitution imposed by Chile's dictatorship. Thus, instead of representing a relatively neutral framework for

¹³ *Id.* at art. 19, no. 21 ("The right to develop any economic activity that is not contrary to morality, public order or national security, respecting the legal norms that regulate it. *The State and its agencies may engage in business activities or participate in them only if authorized by a law with a qualified quorum.* In such case, these activities shall be subject to the ordinary legislation applicable to private individuals, without prejudice to the exceptions established by law for justified reasons, which must also be of qualified quorum.")

¹⁴ An example of this type conservative jurisprudence is, decision no. 4, 317 (declaring unconstitutional a provision of a bill approved in 2018, which sought to prohibit the controllers of private universities from pursuing profit-making purposes). Javier Couso, *Chile's Constituent Process: The End of Pinochet's Neoliberal Legality?*, Montaigne Centre Blog (Feb. 24, 2021), <https://blog.montaignecentre.com/en/chiles-constituent-process-the-end-of-pinochets-neoliberal-legality/>.

¹⁵ Diego Higuera, *Gobierno confirma que estudia acudir al TC por 17 proyectos que se tramitan en el Congreso* [The Government confirms that it is studying going to the TC for 17 projects that are being processed in Congress], ATACAMA NOTICIAS (Sept. 10, 2019) (Chile) (author's translation), <https://www.atacamanoticias.cl/2019/09/10/gobierno-confirma-que-estudia-acudir-al-tc-por-17-proyectos-que-se-tramitan-en-el-congreso-2/>.

¹⁶ Jaime Guzman, *El Camino Político* [The Political Path], 1 REVISTA REALIDAD 13, 19 (1979) (Chile) (author's translation).

democratic politics to unfold, the very purpose of the 1980 charter was to serve as a constraining device on democratic politics.

II. NEGOTIATING A CONSTITUENT PROCESS TO INSTITUTIONALLY-CHANNEL A SOCIAL UPRISING

In the weeks following the uprising, while the government agonized over how to deal with the unprecedented demonstrations, the notion to engage in a constitution making process as the only way out of a crisis that was endangering Chile's democracy, started to gain traction.¹⁷ With this option on the table, conservative politicians and intellectuals raised several objections to the idea that a new constitution was the best way to address this crisis. Among the arguments delivered by these groups against channeling the social uprising through a constituent process, the most important were¹⁸:

1. That a change of the constitutional order would distract from the "real" social demands of the people.
2. That the social upheaval being experienced was not the right context to embark on a constituent process (an argument that contrasts sharply with the one made by conservative groups when President Bachelet proposed a new Constitution in 2014, which provided that there was no need to change the fundamental charter, because there was no crisis in the country).
3. That, because the Piñera administration had been elected only two years before with a program that did not include a new Constitution, now requiring it to embark in that direction was anti-democratic. This argument omitted the fact that, in those same elections, voters supported a majority of representatives to Congress who advocated a new fundamental charter (as well as the fact that, when Bachelet won the presidential elections in 2013 with a program that prominently included the introduction of a new Constitution, which the right-wing minority in Congress blocked, since the quorum necessary to engage in a constituent process required the support of at least part of the conservative parliamentarians).
4. That the 1980 Constitution had been amended so often in the post-authoritarian period, that it was effectively a very different charter from the one introduced by the dictatorship (to this, supporters of a new charter replied that, while it is true that the 1980 Constitution has been amended many times, each and every one of them represented a gracious concession by the political "heirs" of the military regime, the UDI and Renovación Nacional parties), that, at any rate, the amendments were always careful to preserve the key clauses that ensure that the economic model would not be significantly altered by legislation.

¹⁷ See Gonzalo Blumel, *La vuelta larga: Crónica personal de la Crisis de Octubre* (Ediciones UC, 2023).

¹⁸ Note: This is a summary that the author made of well-known argument in Chile.

Notwithstanding conservative resistance to a constituent process, three weeks after the start of the social uprising, President Piñera eventually called on all political parties to negotiate a process to introduce a new constitution.¹⁹ The negotiation process took place on November 14, and 15, 2019, and included a wide range of political parties (from the conservative UDI to segments of the leftist Frente Amplio, as well as the center-left parties that have been part of the former “Concertación” coalition), and concluded with a declaration that formally announced the start of a constituent process.²⁰ Immediately after the negotiations succeeded, a committee with representatives from all the parties that had ratified the agreement was established. This group worked for a month on the technical aspects of the agreed upon constituent process (many of which required constitutional amendments to the existing charter) and then presented its report to Congress, which passed the necessary amendments in December.²¹ The agreement on a new constitution (only the far right Republicanos and the Communist Party abstained from signing the agreement) contributed to a reduction in turmoil brought by social uprising, providing an institutional way out to the country’s worst social and political crisis in decades.

III. THE MAIN FEATURES OF CHILE’S FIRST CONSTITUENT PROCESS

The constitutional amendment passed in December 2019, and introduced a new section to Chapter XV of the Constitution called “*On the procedure to elaborate a New Political Constitution of the Republic*,”²² materializing the political agreement reached a month earlier. The itinerary of this first constituent process contemplated an enabling—or “*entry*”—plebiscite (originally scheduled to take place in April 2020, but postponed to October of that year due to the COVID-19 pandemic) with the purpose of asking Chileans whether they wanted a new constitution, as well as the type of body that would oversee drafting a new text. The overseeing options consisted of a “Constitutional Convention”, composed entirely by popularly elected members, or a “Mixed Convention,” integrated in equal parts by popularly elected members and by members designated by Congress. If the entry referendum resulted in the approval of the idea of having a new charter, the original itinerary included the election of the constituent body in October 2020 (but

¹⁹ See Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile’s Constitution-making Process*, 19 INT’L J. CONST. L. 149, 150-51 (2021).

²⁰ See *Acuerdo Por la Paz Social y la Nueva Constitución [Agreement for Social Peace and the New Const.]*, Nov. 15, 2019, (Chile), https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acu_erdo_por_la_Paz.pdf.

²¹ See Maria Cristina Escuerdo, *Making a Constituent Assembly Possible in Chile: The Shifting Costs of Opposing Change*, 41 BULL. LATIN AM. RSCH. 641, 641-56 (2021).

²² *Constitución Política de la República de Chile, Constitución 1980* [CONSTITUTION] Chapter XV, arts. 127-29 (Chile).

this was postponed to May 2021, due to the pandemic). The fully elected Convention was to have 155 members, while the mixed Convention was to be composed of 172 members, 86 specially elected citizens and 86 members of Congress. The constituent body would have nine months to draft a text, with the possibility of extending this deadline for a maximum of three months. Finally, the process contemplated a ratifying (or “*exit*”) plebiscite, to be held in 2022, to approve or reject the proposed draft. One peculiar aspect of the rules governing this first constituent process was that, while the entry referendum and the election of the members of the constitution making body was to be done with the—then in place—voluntary vote, the exit referendum required compulsory suffrage (something that probed to be politically relevant, as we shall see below).

Aside from the rules regarding the body in charge of drafting the new charter, this first constituent process had many features that are worth mentioning. First, the process was highly regulated in terms of its procedure, but fairly free in terms of the Constitution’s content.²³ Although, the rules governing the process required each clause of the draft to be adopted by two-thirds of the actual members of the constituent body, there were very few substantive constraints on the norms that the Constitutional Convention could adopt. Such restraints include respecting the democratic and republican nature of the Chilean state; respecting International Law including the large number of human rights treaties and conventions that the country has ratified; and respecting final judicial decisions. A second important feature of the process was that the body in charge of elaborating the new charter was to be elected with a gender-parity rule, ensuring that 50% of the constitution making body was integrated by women—a feature without precedent in world constitutionalism. A third key aspect was the prohibition imposed to the body in charge of drafting the new constitution of interfering in any way with the “constituted” (i.e., existing) powers.²⁴ Additionally, the availability of a conflict-resolution mechanism allowing at least a quarter the Convention’s members to ask a panel of five Supreme Court justices to decide whether or not the majority was violating the rules governing the process. Further, it is important to mention that the design contemplated 17 reserved seats, or 12% of the total of the members of the Convention, to Chile’s indigenous peoples, a landmark rule in Chile because the current constitution does not even mention the existence of indigenous peoples.

²³ See Javier Couso, *Chile’s ‘Procedurally Regulated’ Constitution-Making Process*, 13 HAGUE J. ON RULE L. 235, 235-51 (2021).

²⁴ The goal of this rule was to prevent the distorting practice of certain comparative experiences in which, once a constituent assembly or convention is installed, it declares the cessation of the functions of other organs or authorities of the State, such as the legislative or judicial power. In the same vein, it should be noted that the Convention (or its members) will be prohibited from assuming any other functions other than the drafting of a new constitutional text, and that it will be dissolved as of right once the proposed text has been drafted and approved. *Id.* at 248.

I have described in some detail the itinerary and the rules of Chile's first constituent process given its unprecedented nature in the political and constitutional history of the country. Indeed, in over two hundred years as an independent nation, Chile has never had a fully democratic process of drafting its fundamental charter.²⁵ In fact, by contrast, the three constitutions that the country has had since 1833—the Constitution of 1833 that came after the civil war and the 1925 and 1980 charters that followed military coups—were drafted by elite individuals that did not represent the bulk of the citizenry. Despite the safeguards and limits exhibited by Chile's first constituent process, apocalyptic voices emerged from the conservative field and announced the final decadence of the country if the “Approve” option prevailed in the referendum. From the other end of the political spectrum, radical leftists complained that the constituent process imposed too many limits to the sovereign power of the Convention, in particular, the quorum of two thirds of the constituent body members to include elements in the new charter.²⁶

IV. A PARTISAN CONSTITUTIONAL CONVENTION

After the delays caused by the COVID-19 pandemic, on October 25, 2020, the entry referendum finally took place. Amidst the fear of contagion and the restriction imposed by the government authorities, Chileans overwhelmingly approved the option of having a new constitution. Almost 80 % of those who voted chose this option, while only 18% voted against a new charter.²⁷ A similar percentage opted for an entirely elected body to do the drafting. The results were not surprising, given that only the far right *Republicanos* and the UDI Party called to reject a new constitution, while the remaining left, center-left, and a sizable portion of the right, supported the “Approve” option.²⁸ At any rate, the night of the entry referendum, all the political actors started to mobilize for the election of the Convention members, which was set to happen in May 2021. In the case of the right, conscious of the hostile political environment that they faced since the October 2019 uprising, their key goal was to get at least one third of the Convention to be able to exercise a veto power on each of the clauses of the new constitution.²⁹

²⁵ See PABLO RUIZ-TAGLE, *FIVE REPUBLICS AND ONE TRADITION: A HISTORY OF CONSTITUTIONALISM IN CHILE 1810-2020* (Mark Fathi Massoud et al. eds., Ana Luisa Goldsmith trans., 2021).

²⁶ See Camila Vergara, *The Oligarchic Takeover of the Constituent Process*, 54 N. AM. CONG. ON LATIN AM. – REP. ON AM.'S 453, 453-57 (2022).

²⁷ See PAMELA FIGUEROA, *CONST. REFERENDUM DURING THE COVID-19 PANDEMIC: THE CASE OF CHILE 14* (2021).

²⁸ See Paula Molina, *Plebiscito histórico en Chile: apruebo o rechazo, las opciones que tenían los chilenos en el referendo de cambio de Constitución [Historic plebiscite in Chile: approve or reject, the options that Chileans had in the referendum to change the Const.]*, BBC NEWS MUNDO (Oct. 22, 2020), <https://www.bbc.com/mundo/noticias-america-latina-54613149>.

²⁹ See Alejandra Jara, *Delgado y escenario de que Chile Vamos supere el tercio en la Convención Constitucional: “Estamos convencidos de que el trabajo*

After a campaign interrupted by constant lockdowns, on May 15th and 16th of 2021, Chileans elected 155 members to the Constitutional Convention. The results shocked both political parties and analysts, not just because the right failed to get at least one third of the seats of the Convention, but also due to the stunning results obtained by independents, who had been allowed to run in national lists and pacts for the first time in Chile's electoral history.³⁰ Correspondingly, 105 out of the 155 elected members were independents.³¹ Aside from the surprising dominance of independents, the second most consequential feature of the May 15th and 16th election was how successful the left and left-leaning candidates did, by getting around three-fourths of the seats of the Convention. Despite the fact that the results represented a significant left-turn in a country that (only a couple of years before) had elected a center-right President, the left had almost complete control of the constitution making body. Having said this, the fact that the left was highly fragmented in different groups represented a formidable challenge to agree on a draft. One way to look at the results of the election of the constitution making body of Chile's first constituent process, is that it was the electoral expression of the social uprising, and that it marked an unprecedented presence of voices that had traditionally been marginalized from the governmental structures.³² This is a reasonable reading of it, but this needs to be combined with the realization that the election of May 2021 also delivered a highly fragmented body with an unprecedented dominance of independents who were heavily divided by different single-issues platforms. This highly unusual electoral outcome created different interpretations of the new constituent process. Thus, while some right-wing leaders declared that the radical left was the dominant group, more objective analysts noted that within the Convention there was not a cohesive left, but that there were many "lefts." Further, these non-cohesive lefts had very different approximations to both the procedural rules governing the constituent process and the content they thought the

de la coalición va a lograr ese objetivo" [Delgado and scenario that Chile Vamos surpasses the third in the Const. Convention: "We are convinced that the work of the coalition will achieve that objective"], LATERCERA (May 15, 2021, 8:04 AM), <https://www.latercera.com/politica/noticia/delgado-sobre-escenario-de-que-chile-vamos-supere-un-tercio-de-la-convencion-constitucional-estamos-convencidos-de-que-el-trabajo-de-la-coalicion-va-a-lograr-ese-objetivo/OCAA3UCSDFEF5AOPBUFAZYEGAU/>.

³⁰ See Claudia Heiss, *Latin America Erupts: Re-Founding Chile*, 32 J. DEMOCRACY 33, 43 (2021).

³¹ This feature of the electoral outcome would prove to be decisive in the failure of this first serious attempt to get a new constitution. See *id.*; Daniel Zovatto, Maria Jaraquemada, *Analysis of the elections in Chile*, INT'L IDEA, (May 25, 2021), <https://www.idea.int/news/analysis-elections-chile>.

³² See John Bartlett, 'A new Chile': political elite rejected in vote for constitutional assembly, THE GUARDIAN, (May 18, 2021, 4:00 PM), <https://www.theguardian.com/world/2021/may/18/a-new-chile-political-elite-rejected-in-vote-for-constitutional-assembly>.

new constitution ought to have.³³ Thus, for example, while the truly radical left within the Convention (the so-called “Lista del Pueblo” and the Communist Party) called a few weeks after the election to disregard the limits imposed on the constitution making body, they argued that the Convention should have the “*full autonomous power*” that comes with the exercise of “*the original constituent power*.”³⁴ The moderate left supported the meticulous respect for the rules set by Congress for the constituent process.³⁵ While the differences within these two lefts would continue for the entire operation of the Convention, most of the time the moderate left prevailed. For example, it managed to get the rules of procedure to reproduce the constitutional requirement that each clause should be approved by two thirds of the members of the Convention, although the Communist Party and other radical left groups tried to disregard that rule until the first clause was voted in the Plenary.³⁶

Aside from the differences between the two lefts that dominated the Convention, when combined, they had over two thirds of the seats thereby representing an electoral anomaly in Chile. In fact, the May 2021 election delivered a radical outcome for Chile’s historical standards, and this became self-evident when, only a few months later, a legislative election produced a very different outcome than the election of convention members.³⁷ Indeed, the November 2021 elections gave the right significantly more representation (over 33%) than they did in the May 2021

³³ See MARÍA CRISTINA ESCUDERO & ALEJANDRO OLIVARES L., *THE SOCIAL OUTBURST AND POLITICAL REPRESENTATION IN CHILE 178-79* (Bernardo Navarrete & Victor Tricot eds., 2021).

³⁴ The statement ended by saying, “We call to make effective the popular sovereignty of the constituent, expressed both in the rules of procedure and in the regulations to be given, without subordinating ourselves to an Agreement for Peace that the peoples never subscribed.” See Francisca Mayorga, 34 constituyentes plantean 6 “garantías democráticas” para la Convención y que ésta no se debe subordinar a reglas del Acuerdo del 15/N [34 *constituents propose 6 “democratic guarantees” for the Convention and that it should not be subordinated to the rules of the 15/N Agreement*], LATERCERA, (June 8, 2021 7:02 PM) (Chile) (author’s translation), <https://www.latercera.com/politica/noticia/34-constituyentes-plantean-6-garantias-democraticas-para-la-convencion-y-que-esta-no-se-debe-subordinar-a-reglas-del-acuerdo-del-15n/KYS4C4K7BJABHA3SEMIHOD4ZZY/>.

³⁵ The defense within the moderate left of the two thirds rule to approve each clause of the text to be drafted by the Convention (which was established by the constitutional amendment enabling the first constituent process) was done by one of the most important leaders of this group, conventional Fernando Atria. See Federico Joannon, *Fernando Atria, constituyente: “La regla de los dos tercios crea condiciones para que por primera vez en 30 años haya un genuino gran acuerdo”* [Fernando Atria, *constituent: “The two-thirds rule creates conditions so that for the first time in 30 years there is a genuine great agreement”*], ELMOSTRADOR, (May 26, 2021) (Chile) (author’s translation), <https://www.elmostrador.cl/destacado/2021/05/26/fernando-atria-constituyente-la-regla-de-los-dos-tercios-crea-condiciones-para-que-por-primera-vez-en-30-anos-haya-un-genuino-gran-acuerdo/>.

³⁶ See Paul Follert, *Las otras normas que impactan en el quórum de 2/3 aprobado por la Convención* [The other norms that impact the 2/3 quorum approved by the Convention], PAUTA, (Sept. 29, 2021) (Chile), <https://www.pauta.cl/actualidad/2021/09/29/donde-impacta-quorum-dos-tercios-reglamento-convencion-constitucional.html>.

³⁷ See OLIVIER DABÈNE, STÉPHANIE ALENDA & JAVIERA ARCE-RIFFO, *LATIN AMERICA’S PENDULAR POLITICS, ELECTORAL CYCLES AND ALTERNATIONS 49-54* (Olivier Dabène ed., 2023).

election (less than 24%), while giving the centrist parties their usual share of the vote (around a third of the total), instead of the meager 15% they had in the election for the Convention. These results, which should have been a warning sign to the left and center-left who dominated the Convention, were not taken seriously, except by President elect Boric, who visited the Convention in December and gave a speech specifically directed at the hegemonic leftist forces. He stated, “I do not expect in any case a partisan Convention, at the service of our government, because it is not what corresponds. The Convention goes beyond the conjuncture.”³⁸

Regrettably, Boric’s discourse went largely unheard, not merely among the most radical groups of the independent left and the Communist Party, but also by many associates of the moderate left, who thought the congressional election in November 2021 was exceptional (and not that of the members of the Convention). The reason behind the resistance of even close allies of the President to accept the possibility that the electoral results of May 2021 could have been the anomalous one, and therefore Boric’s call for a non-partisan new constitution was the prudent thing to do, rested in the conviction of the former that Chile had initiated on 2019 a new historic cycle that demanded a charter committed to social and political transformation, instead of a non-partisan compromise. This interpretation is apparent in the following statement issued by the first Vice-president of the Constitutional Convention, Jaime Bassa:

I believe that we are at a very important historical moment of a change of cycle. That neoliberal cycle that began to be forged in the 50s and 60s with those agreements between the Chicago School and the Business School of the Catholic University, and the model that was installed after the coup d'état and that unfolded its effects during the 80s and the last thirty years until the revolt. I believe that the milestone of October 2019 is preceded by a cycle of previous important protests: the feminist May 2018, the student revolt of 2011, the pingüinazo of 2006, the environmental demands of 2010, among others. But the revolt marks a break of a form of social coexistence characterized by a certain mode of accumulation of wealth, of power, of capital, which in turn is the reflection of a form of accumulation of poverty, of discomfort and dispossession. *We are in a historical moment of change of cycle, in which that period marked by the radical overvaluation of the private begins to be progressively replaced by a vindication of the common, of the common goods, of nature, of the permanent institutions of the republic, such as the state*

³⁸ See Carlos Reyes P. and Monica Garrido, *Gabriel Boric tras reunión con Loncon: dice que no espera una “Convención partisana al servicio de nuestro gobierno” y que respetará lo que el órgano decida* [Gabriel Boric after meeting with Loncon: he says that he does not expect a “partisan Convention at the service of our gov’t” and that he will respect what the body decides], *LATERCERA* (Dec. 21, 2021 1:09 PM) (Chile) (author’s translation), <https://www.latercera.com/politica/noticia/gabriel-boric-tras-reunion-con-loncon-dice-que-no-espera-una-convencion-partisana-al-servicio-de-nuestro-gobierno-y-que-respetara-lo-que-el-organo-decida/DXHUI3S23NCZJMHB6NJ3HACP5U/>.

*universities, which put at the service of society, of the people, different forms of academic, ancestral, popular knowledge, and different forms of political and social relations.*³⁹

This statement by Frente Amplio, one of the most important leaders at the Convention, makes clear the enterprise in which he thought they were embarked was of historical transcendence, and that drafting a text after a compromise with the diminished right-wing was out of question.

V. THE POLITICAL DYNAMICS OF THE FIRST CONSTITUENT PROCESS

As scheduled in the constituent process itinerary, on July 4, 2021, the Convention held its inauguration with a chaotic ceremony, announcing some of the problems that would delegitimize it before large portions of Chile's electorate. What saved the day was electing Elisa Loncón, a woman belonging to the reserved seats for indigenous peoples, as President of the Convention. Loncón became the highest ranking public official belonging to an indigenous group in the history of the country.⁴⁰

Soon after the inauguration of the Convention, its members started to work on drafting the rules of procedure, a task that would prove to be much more difficult than anticipated. The drafting process took almost four months out of the maximum, which is twelve, that the Convention was allocated to complete its work. Given the overwhelming dominance of the radical and center-left groups in the Convention, in the days following the Convention's inauguration, some right-wing conventionalists started to immediately work to "reject" the option in the ratifying plebiscite. Given that the right lacked a veto power on anything approved by the radical and moderate left, the most conservative members of the right began to prepare arguments to persuade voters in the exit referendum. This strategy, which seemed far-fetched at the time given the large electoral defeat experienced by the right, proved to be successful in the end, in no small part due to a series of attitudes exhibited by the most radical groups of independents, who not only displayed extravagant behaviors that would eventually cause a steep fall in the reputation of the Convention as a whole, but also forced the moderate left to accept clauses that were far too radical for the Chilean electorate as a whole. Aside from the latter, many Chileans were shocked by the partisan attitude displayed by some members of the dominant groups in the Convention. For this

³⁹ Jennifer Abate, *Elisa Loncon y Jaime Bassa: Una diversidad que está cambiando la historia* [*Elisa Loncon and Jaime Bassa: A diversity that is changing history*], PALABRA PUBLICA, (Sept. 9, 2021) (Chile) (author's translation), <https://palabrapublica.uchile.cl/elisa-loncon-y-jaime-bassa-una-diversidad-que-esta-cambiando-la-historia/>.

⁴⁰ See Paula Huenchumil Jerez, *Cuerpos racializados en espacios de poder: mujeres mapuche en la Convención Constitucional y su impacto mediático* [*Racialized bodies in spaces of power: Mapuche women at the Convention Const. and its media impacts*], 31 REVISTA TEMAS SOCIOLOGICOS, 79, 79-106 (2022) (Chile).

reason, Chileans regarded this as antithetical to the spirit of dialogue and unity that, *they thought*, ought to prevail in a constituent body. One example of such attitude happened just days after the election of the members of the Convention, when one of the most voted members of the Convention, Daniel Stingo, stated in national television that:

Here the right wing did not win . . . it now has a minority. We are going to advance the big issues because we represent the people. Those of us who won represent the people . . . we are going to make the big agreements and . . . the others will have to join in. Those of us who are not [right-wing], to make it clear, so that we do not start going around in circles.⁴¹

Conventional Stingo was not a member of the radical left, but an independent conventional close to the Frente Amplio list, where President Boric's coalition made things worse. Even if a relatively moderate member of the dominant groups of the Convention exhibits such partisan attitude, the right-wing members of the Convention had reason to believe that there would be little space to engage in a constructive negotiation with the left.

A couple of months after the Convention started, a scandal shocked the country in ways that would prove to be catastrophic to this first constituent process. A journalistic investigation revealed that one of the most charismatic members of the radical independent group, Lista del Pueblo, Rodrigo Rojas Vade, had lied about being a cancer patient—the very condition he had based his campaign upon. The campaign focused on the need to ensure a robust right to health in the new constitution, so people like him would get affordable treatment for his conditions.⁴² When Rojas Vade confessed that he had lied to voters, and that he had never had such condition, the credibility of the entire Convention, which until then had been very high in the eyes of regular Chileans, began eroding.⁴³ Given that the very support for independent candidates came from distrust of traditional parties, the fact that a posterchild of party independence would have been involved in such an elaborate scheme to deceive voters into supporting him let down

⁴¹ Daniel Stingo, *el constituyente más votado*: “Nosotros vamos a poner los grandes temas (...) Aquí no ganó la derecha” [Daniel Stingo, the most voted constituent: “We are going to raise the big issues (...) The right did not win here”], ELM-STRADOR, (May 24, 2021) (Chile) (author's translation), <https://www.elmostrador.cl/dia/2021/05/24/daniel-stingo-el-constituyente-mas-votado-nosotros-vamos-a-poner-los-grandes-temas-aqui-no-gano-la-derecha/>.

⁴² See Rodrigo Rojas Vade: *el escándalo en Chile después de que el constituyente reconociera que mintió sobre su diagnóstico de cáncer* [Rodrigo Rojas Vade: the scandal in Chile after the constituent acknowledged that he lied about his cancer diagnosis], BBC NEWS MUNDO, (Sept. 6, 2021), <https://www.bbc.com/mundo/noticias-america-latina-58464987>.

⁴³ At this point, it is worth noting that, even after the Rojas vade affair, the Convention continued to be better evaluated than other political institutions in the country, a tribute to the hope that people still place in it, in the midst of a generalized crisis of the established powers. See Aldo Mascareño and Pablo A. Henríquez, *No eres tu, so yo. La montana rusa convencional* [It's not you, it's Me. The conventional roller coaster], (Feb. 18, 2022) (Chile) (author's translation), <https://c22cepchile.cl/publicaciones/no-eres-tu-soy-yo-la-montana-rusa-convencional/>.

millions of Chileans who started to distance themselves from the Convention and the constituent process as a whole.

After the “Rojas Vade” scandal, the focus turned to the congressional and presidential elections of November 2021. As we have anticipated above, the outcome of those elections was very different from that of the election of conventionals (that had taken place only a few months earlier, in May 2021), with the right-wing and centrists parties getting the electoral support that they had traditionally gotten (around 36% each of them), while the left received around 33% of support (or half as much as in the Constitutional Convention election).⁴⁴ More shockingly, the far-right candidate (José Antonio Kast) won the first round of the presidential election, forcing left-wing candidate, Gabriel Boric, to moderate its discourse in order to prevail in the second round.⁴⁵

The results of the November 2021 elections convinced the bulk of the right-wing members of the Convention that the strategy for preparing the ground to call and reject the text was the best one. Although conventional leftists realized that a negotiation with the right was needed, they couldn't convince the radical left. It was in this context that, by early 2022, the Convention started to draft the text of the new constitution.⁴⁶ Thus, in mid-February, the Plenary approved the first clause of the text—which encouraged the left, who managed to organized a very fragmented group of left-wing party members and independents to get the required two-thirds of the Convention to vote in the same direction.⁴⁷ The right saw this outcome with concern, because it meant that the left could go ahead and write a text of its liking without a single vote of theirs.⁴⁸ Soon after, the mainstream media started to closely cover some very radical proposals submitted at the different committees of the Convention (such as the emblematic proposal to install in Chile a political system inspired by the Soviet Union, or the nationalization of the entire privately owned copper mining industry). This coverage would prove to be crucial to scare away moderate voters, even though most of those radical clauses were never approved.⁴⁹

The crucial point for Chile's first constituent process would come in March 2022, when the Plenary adopted what appeared to be (in the eyes of many Chileans) an excessively “indigenist” constitutional proposal. In this context, the initial empathy generated by a Mapuche woman leading such a relevant entity, gradually evolved into a dissatisfaction with what appeared in the eyes of many voters as a proposal that was too focused on the rights of the indigenous peoples. In fact, expressions such as the “Plurinational State” alienated many voters, because it was perceived as a threat to the integrity and unity of the State and to

⁴⁴ See Guillermo Larrain et. al., *How not to write a constitution: lessons from Chile*, 196 PUBLIC CHOICE 233, 238 (2023), <https://link.springer.com/content/pdf/10.1007/s11127-023-01046-z.pdf>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 243.

national identity.⁵⁰ This concern had no basis in constitutional terms, but played a destabilizing role at the symbolic level, since it led many people to consider that plurinationality implied the disintegration of the Chilean State.⁵¹ Something similar happened with a proposal of the Political System Committee that included a sort of “triumvirate” combining a President of the Republic accompanied by a Vice-President and a Cabinet Minister (which some expected to evolve into a sort of de facto Prime Minister). In a country with a deep-rooted presidential tradition, the proposal generated high levels of perplexity and alienation that—even though eventually discarded—contributed to give plausibility to the invective of the opponents of the process to the effect that it was a “delirious” proposal (something which further discredited the Convention in the eyes of public opinion).⁵² A third controversial proposal—this time actually adopted by the Plenary— was a clause constitutionalizing the right to abortion, providing different Christian churches and movements with a single crucial motive to reject the entire draft of the Constitution.

In April 2022, a few weeks after the abovementioned proposals became the focus of a national debate, the opinion polls showed— for the first time—that the “Reject” option was ahead of the “approve” one.⁵³ Immediately after these polls were published, and while the radical left groups of the Convention tried to raise suspicions regarding the reliability of those polls (or to attribute the unexpected results to communication problems), President Boric threw out these attempts to deny reality, pointing out that the Convention should seek:

[T]he greatest transversality and breadth possible, to build a Constitution that will be a meeting point . . . for Chilean men and women. And that implies that we have to give ourselves space to reflect, to think so that the agreements are broader than what they have been so far *in order to modify whatever needs to be modified*⁵⁴

⁵⁰ See *Id.* at 239.

⁵¹ The fact that the group of experts sent by the Venice Commission found nothing anomalous in adopting plurinationality, or in establishing a specialized justice instance to resolve some controversies generated within indigenous communities (having the Supreme Court as the final reviewing instance, as is the case of what was finally approved by the Convention) did not change the perception that the Convention was being too “indigenist.” Eur. Consult. Ass., *Chile-Opinion on the Drafting and Adoption of a new Constitution*, 130th Sess., Doc. No. 4 (2022), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)004-e).

⁵² See Larrain et. al., *supra* note 44, at 240.

⁵³ See Meritxell Freixas, *Aumenta el rechazo a la nueva Constitución de Chile, según los sondeos* [*Rejection of Chile’s new Constitution is on the Rise, polls show*], ELDIARIO.ES (Apr. 29, 2022),

https://www.eldiario.es/internacional/aumenta-rechazo-nueva-constitucion-chile-sondeos_1_8910998.html.

⁵⁴ Boric pide “modificar” lo que sea necesario para lograr aprobar Carta Magna [*Boric Asks to modify whatever is necessary to approve the Magna Carta*], SWISSINFO.CH (Apr. 5, 2022) (Chile) (author’s translation), https://www.swissinfo.ch/spa/chile-constituci%C3%B3n_boric-pide--modificar--lo-que-sea-necesario-para-lograr-aprobar-carta-magna/47493952.

Thus, with only three months left for the Convention to conclude its work, for the first time the specter of a failed constituent process appeared in the scenario. Contributing to the climate of confusion, actors who—until a few months before—were favorably disposed to the work of the Convention began to distance themselves from it. This was the case of “Amarillos” movement (which gathered former center-left politicians and intellectuals) that in June of 2022, made a public call to reject the proposal elaborated by the Constitutional Convention antithetical on the grounds that, “The basic structure of the draft seems to us to be out of touch with reality.”⁵⁵

At this juncture, the question rose as to how to confront the risk that the constituent process might fail, after three years of work.⁵⁶ The first option was that the groups dominating the Convention echoed the call of President Boric and moderated the tenor of the proposals they were elaborating, in order to allow a large electorate group to approve the text of the new constitution in the exit referendum.⁵⁷ In that scenario, the hegemonic forces of the Convention would have to sacrifice some of their aspirations, with the aim of ensuring that important achievements would materialize in a new charter, as a result. As an alternative scenario, only moderate leftists would follow the presidential recommendation, but radical groups would bet that, even with an extreme text, they could prevail in the ratification plebiscite.⁵⁸ The fact that the moderate left failed to persuade the radical left on the risks of failing to prevail in the exit referendum sealed the fate of the process, as we shall see now.

In the final weeks of the campaign for the exit referendum, Chile exhibited a highly polarized environment, coupled with numerous fake news reports regarding the actual content of the draft. In this context, a significant portion of the center-left who supported the “Reject” option seemed to have been decisive for the final outcome, and in what represented a savvy strategy deployed

⁵⁵ In the letter, this group of former center-left politicians and intellectuals declared that: “We voted with hope in the approval and we hoped that the Constitutional Convention would propose to the country a constitution that would gather the demands (...) a constitution that would unite us and that would be profoundly democratic, *but we have read the constitutional text very carefully, we have been attentive to the corrections and we have not found any fundamental transformations. The basic structure of the draft seems to us to be out of touch with reality.*” *Amarillos por Chile llaman a votar Rechazo en el plebiscito de salida* [Yellows for Chile Call for a Vote Rejection in the Exit Plebiscite], DIARIO UCHILE (June 25, 2022) (author’s translation), <https://radio.uchile.cl/2022/06/25/se-definieron-amarillos-por-chile-llaman-a-votar-rechazo-en-el-plebiscito-de-salida/>.

⁵⁶ *Boric pide “modificar” lo que sea necesario para lograr aprobar Carta Magna* [Boric Asks to modify whatever is necessary to approve the Magna Carta], *supra* note 54.

⁵⁷ *See id*; Javier Couso, *Tides of Change: Analyzing the Power Shift in Chile’s Constitutional Process*, CONSTITUTIONNET (May 14, 2023), <https://constitutionnet.org/news/tides-change-analyzing-power-shift-chiles-constitutional-process>.

⁵⁸ *See* Meritxell Freixas, *Rejection of Chile’s New Constitution is On the Rise, Polls Show*, ELDIARIO.ES (Apr. 29, 2022), https://www.eldiario.es/internacional/aumenta-rechazo-nueva-constitucion-chile-sondeos_1_8910998.html; Couso, *supra* note 57.

by the Chilean right, their most well-known leaders left the public arena in the last weeks of the campaign, leaving traditional centrist politicians to lead the campaign to “Reject.”⁵⁹

On September 4, 2022, the exit referendum finally took place, and the results were nothing short of shocking, not because of the fact that the “Reject” option prevailed, but due to the astonishing margin by what it did—almost 62% supported the rejection, while only 38% “Approved.”⁶⁰ The surprising results of the exit referendum represented an electoral conservative reaction to the uprising which, furthermore, put into question the interpretations done by politicians and analysts to the meaning of the social uprising.⁶¹ Was it possible that the uprising and its electoral expression, on May 2021, was representative of only the half of the Chileans who mobilized in the street and voted when suffrage was not mandatory? Could it be that forcing the half of the electorate who had never participated in politics before made millions of more conservative Chileans tip the balance into a very different ideological direction? Or was the September 4th plebiscite the expression of the fact that a large majority of voters were scared away by a draft that was too radical for most Chileans? These questions are still being discussed. In the next section I offer my own take on what went wrong with Chile’s first attempt to adopt a new constitution.

VI. EXPLAINING THE FAILURE OF CHILE’S FIRST CONSTITUENT PROCESS

Even though a thorough understanding of the causes of Chile’s failure to get a new constitution require more time and data, it is possible to advance some hypotheses that can account for what happened. I believe the key factor that explains the failure of the process is the fact that in May 2021, the Convention elected an absolute majority of independents among its members.⁶² This feature of the constituent body, which was celebrated in Chile at the time, contrasts with most successful cases of democratic constitution building in recent decades, where political parties were in control of constituent bodies.⁶³

The predominance of independents in Chile’s Constitutional Convention generated two crucial problems, one at the time of the election of its members, the other during the process of adopting a new constitutional text. First, the presence of a significant portion of independent candidates prevented voters from knowing in advance their ideological orientation, which in turn, led to a

⁵⁹ See Larrain et. al., *supra* note 44, at 241.

⁶⁰ See *Chile Overwhelmingly Rejects Progressive New Constitution*, REUTERS (Sept. 5, 2022), [https://www.reuters.com/world/americas/chileans-head-polls-decide-progressive-new-constitution-2022-09-04/#:~:text=SANTIAGO%2C%20Sept%204%20\(Reuters\),the%20world's%20most%20progressive%20charters](https://www.reuters.com/world/americas/chileans-head-polls-decide-progressive-new-constitution-2022-09-04/#:~:text=SANTIAGO%2C%20Sept%204%20(Reuters),the%20world's%20most%20progressive%20charters).

⁶¹ *Id.*

⁶² See Larrain et. al., *supra* note 44, at 236-37.

⁶³ See *id.* at 234.

Convention with a more leftist outlook than that of the median Chilean voter.⁶⁴ In other words, the rules allowing independent candidates to run on national lists led to the election of candidates with attractive personal characteristics, but with more radical positions than what most voters assumed. Critically, the ideological divergence between the Convention and the median voter had a very tangible and eventually devastating impact on the failure of the whole process. The adoption of certain constitutional proposals were just too radical for most Chileans, such as the recognition of “nature” as holder of fundamental rights; the recognition of a full-fledged right to abortion in a country that, only a few years earlier, had managed to decriminalize just three indications of abortion; or the adoption of a form of plurinationalism and indigenous justice that many saw as a menace to the integrity of the State and equality before the law.⁶⁵ Thus, even though the core of the proposed Constitution was largely in line with the main tenets of a liberal democratic republic (in no small measure due to the moderating effect that the required quorum of two thirds of the members of the Convention to adopt each constitutional clause had), the existence of some norms that were either too radical for the bulk of the population, or perceived as alien to Chile’s constitutional tradition, generated enough opposition to the project, resulting in rejection.⁶⁶

The dominance of independents within the Convention generated a second problem: the almost nil political and legislative experience of most of its members. This was especially marked in the group of radical independents, which led to their refusal to negotiate with right-wing conventionals (in fact, the very notion of negotiating was associated in the imagination of the independent left with lack of integrity).⁶⁷ Furthermore, the legislative and political inexperience exhibited by the radical and moderate left translated into the inability to reconsider previously adopted decisions in light of relevant changes in circumstances.⁶⁸ For example, the hegemonic groups within the Convention failed to decisively change their course of action when, in the last week of March, opinion polls showed for the first time that the “Reject” option was outperforming the “Approval” option.⁶⁹ The Convention's leaders decided to maintain the course of action in utter denial of political realism, betting that opinion surveys were inaccurate or that citizens' attitudes would shift in favor of the Convention's decisions. While this is obviously counterfactual, it can be speculated that a politically-experienced leadership would have taken drastic measures in light of the new scenario. For example, they could have changed the Rules of Procedure in order to open negotiations with the right regarding revising norms

⁶⁴ See *id.* at 241.

⁶⁵ See *id.* at 239.

⁶⁶ See *id.*; *Chile Overwhelmingly Rejects Progressive New Constitution*, *supra* note 60.

⁶⁷ See Larrain et. al., *supra* note 44, at 241.

⁶⁸ See *id.* at 237.

⁶⁹ See *id.* at 237 fig.1.

already adopted by the Plenary, but considered unacceptable by the latter, aiming to secure at least moderate members of the right—who could have called for approving the new constitution at the referendum. Instead, the bulk of the left remained in denial regarding the crude fact that the “Reject” was steadily ahead in the opinion polls.⁷⁰

As related to this last point, the sense held by most leftists’ conventionals—that the exit referendum could not be lost—led the moderate left to focus their efforts in securing the agreement of the radical left. This was to get the two-thirds quorum required to adopt each clause of the new constitution, which prevented the former from engaging in a productive dialogue with the moderate right, because of the perception that entering into deals with the latter could endanger the agreements secured with the radical left.⁷¹ Given that the latter could decisively contribute to get the two thirds quorum, the moderate left was willing to “sacrifice” engaging with the moderate right if that endangered their alliance with the radical left.⁷² As one influential moderate left conventional recognized, soon after the exit referendum this strategy proved useful to produce a constitutional text, but it cost the Convention the exit referendum.⁷³

Another factor that contributed to the failure of Chile’s constituent process was the excessively rigid Rules of Procedure

⁷⁰ See *id.* at 239-40.

⁷¹ See *id.* at 242; FERNANDO ATRIA, EL PROCESO CONSTITUYENTE Y SU FUTURO DESPUÉS DEL PLEBISCITO [THE CONSTITUENT PROCESS AND ITS FUTURE AFTER THE PLEBISCITE] 17 (LA CASA COMÚN, n.d.) (Chile), https://www.lacasacomun.cl/_files/ugd/0626d9_8d40ab447d4e444d8cc93310d4cab8fb.pdf.

⁷² See ATRIA, *supra* note 71.

⁷³ Fernando Atria provided a revealing explanation, from conventional Frente Amplio, who expressed the following: “*The Constitutional Convention had to operate under adverse conditions that it did not choose: extreme initial distrust among its members, with no political articulation external to the Convention (which in different circumstances the parties could have provided), with a composition that implied that the two-thirds bloc capable of proposing a new Constitution to Chile could only be built in conversation with the collectives of independents which represented groups that understood themselves to be traditionally excluded and who then did not exactly arrive grateful for their inclusion. In this context, our participation was always aimed at ensuring that the Convention would be successful in an immediate sense: that it would succeed in presenting the country with a proposal for a new Constitution . . . In retrospect, would I have done anything differently? Of course I would have. Aware that it was a mistake to exclude the right from the conversation, we made several attempts to include it. We always assumed, however, that these attempts had a limit: they could not put at risk the 2/3 articulation that could give us a new Constitution. This limit was very real and decisive for collectives with whom we needed to talk. Even from our own coalition, Apruebo Dignidad, the FA+ was denounced for ‘talking with the right’.* But now we know that achieving this articulation of 2/3 with the exclusion of the right wing was a success in the Convention *but a failure with a view to the plebiscite*, and that we should have insisted on the need to broaden the conversation. What could we have done for that? Simply refused to continue. This would have jeopardized the development of the Convention, because there were sectors that did not feel a greater responsibility for advancing the proposal for a new Constitution, but rather were seeking to make their own demands visible. *Today, with the clarity that hindsight allows that retrospective view allows, I believe that it was a risk that we should have taken.*” See *id.* at 3-5 (author’s translation).

adopted by the Convention. The fact that the Rules of Procedure contemplated the approval, article by article, of the constitutional text by the Plenary, made it impossible to reconsider what had already been approved by the latter. Thus, negotiations were precluded at the final stages of the process, when it became clear that some clauses approved by the Plenary were simply unacceptable to both right-wing conventioners, and more critically, to relevant segments of Chilean society.

Finally, it is worth mentioning that fake news was also a factor that played a role in the defeat of the “Approve” option.⁷⁴ Given, that Chile’s exit referendum took place after Donald Trump massively deployed the use of fake news in the 2016 presidential election, most right-wing parties got inspiration in the latter and deployed fake news regarding the content of the draft approved by the Convention—a task facilitated by inherent difficulty of understanding a complex and extensive constitutional text containing 388 clauses whose meaning could be easily distorted.⁷⁵ An example of fake news that proved to be particularly effective in mobilizing the “Reject” vote was the supposed infringement that the draft inflicted on the property rights of Chileans over their own houses and apartments, as well as on pension funds.⁷⁶ However, it would be a mistake to attribute fake news to a decisive role in what was a result generated by various factors, such as those mentioned above.

VII. THE NEGOTIATIONS LEADING TO CHILE’S SECOND CONSTITUENT PROCESS

Immediately after the rejection of the draft presented by the Convention in the exit referendum of September 4, 2022, the political system reacted with an array of different approaches. President Boric went on national television announcing that the government would propitiate an agreement among all the political forces to start a second constituent process that would provide voters with a draft that most Chileans could agree with.⁷⁷ The (until then) absolutely absent leader of the Republican party, José Antonio Kast, reappeared on the national stage that same night,

⁷⁴ *See id.* at 8-9.

⁷⁵ *See id.*

⁷⁶ *Chile Overwhelmingly Rejects Progressive New Constitution, supra* note 60.

⁷⁷ President Boric stated the following: “In Chile, institutions work, democracy is more robust. We must listen to the voice of the people. Chilean men and women have demanded a new opportunity to meet and we must live up to this call. *Therefore, I am committed to do my best to build together with the Congress and the civil society a new constituent itinerary.* Society demands from our institutions that we work until we arrive at a proposal that interprets us all, that gives confidence.” Veronica Silveri Pazos, *Chile: Boric no desiste y pide un nuevo ‘itinerario constituyente’ tras el abrumador rechazo a la nueva Constitución [Chile: Boric does not give up and calls for a new “constituent itinerary” after the overwhelming rejection of the new Constitution]*, VOZMEDIA (Sept.5, 2022) (author’s translation), <https://voz.us/chile-boric-no-desiste-pide-nuevo-itinerario-constituyente-abrumador-rechazo-nueva-constitucion/>.

declaring the notion of getting a new constitution dead.⁷⁸ While the radical and most of the moderate left was in utter disbelief with the results.

The next weeks and months were marked by uncertainty about the prospect of having a second chance to get a new constitution.⁷⁹ While most of the traditional right was tempted to bury the whole thing (thinking that the social uprising of 2019 had just been a “nightmare” from which the country had fortunately awoken from), more experienced leaders, such as Javier Macaya (the President of UDI) were conscious that Chile’s current charter had been repudiated in the October 2020’s entry referendum; that was, at any rate, a highly dis-functional constitution, which made it hard to any President to deliver their electoral promises, due to the tendency that the electoral system has to deliver a fragmented Congress.⁸⁰ After months of negotiations, in the early days of December 2022, an agreement to start a second constituent process was formally announced by the bulk of the political parties.⁸¹ This time all political parties with congressional representation (from the Communist Party to the UDI) as well as the Amarillos movement, agreed on a second constituent process.⁸² The only parties that did not sign the agreement were the far-right *Republicanos* and the newly formed “*Partido de la Gente*,” a populist center-right party.⁸³ The terms of the agreement were, among others, the following:

1. The process would be not just procedurally regulated, but it would also include a set of twelve “principles” that would bound the bodies in charge of drafting a new text;
2. The new Constitution would be elaborated by a congressionally-designated “*Expert Committee*” of twenty-four members and by a popularly elected “*Constitutional Council*, of 55 members;”
3. The process would be much shorter than the previous one, starting with the designation of experts by Congress in January 2023 (and the opening of its deliberations in early March), which will then be followed by the election of the

⁷⁸ The leader of Chile’s far right Republican Party (and former presidential candidate in 2021, José Antonio Kast, stated on the night of the exit referendum that, “With their vote, millions of Chileans have closed the door to this failed constituent process.” See *Qué escenario se plantea en Chile tras el rechazo a la nueva Constitución* [What is the scenario in Chile after the rejection of the new Constitution?], EL UNIVERSO (Sept. 5, 2022) (author’s translation), <https://www.eluniverso.com/noticias/internacional/que-escenario-se-plantea-en-chile-tras-el-rechazo-a-la-nueva-constitucion-nota/>.

⁷⁹ See Larrain et. al., *supra* note 44, at 246.

⁸⁰ See *Qué escenario se plantea en Chile tras el rechazo a la nueva Constitución* [What is the scenario in Chile after the rejection of the new Constitution?], *supra* note 78.

⁸¹ Valentina Fuentes, *Chilean Political Parties Agree to Have Another Go at Rewriting Constitution*, BLOOMBERG (Dec. 12, 2022, 5:49 PM), <https://www.bloomberg.com/news/articles/2022-12-13/chile-will-try-to-write-a-new-constitution-for-a-second-time#xj4y7vzkg>.

⁸² See *REACTION: Chile’s New Constitutional Roadmap*, AMERICAS QUARTERLY (Jan. 11, 2023), <https://www.americasquarterly.org/article/reaction-chiles-new-constitutional-roadmap/>.

⁸³ See Couso, *supra* note 57.

Constitutional council on May 7, and the opening of its deliberations (in June), to end with a ratifying referendum in December, 17 2023;

4. Each new clause of the draft would have to be adopted by 3/5 of the Expert Committee and the Constitutional Council;
5. A special body, called "Technical Admissibility Committee" would make sure that the other bodies respect the twelve principles that govern the process;
6. There would be some mechanism of public participation, but much more restricted than the one in place in the first constituent process; and g) the rules of procedure would be put in place by Congress.⁸⁴

The announcement of an agreement to have a second constituent process was received with mixed reactions by Chileans.⁸⁵ After three years since the first process launched, many were tired of the constitutional debate. Others were still disappointed by the failure to approve a constitution a few months earlier. A third group was skeptical of the viability of a second process. At any rate, the constitutional amendment required to start the second process was duly approved on January 11, 2023⁸⁶ and the Expert Committee was inaugurated a few months later in March 2023.⁸⁷

The dynamics of the Expert Committee could not have been more different than the Constitutional Convention of 2021-2022.⁸⁸ Composed of a small group which included constitutional scholars, jurists from other areas, former politicians, and social scientists, the Committee started to work with a speed and a disposition to dialogue facilitated by the fact that there was a tie in terms of the ideological shape of the body (with twelve members leaning right, and twelve left).⁸⁹ The sheer fact of the political equilibrium of the Committee of Experts, and the uncertainty as to what would be the result of the May 7th election of the Constitutional Council members propitiated a spirit of consensus that allowed the Committee to elaborate a first draft that was fully endorsed by all twenty-four of its members. Considering that the draft agreed upon was signed by all the members of the Expert Committee (including the member of the Republican Party and one member of the

⁸⁴ See *Chilean Congress approves bill to launch new constituent process*, PEOPLE'S DISPATCH (Jan. 15, 2023), <https://peoplesdispatch.org/2023/01/15/chilean-congress-approves-bill-to-launch-new-constituent-process/>; Couso, *supra* note 47.

⁸⁵ See Larrain et. al., *supra* note 44, at 244-46.

⁸⁶ See *Chilean Congress approves bill to launch new constituent process*, *supra* note 84; *REACTION: Chile's New Constitutional Roadmap*, *supra* note 82.

⁸⁷ See Valentine Hilaire, *Chile starts second attempt to draft new constitution*, REUTERS (Mar. 6, 2023, 11:41 AM), [https://www.reuters.com/world/americas/chile-starts-second-attempt-draft-new-constitution-2023-03-06/#:~:text=SANTIAGO%2C%20March%206%20\(Reuters\),draft%20was%20installed%20on%20Monday.](https://www.reuters.com/world/americas/chile-starts-second-attempt-draft-new-constitution-2023-03-06/#:~:text=SANTIAGO%2C%20March%206%20(Reuters),draft%20was%20installed%20on%20Monday.)

⁸⁸ See Larrain et. al., *supra* note 44, at 236-40.

⁸⁹ See *id.* at 246.

Communist Party) most observers were optimistic for the prospect that Chile would finally get a new constitution.⁹⁰

VIII. THE UNEXPECTED TURN TO THE FAR RIGHT IN THE ELECTION OF THE CONSTITUTIONAL COUNCIL

On May 7th, 2023, Chileans once again went to the polls, this time to elect the members of the Constitutional Council—the entity charged with the task of drafting a new constitution based on a preliminary draft prepared by the Committee of Experts.⁹¹ In an astonishing reversal of fortune (after the first constituent process dominated by leftist parties and political movements), the far right Republican Party won a staggering thirty-five percent of the vote, securing twenty-two out of the fifty seats of the Council.⁹² This electoral outcome provided them with the power to veto any decision of the body (which required three-fifths, or thirty-one seats, to approve any clause of the constitutional draft).⁹³ Considering that the coalition of traditional right-wing parties secured eleven seats, the representation of the right in the Constitutional Council totaled thirty-four seats (or the equivalent to two-thirds of the Council).⁹⁴ This extraordinary domination of the Council would not only allow the right-wing parties to elaborate draft according to their will, but also to disregard any amendments proposed by the Expert Committee in the final stages of the process.⁹⁵ On the other side of the political spectrum, the leftist coalition of Socialists, Frente Amplio and Communists secured only sixteen seats (or about thirty percent of the total), which left them without the power to veto decisions of the right-wing parties.⁹⁶ The final seat was won by a member of Chile’s Indigenous population, who was elected in a parallel process, that immediately sided with the left.⁹⁷

The results just described were “nothing short of a political earthquake,” not only due to their likely impact on the second constituent process, but also because they signaled the unexpected rise of a far-right party as a dominant force in Chile.⁹⁸ The factors explaining the extraordinary electoral performance of the

⁹⁰ See *REACTION: Chile’s New Constitutional Roadmap*, *supra* note 82.

⁹¹ See Catherine Osborn, *Chile’s Constitutional Whiplash*, FOREIGN POLICY (May 12, 2023), <https://foreignpolicy.com/2023/05/12/chile-constitutional-council-election-results-rewrite-right-wing-boric-kast/>; *Chilean Congress approves bill to launch new constituent process*, *supra* note 84.

⁹² See Rocío Montes, *Chile’s far-right becomes main political force following Constitutional Council elections*, EL PAÍS (May 8, 2023), <https://english.elpais.com/international/2023-05-08/chiles-far-right-becomes-main-political-force-following-constitutional-council-elections.html>.

⁹³ Couso, *supra* note 57.

⁹⁴ Tom Phillips, *Chile: major blow to president as far right triumphs in key constitution vote*, THE GUARDIAN (May 8, 2023), <https://www.theguardian.com/world/2023/may/08/chile-constitution-committee-vote-jose-antonio-kast-gabriel-boric>.

⁹⁵ Couso, *supra* note 57.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* See also Phillips, *supra* note 94.

Republicanos in this critical election are complex and still a matter of debate, but there is growing consensus among observers that a key element was the party's ability to capitalize on the widespread dissatisfaction with a politically weak leftist government grappling with a combination of high crime, an immigration crisis and a period of unusually high inflation. Among these factors, the key one appears to have been the deep sense of insecurity related to organized crime, particularly connected with drug trafficking, in the months preceding the Council elections.⁹⁹ Indeed, in what represented something of a "perfect storm," gang members assassinated one policeman each week—for three consecutive weeks—in the month preceding the election.¹⁰⁰ In at least one of these killings, immigrants were involved, which lent credibility to the *Republicanos'* long-standing attack on immigration. The *Republicanos* campaign is thought to have been helped by these killings, combined with the generalized public outrage generated by President Boric's decision to pardon a group of individuals who were convicted for crimes perpetrated in the 2019 social uprising, but were later found to have common criminal records.¹⁰¹ Although the May 7th election was held for the specific goal of electing a body that will draft a new constitution, it is clear that in the end it was "captured" by the prevailing social, economic and political issues.¹⁰² This was already apparent in the television and radio campaigns that preceded the election, which rarely addressed actual constitutional debates, but focused on the law, order, and immigration crises facing Chile.¹⁰³ Such was the emphasis on these issues that one important opposition leader stated that the election was effectively a referendum on the government's performance.¹⁰⁴

⁹⁹ Couso, *supra* note 57. See also Osborn, *supra* note 91 (citing Brian Winter, *In Chile and Elsewhere, Crime Is The New Corruption*, AMERICAS QUARTERLY (May 8, 2023), <https://www.americasquarterly.org/article/in-chile-and-elsewhere-crime-is-the-new-corruption/>); Fuentes, *supra* note 52; Rocío Montes and Ana María Sanhueza, *Detenidos dos de los implicados en el asesinato a sangre fría de un policía en Chile* [Two of those involved in the cold-blooded murder of a police officer in Chile have been arrested], EL PAÍS (Apr. 10, 2023, 4:16 PM), <https://elpais.com/chile/2023-04-10/detenidos-dos-de-los-implicados-en-el-asesinato-a-sangre-fria-de-un-policia-en-chile.html>; Larrain et. al., *supra* note 44 at 246.

¹⁰⁰ Francisca Prieto, *Tercera muerte de un carabinero en 23 días impacta al país: Gobierno anunciará medidas y campaña pasa a segundo plano* [Third death of a police officer in 23 days impacts the country: Government will announce measures and campaign takes a backseat], EMOL (Apr. 6, 2023), <https://www.emol.com/noticias/Nacional/2023/04/06/1091483/muerte-carabineros-palma-medidas-gobierno.html>.

¹⁰¹ Couso, *supra* note 57. See also Rocío Montes, *La polémica por los indultos en Chile fuerza la dimisión de la ministra de Justicia y del jefe de Gabinete de Boric* [The controversy over pardons in Chile forces the resignation of the Minister of Justice and Boric's Chief of Staff], EL PAÍS (Jan. 7, 2023, 3:30 PM), <https://elpais.com/internacional/2023-01-07/dimite-la-ministra-de-justicia-de-chile-tras-la-polemica-de-los-indultos-a-los-condenados-por-el-estallido-social.html>.

¹⁰² Couso, *supra* note 57.

¹⁰³ See *id.* See also CNTV Chile, *Franja Oficial CNTV Consejo Constitucional Emisión 02 de mayo 12:45*, YOUTUBE (May 2, 2023), <https://www.youtube.com/watch?v=WcLR2HyV4mI>.

¹⁰⁴ Couso, *supra* note 57. See also Macarena Faunes, *Chahuán por consejo constitucional: "Hacemos un llamado a los chilenos a plebiscitar el Gobierno de*

In sum, the impact of the Constitutional Council election, in much the same way that the 2021 Constitutional Convention shocked the country due to the unexpected good performance of left-wing radicals, the former fell as a political watershed, not just because the Republican Party outperformed the traditional right by a two to one margin, but also because the election gave the combined forces of the right a complete control of the draft of the text to be presented to ratification in December 2023.¹⁰⁵ Furthermore, the electoral outcome meant that the most pivotal body of the process –the Constitutional Council– would be dominated by a party which not only opposed the very idea of introducing a new constitution, but that included a sizable number of leaders who had openly defended the economic and constitutional legacy of the military regime that imposed the very charter that the constituent process aims to replace.¹⁰⁶ A third implication of the election results was that an eventual coalition of Republicans and traditional right-wing parties could unilaterally impose a constitution of their liking, as they would hold two-thirds of the Council.¹⁰⁷ The only check they had was the “Technical Admissibility Committee,” a body created to ensure compliance with the twelve constitutional principles that frame the constituent process.¹⁰⁸ However, as I explained in a piece published in *Constitutionnet* at the time,¹⁰⁹ this was a small obstacle for the hegemony of the right in the Council because the “Admissibility Committee” was equally divided between experts on the right and the left, making it unlikely to be an effective check on the will of the Council.¹¹⁰ In light of this, the only real constraint that the right-wing coalition in the Council faced was the prospect that their proposal for a new constitution could be rejected in the exit referendum. Yet, since all of the Republicans (and a sizable segment of the traditional right-wing parties) actually liked the existing Constitution of 1980, they found themselves in what initially appeared to be a “win-win” scenario. Even if their proposal for a partisan constitution was rejected, they would retain a charter they were comfortable with.¹¹¹ One alternative scenario was that,

Boric, que ha tenido una nota roja [Chahuán for constitutional advice: “We call on Chileans to plebiscite the Boric Government, which has had a red note”], T13, (May 5, 2023, 3:00 AM), <https://www.t13.cl/noticia/consejo-constitucional/politica/chahuan-por-consejo-constitucional-hacemos-llamado-chilenos-plebiscitar-gobiern>.

¹⁰⁵ Couso, *supra* note 57.

¹⁰⁶ Republicans did not sign the December 12, 2022, political agreement that led to the current constituent process, and later voted against the constitutional amendment that implemented said agreement. *Id.* See Larrain et. al., *supra* note 44, at 242.

¹⁰⁷ Couso, *supra* note 57.

¹⁰⁸ See Larrain et. al., *supra* note 44, at 242; *Chilean Congress approves bill to launch new constituent process*, *supra* note 84.

¹⁰⁹ See Couso, J., “Tides of Change: Analyzing the Power Shift in Chile’s Constitutional Process” *Constitutionnet*, 14 May 2023. Available at the web site: <https://constitutionnet.org/news/tides-change-analyzing-power-shift-chiles-constitutional-process>

¹¹⁰ See Couso, *supra* note 57.

¹¹¹ *Id.*

in a surprising display of constitutional responsibility, Republicanos and their traditional right-wing partners adopted a non-partisan approach and reached an agreement with the left for a charter that all parties could live with, thereby addressing Chile's constitutional plight.¹¹² Such a statesmanlike attitude would have recognized that only a year before almost forty per cent of the population supported a constitutional proposal radically different from the 1980 charter.¹¹³ While in the weeks following the Council's election there was some optimism that such a virtuous scenario might take place, this in the end did not materialize.¹¹⁴ To the contrary, both *Republicanos* and the majority of the traditional right members of the Council, showed a partisan attitude that eventually led to a draft that was impossible to accept to both the left and center-left parties, who then called to reject it in the exit referendum.¹¹⁵

CONCLUSION

Looking back at Chile's attempt to get a new constitution in the four years since the social uprising in October 2019, the panorama is highly frustrating. While it cannot be denied that the agreement on a constituent process reached in November 2019 (amidst violent riots that seemed to put Chile's democracy at risk) provided an institutional way out to what at the time seemed an impossible state of affairs.¹¹⁶ However, the failure of two consecutive constituent processes represents a very disappointing outcome for a country with a long and proud constitutional tradition which was interrupted by a military regime that imposed a charter that Chileans still live with. The surprising electoral outcomes (one skewed to the left, the other to the right) that occurred in the first and second constituent processes, gave control to partisan groups that could not resist taking advantage of the circumstantial majorities they had in order to impose a draft on the minority with clauses that the latter could not live with.¹¹⁷

Chile's constituent experience would no doubt provide much food for thought regarding the dynamics of democratic constitution making in years to come but, at this point, there are some relevant lessons that can be immediately drawn from this country's failed attempts to get a democratically-enacted charter.¹¹⁸ First, as anticipated in the Introduction to this piece, it is naive to expect that when the political stakes are as high as they are in constitution making, the polarization that characterizes much of the democratic world in this era would be somehow suspended when a country enters into a constituent process. Second, despite its virtues,

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *Chilean Congress approves bill to launch new constituent process*, *supra* note 84; Larrain et. al., *supra* note 44, at 235.

¹¹⁷ See Fuentes, *supra* note 81; Larrain et. al., *supra* note 44, at 236-46.

¹¹⁸ *REACTION: Chile's New Constitutional Roadmap*, *supra* note 82.

participatory processes that take place during constitution making often lead to distortions, because the segment of the population which mobilizes for that purpose might have utterly different interests and values than those of the –much larger— portion of the electorate that only participates in the ratifying referendum. Furthermore, Chile’s experience sounds the alarm regarding the preconditions for the viability of the appealing notion that the legitimacy of a constitution making process requires it to be done through an especially elected body. Finally, Chile’s two failed attempts to get a new charter approved in a ratifying referendum, poses the question of the inadequacy of such mechanism to conclude a constitution making effort.