

Democracy and Constitution-Making in Chile

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For years now, Chile has attempted to break from the legacy of dictator Augusto Pinochet and adopt a new constitution. In December 2023, voters decisively rejected a second constitutional draft. These attempts have afforded Indigenous people in Chile unprecedented recognition in the process, while also contemplating new governmental structures for Chile. This Article assesses Chile's inclusive and democratic approach to constitution-making and compares similar processes in Egypt, Tunisia, and particularly, the United States. I provide a comprehensive summary of Chile's political history and apply the reflections of prominent political philosophers to ongoing constitution-making efforts in the country.

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I. INTRODUCTION

Chile has sparked the interest of the global community by twice opting to redraft its constitution with an unprecedented commitment to diversity and inclusion in its constitutional assembly.¹ And, while these values are no doubt admirable, this Article considers whether such a structure can succeed in creating a basic law for Chile that reflects the general will of the people. The costs and benefits of interlinking democracy and constitutionalism have been considered by many philosophers and exemplified in several case studies around the world.

This Article argues that simply bringing more representatives to the table will not ensure a just and fair basic law. Only the will of the people can hold political institutions—in this case constitutional conventions—accountable. Even institutions that are designed to protect democracy are, in a practical sense, irrelevant.² To ensure desired outcomes, the people must continue to organize. Protests by the people prompted the redrafting of the Chilean constitution, but they cannot stop there.

Alexis de Tocqueville warns that the people are too self-interested to ever be free.³ The people should not and cannot rely on the reservation of seats for Indigenous groups and equal representation for women among the constitutional delegation to secure an inclusive basic law. Such tactics in Egypt proved to be ineffective and a detriment to represented groups.⁴

This Article points to the paradox of an inclusive constitutional convention. Because the politics of the day determine so much surrounding constitutional conventions and the interests considered, the document created reflects merely a “snapshot of politics.”⁵ Thus, while democracy is inherently flawed and reserving seats for minorities is ineffective, Chile has yet another hill to surmount. The Chilean constitutional assembly must consider not only the interests and needs of

1. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female 'We'*, UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

2. MARK TUSHNET, *THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* 173-74 (2021).

3. Richard W. Krouse, *'Classical,' Images of Democracy in America: Madison and Tocqueville*, in *DEMOCRATIC THEORY AND PRACTICE* 51 (Graeme Duncan ed., 1983).

4. Ian Hartshorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 *SAGE PUBLICATIONS* 408, 413 (2017).

5. *Id.* at 409.

the people present today, but also consider the interests and needs of the generations to come.⁶

Moreover, this Article seeks to provide a balanced and thorough discussion on constitutional conventions as well as provide insights for the Chilean constitutional assembly specifically. Part II discusses political tensions in Chile and the circumstances that lead the country to elect a constitutional assembly. Augusto Pinochet's violent rise to power and creation of the current 1980 constitution demonstrate the dangers of pluralism as a democratic model. Part III then explains constitution-building by delving into several methods used to create a document that serves as a useful basic law. Comparing the vastly different strategies of the Chilean Convention to the Philadelphia Convention provides useful contrast on the issues of inclusivity and rights-based frameworks. Moreover, building on our understanding of constitutional conventions, Part IV analyzes the costs and benefits of utilizing constitutional conventions as democratic lawmaking bodies. Importantly, Part IV looks to the tactics used in Tunisia and Egypt to create new constitutions to provide examples of constitutional conventions gone awry.

II. BACKGROUND ON POLITICAL TENSION IN CHILE

Political tensions in Chile have been mounting for decades and culminated in a historic vote to elect a diverse body of delegates to propose a new constitution for the country.⁷ In 2019, President Sebastian Pinera agreed to hold a referendum that would allow the people to weigh in on two important issues of the day:⁸ first, whether they support the drafting of a new constitution,⁹ and second, how and who would draft a possible new constitution.¹⁰ Overwhelmingly, the people voted to draft a new constitution and to have a body elected by popular vote draft the document.¹¹ Part II provides a critical background of democracy in Chile to contextualize the 2019 referendum and place the 2021 constituent assembly vote in the larger democratic history of Chile. There is no doubt that pressure has been mounting for decades to craft a more inclusive

6. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 376 (1995).

7. *Jubilation as Chile Votes to Rewrite Constitution*, BBC, <https://www.bbc.co.uk/news/world-latin-america-54687090> (last visited Dec. 15, 2021).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

constitution. At the same time, it was pluralism in Chile that led to the collapse of democracy in Chile in the first place.

A. Chile's Democratic History: A Cautionary Tale

As early as the mid-nineteenth century, Chilean presidents were democratically elected.¹² Traditionally, Chile held staggered elections that occurred on a frequent basis.¹³ Presidential elections were held every six years, congressional elections every four, and municipal councils every three years, later every four years.¹⁴ Within the first year of most presidential elections and near the end of the presidential term, honeymoon and counter-honeymoon elections were also held respectively.¹⁵ Almost none of these elections coincided.¹⁶

Chilean democracy operated under a de facto multiparty system with direct democracy, entrenching localism while encouraging coalition building.¹⁷ The party who received the largest plurality of the vote in the presidential election would take office.¹⁸ Then, the mid-term municipal and congressional elections, known as “honeymoon” elections, would function as referenda on the ideological forces that prevailed in the presidential election.¹⁹ Parties showed their strength as coalition partners to overturn the incumbent president.²⁰ Because the midterms never coincided with the presidential election, politics stayed largely localized.²¹

For example, in the 1970 presidential elections, all three predominant political parties vied for the plurality and did not form coalitions.²² The leftist party candidate Salvador Allende garnered 36.6%, the right's candidate Jorge Alessandri received 35.2%, and the Christian Democrat's Radomiro Tomic finished with 28.1% of the vote.²³ Then, in the 1971 honeymoon election, the leftists drew on support from the

12. Matthew Shugart & John Carey, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 85 (2012).

13. *Id.* at 244.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 85, 246.

18. *Id.* at 246.

19. *Id.* at 244.

20. *Id.* at 248.

21. *Id.*

22. *Id.* at 247.

23. *Id.*

right.²⁴ The left received nearly half the vote while the right's support decreased to eighteen percent.²⁵

Of course, Chile's longstanding democracy came to an abrupt halt when Augusto Pinochet rose to power by inciting a deadly coup that left more than 3,000 people dead or missing.²⁶ Some credit this violent collapse of democracy to the extreme polarization of the day.²⁷ Still, it was Pinochet's new constitution in 1980 that reintroduced democratic elections to the country. The 1980 constitution certainly solidified Pinochet's position as president for the following eight-year term, but it also allowed for a referendum election in 1988.²⁸

When Pinochet was finally ousted in 1988, Chile largely kept the 1980 constitution over the course of the next twenty years.²⁹ After Pinochet reluctantly let go of power, scholars seemed optimistic for future salability for Chile.³⁰ Specifically, they remark that the parties were "forced to make concessions and compromises, to relinquish utopian dreams in order to achieve incremental progress, and to recognize that both the country and the world have changed."³¹ And so it seems that Chileans predicted a pivot from dictatorship to robust and balanced democracy for their country.³²

B. *The People Call for a New Constitution with an Inclusive Process*

Much to the contrary, Indigenous groups in Chile have felt excluded from the democratic process.³³ Without formal recognition in the Chilean constitution, multi-national corporations with the blessing of the Chilean government have usurped Indigenous land and resources.³⁴ And, relating

24. *Id.*

25. *Id.*

26. *Chile Country Profile*, BBC, <https://www.bbc.com/news/world-latin-america-19357497> (last visited July 31, 2021).

27. Pamela Constable & Arturo Valenzuela, *Chile's Return to Democracy*, 68 FOREIGN AFF. 169, 171 (1988-1990).

28. Salome Garnier, *From Dictatorship to Democracy: Chile's Outdated Constitution*, HARV. INT'L REV., (Feb. 15, 2020), <https://hir.harvard.edu/from-dictatorship-to-democracy/>.

29. *Id.*

30. Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010*, 89 TEX. L. REV. 1517, 1534 (2011).

31. Pamela Constable & Arturo Valenzuela, *Chile's Return to Democracy*, 68 FOREIGN AFF. 169, 171 (1988-1990).

32. *Id.*

33. *Id.*

34. Jane Chambers, *Chile's Mapuche Indigenous Group Fights for Rights*, BBC (Nov. 26, 2020), <https://www.bbc.com/news/world-latin-america-55042838>; Patricia Rodriguez, *Chilean Protesters Are Waving the Mapuche Flag. What's the Mapuche Flag, and Who's Hoisting*

to the economic landscape of Chile generally, the country is one of the most unequal countries in the world, with the richest twenty percent earning ten times more than the poorest twenty percent.³⁵ In response to rising subway fares, and a number of other economic issues driven by Chile's broader economic model, many Chileans took to the streets.³⁶

In 2019, protests and unrest came to a head, leading to the current redrafting of the constitution.³⁷ Violence and arson in the protests of 2019 led to a military deployment, where one thousand people were injured and twenty killed.³⁸ Months of instability ensued, until formal efforts to craft a constitution were made.³⁹ Then, in May 2021, Chile elected 155 delegates to the Constitutional Convention tasked to draft a new constitution for the country with social equity and inclusion in mind.⁴⁰

In crafting a new constitution, Chile went further than any country before it to include women and Indigenous groups in the process of building a constitution.⁴¹ Of the 155 seats, seventeen are expressly reserved for Indigenous groups.⁴² The other seats were distributed through a popular vote where forty-five seats were won by independents, thirty-nine by the conservative ruling party "Chile Vamos," twenty-five by the centre-left "Unidad Constituyente," twenty-eight by the far-right

It?, WASH. POST (Nov. 11, 2019), <https://www.washingtonpost.com/politics/2019/11/11/chilean-protesters-are-waving-mapucho-flag-whats-mapucho-flag-whos-hoisting-it/>.

35. Jane Chambers, *Chile's Mapuche Indigenous Group Fights for Rights*, BBC (Nov. 26, 2020), <https://www.bbc.com/news/world-latin-america-55042838>; Patricia Rodriguez, *Chilean Protesters Are Waving the Mapuche Flag. What's the Mapuche Flag, and Who's Hoisting It?* WASH. POST (Nov. 11, 2019), <https://www.washingtonpost.com/politics/2019/11/11/chilean-protesters-are-waving-mapucho-flag-whats-mapucho-flag-whos-hoisting-it/>.

36. *Chile Protests: Is Inequality Becoming Worse?*, BBC, <https://www.bbc.com/news/world-latin-america-50123494> (last visited July 31, 2021).

37. Salome Garnier, *From Dictatorship to Democracy: Chile's Outdated Constitution*, HARV. INT'L REV., (Feb. 15, 2020), <https://hir.harvard.edu/from-dictatorship-to-democracy/>.

38. Alex Ward, *Chileans Want a More Equal Society. They're About to Rewrite the Constitution to Have It*, VOX (Oct. 26, 2020), <https://www.vox.com/21534338/chile-constitution-plebiscite-vote-pinochet>.

39. Salome Garnier, *From Dictatorship to Democracy: Chile's Outdated Constitution*, HARV. INT'L REV., (Feb. 15, 2020) <https://hir.harvard.edu/from-dictatorship-to-democracy/>.

40. *Id.*

41. Alex Ward, *Chileans Want a More Equal Society. They're About to Rewrite the Constitution to Have It*, VOX (Oct. 26, 2020), <https://www.vox.com/21534338/chile-constitution-plebiscite-vote-pinochet>; Daniel Zovatto et. al, *Analysis of the Elections in Chile*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (May 25, 2021), <https://www.idea.int/news/analysis-elections-chile>.

42. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female 'We,'* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

“*Apruebo Dignidad*,” and the final seat going to a small coalition.⁴³ Additionally, half of the delegates of the whole convention must be female per a gender quota agreement and 2015 law.⁴⁴ Prior to the elections, the gender quota system was designed to ensure gender parity in both the nomination and election of female candidates in a given party.⁴⁵ This dual mechanism worked to encourage parties to run competitive female candidates, resulting in a final count of seventy-eight male and seventy-seven female delegates.⁴⁶ The gender mandate, somewhat ironically, forced eleven female candidates to give their places to their male co-runners.⁴⁷

III. CONSTITUTIONAL CONVENTIONS AS A PROCESS FOR CONSTITUTION CONSTRUCTION

Many countries around the world have opted to use constitutional conventions to create the basic law of the land.⁴⁸ Of course, the American Constitution of 1787 provides useful insight into conventions, but so do the constitutions of post-World War II Germany and Japan. Depending on the procedures followed by the constitutional assembly, the people can be more or less involved in the process. As Jon Elster writes, “the relation between the assembly and its creators can be summarized in two opposing slogans: ‘Let the kingmaker beware of the king’ versus ‘Let the king beware of the kingmaker.’”⁴⁹ Part III explains some general aspects and

43. *Id.*

44. Dave Sherwood et al., *Chile’s Govt in Shock Loss as Voters Pick Independents to Draft Constitution*, REUTERS (2021), <https://www.reuters.com/world/americas/chile-ruling-coalition-heading-disappointment-constitutional-delegates-vote-2021-05-17/>. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female ‘We,’* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

45. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female ‘We,’* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>; Leslie Schwindt-Bayer, *Chile’s Gender Quota: Will it Work?* 1 (2015) (on file with author).

46. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female ‘We,’* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

47. *Id.*

48. *Id.*

49. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 376 (1995).

advantages of constitutional assemblies while exploring constitutionalism around the world. And, to build a deeper understanding of these constitution-making processes, Part III contrasts the historic proceedings of the Philadelphia Convention with the new tactics being developed in Chile.

A. What is a Constitutional Convention?

If Chile intends to continue its democratic traditions, the constitutional convention they've opted for seems to fit the bill and may produce a more inclusive basic law for the country.⁵⁰ A constitutional convention is defined as "a representative body collected together to discuss constitutional change."⁵¹ Convention implies "agreement," and so a constitutional convention translates to "an agreement forming a constitution."⁵² In general, the body of people tasked with designing a new constitution may be directly elected assemblies, appointed committees, or parliamentary committees.⁵³

In *After the Referendum: Options for a Constitutional Convention*, Alan Renwick lays out a set of considerations for constitution-building.⁵⁴ Of course, one must consider the purpose of the process and who takes part in it.⁵⁵ The basic structure for debate and the constitutional body's operational procedures are also important considerations.⁵⁶ Finally, the convention must determine what will happen once the constitution-making body concludes deliberations and finalizes the document.⁵⁷

To achieve their end, constitutional conventions may include expert commissions, be influenced by negotiations among political leaders and civil societies, or even take a mixed model approach in organizing citizens to design their constitution.⁵⁸ These constitution-making bodies are given

50. *Id.* at 373-74.

51. *Id.* at 375.

52. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female 'We,'* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

53. Thomas Brown, *Constitutional Conventions: Possible Options in the New Parliament*, HOUSE OF LORDS 1 (2015).

54. Sir Ivor Jennings, *THE LAW AND THE CONSTITUTION* 81 (Hodder and Stoughton eds., 5th ed. 1964).

55. Ian Hartshorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 408, 409, 420 (2017).

56. Alan Renwick, *AFTER THE REFERENDUM: OPTIONS FOR A CONSTITUTIONAL CONVENTION* 7 (2014).

57. *Id.*

58. *Id.*

a limited mandate to design a constitution and usually disband after submitting their constitutional proposal.⁵⁹ Thus, they reflect a “snapshot of politics” even though they lay the foundation for constitutional matters in the decades to come.⁶⁰ Given this framework, it’s worth critically considering whether a truly inclusive basic law is even possible. If the electorate constantly changes, how can the constitution retroactively represent them?

Though Jon Elster does not specifically address Latin American constitution-making in his article *Forces and Mechanisms in the Constitution-Making Process*, he speaks generally to the mindset of framers.⁶¹ First, framers must make certain assumptions about the motivations of future voters, politicians, judges, central bankers, and other actors that may need to be regulated in the constitution.⁶² Elster also points out that there are three categories of interests: namely, personal interests, group interests, and institutional interests.⁶³ Group interests are the most important and are usually decisive in forming electoral laws.⁶⁴ Larger parties tend to prefer majority voting in single-member districts, and smaller parties, by contrast, tend to prefer proportional elections.⁶⁵

B. . . . And Why Proceed with It?

Nonetheless, while constitutional conventions inherently struggle to be representative of the will of the people, they provide other benefits to the people. Constitutional conventions create a stable legal framework.⁶⁶ And, as Justice Scalia writes at length, the importance of a predicable basic law cannot be understated.⁶⁷ Predictability asserts that on a basic level, the people must be aware of the law to be held accountable to it. Indeed, Scalia writes, “rudimentary justice requires that those subject to the law must have the means of knowing what is prescribed.” He even goes so far as to write “there are times when even a bad rule is better than no rule at all.”⁶⁸

59. *Id.*

60. *Id.* at 8.

61. *Id.* at 21-25.

62. Ian Hartshorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 408, 409 (2017).

63. *Id.*

64. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 376 (1995).

65. *Id.*

66. *Id.*

67. *Id.* at 378.

68. *Id.*

In creating a predictable basic law, constitutional conventions may also work to constrain the power of the government. Indeed, David Feldman defines constitutionalism as “the political doctrine that claims that political authority should be bound by instructions that restrict the exercise of power.”⁶⁹ In essence, constitutions work to carve out norms for society and articulate citizen values.⁷⁰ Likewise in practice, James Madison contends that constitutions offer stability, fundamental rights, neutrality, accountability, fair representation, informed consensus, and effective government.⁷¹

Strong institutions also offer stability, but these are largely linked to the integrity and commitments of the institution’s members and agents.⁷² Specifically, David Feldman submits that the institution’s members and agents should 1) allow political and legal processes to resolve conflicts concerning the organization, 2) consider the underlying principles of the organization, and 3) reference a “normative vision of the good state” when advancing a policy.⁷³ In other words, to build strong institutions, the institutions’ members and agents must rely on politico-legal justifications in their policy-making roles.⁷⁴ Feldman maintains that this model of constitutionalism applies to all forms of constitutions.⁷⁵

In an evolving world, a basic and unchanging law provides an anchor for the people.⁷⁶ Take, for example, the U.S. Constitution’s Fourth Amendment, which states “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁷⁷ As technology advances, the search methods of the government change, but the personal privacy rights of the people guaranteed by the Fourth Amendment should remain.⁷⁸ In *Kyllo v. United States*, the United States Supreme Court considered whether the use of a thermal-imaging device, without a warrant, to scan a house for marijuana

69. SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 81 (Hodder and Stoughton eds., 5th ed. 1964).

70. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

71. *Id.*

72. David Feldman, *‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad*, OXFORD UNIVERSITY PRESS 119 (2011).

73. CONSTITUTIONS IN AUTHORITARIAN REGIMES 13 (Tom Ginsburg & Alberto Simpser eds., 2014).

74. Robert Dahl, *ON DEMOCRACY* 124-25 (2000).

75. David Feldman, *‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad*, OXFORD UNIVERSITY PRESS 124 (2011).

76. *Id.*

77. *Id.* at 125.

78. *Id.*

constituted an unreasonable search and seizure.⁷⁹ In a 5-4 opinion, Justice Scalia wrote, “where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”⁸⁰

Moreover, constitutional conventions tease out the “raw material” for the law to the benefit of the people.⁸¹ Constitutional conventions with democratic features allow information to be gathered from all cross-sections of society.⁸² With the maximum representation, the agreements reached would, theoretically, work to protect shared interests of society. All groups can agree on upholding the rule of law and preventing corruption and tyranny.⁸³ Constitutions can also work to protect unpopular minorities.⁸⁴ Judges, for example, may be tasked with the role of protecting the criminal defendant against the popular will.⁸⁵ Because the power of any one group in a democracy changes with the tailwinds, all the groups represented in a constitutional convention may likewise have an interest in protecting the rights of minorities.

C. *Constitutionalism at Work Around the World*

After the end of World War II, the Allied Powers exported constitutionalism to Germany and Japan.⁸⁶ The Allied Powers required Germany to adopt a constitution that established a federal structure of government that would protect individual rights and freedom while providing for some centralized government authority.⁸⁷ In the end, the Parliamentary Council crafted the German Basic Law, which was approved by the Allied Powers and ratified by two-thirds of the German legislature in May, 1949.⁸⁸ Likewise in Japan, a new constitution was

79. SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 81 (Hodder and Stoughton eds., 5th ed. 1964).

80. U.S. CONST. AMEND. IV.

81. *Kyllo v. United States*, 533 U.S. 27, 27 (2001).

82. *Id.*

83. *Id.*

84. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

85. CONSTITUTIONS IN AUTHORITARIAN REGIMES 13 (Tom Ginsburg & Alberto Simpser eds., 2014).

86. Alan Ryan, *Mill and Rousseau: Utility and Rights*, in *DEMOCRATIC THEORY AND PRACTICE* 50 (Princeton University Press, 2012).

87. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

88. *Id.*

adopted in 1947 through a joint effort.⁸⁹ The Japanese constitution, however, was crafted by American lawyers with the specific goal of establishing human rights protections in Japan and subjecting the emperor to popular vote.⁹⁰

Many other states, however, reject constitutionalism by declaring that a constitution with strong institutions would be a liability to the state.⁹¹ Specifically, countries in Africa such as Swaziland, Zimbabwe, Lesotho, Kenya, Tanzania, and Zambia have argued that a strong constitutional order would limit economic development.⁹² Fragmenting power, they say, will present serious long-term challenges to central planning and financial coordination.⁹³ In the short term, these countries argue that an independent constitutional order would slow down the delivery of government services and hinder the state's ability to make sound education, health, and agricultural policy.⁹⁴

Unsurprisingly, these countries experienced a consolidation of power among the political elite when coercive powers under the constitution were expanded.⁹⁵ The transformation of constitutions into political instruments took place in several ways.⁹⁶ First, the role of parliament as a supervisor to executive emergency power was either removed or significantly weakened.⁹⁷ Second, when conflicts arose between provisions in the constitution and specific legislation, the constitution would simply be amended.⁹⁸ In essence, the constitution became irrelevant in these countries.⁹⁹ It no longer worked to arbitrate the power process or establish the basic law the land.¹⁰⁰ Constitutional amendments reacted to the politics of the day rather than establishing a foundation for the process.¹⁰¹ The constitutional order no longer set out

89. Vicki Jackson & Mark Tushnet, *COMPARATIVE CONSTITUTIONAL LAW* 317 (3rd ed. 2014).

90. *Id.*

91. *Id.*

92. *Id.* at 318.

93. *Id.*

94. CONSTITUTIONALISM AND DEMOCRACY TRANSITIONS IN THE CONTEMPORARY WORLD 72 (Douglas Greenburg et al. eds., 1993).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 73.

99. *Id.*

100. *Id.*

101. *Id.*

the basic rules for the game; it became “a crucial element in political warfare, an instrument of and from the appropriation of power.”¹⁰²

D. Chile Takes an Inclusive Approach, Contrasting Philadelphia

Chile has opted to pursue a remarkably representative framework that includes most, if not all, interest groups in the country. Specifically, the people opted for a citizen’s assembly. Chileans elected for a comprehensive review of the constitution guaranteed unprecedented gender equity, and reserved space for Indigenous groups.¹⁰³ Recently, Chile also determined five operational procedures for their constitutional convention.¹⁰⁴ These five rules address ethics; Indigenous participation and consultation; regulation of mechanisms organization, and methodologies of public participation; and finally, the administration and financing of the convention.¹⁰⁵ Finally, the Chilean constitution will be crafted with a rights framework that works to increase pensions and salaries while guaranteeing better healthcare for the people.¹⁰⁶

The American constitution, by contrast, was crafted with a rights framework that works to decrease centralized power and guarantee individual freedoms.¹⁰⁷ When crafting the U.S. Constitution, James Madison famously wrote:

If men were angels, no government would be necessary. If angels were to govern men, neither external not internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁰⁸

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female ‘We,’* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

107. *Id.*

108. Pamela Figueroa, *The Constitutional Convention’s Rules of Procedure: A Path of Transformative Institutionalism in Chile* (Oct. 30, 2021), <https://constitutionnet.org/news/constitutional-conventions-rules-procedure-path-transformative-institutionalism-chile>.

Thus, the United States Constitutional Convention of 1787, known as the “Philadelphia Convention,” opted for a more representative model.¹⁰⁹ The constitution-making body in this case was composed of appointed or indirectly elected citizens.¹¹⁰ Delegates were elected by their state legislatures to represent the interests of their state.¹¹¹ Thus, the Philadelphia convention was achieved through appointment or the indirect election of representatives.¹¹²

In his seminal work, *Rights as Trumps*, Jamal Greene also points out that the U.S. Constitution created near-absolute rights, leading to many dire consequences.¹¹³ Greene points out that the First Amendment right to freedom of speech is an example of a “trump” right when he analyzes the controversial U.S. Supreme Court case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.¹¹⁴ Instead of weighing the interests of many groups, Greene argues that “rights as trumps front-loads questions of rights definition that judges, justifiably fearful of their own capacity and legitimacy, address mechanistically.”¹¹⁵ Moreover, some have said that the rights framework of the U.S. Constitution posits that all people have an interest in a set of absolute rights.¹¹⁶ But, according to Greene, this rights framework cannot be democratic because “all rights cannot count if all rights are absolute.”¹¹⁷

The Philadelphia Convention differed from the Chilean Convention by entirely excluding groups of people in America from the delegation.¹¹⁸ Not only were women, minorities, and the poor excluded from participating in the Philadelphia convention, the Constitution crafted perpetuated these inequities.¹¹⁹ Specifically, the three-fifths clause enshrined in the basic law of the land the democratic “worth” of a slave to be three-fifths of a person.¹²⁰ Still, it’s worth noting that the Philadelphia Convention required the states to ratify the Constitution,

109. *Id.*

110. Patricio Navia, *Chile Is About to Make a Huge Mistake*, AMERICA’S Q. (Mar. 5, 2020), <https://americasquarterly.org/article/chile-is-about-to-make-a-huge-mistake/>.

111. THE FEDERALIST NO. 69 (Alexander Hamilton).

112. THE FEDERALIST NO. 51 (James Madison).

113. ALAN RENWICK, AFTER THE REFERENDUM: OPTIONS FOR A CONSTITUTIONAL CONVENTION 23 (2014).

114. *Id.*

115. *Id.*

116. *Id.*

117. Jamal Greene, *Foreword: Rights as Trumps*, 132 HARV. L. REV. 30, 32 (2018).

118. *Id.* at 31.

119. *Id.* at 88.

120. *Id.* at 90.

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guaranteeing that at least the interests of each state would be considered in the Constitution.¹²¹ And, for the first time, the people were king.¹²²

IV. CONSTITUTIONAL CONVENTIONS AS DEMOCRATIC LAWMAKING

Building a constitution through democratic means is a tall order. As Alan Renwick summarizes, a constitutional convention should foster debate that is based on high-quality reasoning and not self-interest; the deliberations should be inclusive and representative of the people; and, importantly, the proceedings should lead to public and political legitimacy of the constitution crafted.¹²³ In the twentieth century alone, though, forty countries have experienced breakdowns in democratic regimes.¹²⁴ As discussed earlier, Pinochet's coup in 1973 led to the collapse of democracy in Chile for nearly twenty years. Indeed, democracies are fragile, and consensus is difficult to build. Part IV considers the advantages and disadvantages to including the people in the constitution-making process. As Chile has opted to place a high value on representing all groups of people, even going as far as to reserve seats for Indigenous groups, Part IV analyzes whether a directly elected constituent assembly with reserved seating for some interest groups would allow Chile to achieve its aims.

A. *Constitutionalism and Democracy Interwoven in Chile*

The democratic model of a country largely influences the type of constitutionalism that the people are likely to embrace.¹²⁵ In Chile, even the first Constitutional Court from 1970-1973 lacked a rights consciousness and allowed legislation to reign supreme.¹²⁶ Committed to direct democracy, Chile's first Constitutional Court focused on enforcing a fair set of rules for elections rather than chartering the rights of the people.¹²⁷ In the end, the court did little to arbitrate between the executive

121. *Id.* at 34.

122. Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011).

123. *Id.* at 518-19.

124. *Id.* at 519.

125. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 374 (1995).

126. CATHERINE D. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* 190 (1986); Ray Raphael, *Gouverneur Morris: The Reason We Have a President*, HISTORY NET (Jan. 27, 2012), <https://www.historynet.com/power-play/>.

127. Alan Renwick, *AFTER THE REFERENDUM: OPTIONS FOR A CONSTITUTIONAL CONVENTION* 10 (2014).

and legislative branches.¹²⁸ Ironically, these failings of the Constitutional Courts lead to Pinochet's military coup and the demise of democratic proceedings in Chile for the next fifteen years.¹²⁹

Thus, the political history of Chile demonstrates that as a constitution endures, so does its democracy. Justice Holmes agreed, "the key concept for understanding the interdependence of liberalism and democracy is constitutionalism."¹³⁰ In another sense, though, it is the voice of the people, often through organized protest, that ensures the constitution truly reflects the will of the people. As John Stewart Mill writes:

Political institutions are the work of men; owe their origin and their whole existence to human will. Men did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, 'are aye growing,' while men 'are sleeping.' In every stage of their existence, they are made what they are by voluntary human agency.¹³¹

Moreover, this subpart explores the inextricable link between democracy and constitutionalism identified by Mill, Justice Holmes, and Chilean scholars alike.¹³²

1. Pure Democracy Is a Bad Idea, or Else Impossible

Plato and Aristotle, however, understood the tension of constitution-making and democracy as an incompatibility.¹³³ And if we agree that democracies must support majoritarian rule, their arguments are well founded.¹³⁴ Plato and Aristotle look to the ambivalence of the majority on social justice issues.¹³⁵ Examples of this are not difficult to find even in United States, which rejects direct democracy.¹³⁶ Year after year, more Americans watch the Super Bowl than vote.¹³⁷ And, because democracies

128. Matthew Shugart & John Carey, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 40 (2012).

129. *Id.*

130. Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010*, 89 *TEX. L. REV.* 1517, 1517 (2011).

131. *Id.* at 1529.

132. *Id.* at 1530.

133. *Id.* at 1529.

134. *Id.*

135. Stephen Holmes, *PASSIONS AND CONSTRAINT* 6 (1995).

136. John Stewart Mill, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 4 (1st ed. 1865).

137. Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010*, 89 *TEX. L. REV.* 1517, 1517 (2011); JOHN STEWART

are supported by continual elections, morals tend to give way to popular rhetoric.¹³⁸ “General licentiousness” comes with the entrenchment of a powerful few in office.¹³⁹ The people along with the elected pursue their own self ambitions, meaning that moral or social aims are entirely absent in society.¹⁴⁰

John Stewart Mill and Rousseau also saw pure democracy as problematic, but for different reasons.¹⁴¹ They take issue with the practical barriers to citizen participation in government.¹⁴² It is not the duty of the people to govern themselves, but rather to elect a class of people that could govern best.¹⁴³ And, because it’s impossible to involve the entire electorate in politics, even pure democracies will naturally form aristocracies.¹⁴⁴ Thus, Rousseau offers a delineation of aristocracy as an alternative to pure democracy.¹⁴⁵ He admits that a hereditary aristocracy is the worst of all governments but maintains that an elective aristocracy is the best.¹⁴⁶

More cynically, Alexis de Tocqueville agrees that democracies tend to devolve into despotism.¹⁴⁷ He writes, “there is no need to drag their rights away from citizens of this type; they themselves voluntarily let them go. They find it a tiresome inconvenience to exercise political rights which distract them from industry.” Because people are selfish, they are too wrapped up in their own interests to be free. Humans tend toward oligarchical control because people have a “general apathy, cynicism and

MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 4 (1st ed. 1865); STEPHEN HOLMES, PASSIONS AND CONSTRAINT 6 (1995).

138. Paul Corcoran, THE LIMITS OF DEMOCRATIC THEORY IN DEMOCRATIC THEORY AND PRACTICE 16 (Graeme Duncan ed.1983).

139. William Piotrowski, *Commentary Introduction: Democracy and Constitutions: One Without the Other*, 37 CONN. L. REV. 851, 852 (2005).

140. Paul Corcoran, THE LIMITS OF DEMOCRATIC THEORY IN DEMOCRATIC THEORY AND PRACTICE 17 (Graeme Duncan ed.1983).

141. Brandon Schlager, *More People Watched Super Bowl XLIX than Voted in Presidential Election—Again*, SPORTING NEWS (Feb. 5, 2015), <https://www.sportingnews.com/us/nfl/news/more-people-watched-super-bowl-xlix-than-voted-in-presidential-election/1x5qpbnnwvsyr1l6v8yflva3bl>.

142. *Id.*

143. Paul Corcoran, THE LIMITS OF DEMOCRATIC THEORY IN DEMOCRATIC THEORY AND PRACTICE 17 (Graeme Duncan ed.1983).

144. *Id.*

145. *Id.*

146. Alan Ryan, *Mill and Rousseau: Utility and Rights*, in DEMOCRATIC THEORY AND PRACTICE 41 (Princeton University Press, 2012).

147. *Id.*

ignorance about politics.”¹⁴⁸ This is certainly the case in the United States and could easily pan out in Chile too.

Campaign finance also presents a dilemma for democracies.¹⁴⁹ The U.S. is a perfect example of how even systems that place the will of the people as paramount see the creation of power centers. In the 2020 elections, groups from outside the state of Colorado spent \$27 million on the U.S. Senate race between Cory Gardner and John Hickenlooper, with months left to go in the election.¹⁵⁰ By the end of the election season, Hickenlooper’s campaign spent \$41 million to defeat Gardner.¹⁵¹ In total, \$14 billion USD was spent on the 2020 election cycle.¹⁵²

Recognizing these threats, Rousseau offers a delineation of aristocracy as an alternative to pure democracy.¹⁵³ Democracy only works if the state is small, the people are economically equal, and the issues are so simple that the ordinary citizen can understand, vote, and administer the law.¹⁵⁴ Persuasion on a small scale is not manipulation of the masses but education of the people. In Switzerland for example, voters are sent informational pamphlets on the issues, allowing their direct democracy to flourish.¹⁵⁵

And, in any case, it’s possible that direct democracy is unnecessary to find the general will. Implementing checks and balances may be enough to protect and articulate the general will.¹⁵⁶ The general will is not a collective agreement on policy. Rather, it is the shared interest of the people against corruption. Corruption can often take the form of complex schemes, but, as Alan Ryan writes in *Mill and Rousseau: Utility and Rights*, “if affairs are simple, their lack of sophistication is not likely to

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Richard W. Krouse, ‘Classical,’ *Images of Democracy in America: Madison and Tocqueville*, in *DEMOCRATIC THEORY AND PRACTICE* 71 (Graeme Duncan ed., 1983).

153. PAUL CORCORAN, *THE LIMITS OF DEMOCRATIC THEORY IN DEMOCRATIC THEORY AND PRACTICE* 19 (Graeme Duncan ed. 1983).

154. Lori Ringhand, *Defining Democracy: The Supreme Court’s Campaign Finance Dilemma*, 56 *HASTINGS L.J.* 77 (2004).

155. Sandra Fish, *Out-of-State Money Fuels Senate Race Between Cory Gardner and John Hickenlooper*, *CPR NEWS* (Sept. 9, 2020), <https://www.cpr.org/2020/09/09/out-of-state-money-fuels-senate-race-between-cory-gardner-and-john-hickenlooper/>.

156. Sandra Fish, *John Hickenlooper Spent \$41 Million to Win Colorado’s U.S. Senate Race, Far Surpassing Cory Gardner*, *COLO. SUN* (Dec. 4, 2020), <https://coloradosun.com/2020/12/04/john-hickenlooper-spent-41-million-cory-gardner-2020-election/>.

lead them into being bamboozled.”¹⁵⁷ The people, for example, seem to notice when a President uses \$11 million dollars of government funds to upgrade his house with a swimming pool.¹⁵⁸

2. Open Proceedings Ironically Lead to More Opaque Politics

While considering the link between constitutions and democracy, the decision of whether to keep constitutional debates secret is critical. Jon Elster asserts the procedures guiding negotiation processes in constitutional conventions can either hinder or enhance agreement.¹⁵⁹ Views can be transformed through discussion, but delegates are unlikely to express the preferences they actually have in public speeches or votes.¹⁶⁰ Thus, it’s possible that deciding to keep a process secret would engender greater compromise between different interest groups.¹⁶¹

Indeed, the Philadelphia Convention placed a high value on keeping the views of each delegate secret to engender honest compromise between the states. Indeed, two rules governed the proceedings.¹⁶² First, no official record would be kept of the individual delegate votes.¹⁶³ Second, the deliberations between delegates were kept secret.¹⁶⁴

In secret discussions, framers are less likely to present their preference as a general public good, leading to more compromise.¹⁶⁵ Even though the “center of gravity,” so to speak, may have shifted away from the people, the solution would become more palatable for all.¹⁶⁶ Moreover, while public discussions would theoretically include more people, this inclusion could end up distorting the process by giving

157. Brian Schwartz, *Total 2020 Election Spending to Hit Nearly \$14 Billion, More Than Double 2016’s Sum*, CNBC (Oct. 28, 2020), <https://www.cnbc.com/2020/10/28/2020-election-spending-to-hit-nearly-14-billion-a-record.html>.

158. Alan Ryan, *Mill and Rousseau: Utility and Rights*, in *DEMOCRATIC THEORY AND PRACTICE* 41 (Princeton University Press, 2012).

159. *Id.*

160. Alexander Thoele, *Direct Democracy Also Has Its User Guide*, SWISSINFO (Feb. 9, 2016), <https://www.swissinfo.ch/eng/business/direct-democracy-also-has-its-user-guide/41773098>.

161. Alan Ryan, *Mill and Rousseau: Utility and Rights*, in *DEMOCRATIC THEORY AND PRACTICE* 51 (Princeton University Press, 2012).

162. *Id.*

163. Jessica Elgot, *Jacob Zuma Breached Constitution over Home Upgrades, South African Court Rules*, GUARDIAN (Mar. 31, 2016), <https://www.theguardian.com/world/2016/mar/31/jacob-zuma-ordered-repay-upgrades-nkandla-home-south-african-state-funds>.

164. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 387 (1995).

165. *Id.* at 388.

166. *Id.*

delegates perverse incentives to misrepresent their preferences.¹⁶⁷ When delegates begin to lie about their true positions, the possibility of compromise fades into oblivion.

3. Still, Inclusive Conventions Lend to Legitimacy

Importantly, democratic constitutional conventions lend to the legitimacy of the constitution created.¹⁶⁸ Because laws gain legitimacy where the people assent to them through democratic processes, a basic law would likewise gain legitimacy where the people assent to it. Jean Jacques Rousseau agrees, the power behind legitimate laws comes from the assent of the people.¹⁶⁹ According to Rousseau, states are simply artificial legal communities that derive their power from the consent of the people.¹⁷⁰ The people are sovereign, not the state.¹⁷¹ Of course, the sovereignty of the people does not hinge on the unanimity of the people.¹⁷² For the law to be legitimate, it is enough that each person receives a vote.¹⁷³ The people will obey the outcome if they support the process.¹⁷⁴

Moreover, democratic models of governance can be useful to promote the self-determination of the people.¹⁷⁵ Autocratic regimes, by contrast, consolidate power and stand in direct opposition to democratic principles.¹⁷⁶ Take, for example, the rule and reign of Joseph Stalin in the Soviet Union.¹⁷⁷ Stalin controlled nearly all aspects of life in the Soviet Union, which meant that the citizenry had essentially no self-determination.¹⁷⁸ He justified his totalitarian methods by promising a “withering away” of the state once equality was achieved.¹⁷⁹ In reality, 20 million people died in labor camps, from famine, or were executed for political reasons.¹⁸⁰

167. Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S. C. L. REV. 183, 195 (2012).

168. *Id.*

169. *Id.*

170. John P. Kaminski, *Secrecy and the Constitutional Convention* 8-9 (2005).

171. *Id.* at 9.

172. *Id.*

173. *Id.*

174. *Id.*

175. Alan Ryan, *Mill and Rousseau: Utility and Rights*, in *DEMOCRATIC THEORY AND PRACTICE* 49 (Princeton University Press, 2012).

176. *Id.*

177. *Id.* at 44.

178. *Id.*

179. *Id.* at 46.

180. *Id.*

For Chile, a major benefit and point of progress lies in the first constitutional convention's historic inclusion of women and minorities in the process.¹⁸¹ While Chile remains a divided society, creating a basic law can be hugely beneficial in preventing the discrimination and victimization of minority groups.¹⁸² In Bosnia and Herzegovina, for example, drafting a constitution effectively ended three years of extreme violence between ethnic groups.¹⁸³ The goal of the constitution-making process was to mend the deep wounds between the Bosnians, Croats, and Serbs by creating space for cooperation and consensus building.¹⁸⁴

B. Democratic Approaches in Chile, Egypt, and Tunisia: Can an Inclusive Approach Succeed?

While it is possible that all people are unified against corruption, the drafters of Chile's new constitution do not seem particularly focused on destroying factions. Indeed, Chile is working hard to invite more interest groups to the table. It is worth, then, first analyzing whether these groups can reach a consensus to create a new constitution. Second, it is worth analyzing if the document created represents the people and their interests.

James Madison argued that finding the general will of the people is nearly impossible, even in exclusive groups. He writes, "in all civilized societies, distinctions are various and unavoidable."¹⁸⁵ Describing those differences, Madison continues, "there will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest." Even more, he says that "In addition to these natural distinctions, artificial ones will be founded on accidental differences in political, religious, or other opinions, or an attachment to the persons of leading individuals."¹⁸⁶ Here, Madison makes the essential point that the self-interest of man will never cease.¹⁸⁷ He will always strive for power and continually exalt himself over others.¹⁸⁸

181. *Id.*

182. *Id.* at 45.

183. *Id.* at 46.

184. *Stalinism*, BRITANNICA, <https://www.britannica.com/topic/Stalinism> (last updated Aug. 9, 2024).

185. *Id.*

186. *Id.*

187. Robert Dahl, *ON DEMOCRACY* 46 (2000).

188. Camila Cocina et al., *Chile Will Write Its New Constitution Building on a More Diverse, Plural and Female 'We,'* UCL: THE BARTLETT DEVELOPMENT PLANNING UNIT (May 24, 2021), <https://blogs.ucl.ac.uk/dpublog/2021/05/24/chile-will-write-its-new-constitution-building-on-a-more-diverse-plural-and-female-we/>.

And, where inclusive constitutions have been attempted, the results leave a lot to be desired. In fact, I argue that the cases studies of Tunisia and Egypt provide cautionary tales for Chile to heed as it proceeds with its inclusive and democratic proceedings. Chile, Tunisia, and Egypt are comparable because the constitution-building process in all three countries was born out of economic, social, or political crisis.¹⁸⁹ In Chile, many people protested for months over the vast economic inequalities in the country.¹⁹⁰ And, before that, Indigenous groups had long complained of their lack of representation in the national government.¹⁹¹ In Egypt, the people also protested en masse for greater equity and social justice before a military coup ousted President Mohamed Morsi in 2013.¹⁹² Then, military leadership oversaw the country's constitutional assembly to draft a new constitution.¹⁹³ Similarly, in Tunisia, the people protested before political parties gathered to discuss the redrafting of a constitution.¹⁹⁴

The Tunisian constitutional assembly warns that oligarchy and factions in Chile may worsen by pursuing democratic processes to draft the constitution.¹⁹⁵ Similarly to Chile, the transitional Tunisian government opted for the direct election of a constitutional assembly.¹⁹⁶ Indeed, the outcomes in Tunisia would suggest a constitutional assembly of directly elected delegates could lead to a fractioned constitution.¹⁹⁷ Importantly, though, Tunisia did not reserve any seats for specific interest groups.¹⁹⁸

As a result, interest groups took to the streets once again to exert influence over the constitutional assembly.¹⁹⁹ Tunisia's Union Generale

189. David Feldman, *'Which in Your Case You Have Not Got': Constitutionalism at Home and Abroad*, OXFORD UNIVERSITY PRESS 140 (2011).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Richard W. Krouse, 'Classical,' *Images of Democracy in America: Madison and Tocqueville*, in *DEMOCRATIC THEORY AND PRACTICE* 61 (Graeme Duncan ed., 1983).

195. *Id.*

196. *Id.*

197. Alex Ward, *Chileans Want a More Equal Society. They're About to Rewrite the Constitution to Have It*, VOX (Oct. 26, 2020), <https://www.vox.com/21534338/chile-constitution-plebiscite-vote-pinochet>; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 370 (1995).

198. Alex Ward, *Chileans Want a More Equal Society. They're About to Rewrite the Constitution to Have it*, VOX (Oct. 26, 2020), <https://www.vox.com/21534338/chile-constitution-plebiscite-vote-pinochet>.

199. Patricia Rodriguez, *Chilean Protesters Are Waving the Mapuche Flag. What's the Mapuche Flag, and Who's Hoisting It?* WASH. POST (Nov. 11, 2019), <https://www.washingtonpost.com>.

Tunisienne du Travail (UGTT), for example, advanced their interests by continuing to protest.²⁰⁰ On the one hand, one can observe that the drafting process did not quell protests.²⁰¹ In fact, the drafting process enlarged the protests, leading to the assassination of two major political figures and a two-day national strike.²⁰² On the other hand, by exerting external influence, the UGTT successfully advanced their interests and secured protections for laborers in the Tunisian constitution.²⁰³ They gained an unrestricted right to strike and the UGTT enjoyed a rise in its prominence and stature.²⁰⁴

While one can empathize with the plight of workers, it is worth asking whether the interests of the UGTT reflect the general will of the people. While workers enjoy a right to strike, employers may have less of a right to hold their workers to employment contracts. Therefore, one must wonder whether the activism of the people can work to produce an inclusive basic law.

In any case, assuming that faction interests should be included in constitutions, the constitutional assembly in Egypt provides additional warnings for Chile to heed concerning the reservation of delegation seats for interest groups.²⁰⁵ Egypt's 2012 constitutional assembly reserved nine seats for "syndicates" or "unions."²⁰⁶ Additionally, in Egypt, certain groups were picked to increase "representation" even going as far as to choose youth, revolutionaries, religious groups, and minorities.²⁰⁷ Similarly, Chile reserved seventeen seats of their assembly for "indigenous" groups.²⁰⁸

Despite their structural representation in constitutional proceedings, the Egyptian Trade Union Federation (EUTF) and unionists struggled to

com/politics/2019/11/11/chilean-protesters-are-waving-mapucho-flag-whats-mapucho-flag-whos-hoisting-it/.

200. *Egypt's Mohammed Morsi: A Turbulent Presidency Cut Short*, BBC (June 17, 2019), <https://www.bbc.com/news/world-middle-east-18371427>.

201. Ian Hartsorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 413 (2017).

202. Sharan Grewal, *Ten Years in, Tunisian Democracy Remains a Work in Progress*, BROOKINGS (Jan. 22, 2021), <https://www.brookings.edu/articles/ten-years-in-tunisian-democracy-remains-a-work-in-progress/>; Ian Hartsorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 415 (2017).

203. Ian Hartsorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 408, 411-16 (2017).

204. *Id.* at 413, 417.

205. *Id.* at 414.

206. *Id.*

207. *Id.* at 414.

208. *Id.*

advance their interests.²⁰⁹ In *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison* Ian Hartshorn even goes as far as to say that the automatic inclusion of unionists in Egypt's constitutional proceedings was detrimental to their interests.²¹⁰ First, Hartshorn points out that the unionists struggled to establish their legitimacy.²¹¹ Second, the unionists also had issues connecting to the other political parties and negotiating.²¹²

In the end, the unions' "representation" at Egypt's constitutional assembly silenced them.²¹³ Workers received even less formal protection in the final constitution than in previous constitutions.²¹⁴ As far back as 1971, the Egyptian constitution provided that half the seats in parliament would be reserved for workers and farmers.²¹⁵ In the 2014 constitution, this clause was eliminated.²¹⁶ And, when one appreciates that the unionists set out to expand the fifty percent quota for workers and farms clause in the constitutional assembly, the failings of a seat reservation model become even more pronounced.²¹⁷

V. CONCLUSION

The concepts of democracy and constitutionalism are inherently complex, idealistic, and paradoxically interwoven. Creating a document that 1) is inclusive of all present and future groups of people and 2) establishes a predictable and stable law of the land is a formidable challenge. Framers in the United States, Tunisia, and Egypt have all struggled to achieve this aim. And indeed, all fell short. In many ways, the Philadelphia Convention was undemocratic. Those framers excluded huge swaths of the American population while keeping deliberations secret from the people. As a result, scholars continue to question the document's legitimacy. And, while Egypt included many groups in their constitutional proceedings by providing more seats, the document itself limited the rights of the very groups said to be represented. Finally, while

209. *Id.*

210. *Id.*

211. *Id.* at 416.

212. *Id.*

213. *Id.* at 412-413.

214. *Id.* at 412.

215. *Id.* at 416.

216. 44 Dave Sherwood et al., *Chile's Govt in Shock Loss as Voters Pick Independents to Draft Constitution*, REUTERS (2021), <https://www.reuters.com/world/americas/chile-ruling-coalition-heading-disappointment-constitutional-delegates-vote-2021-05-17/>.

217. Ian Hartsorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 408, 413 (2017).

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groups in Tunisia did achieve representation in the constitution through continued protest, their process was marked by chaos and violence instead of compromise and agreement.

The general will is elusive and agreement between interest groups unlikely, but it's still possible that Chile blazes a new path forward for us all. As Winston Churchill famously once said, "democracy is the worst form of Government except for all those other forms that have been tried."²¹⁸ Still, there is hope that careful consideration of the interests of future Chileans could unify the electorate to create a truly inclusive basic law. Interests in deterring corruption or even in creating structures to balance inherently competing rights could take center stage. The law can provide a strong foundation to ensure future generations have their opportunity to let us down again.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 417.

222. *Id.* at 416.

223. *Egypt's Workers, Farmers Blast Draft Constitution*, ABRAHAM ONLINE <https://english.ahram.org.eg/News/56851.aspx> (last visited Dec. 16, 2021).

224. Ian Hartsorn, *Organized Interests in Constitutional Assemblies: Egypt and Tunisia in Comparison*, 70 SAGE PUBLICATIONS 408, 416 (2017).

225. *Id.*

226. Richard M. Langworth, *Churchill's "Democracy is the Worst Form of Government . . ."* RICHARD M. LANGWORTH (June 20, 2022), <https://richardlangworth.com/worst-form-of-government>.