

BUILDING A SHIP IN TROUBLED AND UNCHARTED WATERS: REFLECTIONS ON THE CHILEAN CONSTITUTION-MAKING PROCESS, 2019-2023

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INTRODUCTION

As I write these lines, we are approaching the four-year anniversary of the start of the “social uprising” in Chile, which set off a tumultuous process of constitution writing that, if current predictions prove accurate, may well end on a highly ironic note, with the same political forces that rose up to demand a new social compact casting ballots, on December 17, 2023, to keep the institutional design of the dictatorship in place.¹ In this brief comment, I seek to supplement and complement Professor Javier Couso’s cogent analysis of how and why the process has unfolded as it has, offering some reflections from my perspective as a political scientist and

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**This piece is a comment on Professor Javier Couso’s piece which begins on page one of this journal.

¹ Note from the author and editors: At the time of this issue’s publication, these predictions have been confirmed as accurate.

longtime observer of Chile. I will begin in Section II by providing some background on Chile that helps explain why a constitutional rewrite was a key demand of the mass protests of late 2019, and why it initially took the form that it did. Then, I will explain in Section III how and why the very features of the first constitution-making process proved to be its fatal flaws, despite what analysts saw as promising in 2021. In Section IV, I critically engage with Professor Couso regarding the broader lessons he briefly mentions in his piece. My main departure from Professor Couso is in the characterization of Chile as “polarized.” Rather than polarization, I submit that the contextual factor that has bedeviled the constitution writing effort in Chile is the affective and organizational chasm between the political establishment and ordinary citizens. In this context, where channels of communication and intermediation between government and citizenry have broken down, institutional mechanisms—whether representative or participatory—don’t function properly. We should thus be careful not to conclude that participatory mechanisms or processes are *per se* problematic. As the 2022-23 sequel to the story in Chile suggests, and as I conclude in Section V, the constitutional shipbuilders, whoever they are, will be unlikely to succeed when they work in turbulent and unfamiliar political seas.

I. A BRIEF BACKGROUND

Professor Couso begins his narrative with a brief account of the social uprising (or “*estallido*,” “explosion”), noting that a “striking” and “peculiar aspect” of the mass protests in Chile, as compared to other countries, was the call for a new constitution.² This did not come out of the blue; scholars, grassroots organizations, and political leaders had been promoting constitutional replacement for years.³ Between 2015-2017, former President Michelle Bachelet’s government led public consultations on reforms, and submitted a draft constitution to Congress, where it languished due to weak support in the legislature and was abandoned after Sebastian Piñera returned to power in 2018.⁴ Nonetheless, from an outside perspective, it is rather surprising that constitutional rewrite was a central

² Javier Couso, *Chile's Failed Attempt to Get a New Constitution: Or the Challenges of Democratic Constitution Making in a Polarized Era*, 30 SW. J. INT’L L. 1, 4 (2024).

³ See Javier Couso, *Chile’s ‘Procedurally Regulated’ Constitution-Making Process*, 13 HAGUE J. ON THE RULE OF L. 235 (2021).

⁴ See Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet’s Project*, INT’L J. CONST. L. BLOG, Mar. 13, 2018, at 1.

demand of the 2019 mass mobilization, given that the protests were triggered by a hike in public transportation fees and focused on various forms of systemic inequality and injustice, many of which did not directly or immediately derive from the Constitution.

Two factors, in combination, help explain how and why a new constitution became the focal point of the uprising. The first, as Professor Couso mentions, is the well-founded perception that the 1980 Constitution, despite numerous amendments, continues to put significant limits on the policy making of popularly elected majorities.⁵ During the thirty-plus years since the transition back to democracy, key aspects of the charter have effectively prevented reforms that would strengthen the public sector and more equitably distribute wealth and power.⁶ Many citizens thus viewed the revamping of that illegitimate document as a necessary part of the transition to a more just and democratic social order. Second, and more generally, “seeking to achieve change through institutional and legal means is a longstanding practice in Chile; politics has always been done in the idiom of law, whether under Allende, Pinochet, or in the post-Pinochet era.”⁷ Meticulous attention to legal forms is part of the country’s political history and identity⁸ and has always been key to the government’s legitimacy.⁹

At the same time, recent years have witnessed a severe erosion in political trust in Chile. The extreme concentration of wealth and power in the hands of a tiny elite, contrasted with the daily struggles and precariousness of middle and lower income people, has led to the widespread public perception that the system is rigged in favor of a privileged few, who are aloof from and indifferent to the lived reality of

⁵ See CLAUDIA HEISS, ¿POR QUÉ NECESITAMOS UNA NUEVA CONSTITUCIÓN? (2020).

⁶ This was very much the intent of its framers, as Professor Couso documents. Indeed, Pinochet himself borrowed a phrase from Spain’s dictator, General Francisco Franco, stating that, through the legal edifice he bequeathed to Chile, he would leave the country “tied up, and well tied up.” See J. Samuel Valenzuela, *Orígenes y Transformaciones del Sistema de Partidos en Chile*, ESTUDIOS PÚBLICOS, Mar. 1, 1995, at 5.

⁷ Lisa Hilbink, *Constitutional Rewrite in Chile: Moving toward a Social and Democratic Rule of Law?*, 13 HAGUE J. ON THE RULE OF L. 223, 225 (2021).

⁸ See Lisa Hilbink, *The Constituted Nature of Constituents’ Interests: Historical and Ideational Factors in Judicial Empowerment*, 62 POL. RSCH. Q. 781 (2009).

⁹ See, e.g., GENARO ARRIAGADA HERRERA, DE LA VÍA CHILENA A LA VÍA INSURRECCIONAL (1974); Valenzuela, *supra* note 6, at 26; CARLOS HUNEES, THE PINOCHET REGIME (Lake Sagaris trans., 2007).

most of the population.¹⁰ This has been apparent in stagnating levels of confidence in all government institutions in recent years, independent of their performance.¹¹ As Suárez-Cao¹² notes, for several years before the social uprising, surveys registered historic lows of public trust in political parties and in Congress (both in the single digits), as well as a sustained decline in party identification, from well over fifty percent in 2006 to less than twenty percent in 2019,¹³ leading some to diagnose a crisis of representation in the country.¹⁴

The social uprising was thus characterized by a strong antipathy toward the political class, and not merely toward the sitting (rightwing) government/administration.¹⁵ As several analysts have observed in other countries in the region, similar conditions have resulted in the rise of a radical populist leader, whether from the left or the right.¹⁶ The successful channeling of the “violent energy of [the] social explosion” “into an institutional process, characterized by relative peace” is thus remarkable.¹⁷ However, as Professor Couso highlights, the populist groundswell continued to animate the process, shaping both key procedural decisions and the behavior of many actors in and around the Constitutional Convention. It is these choices that have become the target of critique since the September 2022 defeat of the exit referendum on the Convention’s draft.

¹⁰ See Lisa Hilbink et al., *Why People Turn to Institutions They Detest: Institutional Mistrust and Justice System Engagement in Uneven Democratic States*, 55 COMPAR. POL. STUD. 3 (2022).

¹¹ See Andrés Velasco and Robert Funk, *Institutional Vulnerability, Breakdown of Trust: a Model of Social Unrest in Chile*, WORLD BANK (May 2023), https://static.fen.uchile.cl/2023/07/pdf/funk_velasco.pdf.

¹² See Julieta Suarez-Cao, *Reconstructing Legitimacy After Crisis: The Chilean Path to a New Constitution*, 13 HAGUE J. ON THE RULE OF L. 253, 255 (2021).

¹³ See Bargsted M, Maldonado, *Party Identification in an Encapsulated Party System: the Case of Postauthoritarian Chile*, 10 J. POL. LAT. AM. at 29 (2018).

¹⁴ See Juan Pablo Luna & David Altman, *Uprooted but Stable: Chilean Parties and the Concept of Party System Institutionalization*, 53 LAT. AM. POL. & SOC’Y 1 (2011); Juan Pablo Luna, *Delegative Democracy Revisited: Chile’s Crisis of Representation*, 27 J. OF DEMOCRACY 129 (2016); Peter M. Siavelis, *Crisis of Representation in Chile? The Institutional Connection*, 3 J. OF POL. IN LAT. AM. at 61 (2016).

¹⁵ As observed by the author of this article, this was evident in chants and posters of “They all need to go! (¡Que se vayan todos!)” and later, during the Convention, of “¡El pueblo unido avanza sin partidos!” (“The people united advance without parties!”).

¹⁶ See Suárez-Cao, *supra* note 12, citing Cristobal Bellolio, *Populismo como democracia illiberal: Una hipótesis sobre el estallido social chileno*, 35 REVISTA DE SOCIOLOGÍA 43 (2020); Cristobal Rovira Kaltwasser, *El Error de Diagnostico de la Derecha Chilena y su Encrucijada Actual*, 158 ESTUDIOS PÚBLICOS 31 (2020).

¹⁷ Tom Ginsburg & Isabel Alvarez, *It’s the procedures, stupid: The success and failures of Chile’s Constitutional Convention*, GLOB. CONSTITUTIONALISM 1, 3 (2023).

II. FEATURES OF THE FIRST ATTEMPT: FROM ASSETS TO FATAL FLAWS

In 2021, as the Constitutional Convention got underway, analysts were cautiously optimistic that some defining characteristics of Chile's constitutional process, such as "inclusive mechanisms of representation, decision making, and direct citizen involvement,"¹⁸ would "boost legitimacy via descriptive representation" and "help air out the elitist political system."¹⁹ As Professor Couso noted then, non-partisan analysts "celebrated the fact that such a large number of independent candidates got elected" because this "eliminated the risk that regular Chileans" would perceive "that the traditional political parties 'captured' the Convention."²⁰ Moreover, he and others (rightly, in my view) underscored the importance of having "an assembly bound by preexisting rules,"²¹ and "a procedurally regulated constituent process," which would "promote the rule of law."²² This distinguished the Chilean case from other recent constitution writing experiences in Latin America, most notably Venezuela in 1999, where regulation of the constitutional process "was absent and ad-hoc" and "institutional or legal restrictions [came] second to the 'voice of the people' and Chávez's will as their legitimate leader."²³ Moreover, comparative studies show that these features are associated with successful constitutional replacements in democratic regimes.²⁴

Two years on, and with the benefit of hindsight, the very factors that made the scenario seem so promising early on are now those that analysts, including Professor Couso, identify as the fatal flaws of the process. After Chileans voted overwhelmingly to reject the draft charter produced by the Constitutional Convention, several comparative constitutional scholars and political scientists published post-mortem reflections that attribute the failure largely to naïve, uncooperative, and over-reaching behavior on the

¹⁸ Gabriel L. Negretto, *Deepening Democracy? Promises and challenges of Chile's Road to a New Constitution*, 13 HAGUE J. ON THE RULE OF L. 335, 336 (2021).

¹⁹ Suarez-Cao, *supra* note 12 at 257.

²⁰ Couso, *supra* note 3, at 247-48; See Marcela Rios Tobar, *Chile's Constitutional Convention: a triumph of inclusion*, U.N.D.P. (June 3, 2021), <https://www.undp.org/latin-america/blog/chiles-constitutional-convention-triumph-inclusion>.

²¹ Negretto, *supra* note 18.

²² Couso, *supra* note 3, at 249.

²³ Carlos Garcia Soto et al., *Winds of Change: Comparing the Early Phases of Constitutional Redrafting in Chile and Venezuela*, 13 HAGUE J. ON THE RULE OF L. 322, 330 (2021).

²⁴ See Negretto, *supra* note 18.

part of the independents that dominated the Convention (103 of 155), incentivized and exacerbated by unfortunate and overly rigid procedural decisions.²⁵ For example, Larrain, et al. highlight that “Groups of independents lacked organization and consistent reform programs. Most independents were single-issue activists seeking to participate in the Convention as environmentalists, feminists, or traditionalists rather than as agents responsible for negotiating across multiple, complex dimensions.”²⁶ Moreover, they underscore the fact that independent delegates were one-shot players who had no need to build working relationships with other members of the body; on the contrary, they had incentives to use the singular opportunity “to bind future legislators as closely as possible.”²⁷ Ginsburg and Álvarez point out that the decision making by a body predominantly made up of such independent delegates was further complicated by “faulty procedures,” specifically a “two-thirds decision rule with a circular voting mechanism for individual norms, with no final vote on the text as a whole.”²⁸ They contend that this convoluted, piecemeal approach, with no mechanism for revisiting prior decisions along the way, further discouraged cooperation within the Convention and produced an incohesive final constitutional draft.²⁹ Indeed, “the dynamics within the Convention were incredibly adversarial and lacked unity,”³⁰ and “an extreme commitment to publicity exposed the deficiencies of [the] process,”³¹ including “extravagant behaviors that would eventually cause a steep fall in the reputation of the Convention as a whole.”³²

One key procedural error was the mismatch between the voting rule for the Convention elections in May 2021, which was voluntary and garnered only a forty-three percent turnout,³³ and the referendum on the final draft in September 2022, which was compulsory and had an eighty-six percent turnout. All analysts, including Professor Couso, agree that, with only the most motivated, change-seeking voters participating in the former elections, the resulting composition of the Constitutional

²⁵ See Guillermo Larrain et al., *How not to Write a Constitution: Lessons from Chile*, 194 PUB. CHOICE 233 (2023); Ginsburg & Alvarez, *supra* note 17; Samuel Issacharoff & Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, 78 UNIV. MIA. L. REV. (2023); Couso, *supra* note 2, at 19.

²⁶ Larrain et al., *supra* note 25, at 241.

²⁷ *Id.*

²⁸ Ginsburg & Alvarez, *supra* note 17, at 5.

²⁹ See *id.* at 7-8; Couso, *supra* note 2.

³⁰ Ginsburg & Alvarez, *supra* note 17, at 9.

³¹ Larrain et al., *supra* note 25, at 243.

³² Couso, *supra* note 2, at 15.

³³ This was also during the COVID pandemic which disincentivized participation.

Convention anomalously skewed to the political Left, which permitted the exclusion of the Right in deciding most provisions.³⁴ In the end, this approach proved to be naïve and short-sighted,³⁵ as some five million voters who had not expressed their preferences at the ballot box in May 2021 were compelled to turn out and offer an up-or-down vote on the end-product of a flawed process conducted by an assembly in which they had not been represented.³⁶ As Alemán and Navia put it, the final text was “out of sync with Chileans,” including those in indigenous and low-income municipalities, where opposition was “particularly pronounced.”³⁷

A final and related observation shared by these analysts is how the diminished role of political parties, which “reflected the [antiestablishment] sentiment of the moment,”³⁸ handicapped the process in several ways. As already noted, the independents in the Convention were one-shot players, whereas “party representatives are likely to be present not only in a special body temporarily responsible for drafting the constitution but also in institutions at the post-constitutional stage that will implement the new constitution over time; they [thus would] have a stake in both the design and enforcement of the new constitution.”³⁹ Members of political parties are also more likely to have experience negotiating with opponents and crafting legislation,⁴⁰ anticipating challenges and adapting to developments in the context, all of which would have made for more efficient and effective drafting.⁴¹ Finally, political party affiliation would have helped orient voters to the broad ideological and policy stances of Convention candidates, possibly lessening the importance of personal characteristics or single-issue positions at the time of election⁴² and “reducing the information costs for voters trying to understand what is at

³⁴ See Couso, *supra* note 2.

³⁵ Professor Couso calls it an “utter denial of political realism.” *Id.* at 19.

³⁶ See Larrain et al., *supra* note 25, at 246; Samuel Tschorne, *Referendums and Representation in Democratic Constitution Making: Lessons from the Failed Chilean Constitutional Experiment*, KING’S L.J., Aug. 17, 2023, at 4; As Professor Couso notes, the Convention delegates (wrongly) assumed that those who had not turned out to vote shared the preferences of those who did.

³⁷ Eduardo Aleman & Patricio Navia, *Chile’s Failed Constitution: Democracy Wins*, 34 J. OF DEMOCRACY 96, 99 (2023). See also Couso, *supra* note 2, at 22.

³⁸ Ginsburg & Alvarez, *supra* note 17, at 5.

³⁹ Larrain et al., *supra* note 25, at 241.

⁴⁰ See Issacharoff & Verdugo, *supra* note 25, at 27.

⁴¹ See Couso, *supra* note 2.

⁴² See *id.*

stake in the process of constitution formation.”⁴³ It would have also enhanced delegates’ capacity to mobilize supporters and allies once the process was complete.⁴⁴ However, in a bid to secure greater legitimacy for the process at a moment of deep distrust of the political class, the protagonists of the Chilean Constitutional Convention deliberately eschewed a party-led process and traded away these potential benefits. In retrospect, this may have doomed the endeavor.⁴⁵

III. THE OTHER DIVIDE⁴⁶: NOT POLARIZATION WITHIN THE PUBLIC, BUT BETWEEN THE PUBLIC AND THE POLITICAL ELITES

In my estimation, Professor Couso, along with the other analysts discussed above, accurately identify the main factors that led to failure in the 2021-22 constitutional drafting attempt in Chile. The public clamor for a more inclusive and responsive government was genuine, but specific decisions taken with the goal of boosting the legitimacy of the Convention, on the one hand, and locking in rules to regulate the process, on the other, didn’t solve the country’s crisis of representation and wound up discouraging the kind of longer-term thinking and behavior necessary to secure broad political buy-in, inside and outside the Convention. As frequently happens in political life, decisions taken to address one set of concerns and risks had unintended, even perverse, consequences when they were implemented.⁴⁷

This law of unintended consequences continues to operate in the second and ongoing attempt at constitution-making in Chile, which, it should be noted, has remained firmly in the hands of political elites. Despite this, and the fact that this “do over” was carefully designed as a staged process intended to bind drafters to a set of twelve principles approved in advance by a Congress equally divided between Left and Right and to ensure that experts played a central role, it has also taken an unexpected turn. As Professor Couso explains, the May 2023 elections for

⁴³ Issacharoff & Verdugo, *supra* note 25, at 26-27.

⁴⁴ See Larrain et al., *supra* note 25, at 241; Aleman & Navia, *supra* note 37, at 94.

⁴⁵ See Issacharoff & Verdugo, *supra* note 25, at 42.

⁴⁶ See generally YANNA KRUPNIKOV, & JOHN BARRY RYAN, *THE OTHER DIVIDE* (Cambridge University Press, 2022) (here, I reference a recent book with this title that makes a slightly different but related point about the U.S.: that polarization only affects the politically engaged, and that there is a large portion of the population that does not have its identity tied up with politics/political parties).

⁴⁷ See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. ASS’N 894 (1936).

the Constitutional Council produced a “political earthquake” and an “astonishing reversal of fortune” for the (largely left-of-center) forces that championed a constitutional rewrite.⁴⁸ A roughly four year old-far-Right party named the Republicanos managed to capitalize on public insecurity and low support for the incumbent (moderate Left) government to win forty-four percent of the seats on the Council. When combined with the seats won by the traditional Right, this enables them to control the content of the new constitutional draft, even overriding any objections raised by the experts in the planned final stages of the process.⁴⁹ As noted in the introduction, this turn of events has led some of the sectors that have called for constitutional replacement for years to announce they will vote to reject the new draft and keep the 1980 Constitution.⁵⁰ Meanwhile, public opinion polls have shown a consistent, and in some cases increasing, majority intent to reject.⁵¹

With this in mind, when Professor Couso discusses the lessons that might be drawn from the Chilean experience with constitution-making, he takes a step back from the specifics of the first (2021-22) constitutional rewrite attempt, which have been the focus of the other analyses referenced above, to consider broader contextual factors that have affected both that attempt and the second, very distinct effort. As the title of his article suggests, he first points to political polarization, a characteristic of many contemporary democracies, as a key contributor to the failure of the constitutional process. Second, he calls into question “participatory processes that take place during constitution making” because those who mobilize during constitutional moments may not represent the population as a whole and may thus, in the name of the people, produce a charter that is out-of-step with the “much larger” portion of the electorate. To conclude, Professor Couso indicates that given these conditions and risks,

⁴⁸ Couso, *supra* note 2, at 28.

⁴⁹ *Id.* at 23-24.

⁵⁰ See, *Chilean unions to reject draft Constitution promoted by the right*, PRENSA LATINA, (Sept. 29, 2023), <https://www.plenglish.com/news/2023/09/29/chilean-unions-to-reject-draft-constitution-promoted-by-the-right/>.

⁵¹ See Ignacio Guerra, *Cadem: 54% would vote against in the plebiscite and 41% prefer to reject and continue with the current Constitution*, EMOL, (Oct. 1, 2023), <https://www.emol.com/noticias/Nacional/2023/10/01/1108728/cadem-54-contra-plebiscito-constitucion.html>; Andrés Cárdenas, *UDP survey reveals that the majority believes that the Constitutional Council is “much worse” than the Convention*, EL MOSTRADOR, (Oct. 6, 2023), <https://www.elmostrador.cl/noticias/pais/2023/10/06/encuesta-udp-revela-que-mayoria-opina-que-consejo-constitucional-es-mucho-peor-que-la-convencion/>.

constitution making might be better left to experts, and that even ratifying referenda may not be advisable.⁵² In the remainder of this comment, I engage and complicate these claims.

I want to begin by problematizing the notion that political polarization undermined the constitutional process in Chile. Polarization is a bimodal sorting, a distribution in which the center is vacated. Under conditions of polarization, there are few to no people in the middle of the distribution, and little ideological overlap between the two sides.⁵³ In polarized polities, party affiliation is strong and exclusive, and in what McCoy, Rahman, and Somer (2018) call “pernicious polarization,” the kind of polarization associated with democratic erosion, political identity becomes a social identity; politics becomes about tribal loyalty.⁵⁴ I will not contest the fact that in the campaign for the first exit referendum in August 2022, “Chile exhibited a highly polarized environment,”⁵⁵ nor that, in the present moment, political strategists, following effective models from other countries (e.g., the U.S. and Brazil), are seeking to stoke negative emotions (fear, anger, resentment) in Chilean society to vilify opponents and generate electoral support for extremist alternatives. However, I contend that it is off the mark to suggest that Chile’s constitutional-making efforts failed due to political polarization.

I offer three reasons to support this contention. First, far from a bimodal sorting (as in the U.S., Brazil, or Venezuela), surveys indicate that the predominant characteristic of the Chilean electorate is a lack of identification with political parties.⁵⁶ There is not (yet?) tribal identification with any political party, movement, or particular leader that is driving the kind of zero-sum politics associated with pernicious polarization.⁵⁷ Second, surveys consistently show that the Chilean public is not ideologically bimodal either. Indeed, the historically tripartite division of the population on a Left-Right spectrum persists, with over 30% of

⁵² See Couso, *supra* note 2, at 32.

⁵³ See EZRA KLEIN, *WHY WE’RE POLARIZED* (Simon & Schuster ed. 2020); NOLAN MCCARTY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* (Oxford Univ. Press ed. 2019).

⁵⁴ *Id.*

⁵⁵ Couso, *supra* note 2, at 20.

⁵⁶ See Labcon. Laboratorio Constitucional, *Encuesta sobre Proceso Constituyente*, FEEDBACK RSCH., 71 (Sept. 2023), <https://labconstitucional.udp.cl/cms/wp-content/uploads/2023/10/InformeEncuesta-LabConUDP-Feedback.Septiembre-Septiembre-2023.pdf>.

⁵⁷ See Jennifer McCoy and Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT’L PEACE, (Jan. 18, 2022), <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190>.

respondents locating themselves at or near the Center 4-6 on a 0-10 scale.⁵⁸ Moreover, when asked to locate their values on a 0-10 conservative to liberal scale, a near majority self-identifies as a 7 or above (liberal), about 30% as moderate with a 4-6 rating on the scale, and 20% as strongly conservative (0-3 on the scale).⁵⁹ This data, along with supermajority agreement on a number of specific issues that traverse the positions of different political parties,⁶⁰ indicate that while the “median voter” may be difficult to locate in Chile, Chileans are not divided into warring political tribes that would make agreement on a new constitution impossible. Indeed, the only issue over which there is such a split is the protection of fetal life,⁶¹ although even there, the July 2023 iteration of the cited survey showed 74% of Chileans opposed the “prohibition of abortion under any circumstances.”⁶² Third, and notably, these same surveys have shown Chileans to be overwhelmingly in favor of democratic rights, with over 80% supporting the inclusion in the constitution of the right to peaceful demonstrations, as well as for a provision establishing that the armed forces must respect the democratic order and human rights.⁶³ A similar percentage repeatedly agrees that it is better to “seek common ground with those holding different perspectives in order to reach major agreements” on the content of the new constitution than “to stick firmly to one’s principles, without engaging in transactions with other sectors.”⁶⁴ Given all of this, I disagree with Professor Couso that Chile offers a cautionary tale about constitution-making in polarized contexts.

Nonetheless, Professor Couso is correct that Chile’s experience points to lessons about the difficulties of democratic constitution-making in the contemporary era.⁶⁵ Rather than polarization, though, I would argue that it

⁵⁸ See Labcon., *supra* note 56, at 75.

⁵⁹ *Id.* at 74.

⁶⁰ For example, over 80% express support for environmental protection and for recognition of caregiving as a form of work, as well as for immediate expulsion of foreigners who have entered the country illegally. *Id.* at 45-47. In addition, well over 80% support either a principal or a shared role for the state in the provision of social services such as education, water, health, and pensions. *Id.* at 41.

⁶¹ *Id.* at 46.

⁶² See *id.* at 37.

⁶³ See *id.* at 47.

⁶⁴ *Id.* at 27. See also Andrés Cárdenas, *Encuesta UDP revela que mayoría opina que Consejo Constitucional es “mucho peor” que la Convención*, ELMSTRADOR (Oct. 6, 2023), <https://www.elmostrador.cl/noticias/pais/2023/10/06/encuesta-udp-revela-que-mayoria-opina-que-consejo-constitucional-es-mucho-peor-que-la-convencion/>.

⁶⁵ See generally Couso, *supra* note 2.

was the affective and organizational disconnect between government and citizens, the crisis of representation referenced above,⁶⁶ that doomed the process. In the words of Tschorne, discussing the 2021-22 process, “the failure of the Chilean constitutional experiment...is, first and foremost, a consequence of the unhealthy and gravely dysfunctional condition of the overall system of democratic representation.”⁶⁷ The Convention assembled a supra-majority of delegates who were not just unaffiliated with political parties, but were “alienated from (antagonistic even)” to them.⁶⁸ Moreover, on the whole, they did not even come out of well-established social movement organizations that might have given them stronger links to civil society; rather, like the social uprising that launched the constitutional process, they were an “atomized assembly without organizations and leadership able to forge or sustain coherent agreements.”⁶⁹ They were thus detached in their own way from broader society, out of touch with the substantive political preferences of too many Chileans. Consequently, the draft they produced “came to be seen [by the wider population] as unilateral and responding mainly to the aspirations of a relatively narrow composite of particularistic constituencies.”⁷⁰ However, the rejection of the 2022 draft did not mean that Chileans were ready to entrust the traditional political parties with constitution-making; far from it. In the May 2023 elections for the Constitutional Council, where mandatory voting rules led to 85% turnout, traditional parties garnered only 47% of all the votes cast.⁷¹ The majority of the electorate (nearly 7 million voters) either cast ballots for the new, far Right party, Republicanos (27% of total votes) or the populist Party of the People (4% of total votes), both of which had not signed the congressional accord on the new constitutional process, or they cast blank or spoiled ballots (21% of total votes).⁷² This would appear to be another example of what Sazo identifies as a pattern of electoral “preferences based on rejecting specific parties or movements rather than

⁶⁶ See Suarez-Cao, *supra* note 12.

⁶⁷ See Tschorne, *supra* note 36, at 16.

⁶⁸ *Id.* at 8.

⁶⁹ Larrain et al., *supra* note 25, at 240.

⁷⁰ Tschorne, *supra* note 36, at 20 (first citing Guillermo Larrain et al., *supra* note 25, at 242; Aleman & Navia, *supra* note 37, at 94-95).

⁷¹ SERVEL, *División Electoral*, ELECCIÓN CONSEJO CONSTITUCIONAL 2023, <https://app.powerbi.com/view?r=eyJrIjoiNGVhYmQxNTMtNmFhNS00NGIzLTlmMWMtMTUxMDMyZjBhMTc4IiwidCI6ImVhZjg3OWJkLWQzZWMtNDY1MCI1MTI5LTEzZGZkZjQ4NTlmZSJ9> (last visited Mar. 19, 2024).

⁷² See *id.*

on ideological affinity.”⁷³ Yet, just as the Constitutional Convention delegates mistook the outcome of the May 2021 elections to be a mandate for a left-leaning charter, the Constitutional Council delegates seem to have interpreted the May 2023 election results as a call for a fundamental law that is even more rightwing than the (reformed) 1980 disposition.⁷⁴

The fact that the second attempt at constitution writing in Chile, led and controlled by political elites, appears destined to end in a similar defeat at the polls as the first attempt in which parties were marginalized, suggests that pinning the blame on “participatory processes”⁷⁵ in general may be unfair, for in a context of a representational crisis, even delegates elected on political party lists may have “constitutional preferences [that are] in sharp contrast with that of electorate’s majority.”⁷⁶ While it is certainly frustrating—even exasperating—that voters appear to send one message in elections to constitution drafting bodies, and another message in referenda asking for their approval or rejection of the texts those bodies produce, the problem is not popular participation *per se*, nor even the specific mechanism of the (exit) referendum.⁷⁷ As Tschorne argues, “exit referendums can only perform their constraining role appropriately—i.e., encouraging the constitution-making body to seek an alignment between the contents of the new constitution and the preferences of most citizens and to ensure that it enjoys broad support among the country’s main political forces—when the representative capacity of the institutions to which they are structurally coupled...is not too severely compromised.”⁷⁸ Referendums, and I would add participatory mechanisms of any kind, can “be a useful complement and corrective to representative institutions,” but

⁷³ Diego Sazo, *Chile 2022: From Great Expectations to Rising Pessimism**, 43 REVISTA DE CIENCIA POLITICA 193, 218 (2023) (first citing Carlos Melendez, *The Post-Partisans: Anti-Partisans, Anti-Establishment Identifiers, and Apartisans in Latin America* (Cambridge Univ. Press ed., 2022); and then citing Rodrigo M. Medel, *Chile, la política y la calle: Dinámicas de una politización antipartidista* (Nueva Sociedad ed., 2023)).

⁷⁴ See Harboe afirma que “centroizquierda por el Rechazo” no apoyará “texto constitucional conservador”, EL MOSTRADOR (Sept. 22, 2023), <https://www.elmostrador.cl/noticias/pais/2023/09/22/harboe-afirma-que-centroizquierda-por-el-rechazo-no-apoyara-texto-constitucional-conservador/>.

⁷⁵ See Couso, *supra* note 2, at 32; Samuel Issacharoff & Sergio Verdugo, *supra* note 25, at 1.

⁷⁶ See Couso, *supra* note 2, at 3.

⁷⁷ Roberto Gargarella, *Why are “Exit Referendums” undesirable?: The Case of Chile (2020-2022)*, 2023 EUR. HUM. RTS. LAW REV. 32.

⁷⁸ Tschorne, *supra* note 36, at 23.

they only work well when representative institutions are relatively healthy.⁷⁹

Of course, this leaves Chile, and other countries where “political parties and other instruments of civil society that intermediate between the individual and the state” are in “serious disrepair,” with a challenge that goes far beyond this constitutional moment.⁸⁰ Feeling alienated from and excluded from a political system whose intermediary institutions “have lost their embeddedness in society and local politics,”⁸¹ ordinary citizens continue to demand a greater voice in politics.⁸² They mistrust, even disdain, the political establishment and use the opportunities they have in elections and referendums largely to signal this dissatisfaction. But the solution can neither be to substitute participatory institutions for representative ones,⁸³ nor to sideline citizens and leave the governing to technocratic experts, which will simply deepen the problem. The only democratic path forward is “to rebuild the connection between elites and civil society and find institutional solutions to address the demands” of the citizenry,⁸⁴ improving representation and introducing or enhancing participatory mechanisms that can serve as a “complement and corrective” to those.⁸⁵ This is a long-term project that appears exceedingly daunting in an era in which the vast majority of the population say their current mood is best described by “uncertainty” (35.6%), “worry” (30.7%), and “fear” (8%).⁸⁶ People feel such a deep sense of insecurity that they “take refuge in their family, in their communities, in their home and in their traditions” and “when they project themselves into the future, they don’t think more than three months ahead.”⁸⁷ Any successful democratic constitutional

⁷⁹ *Id.* at 22.

⁸⁰ Issacharoff & Verdugo, *supra* note 25, at 18-19 (citing Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEGAL PROBS. 89, 97 (2020)).

⁸¹ Suarez-Cao, *supra* note 12, at 254.

⁸² See Rocio Montes, *Encuesta Chile Dice: un 60% piensa que el autoritarismo se justifica en algún caso, pero los chilenos buscan una democracia participativa*, EL PAIS (Aug. 29, 2023, 00:30 AM EDT), <https://elpais.com/chile/2023-08-29/encuesta-chile-dice-un-60-piensa-que-el-autoritarismo-se-justifica-en-algun-caso-pero-confian-en-la-democracia.html>.

⁸³ See Issacharoff & Verdugo, *supra* note 25, at 24-25.

⁸⁴ Sazo, *supra* note 73, at 218.

⁸⁵ Tschorne, *supra* note 36, at 22.

⁸⁶ Labcon, *supra* note 56, at 10.

⁸⁷ See Antonieta De La Fuente, *Jaime Bellolio, former Chilean minister: ‘The Republican voters never wanted the constitutional process in the first place’*, EL PAIS (Sept. 23, 2023, 7:00 PM EDT), <https://english.elpais.com/international/2023-09-23/jaime-bellolio-former-chilean-minister-the-republican-voters-never-wanted-the-constitutional-process-in-the-first-place.html> (Jaime Bellolio, director of the Institute for Public Policy Studies at Andrés Bello University, summarizing the findings of a recent study from the Institute, in an interview).

refounding, in Chile or beyond, will require being proximate to and working alongside ordinary people to understand and address this insecurity.⁸⁸

CONCLUSION

In most cases, and certainly in democratic settings, designing a constitution is not an insulated, technocratic exercise where drafters are sheltered from the rough and tumble of ordinary politics, but rather, it is like “building a ship at sea.”⁸⁹ While this does not mean that who the builders are (their qualifications and their dispositions), how they approach their work (collaboratively or antagonistically), and what rules they follow and methods they use do not matter. They all do, of course. However, to roll with the metaphor, regardless of who the constitutional crafters are and how they conduct themselves, what they can achieve will ultimately be affected by the nature of the waters in which they are sailing: How stormy is the sea? What are the prevailing winds? How well-charted are the waters? Upon what shoals might the ship founder?

If we take this perspective, the outlook for success in democratic constitution-making in Chile and many other countries in the contemporary world looks grim. Whether the broader political context is one of polarization as Professor Couso suggests, or an effective and organizational chasm between the political establishment and ordinary citizens, as I have contended, the climatic conditions in which constitution drafters must attempt to do their work are highly unstable and unpredictable. In terms of the maritime metaphor, Chilean constitution writers work in troubled and uncharted waters. Add to this the factors beyond the scope of Professor Couso’s article and this brief comment —such as the weakened leverage that regional and international actors have to promote constitutional democracy or to deter authoritarian machinations,⁹⁰ or the difficulty of unifying people in the age of social media echo chambers, fake news, and

⁸⁸ See ASTRA TAYLOR, *THE AGE OF INSECURITY: COMING TOGETHER AS THINGS FALL APART* (House of Anansi Press Inc. ed., 2023).

⁸⁹ See Jon Elster et al., *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge Univ. Press ed. 1998).

⁹⁰ See David J. Samuels, *The International Context of Democratic Backsliding: Rethinking the Role of Third Wave “Prodemocracy” Global Actors*, 21 *PERSPECTIVES ON POL.* 1001, 1004-06 (2023).

A.I. trolls⁹¹—and the outlook grows even darker. As Isacharoff and Verdugo note at the end of their recent analysis of the first (2021-22) attempt, we have “enter[ed] a domain where past is not prologue,” and in the contrast between the late 20th century constitutional replacement in South Africa and Chile’s experience, “we may be seeing the politics of democratic decline being played out at the constitutional plane.”⁹²

Rather than ending on a note of despair, however, I instead offer a passage from Astra Taylor’s recent book, *The Age of Insecurity*, which seeks to inspire citizens to keep working for the common good, despite the understandable impulse to retreat from the public sphere when the world seems to be crumbling around us: “[H]owever unknowable the future may be, there is no doubt our fortunes will remain interlinked. Risks proliferate, time passes, and things fall apart. But even amid the rubble, we can always reimagine, repair, and rebuild.”⁹³ Chileans are resilient and creative, and their political experimentation has repeatedly excited the international imagination. Perhaps in the coming years they will prove the pessimists wrong.

⁹¹ See ZEYNEP TUFEKCI, TWITTER AND TEAR GAS. THE POWER AND FRAGILITY OF NETWORKED PROTEST xxix, 161, 238-39, 241 (Yale Univ. Press ed., 2017) (first citing Keith N. Hampton et al., *Social Media and Political Discussion: When Online Presence Silences Offline Conversation*, 20 INFO., COMM’N. & SOC. 1090, 1090 (2017); Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 POL. SCI. 1130, 1130 (2015); Zeynep Tufekci, *Facebook Said Its Algorithms Do Help Form Echo Chambers, and the Tech Press Missed It*, 32 NEW PERSP. Q. 9, 9 (2015)); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (Princeton Univ. Press, 2018).

⁹² Issacharoff & Verdugo, *supra* note 25, at 62-63.

⁹³ Taylor, *supra* note 88, at 278.