

RESEARCH ARTICLE

Elite non-cooperation in polarized democracies: Constitution-making deferral, the entry referendum and the seeds of the Chilean failure

Luis Eugenio García-Huidobro 

Pontificia Universidad Católica de Chile & Centro de Estudios Públicos, Avda. Libertador Bernardo O'Higgins 340, 3rd Floor, Santiago, Chile
Email: legarciahuidobro@uc.cl

Abstract

This article extends the study of the shortcomings of the constitution-making design that contributed to the failure of the Chilean process by addressing a largely overlooked aspect: the 2020 entry referendum. By placing two competing constitution-making models on the ballot, the political elites delegated to the voters a highly conflictual aspect of the process design that prevented cooperation among them. While some political parties approached the disagreements placed on the ballot as an opportunity to reopen discussions already settled by the 2019 Agreement, others interpreted the move as a cancellation of the political insurance contained in the Agreement. This exacerbated the existing polarization among political elites and imperiled prospects for the success of the process.

Keywords: Chilean Constitutional Convention; constitution-making; constitutional referendum; interim constitution; elite cooperation

1. Introduction

After the landslide defeat of the constitutional proposal drafted by the Chilean Convention in the 2022 referendum, most political recriminations have revolved around one uncomfortable question: who is to blame for this constitutional failure? In the months following this outcome, nearly all fingers have been pointed at the constitution-makers,¹ who have emerged as the leading contenders to become the *scapegoats-in-chief*.² According to pollsters, the main reason voters rejected the proposal was the constitution-makers' chaotic behavior throughout the process.³ There are numerous reasons for this, but one

¹See G Parrini, 'La hora de las culpas entre los convencionales derrotados', *La Tercera*, 11 September 2022.

²F Zúñiga, 'El rechazo en el plebiscito chileno de 4 de septiembre de 2022: perspectivas constitucionales' (2022) 3 *Cuadernos Constitucionales* 77–98.

³See Encuesta CEP N°88. Centro de Estudios Públicos, January 2023. Available at <<https://www.cepchile.cl/encuesta/encuesta-cep-n-88>>.

incident from the Convention sessions stands out as a vivid illustration of the confrontational atmosphere that prevailed.⁴ Amidst a session filled with jeering and quarreling, the Convention's secretary, a seasoned congressional staffer with years of experience, unknowingly left his microphone open and turned to the chairwoman, posing a question that resonated deeply with the voters: 'Madam President, how do we handle this circus?'⁵

While it is undeniable that these episodes played a significant role in shaping the referendum outcome, it is important to recognize that they are only one piece of a larger picture in understanding the factors that contributed to this failure.⁶ For example, some scholars have suggested that numerous shortcomings in the design of the constitution-making process also played a significant part in this outcome. These alleged shortcomings include the Convention's internally imposed drafting procedure,⁷ the irrelevance of the harmonization end-stage⁸ and the absence of a final draft vote.⁹

Some design shortcomings did exist long before the constitution-makers were elected. Many came as upstream constraints externally imposed on the Convention by congressional mandates,¹⁰ such as the electoral rules for selecting the constitution-makers, the two-thirds majority to adopt constitutional provisions and the inclusion of an exit referendum.¹¹ This article expands on the analysis of these shortcomings by suggesting that there is one aspect that was paramount to the failure of the process, which Congress also adopted, and which has largely been overlooked: the design of the 2020 entry referendum.

It is indeed often forgotten that this referendum – technically a plebiscite¹² – left it to the voters to decide whether the constitutional proposal would be drafted by a convention composed entirely of elected representatives or by a hybrid convention of elected representatives and legislators. I suggest that by putting two competing constitution-making models on the ballot, the political elites delegated to the voters a highly conflictive aspect of the process design that prevented cooperation between them at critical stages when consensus-building was most needed. Some political parties approached the disagreement over the constitution-making model as an opportunity to reopen discussions already settled by the 2019 Constitutional Agreement, such as the rules for electing

⁴The proceedings of the Constitutional Convention were characterized by a tense and polarized atmosphere, according to numerous written accounts by constitution-makers. See, for example, A Squella, *Apuntes de un constituyente* (Ediciones UDP, Santiago, 2022), C Bown, *Secreto Constituyente: diario de una convencional* (Self-published, 2022); R Garín, *El Fracaso: cómo se incendió la convención* (Catalonia, Santiago, 2023).

⁵El micrófono abierto del secretario de la Convención: ¿Qué vamos a hacer con este circo, presidenta?, available at <https://www.cnnchile.com/constituyente/secretario-convencion-olvida-microfono-abierto-circo_20220429>.

⁶For a discussion of the various causes contributing to the process failure, see Verdugo and García-Huidobro in this special issue.

⁷G Larrain, G Negretto and S Voigt, 'How Not to Write a Constitution: Lessons from Chile' (2023) 194 *Public Choice* 233–47.

⁸LE García-Huidobro 'Lecciones constitucionales para no tropezar con la misma piedra' (2022) *The Clinic*, 9 September, available at <<https://www.theclinic.cl/2022/09/09/lecciones-constitucionales-para-no-tropezar-con-la-misma-piedra>>.

⁹See Ginsburg and Álvarez in this special issue.

¹⁰J Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45(2) *Duke Law Journal* 364–96, underlining the difference between upstream and downstream constraints.

¹¹See Verdugo and García-Huidobro in this special issue.

¹²See D Altman, *Direct Democracy Worldwide* (Cambridge University Press, Cambridge, 2010).

the constitution-makers. These electoral rules sought to legitimize the constitution-making process by electing constitution-makers who were more descriptively representative of the electorate. However, by proceeding in this way, the other parties interpreted the political insurance contained in the Constitutional Agreement as being canceled.

In making this point, this article suggests that the failed Chilean experience contributes to a growing body of literature that emphasizes the crucial role that cooperation and accommodation between political elites must play throughout constitution-making processes within democratic settings. The recent Chilean experience suggests that some varieties of elite cooperation that employ accumulation strategies can be very costly to the success of a constitution-making process in a polarized context.

The remainder of this article is divided into two parts. Part II contextualizes the argument by emphasizing that many academic accounts of the process have not paid much attention to how the growing polarization of the political elite conditioned the negotiations of the 2019 Agreement. Such conditions were crucial for understanding how this Agreement's negotiations unfolded and the political elites' non-cooperation from the inception of the process. Part III presents the article's core argument, suggesting that the inclusion of an entry referendum as an accumulation strategy in the Agreement's bargaining facilitated the prompt cancellation of the political insurance attached to such an agreement.

II. The Chilean context: Constitution-making and elite polarization

The 2019–22 Chilean constitution-making process

The story is well documented: to address the worst political crisis since the return to democracy in 1990, representatives of most political parties agreed to begin a constitution-making process to replace the Constitution originally enacted under the Pinochet dictatorship. Amidst massive demonstrations and violent riots, this Agreement embraced a post-sovereign approach to constitution-making. The process included an entry referendum, the democratic election of half or all of the constitution-makers, the two-thirds majority threshold to adopt constitutional provisions, a one-year deadline for a single-purpose assembly to discharge its mandate, a judicial review mechanism before the Supreme Court for procedural infringements and an exit referendum with compulsory voting.

The Agreement was intended to serve as an interim constitution – that is, mutual concessions between political rivals deliberately adopted as a temporary document that provides a constitution-making framework designed to be replaced by a permanent Constitution at the end of the process.¹³ Such accommodations are designed to overcome the fact that, unlike during ordinary politics, constitution-making periods tend to lack stable rules and institutions.¹⁴ Therefore, these pre-commitments and temporary arrangements can play a fundamental role in channelling the passions surrounding constitutional politics within institutional frameworks that facilitate elite cooperation toward the consensus-building required in a constitution-making process where power is

¹³C Goss, 'Interim Constitutions and the Invisible Constitution', in *The Invisible Constitution in Comparative Perspective*, edited by R Dixon and A Stone (Cambridge University Press, Cambridge 2018) 167–90. For a thorough examination of the Agreement as an interim constitution and the concessions made by each of the negotiating parties, see M Prieto and S Verdugo, 'How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions' (2021) 13 *Hague Journal on the Rule of Law* 265–94.

¹⁴D Landau, 'Constitution-Making Gone Wrong' (2013) 64 *Alabama Law Review* 923–80.

dispersed among many actors.¹⁵ Prieto and Verdugo rightly point out that this interim Constitution must accommodate competing parties' core interests and (some) political narratives to maintain its self-enforcing capacity.¹⁶ Only in this way can this framework provide 'two-sided' political insurance. I will return to this point later.

Constitutional amendments providing for a gender-balanced assembly and letting independents run on electoral lists for the election of constitution-makers were added to the interim Constitution soon after its adoption and, months later, reserved seats to secure Indigenous representation were also added. Scholars widely celebrated these innovations as opening up the constitutional process to political pluralism unprecedented in Chilean history.¹⁷

In October 2020, the initial enthusiasm translated into massive citizen support for the constitution-making process in the entry referendum, with over 78 per cent of Chilean voters supporting the replacement of the current Constitution and an even higher percentage in favour of entrusting this responsibility to a fully elected convention.¹⁸ A few months later, in May 2021, the 155 constitutional delegates were elected alongside local and regional authorities, resulting in a convention with a socially and culturally plural composition that was far more descriptively representative than any previous deliberative body.¹⁹ Dissatisfaction with the political parties translated into an electoral backlash that hit the right and centre-left particularly hard, causing their performance to fall well below their historical numbers.²⁰

After this episode, the political elites seemed to fade from mainstream accounts of the process until the months before the exit referendum, when a large proportion of them mounted an institutional resistance to the Convention's proposal.²¹ Moreover, the circumstances of the Agreement's negotiation seem to receive little attention in most academic accounts.²²

This oversight seems to overlook that in post-sovereignty constitutional processes, success rests not only on the drafters, but also on a range of institutional actors intervening throughout the process. Since the choices made by the political parties in this first phase determined much of what happened in the downstream process, it is important to pay attention to the negotiations that led to the 2019 Agreement. On this

¹⁵O Varol, 'Temporary Constitutions' (2014) 102(2) *California Law Review* 409–64 (suggesting that temporary constitutions can contribute to consensus-building by funneling constitutional passions); G Negretto and M Sánchez-Talanquer, 'Constitutional Origins and Liberal Democracy: A Global Analysis 1990–2015' (2021) 115(2) *American Political Science Review* 522–36.

¹⁶Prieto and Verdugo (n 13).

¹⁷See, for example, M Ríos, 'Chile's Constitutional Convention: A triumph of Inclusion' (PNUD, Santiago, 2021), available at <<https://www.undp.org/latin-america/blog/chiles-constitutional-convention-triumph-inclusion>>.

¹⁸See electoral results 2020 constitutional plebiscite (SERVEL, 2020, available at <<https://historico.serVEL.cl/servel/app/index.php?r=EleccionesGenerico&id=10>>.

¹⁹J Suarez-Cao, 'Reconstructing Legitimacy After Crisis: The Chilean Path to a New Constitution' (2021) 13 *Hague Journal on the Rule of Law* 253–64.

²⁰See results for the 2021 constitution-makers election (SERVEL, 2021), available at <<https://www.serVEL.cl/centro-de-datos/procesos-electorales-detalle/?id=25>>.

²¹See Escudero in this special issue.

²²Exceptionally, see MC Escudero, 'Making a Constituent Assembly Possible in Chile: The Shifting Costs of Opposing Change' (2022) 41(4) *Bulletin of Latin American Research* 641–56; S Verdugo and M Prieto, 'The Dual Aversion of Chile's Constitution-making Process' (2021) 19(1) *International Journal of Constitutional Law* 149–68.

point, the Chilean experience can offer lessons on a central point of constitution-making design. Because these preliminary agreements are often negotiated behind closed doors among institutional actors,²³ some accounts of the process – even those that accept its post-sovereign design – may not fully reflect the dominance of these upstream actors in shaping the failure of the process.²⁴

This observation is consistent with alternative approaches to constituent power that emphasize the critical role of political elites in constitution-making.²⁵ Elite cooperation and accommodation are essential to the success of any constitution-making effort in a pluralistic democracy. But this cooperation becomes inescapable and difficult within institutional settings where power is dispersed among several institutional actors.²⁶

This is not to say, of course, that political elites can do without the public or their demands. Even if they wanted to, in times of mass mobilization and citizen discontent it would probably be impossible for them to do so.²⁷ More importantly, public participation can legitimize constitution-making from below, which explains the increasing use of public consultations, citizens' initiatives and referenda.²⁸ But even if one accepts the importance of public participation in constitution-making, the central point still stands: elite–mass linkages may exist at some stages of the process, but constitutional design is still an elite affair.²⁹

Looking at the failed Chilean case through this lens, a major reason for the outcome of the process becomes clear: the political elites' failure to agree on crucial aspects of constitution-making design.

Elite polarization in Chile and the constitution-making process as political insurance

Many explanations for the Chilean failure are consistent with this understanding of the role of political elites in constitution-making. Cooperation and accommodation between

²³Similarly, see J Widner, *Constitution Writing and Conflict Resolution Project* (Princeton University Press, Princeton, NJ, 2007).

²⁴Similarly, see JM Carey, 'Does It Matter How a Constitution is Created?' In *Is Democracy Exportable?*, edited by Z Barany and RG Moser (Cambridge University Press, Cambridge, 2009) 155–77.

²⁵See, for example, S Issacharoff and S Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond* (New York University School of Law, New York, 2023); G Negretto, 'Replacing Constitutions in Democratic Regimes: Elite Cooperation and Citizen Participation', in *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives*, edited by G.L. Negretto (Cambridge University Press, Cambridge, 2020) 101–28; A Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, Oxford, 2016); A Sethi, 'Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining' (2023) *Global Constitutionalism* forthcoming, <https://doi.org/10.1017/S2045381723000096>.

²⁶Negretto and Sánchez-Talanquer (n 15).

²⁷The Chilean process provides one such example. See Escudero (n 22); J Suarez-Cao 'Reconstructing Legitimacy After Crisis: The Chilean Path to a New Constitution' (2021) 13 *Hague Journal on the Rule of Law* 253–64.

²⁸H Landmore, *Open Democracy: Reinventing Popular Rule for the Twenty First Century* (Princeton University Press, Princeton, NJ, 2020) 180. See also A Sethi, *Reassessing Public Participation in Constitution-Making Processes* (2023) *Dikaion* forthcoming, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4513429>.

²⁹Negretto and Sánchez-Talanquer (n 15) 524.

political parties in designing the constitution-making process, however, proved extremely difficult in a context of deep polarization. To put these negotiations into context: in the months between President Piñera's inauguration (March 2018) and the social outbreak (October 2019), the opposition unsuccessfully impeached two cabinet members and a Supreme Court justice.³⁰ They also sought the removal of the Attorney-General and pushed for the appointment of fifteen special congressional commissions in the Chamber of Deputies to scrutinize the government.³¹

These circumstances are symptomatic of Chilean democracy, defined by a fragmented and competitive multi-party presidential system with high levels of legislative gridlock and insufficient incentives to build legislative coalitions.³² But they also connect the social demands that led to the outbreak with the disaffection with political parties and the popular demands for constitutional change.³³ Legislative gridlock hinders the adaptation of public policies to the rapid socioeconomic transformation that the country has undergone over the past three decades, threatening the political elite's ability to respond in a timely manner.³⁴

Yet there are also historical reasons for a stalemate on constitutional affairs. One of the defining elements of Chile's democratic transition was the existence of a minority presidential system, imposed by the authoritarian enclaves left in the Constitution by the dictatorship³⁵ and also influenced by the electoral preferences of the electorate.³⁶ Consequently, any significant reform during the first democratic governments was linked to this so-called 'consensus democracy', or the need to secure the support of the opposition.³⁷

The authoritarian enclaves were removed from the Constitution in 2005, but the supermajority threshold required for constitutional amendments continued to block the possibility of a new Constitution. In addition, the consensus-building that characterized Chilean politics in the early years after the democratic transition collapsed during the 2013 elections, in which the centre-left coalition pledged to move quickly on structural reforms without first forging broad political consensus.³⁸ The right-wing parties responded to this new approach by constitutionalizing political debates, aiming to leverage the Constitutional Court's power to overturn new legislation approved by

³⁰See the Chamber of Deputies website for information on impeachment motions, available at <https://www.camara.cl/fiscalizacion/Acusaciones_Constitucionales.asp>.

³¹See the Chamber of Deputies website for information on special congressional commissions, available at <https://www.camara.cl/fiscalizacion/comisiones_investigadoras/comisiones_investigadoras.aspx#marca>.

³²S Verdugo, 'On the Protests and Riots in Chile: Why Chile Should Modify Its Presidential System' (2019) *International Journal of Constitutional Law Blog*, available at <<http://www.iconnectblog.com/2019/10/on-the-protests-and-riots-in-chile-why-chile-should-modify-its-presidential-system>>.

³³C Heiss, 'Re-founding Chile' (2021) 32(3) *Journal of Democracy* 33–47. See generally F Atria *et al.*, *El Otro Modelo. Del orden neoliberal al régimen de lo público* (Catalonia, Santiago, 2013).

³⁴C Le Foulon, 'Cooperation and Polarization in a Presidential Congress: Policy Networks in the Chilean Lower House 2006–2017' (2020) 40(2) *Politics* 227–44.

³⁵P Siavelis, 'Enclaves de la transición y democracia chilena' (2009) 29(1) *Revista de Ciencia Política* 3–21.

³⁶S Valenzuela and T Scully, 'Electoral Choices and the Party System in Chile: Continuities and Changes at the Recovery of Democracy' (1997) 29(4) *Comparative Politics* 511–27, suggesting that, despite the dictatorship's attempts to reshape Chilean politics, voting patterns during the democratic transition exhibited remarkable continuities with elections before the 1973 coup d'état.

³⁷C Fuentes, *La Transición Inacabada El Proceso Político Chile 1990–2020* (Catalonia, Santiago, 2021).

³⁸J Fábrega, J González and J Lindh, 'Polarization and Electoral Incentives: The End of the Chilean Consensus Democracy, 1990–2014' (2018) 60(4) *Latin American Politics and Society* 49–68.

Congress.³⁹ Moreover, legislative gridlock became even more entrenched after the 2015 electoral reform, leading to increasing fragmentation of the party system.⁴⁰

The need for a new Constitution became inescapable after the mass mobilizations triggered the 2019 political crisis. The right-wing parties initially resisted the demands for a new Constitution, but public pressure and the increasing polarization within Congress made this option impossible. Faced with the possible collapse of the government and prosecution for the police repression that followed the outbreak, they ‘gave away’ the Constitution, with all the veto powers it had granted them over the years.⁴¹

This strategy echoes Dixon and Ginsburg’s idea that constitutions can provide an insurance to political elites against the risk of losing their offices and influence in future elections.⁴² The uncertainty created by more than a million people on the streets demanding structural change and, more importantly, the prospect of an unconstrained constituent assembly, prompted the right-wing parties to enter constitutional talks to retain some control over the constitution-making process. This fear was not entirely unfounded, as three days before the Agreement, all opposition parties had adopted the language of the constituent power in a joint statement proclaiming that ‘the mobilized citizens throughout the national territory have staged, de facto, a constitution-making process throughout the country’.⁴³

Following Dixon and Ginsburg’s distinction, the right-wing parties sought ‘power-based insurance’ in entering the constitutional negotiations.⁴⁴ They demanded certain safeguards, such as a single-purpose constitution-making convention and a supermajority rule that would give them veto power. In return, they compromised with the opposition parties by offering them a constitutional ‘swap’: the draft Constitution would be written from scratch (‘blank page’), without the 1980 Constitution as a default rule in case of stalemate. These mutual compromises illustrate that the 2019 Agreement was intended to act as a two-sided political insurance. As such, power-sharing arrangements were built into its design to promote bipartisan consensus.⁴⁵

³⁹See F Atria, ‘Sobre el Tribunal Constitucional y la Nueva Constitución’ (2020) 6(1) *Derecho y Crítica Social* 102, 122, available at <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/83218/10/03a_Rol_T.Constitucional_FranandoAtriaL_.pdf&origen=BDigital> (a summary of two articles previously written by the author).

⁴⁰F Cruz and C Varetto, ‘Crónica de un cambio anunciado. Las elecciones de 2017 en Chile frente al cambio de sistema electoral’ (2019) 54 *Estudios Políticos* 233–58; K Bunker, ‘La elección de 2017 y el fraccionamiento del sistema de partidos en Chile’ (2018) 9(2) *Revista chilena de derecho y ciencia política* 204–29. In the 2013 parliamentary elections, only eight parties won representation in the Chamber of Deputies, a number that was due to increase to sixteen in the 2017 elections and 21 in the 2021 elections.

⁴¹The fear of a possible collapse of the government was recognized by an influential constitutional law professor who was serving as a presidential advisor at the time. S Soto, *La Hora de la Re-Constitución. Una guía para la convención* (Ediciones UC, Santiago, 2020) 46.

⁴²R Dixon and T Ginsburg, ‘The Forms and Limits of Constitutions as Political Insurance’ (2017) 15(4) *International Journal of Constitutional Law* 988–1012, 989.

⁴³See ‘La oposición, desde la DC al Frente Amplio, pide plebiscito y asamblea constituyente’, available at <<https://cooperativa.cl/noticias/pais/politica/constitucion/la-oposicion-desde-la-dc-al-frente-amplio-pide-plebiscito-y-asamblea/2019-11-12/170506.html>>.

⁴⁴Dixon and Ginsburg (n 42) 998.

⁴⁵B Alemparte, ‘The Institutional Interest of Political Parties in Chile’s Constitution-Making Process’ (2020) *International Journal of Constitutional Law Blog*, 17 November, available at <<http://www.iconnectblog.com/2020/11/the-institutional-interest-of-politicalparties-in-chiles-constitution-making-process>>.

III. The entry referendum and its constitution-making consequences

The entry referendum has received little attention from observers of the Chilean process except to assess its political and electoral implications.⁴⁶ In this part, I address this gap by arguing that its inclusion in the process design helped the political elite to sidestep an agreement on the constitution-making model. This left the interim Constitution too open-ended, undermining elite cooperation and accommodation by preventing consensus-building at a critical moment in the process.

Given the similarities between the two constitution-making models and the fact that the 2020 referendum was dominated by one of them, this point may seem irrelevant. For example, some scholars have argued that the devolution of representation in the entry referendum cannot be compared with cases like Brexit because there was a clear electoral mandate.⁴⁷ However, this approach overlooks that this electoral mandate did not reflect the preferences of the political elite at the time, nor did it lead to a subsequent shift in electoral preferences.⁴⁸ Moreover, some design shortcomings of the entry referendum were also present in the Brexit referendum.⁴⁹

Origins of the Entry Referendum

Constitutional referenda are becoming increasingly common,⁵⁰ as are plebiscites placed at the inception of constitution-making processes, as the examples of South Africa (1992), Venezuela (1999), Ecuador (2007) and Chile (2020) suggest. The reliance on these direct democracy mechanisms in constitution-making has attracted criticism and praise. Some see them as an embodiment of popular sovereignty, rejuvenating the people's ability to exercise self-determination concerning essential matters of the polity. Others see them as a threat to democratic pluralism.⁵¹

There is no doubt that entry referenda present many of the dangers described in the literature. Positioned at a critical stage of consensus-building, they often provide no concrete mandate for constitutional drafters,⁵² and may even weaken the constraints on electoral

⁴⁶See J Couso, 'Chile's "Procedurally Regulated" Constitution-Making Process' (2021) 13 *Hague Journal on the Rule of Law* 235–51; P Figueroa, *Constitutional Referendum During the Covid-19 Pandemic: The Case of Chile* (International IDEA, 2021).

⁴⁷C Maldonado, C Rovira and J Sajuria, 'Chile 2020: pandemia y plebiscito constitucional' (2021) 41(2) *Revista de Ciencia Política* 263–290.

⁴⁸The November 2021 parliamentary elections underscore the exceptional outcome of the 2021 Constitutional Convention elections. In the former, right-wing parties achieved a similar result as in the 2017 parliamentary elections. See Larraín, Negretto and Voigt (n 7).

⁴⁹See, for example, J Eisler, 'Dissonant Referendum Design and Turmoil in Representation' (2019) 4 *Public Law* 622–32.

⁵⁰Z Elkins and A Hudson, 'The Constitutional Referendum in Historical Perspective', in *Comparative Constitution Making*, edited by David Landau and Hanna Lerner (Edward Elgar, Cheltenham, 2019) 142–64.

⁵¹The literature on constitutional referenda and plebiscites is too extensive to provide an overview of the arguments for and against their use. For a concise summary of these arguments, see R Bellamy, 'Political Constitutionalism and Referendums: The Case of Brexit' (2023) 18(1) *Social & Legal Studies* (2023) 126–33; R Stacey and R Albert, 'Democracy, Liberalism and Constitutional Referendums: When Does Popular Sovereignty Legitimate Constitutional Change?', in *The Limits and Legitimacy of Constitutional Referendums*, edited by R Stacey and R Albert (Oxford University Press, Oxford, 2022).

⁵²See A Weale, *The Will of the People: A Modern Myth* (Polity Press, Cambridge, 2018).

majorities in the name of 'the people'.⁵³ In contrast, their use also provides a valuable mechanism for legitimizing constitution-making, as public engagement at various stages can allow voters to embrace the process as 'theirs'.⁵⁴ They can also provide a political check on decision-makers when their actions diverge from the average voter.⁵⁵ Nevertheless, the literature emphasizes the negative consequences that referendums can have when used to supplant representative democracy.⁵⁶ This was the case in the entry referendum, where two competing constitution-making models, representing each side of the political elite, were placed on the ballot.

The inclusion of the entry plebiscite in the design of the constitution-making process was a strategy devised to speed up the negotiations for agreeing on an interim Constitution.⁵⁷ It was first mentioned during the parliamentary debates following the outbreak.⁵⁸ Faced with the right-wing parties' refusal to accept any substantial constitutional change, centre and left-wing legislators proposed holding a referendum to delegate to the citizens the decision on whether or not to initiate a constitution-making process. A congressman who would later sit on the Constitutional Convention noted during these debates that 'it must be accepted that no agreement will be reached. If there is no solution, the only way out is an entry referendum'.⁵⁹

The prospect of an entry referendum resurfaced when the conservative right entered the negotiations. The day before the Agreement was reached, two lawmakers (UDI, right-wing) signaled that they would support a constitution-maker process if it included an entry and exit referendum, with the first one putting the question of the constitution-making model on the ballot.⁶⁰ Before that, they had been open to a constitutional replacement, but it had to be handled by Congress, operating under the existing vetoes and rules that prevented any significant constitutional change.⁶¹ At the same time, the pressure on the political parties to agree on a constitution-making process increased significantly after more than 200 mayors agreed to call for a non-binding local referendum on a possible constitutional replacement.⁶²

⁵³See R Van Crombrugge, 'Are Referendums Necessarily Populist? Countering the Populist Interpretation Through Institutional Design' (2021) 57(1) *Representation* 109–30.

⁵⁴See S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2012).

⁵⁵See S Verdugo, 'Referéndum y proceso constituyente: ¿extorsión electoral o veto ciudadano?' (2023) 47 *Actualidad Jurídica* 245–75.

⁵⁶See Bellamy (n 51); L Trueblood, 'Brexit and Two Roles for Referendums in the United Kingdom', in *The Limits and Legitimacy of Referendums*, edited by R Albert and R Stacey (Oxford University Press, Oxford, 2022); Van Crombrugge (n 53).

⁵⁷Escudero (n 22).

⁵⁸See session of the Constitution Committee of the Chamber of Deputies on 29 October 2019. See *Historia de la Ley* N° 21.200, 113, available at <https://www.bcn.cl/historiadelailey/nc/historia-de-la-ley/7711>.

⁵⁹See the speech by Deputy Hugo Gutiérrez at session No. 154 of the Constitution Committee of the Chamber of Deputies dated 4 November 2019, *Historia de la Ley* N° 21.200, pp. 127–28, available at <https://www.bcn.cl/historiadelailey/nc/historia-de-la-ley/7711>.

⁶⁰J Quintana, *Sírvase Conectar* (Catalonia, Santiago, 2020) 117.

⁶¹See 'Ministro Blumel anunció proceso para una nueva Constitución mediante un congreso constituyente', 10 November 2019, available at <https://cooperativa.cl/noticias/pais/manifestaciones/ministro-blumel-anuncio-proceso-para-una-nueva-constitucion-mediante-un/2019-11-10/231146.html>.

⁶²See 'La rebelión municipal: el plebiscito que busca dar participación a la ciudadanía ante la crisis social', available at <https://www.elmostrador.cl/destacado/2019/11/11/la-rebelion-municipal-el-plebiscito-que-busca-dar-participacion-a-la-ciudadania-ante-la-crisis-social>.

From then on, the negotiations over the constitution-making model will follow what Schepelle has called ‘aversive constitutionalism’ – that is, an attempt to escape from constitutional possibilities that are forcefully rejected by institutional actors intervening in the process.⁶³ Verdugo and Prieto have used this framework to examine the Chilean process, suggesting that in the negotiations that led to the 2019 Agreement, each competing political coalition sought to move away from the negative elements championed by the opposing side.⁶⁴ Left-wing parties rejected the constitutional arrangements identified with the Pinochet dictatorship, which gave strong veto powers to minorities that favoured the status quo and perpetuated democratic deficits.⁶⁵ Conversely, right-wing parties rejected a model of transformational constitutionalism advocated by the left-wing parties, which they identified with elements characteristic of the neo-Bolivarian constitutional model, including the weakening of checks on political power and the strengthening of descriptive and symbolic forms of representation.⁶⁶

The inclusion of the referendum played a strategic role in bringing together seemingly irreconcilable positions.⁶⁷ However, these negotiations almost inevitably adopted an accumulative strategy in which each negotiating party excluded the more radical elements of the models defended by the other.⁶⁸ As a result, they resulted in two constitution-making models that were perceived by the political elites as mutually exclusive, since each one would be strongly linked to the political coalition that endorsed it.

This strategy was successful in helping to reach a constitutional agreement and because the disputed alternatives were similar (the only difference being the composition of 50 per cent of the constituent body and its name).⁶⁹ However, it provided an appearance of consensus that would prove untrue only days later.

Too open-ended an agreement?

Political agreements intended to serve as interim constitutions can take various forms. Some are limited to a few procedural rules (Spain, 1977 Political Reform Act), some contain substantive precommitments (Argentina, 1993 Olivos Pact) and some provide for mechanisms of judicial review (South Africa, 1993 Interim Constitution). In all cases, however, they require the competing parties to respect and preserve the core interests of their rivals in exchange for the inclusion of their own core interests.⁷⁰ This did not happen in the case of the 2019 Agreement. The inability of the political elite to agree on what had historically been one of the main obstacles to replacing the Chilean Constitution was hidden behind the false appearance of consensus offered by the accumulation strategy used.

⁶³KL Schepelle, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models’ (2003) 1(2) *International Journal of Constitutional Law* 296–324.

⁶⁴Verdugo and Prieto (n 22).

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷Escudero (n 22).

⁶⁸For an examination of the strategy of accumulation in constitution-making processes, see R Gargarella, ‘Constitution Making in the Context of Plural Societies, The Accumulation Strategy’ in *Constituents Assemblies*, edited by J Elster et al. (Cambridge University Press, Cambridge, 2018) 13–29.

⁶⁹See Chilean Constitution, Article 130.

⁷⁰Prieto and Verdugo (n 13) 267.

There had been calls for a new Constitution in Chile for decades, but the political elites never agreed on how to implement them. Escudero has elaborated on this point, suggesting that even as citizen support for a constituent assembly grew, the political elites supporting a constitutional replacement were divided over who should take on this responsibility.⁷¹

When a political agreement is enacted as a source of law, whether in ordinary or constitutional politics, it creates what Jeremy Waldron calls the ‘circumstances of politics’. In constitutional democracies, these agreements are respected and honoured as an achievement of cooperative and coordinated collective action in culturally diverse societies.⁷² In the 2019 Agreement, however, these circumstances of politics did not occur through an ‘overlapping consensus’ that would sustain widespread allegiance to the interim Constitution because they relied on an accumulation of models rather than the deliberation of a single one.⁷³

Such a strategy proved very costly for consensus-building at this early stage. The absence of overlapping consensus probably led some parties not to feel bound by this part of the Agreement. These parties sought to deepen elements of their constitution-making model that had been left out of the negotiations. The chairwoman of one of the signatory parties (Democratic Revolution, left) later admitted that ‘when we realized we were not going to get (Indigenous) reserved seats in the Agreement, we decided to leave it for a later debate’.⁷⁴ As a result, the remaining parties interpreted this action as a cancellation of the political insurance provided by the interim Constitution, further polarizing interactions among the political elites.

Faced with uncertainty over how the political crisis would affect the right-wing parties in the upcoming electoral cycle, some left-wing parties pushed to reopen the 2019 Agreement’s provisions on the electoral rules for electing constitution-makers. In doing so, they pushed to move the constitution-making process in a direction that would better align with the model they championed.

During the ongoing debates in Congress over the 2019 Agreement, legislators began to introduce Bills aimed at electoral rules that would facilitate the election of independent candidates, ensure a gender-balanced convention and reserve seats for Indigenous people.⁷⁵ Notably, the right-wing negotiators rejected these last two points during the constitutional talks. According to the then President of the Senate, just before the Agreement was reached, Deputy Gabriel Boric (Broad Front, left) raised the idea of including reserved seats and gender parity electoral rules, which Senator José Antonio Coloma (UDI, right) rejected.⁷⁶

⁷¹For a detailed overview of the positions of the political elite on the mechanism to replace the Constitution, see Escudero (n 22).

⁷²J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999) 101–3.

⁷³I borrow the concept of overlapping consensus from J Rawls, ‘The Domain of the Political and Overlapping Consensus’ (1989) 64(2) *New York University Review of Law* 233–55. See also J Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7(1) *Oxford Journal of Legal Studies* 1–25.

⁷⁴See Catalina Pérez’s intervention in *Acuerdo del 15 de Noviembre de 2019: una noche histórica* (Centro de Estudios Públicos, Santiago, 2022). Available at <https://www.youtube.com/watch?v=enfUe_k-vg>.

⁷⁵I Caro, ‘Acuerdo constitucional: oposición amenaza con enviar su propia reforma para cuotas’, *La Tercera*, 1 December 2019, available at <<https://www.latercera.com/politica/noticia/acuerdo-constitucional-oposicion-amenaza-enviar-reforma-cuotas/922459>>.

⁷⁶J Quintana, *Sírvase Conectar* (Catalonia, Santiago, 2020) 123.

Confronted with this dilemma and the uncertainty of the political landscape, a division emerged within the right-wing parties. The more moderate faction accepted these demands and sought compromise solutions to mitigate the associated electoral costs.⁷⁷ Moreover, these new negotiations unfolded amidst protests and mounting pressure from social movements advocating for several of the reforms that were being promoted.⁷⁸ On the other hand, the conservative right (UDI) criticized such proposals as a breach of the 2019 Agreement and subsequently distanced itself from the other parties in the coalition.⁷⁹ This division within the right-wing parties over their approach to the constitution-making process persisted for several months.⁸⁰

These three amendments to the 2019 Agreement have received the most attention from scholars, and can be viewed as a successful attempt at reopening the interim Constitution. However, Congress also passed an electoral amendment to establish quotas for people with disabilities, securing their inclusion in the electoral lists for the election of the Constitutional Convention.⁸¹ In addition, in the months following the Agreement, legislators introduced constitutional reform Bills that repeatedly and unsuccessfully attempted to implement measures to expand voter representation. These proposals included extending the right to vote in the entry referendum to anyone over the age of 14,⁸² disqualifying senior executive officials from standing as candidates in the constitution-makers elections,⁸³ introducing remote voting,⁸⁴ creating overseas electoral districts,⁸⁵ granting voting rights to prisoners⁸⁶ and introducing compulsory voting in the entry referendum.⁸⁷

The revisions to the Agreement succeeded in broadening the representation of the Constitutional Convention, particularly to the benefit of minorities traditionally marginalized from elected office.⁸⁸ However, this was done at the cost of cancelling the political insurance the interim Constitution provided to the right-wing parties.

⁷⁷C Fuentes, 'Escanos reservados, o la política en la medida de lo posible', CIPER, 19 December 2020, available at <<https://www.ciperchile.cl/2020/12/19/escanos-reservados-o-la-politica-en-la-medida-de-lo-possible>>.

⁷⁸See, for example, Y Márquez, "'Hagan su tarea': feministas protestan en Congreso exigiendo paridad de género en nueva Constitución', Biobio, 18 January 2020, available at <<https://www.biobiochile.cl/noticias/nacional/region-de-valparaiso/2019/12/18/hagan-su-tarea-feministas-protestan-en-congreso-exigiendo-paridad-de-genero-en-nueva-constitucion.shtml>>.

⁷⁹A Labra, 'UDI notifica que suspende su participación en Chile Vamos tras apoyo desde RN y Evópoli a paridad de género', *La Tercera*, 20 December 2019, available at <<https://www.latercera.com/politica/noticia/udi-notifica-suspende-participacion-chile-tras-apoyo-desde-rn-evopoli-paridad-genero/946459>>.

⁸⁰C Fuentes, 'El proceso fallido. La dinámica constituyente en dos niveles' in *El Proceso Fallido La Dinámica Constituyente en Chile 2020–2022*, edited by C Fuentes (Catalonia, Santiago, 2023) 38–95, 50–53.

⁸¹See A Meneses et al, 'Disability in the Chilean Constitutional Process' (2023) 38(8) *Disability & Society* 1496–1501.

⁸²See Legislative Bulletin No. 14212-07, 18 April 2021, available at <<https://www.camara.cl/legislacion>>.

⁸³See Legislative Bulletin No. 13866-07, 28 October 2020 available at <<https://www.camara.cl/legislacion>>.

⁸⁴See Legislative Bulletin No. 13788-07, 14 September 2020 available at <<https://www.camara.cl/legislacion>>.

⁸⁵See Legislative Bulletin No. 13813-07, 28 September 2020 available at <<https://www.camara.cl/legislacion>>.

⁸⁶See Legislative Bulletin No. 13783-07, 25 August 2020 available at <<https://www.camara.cl/legislacion>>.

⁸⁷Ibid.

⁸⁸See, for example, C Le Foulon and V Palanza, 'Elecciones a la Convención Constituyente: Innovación y Renovación', Centro de Estudios Públicos, Puntos de Referencia No. 580, July 2021, available at <https://www.cepchile.cl/wp-content/uploads/2022/09/pder580_clefoulon_vpalkan.pdf>.

These dynamics are hardly unique to the Chilean process. Negretto notes that ‘political actors would attempt to renegotiate the terms of a constitutional agreement or renege on it ex post if they have the capacity to do so’. He argues that, ‘Most political agreements are opportunistic or induced by temporary influence of exogenous factors.’⁸⁹ Predicting such renegotiations is difficult, but once they arise, the cooperation from those impacted by them can be expected to decline significantly. Therefore, as the left-wing parties pursued these electoral reforms that brought the process closer to their constitution-making model, the right-wing parties perceived the constitutional swap of the political insurance that underpinned the interim Constitution as cancelled. Although most of its leaders constantly called for respecting the Agreement, a large part of the coalition openly campaigned against a new Constitution in the entry referendum.⁹⁰

The rest of the story is also well documented: the initial division among the right-wing parties over how to deal with the uncertainty posed by the Constitutional Convention disappeared after their constitution-makers were excluded from the constitutional bargaining.⁹¹ Simultaneously, the 2021 parliamentary elections improved the relative position of the right-wing parties in Congress, giving them more insights into their political standing *vis-à-vis* the electorate.⁹² This strengthened their hand to develop institutional resistance strategies against the Constitutional Convention. These strategies were initially subtle, such as petitioning the Venice Commission for an opinion on the Convention’s proposals to redesign the bicameral structure of Congress, the Judiciary, and the Constitutional Court.⁹³ As popular support for the Convention waned, these strategies became more aggressive. For example, they agreed to lower the supermajorities required to amend the 1980 Constitution.⁹⁴ This aimed to reduce the transaction costs for those who wanted a new Constitution, were dissatisfied with the Convention’s outcome, and were still deciding whether to reject the constitutional proposal in the exit referendum. Paradoxically, this move can also be explained as a constitutional swap intended to serve as political insurance: the right and the center-left agreed to ‘defer’ the adoption of a new Constitution, but in return, the right-wing parties reduced their veto power over the 1980 Constitution.⁹⁵

IV. Conclusion

Chileans’ memories of the failed constitution-making process are likely associated with episodes from the Constitutional Convention.⁹⁶ They may recall one constitution-maker

⁸⁹Negretto (n 25).

⁹⁰Verdugo and Prieto (n 22).

⁹¹E Rubio, ‘Convencionales de derecha reaccionan a los dichos de Andrés Cruz y aseguran que han sido ‘excluidos’ de la discusión constitucional’, *La Tercera*, 19 February 2022.

⁹²See Dixon and Ginsburg (n 42) 1001.

⁹³See Senador Castro Prieto sobre el informe de Comisión Venecia: ‘queremos una buena Constitución que nos represente a todos’, available at <<https://www.senado.cl/senador-castro-prieto-sobre-el-informe-de-comision-de-venecia-queremos>>.

⁹⁴See Law No. 21.481, dated 19 August 2022.

⁹⁵The Bill to amend the Constitution was sponsored by Christian Democratic senators (center-left). However, the right-wing parties were instrumental in negotiating the Bill. See ‘La «Tercera vía» en el Senado: proyecto que rebaja a 4/7 el quórum para reformar actual Carta Magna será revisado por Comisión de Constitución’, available at <<https://www.elmostrador.cl/destacado/2022/06/27/la-tercera-via-en-el-senado-proyecto-que-rebaja-a-4-7-el-quorum-para-reformar-actual-carta-magna-sera-revisada-por-comision-de-constitucion>>.

⁹⁶See J Piscopo and P Siavelis, ‘Chile’s Constitutional Chaos’ (2023) 34(1) *Journal of Democracy* 141–55.

lying about having terminal cancer; another admitting to voting remotely from the shower; a third yelling at a children's choir while they sang the national anthem; and two others dressing up in costumes inside the Convention Hall. But, as this article has suggested, the mistakes and shortcomings began long before they were elected.

The entry referendum provided a basis for reaching a constitutional agreement at a critical juncture. However, by turning to this mechanism, the political elites postponed for months one of the most critical aspects of the design of a constitution-making process. By delegating this decision to the voters, the political elites also ignored that the threat of factionalism is probably the most pressing challenge in organizing constitutional politics. Constitutional politics aims to articulate institutional arrangements that frame future political competition.⁹⁷ This creates a strong incentive for a majority faction to exploit its dominant position, even if this sometimes leads to democratic erosion or backsliding.⁹⁸

In the context of elite polarization, introducing such a referendum at the onset of the constitution-making process proved to be a design shortcoming. It stands as a paradigmatic example of a constitution-making mechanism that intensifies elite polarization,⁹⁹ fostering strong factionalism and hindering any consensus-building among the political elites in the initial stage of the process. This design shortcoming set the stage for the smooth cancellation of the political insurance that underpinned the 2019 Agreement and, more importantly, for the factionalism unleashed soon after.

⁹⁷W Partlett and S Nwokora, 'The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics are Different' (2019) 26 *Constellations* 177–93.

⁹⁸Ibid.

⁹⁹See J Widner, 'Constitution Writing and Conflict Resolution' (2005) 94(381) *The Round Table* 503–18.