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## DE-CONSTITUTIONALIZING DEMOCRACY

JOEL I. COLÓN-RÍOS\*

*Fear and self-assertion by denial were present at the moment of great constitutional foundations. The acknowledgment that fear drives the minds and pens of constitution makers, the admission of human frailty, is not very attractive.*<sup>1</sup>

Democracy and constitutionalism are on close personal terms.<sup>2</sup> But it is the precise nature of that relationship which tends to divide contemporary theorists. The prevailing orthodoxy is that constitutionalism and democracy are so closely related that they are two sides of the same coin; any tension between the two is more apparent than real.<sup>3</sup> This dominant view presents constitutionalism as the embodiment of democratic principles, such that a “constitutional democracy” is considered to be the realization of the two ideals. In contrast to this dominant view, this Article will defend the proposition that only a “weak” form of constitutionalism, one in which democracy is de-constitutionalized in important ways, can be rendered consistent

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1. ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 3 (1999).

2. Unless otherwise indicated, the terms “constitutionalism” and “liberal constitutionalism” are used interchangeably to refer to the conception of constitutionalism that informs liberal constitutional regimes, as those existing in countries like the United States and Canada.

3. *See, e.g.*, MICHAEL SAWARD, *THE TERMS OF DEMOCRACY* 56 (1998) (“The term ‘democracy’ already incorporates a conception of constitutionalism. It is wrong to separate them out; the resulting discussions may be illuminating in various ways, but they can also be misleading in that they are based on a false premise of separation and opposition.”). *But see, e.g.*, SAJÓ, *supra* note 1, at 54 (“Democracy and constitutionalism cannot be considered in any way the same. At best, their relationship can be characterized as a tension bordering on animosity.”).

with the basic thrust of the democratic ideal.

By attempting to de-constitutionalize democracy, I do not suggest there can be a democracy in the absence of constitutional forms. As Christopher Eisgruber and Stephen Holmes have argued, people cannot magically express their will in the absence of certain institutions and procedures.<sup>4</sup> In that sense, the de-constitutionalization of democracy will always be partial and incomplete. But this does not mean the constitutional forms and institutions that currently characterize liberal constitutionalism are consistent with basic democratic principles (much less that they are the most democratic constitutional forms that one could aspire to). The goal of the democrat should be to defend and propose institutions and procedures that tend to realize democracy to the maximum degree possible, not to find ways of justifying the constitutional regimes we already have.

There are different “angles” from which the tension between constitutionalism and democracy can be examined. This Article is primarily concerned with examining the ways in which democracy is negated by constitutionalism’s traditional approach to constitutional change.<sup>5</sup> An important clarification is in order here, so the objective and focus of this Article are made clear from the beginning. Here, constitutional change refers to constitutional amendments, to changes in the constitutional *text*. Although, according to many contemporary constitutional theorists, a liberal constitution is always in flux—a “living tree” that is always *changing* through interpretation<sup>6</sup>—these kinds of changes (while important) are not, in my view, a substitute for democratic constitutional change. On the one hand, these changes tend to be gradual in nature, and there are certain things that would be very hard to do through constitutional interpretation (think, for example, of moving from bicameralism to unicameralism, or the other way around, through interpretation).<sup>7</sup> There is, however, another,

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4. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 12 (2007); STEPHEN HOLMES, PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY 167 (1995).

5. Although this Article draws some conclusions that are applicable to most contemporary constitutional regimes, it will mostly engage with U.S. constitutional theory.

6. See, e.g., W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 270-71 (2007).

7. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE

more important reason for avoiding the focus on interpretation. Regardless of the limits of constitutional interpretation as a means to important constitutional transformations, the main problem with such an approach is its lack of democratic credentials.

Interpretation is usually done by judges, and *democratic* constitutional change must take place through procedures in which popular majorities assume a central role.<sup>8</sup> This means that popular majorities should be allowed to trigger and decide on important constitutional changes, not merely that their views might (or should) be taken into account by those interpreting the constitution.<sup>9</sup> At a time when a *democratic* form of constitutionalism is increasingly connected to a system in which courts are more or less responsive to popular opinion,<sup>10</sup> and in which imagining “what the law of the U.S. Constitution should *look* like in the year 2020” is viewed as a matter of being “free to *interpret the Constitution* differently than the

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CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 160 (2006).

8. John Hart Ely’s approach to judicial review provides a good example of this point. Ely maintained that neither of the major schools of constitutional interpretation is successful in defending judicial review from the democratic objection. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73 (1980). Interpretivism (e.g., originalist theories of interpretation) cannot successfully claim to be simply about respecting the “will of the people” because, in addition to the difficulties of discovering that will, the difficulty in amending the constitution makes the “will of the people” equivalent to the will of previous generations. *Id.* at 11-12. Non-interpretivism (e.g., “living-tree” theories of interpretation) could only bring the constitution up to date by making judges function as unelected legislators. *Id.* at 45-48. As a solution to this problem, Ely advanced a powerful process-based defense of judicial review, according to which judges would only strike down statutes that hinder the democratic process. *Id.* at 86-87. However, it is interesting to think about the road Ely did not follow. That is to say, instead of finding a way of limiting the power of judges in order to ameliorate the democratic objection, Ely could have advanced a theory of constitutional amendments according to which present generations could become the real authors of their constitution.

9. See Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14-16 (2009).

10. Post & Siegel, *supra* note 9, at 379.

Supreme Court now does,”<sup>11</sup> it seems particularly important to re-examine the ways in which we understand both democracy and constitutionalism. Now, perhaps more than ever, there appears to be an irreversible tendency towards seeing the constitutional text as an unchangeable default that one can only hope to expand through interpretative mechanisms, and away from imagining a new or importantly amended (and amendable) constitution.

Part I of this Article consists of an examination of the concept of constitutionalism and of the ideology that drives it as a political practice. Constitutionalism is characterized by a sacralization of the constitutional regime, a defense of the permanence of the constitution that has entrenched conceptions of what is thought to be the “right” content. Its main objective is the closure of the political, the avoidance of future exercises of constituent power.<sup>12</sup> Against constitutionalism’s insistence on the permanence of the established constitutional text and the consequent necessity of creating obstacles to any attempt to alter it, democracy recommends that even the most fundamental principles are subject to reformulation through democratic procedures. The ideal of *democratic openness*, one of the basic components of democracy, appears to be at odds with constitutionalism. Part II will be devoted to a discussion of the ideal of democratic openness. Because constitutions do much more than simply secure the conditions of democratic debate, the ideal of democratic openness cannot be rejected through an appeal to a constitution’s “democracy enabling” features (i.e., those provisions, such as basic political rights, that allow democratic practices to take place).

Part III of this Article examines the second basic component of democracy—namely, *popular participation* in the positing of all laws, fundamental laws included. Popular participation is required by the very meaning of democracy: democracy is a regime of popular self-government, one in which those who live under a political order can take part in its constitution and re-constitution. Popular participation also played a central role in the writings of modern opponents of democracy, who rejected democracy precisely because of the risks

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11. Jack M. Balkin & Reva B. Siegel, *Introduction* to THE CONSTITUTION IN 2020 at 1, 1 (Jack M. Balkin & Reva B. Siegel eds., 2009) (emphasis added).

12. See MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 68 (2003). The concept of constituent power will be discussed in Part IV.

associated with the participation of ordinary citizens in the making of substantive decisions.<sup>13</sup> However, in contemporary discussions about what democracy requires in the context of contemporary constitutional regimes, the ideal of popular participation has been moved to a secondary plane. This view of democracy—in which popular participation (understood as requiring something more than voting every few years in regular elections and occasional referendums) is seen as an unrealistic aspiration—has been happily inherited by constitutional democracy, as it sits comfortably with constitutionalism’s attitude towards constitutional change. Contemporary constitutional theorists, even those of a progressive persuasion, rarely talk about popular participation. Now, instead of *participating* in the production of the fundamental laws, democratic citizens *mobilize* in order to influence the ways in which officials interpret the constitution.

Parts IV and V of this Article present a notion of constitutionalism that is more consistent with the democratic ideal: weak constitutionalism. Weak constitutionalism does not aspire to a final reconciliation between constitutionalism and democracy. Instead, it seeks to be consistent with democracy’s basic components by allowing ordinary citizens to approach the constitutional regime as radically open, susceptible to any kind of modification. In this respect, weak constitutionalism does not approach constituent power as a threat, but as the possibility of correcting existing injustices. This Article, it cannot be stressed enough, does not argue in favor of a “flexible” constitution, if that term is understood as describing a constitution that can be changed by simple legislative majorities. Instead, weak constitutionalism supports the development of procedures of constitutional change in which ordinary citizens, not only state officials, are able to deliberate and decide on the content of the laws that regulate their political association.

#### I. CONSTITUTIONALISM AND THE FEAR OF CONSTITUTIONAL CHANGE

There are many definitions of constitutionalism. Constitutionalism is often defined in association with ideas such as “restrained and

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13. See *infra* Part III (discussing the work of constitutional theorists such as Bodin, Ferguson, and Madison).

divided” political power,<sup>14</sup> government limited by the rule of law,<sup>15</sup> the protection of fundamental rights,<sup>16</sup> and, of course, the principle of constitutional supremacy<sup>17</sup> (which is based on a distinction between ordinary and higher laws<sup>18</sup>). That these are the ideas that characterize modern constitutionalism should not be a matter of controversy; in fact, they do not seem like bad ideas at all. But this is not the whole story. Constitutionalism is also characterized by a Lycurgian<sup>19</sup> obsession with permanence, a fear of constitutional change based on the idea that a constitution that contains the right content—a good constitution—should also be a *finished* constitution. That is, a constitution that might be improved by correcting some historical mistakes here and there (and that might even evolve and be expanded through judicial interpretation), but whose fundamental principles and the governmental structures it creates should be more or less immutable and placed beyond the scope of democratic politics.<sup>20</sup> It is this idea that is at odds with democracy.<sup>21</sup>

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14. Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy: Political Theory and the American Constitution*, 27 BRIT. J. POL. SCI. 595, 595 (1997).

15. Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 10 OXFORD J. LEGAL STUD. 200, 202 (1990).

16. Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 3, 5 (Michael Rosenfeld ed., 1994).

17. SAJÓ, *supra* note 1, at 39.

18. See JOHN RAWLS, POLITICAL LIBERALISM 233 (expanded ed., 2005).

19. Lycurgus—who, according to Greek mythology, was a direct descendant of Hercules and the author of the Spartan constitution—persuaded Spartans to promise they would not alter the new constitution until he returned from the Delphic oracle. Dennis Thompson, *Democracy in Time: Popular Sovereignty and Temporal Representation*, 12 CONSTELLATIONS 245, 251 (2005). When the oracle revealed to him that he had prepared a good constitution, he killed himself and had his ashes scattered in the ocean so that no one could ever maintain he had returned in any form. *Id.* The constitution remained unaltered for 500 years. *Id.*

20. As will become clear later, my conception of “democratic politics” goes beyond majoritarian decision-making in an elected legislature. See *infra* Part IV.

21. The U.S. Constitution provides a good example of immutability: not only it is extraordinarily difficult to amend (through a process that can hardly be described as democratic and participatory), but it is always presented in its original form, with amendments not typographically integrated into the text but appearing at the end. Claude Klein, *A Propos Constituent Power: Some General Views in a*

This foundational component of constitutionalism has been defended at different moments with different degrees of emphasis. In eighteenth century France, Isaac Le Chapelier, the Jacobin jurist, claimed “the Revolution is finished,” because there were “no more injustices to overcome, or prejudices to contend with.”<sup>22</sup> Some years later, Napoleon issued a similar declaration: “Citizens, the revolution is determined by the principles that began it. The constitution was founded on the sacred rights of property, equality, freedom. The revolution is over.”<sup>23</sup> The aspiration of permanency that drove Le Chapelier’s and Napoleon’s dictums is alive and well, and, perhaps today more than ever, continues to inform liberal constitutionalism.<sup>24</sup>

Constitutional entrenchment, however, is driven by more than the desire to preserve individual rights. It is also grounded in concern that fundamental alteration of a constitution is looking for trouble, playing with the stability of a political system, and risking the precious ideal of the rule of law. In American constitutional thought, James Madison articulated one of the first formulations of this view in response to Thomas Jefferson’s “dangerous” ideas about constitutional change. Jefferson, it is well known, despised the idea of perpetual constitutions.<sup>25</sup> He complained, “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.”<sup>26</sup> In his view, “laws and institutions must go hand in hand with the progress of human mind” and those living

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*Modern Context*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 33, 33 n.12 (Antero Jyränky ed., 1999).

22. See Lucien Jaume, *Constituent Power in France: The Revolution and its Consequences*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 67, 71 (Martin Loughlin & Neil Walker eds., 2007) (citation omitted) (quoting Isaac Le Chapelier’s September 1791 address to the French National Assembly).

23. See ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 2 (1999) (citation omitted) (quoting Napoleon’s declaration issued on December 15, 1798).

24. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 177-81 (1999) (discussing the liberal fear of constitutional revision).

25. See generally Victor M. Muñiz-Fraticelli, *The Problem of a Perpetual Constitution*, in INTERGENERATIONAL JUSTICE 377 (Axel Gosseries & Lukas Meyer eds., 2009) (providing a contemporary defense of perpetual constitutions).

26. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE PORTABLE THOMAS JEFFERSON 552, 558-59 (Merril D. Peterson ed., 1975).



under a constitutional regime must be allowed to correct the mistakes of previous generations.<sup>27</sup> Jefferson even suggested that at set periods of time (every time a new generation came into place, which occurred every nineteen years according to his interpretation of the European tables of mortality), all laws and institutional arrangements should lapse and periodic constitutional conventions should be convened.<sup>28</sup> These conventions would guarantee the present generation had the “right to choose for itself the form of government it believes most promotive of its own happiness.”<sup>29</sup>

Madison disagreed with most of Jefferson’s ideas about constitutional change and constitutional conventions. He maintained that Jefferson’s ideas involved “[t]he danger of disturbing the public tranquility by interesting too strongly the public passions.”<sup>30</sup> It is not that Madison defended the idea that a constitution could (or should) *never* be changed.<sup>31</sup> However, he believed Jefferson’s proposal

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27. *Id.* at 559.

28. *Id.* at 560. A similar idea was defended by Rousseau, who proposed: [Periodic assemblies] should always take the form of . . . two propositions that may not be suppressed, which should be voted on separately. The first is: Does it please the Sovereign to preserve the present form of government? The second is: Does it please the people to leave its administration in the hands of those who are actually in charge of it?

JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE DISCOURSES* 269 (G.D.H. Cole trans., Everyman’s Library ed. 1993) (1762). In the United States, the current Constitution of the State of New York contains a provision that appears to put Jefferson’s theory into practice:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state . . . .

N.Y. CONST. art. XIX, § 2.

29. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 26, at 560.

30. THE FEDERALIST NO. 49, at 256 (James Madison) (Bantam Classic ed., 1982).

31. In fact, he at least favored an important constitutional amendment. In a letter to George Hay dated August 23, 1823, Madison argued in favor of modifying the rules for electing the President. LEVINSON, *supra* note 7, at 95. But the kind of amendment procedure he favored (the one contained in Article V) establishes requirements that are so difficult to meet (in order, of course, to make constitutional change difficult and unlikely) that it makes constitutional amendments almost

suggested to the citizenry that their current system of government was somehow defective, depriving the government of “that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>32</sup> Thus, instead of periodic constitutional conventions that, by opening the constitution to the “decisions of the whole society”<sup>33</sup> interested “too strongly the public passions,”<sup>34</sup> Madison favored a complicated amendment procedure, one that involved a series of extraordinary majorities at the federal and state levels—in other words, an amendment procedure that would make constitutional change difficult and unlikely, and whose usual protagonists were not ordinary citizens (that would simply be too risky),<sup>35</sup> but state officials already sitting in federal and state legislatures.

In contemporary constitutional theory, no one has followed Madison’s advice better than Kathleen Sullivan. Sullivan’s critique of what she calls *amendmentitis* (the unjustified desire to amend the constitution) is not very far from the idea that a constitution should never be altered. For Sullivan, amendments “are dangerous apart from their individual merits.”<sup>36</sup> Not surprisingly, she maintains that Jefferson’s proposals about constitutional change were ignored for good reasons.<sup>37</sup> According to Sullivan, a frequently amended

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impossible. *Id.* at 21. And, when they actually take place, they are not adopted through participatory procedures, but give certain groups extraordinary veto powers that can render moot the will of popular majorities. *Id.* at 19.

32. THE FEDERALIST NO. 49, *supra* note 30, at 256 (James Madison).

33. *Id.*

34. *Id.*

35. As Sanford Levinson has expressed:

Although Madison was not opposed to constitutional amendments as such, he clearly saw almost no role for a public that would engage in probing questions suggesting that there might be serious “defects” in the Constitution. Only philosophers (like himself?) or, perhaps, “patriotic leaders” could be trusted to engage in dispassionate political dialogue and reasoning.

LEVINSON, *supra* note 7, at 19.

36. Kathleen Sullivan, *What’s Wrong with Constitutional Amendments*, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39, 39 (Louis Michael Seidman & Virginia Sloan eds., 1999).

37. Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (Sept.

constitution decreases the people's confidence that their constitutional system is stable, and undermines the idea of having a constitution in the first place.<sup>38</sup> Amending a constitution also frequently obscures the distinction between constitutional and ordinary politics, making the supreme law lose its fundamental character and putting at risk its coherence and generality.<sup>39</sup> Finally, amending the constitution might help "politicize" it, and "the more a Constitution is politicized the less it operates as a fundamental charter of government."<sup>40</sup> For these and other reasons, Sullivan concludes the constitution should be amended "only reluctantly and as a last resort."<sup>41</sup> (Although, notably, the problems Sullivan identifies are not common.) While there are major U.S. constitutional theorists who, for different reasons, argue against the rigidity of Article V,<sup>42</sup> it is the Lycurgian approach to constitutions and constitutional change that is well established in U.S. constitutional theory and practice (although in a more subtle way than Sullivan argues).<sup>43</sup>

In constitutional theory, this view is exemplified in the writings of

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21, 1995), [http://www.prospect.org/cs/articles?article=constitutional\\_amendmentitis](http://www.prospect.org/cs/articles?article=constitutional_amendmentitis).

38. *Id.*

39. *Id.*

40. Sullivan, *supra* note 36, at 42.

41. Sullivan, *supra* note 37. Sullivan's rejection of formal constitutional amendments, of course, implicitly defends other modes of amending the constitution (e.g., amendments by judicial interpretation). *Id.*; see also David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1467 (2001).

42. See, e.g., LEVINSON, *supra* note 7; Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 86 (Sanford Levinson ed., 1995); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in RESPONDING TO IMPERFECTION, *supra*, at 89, 90-92; Stephen M. Griffin, *The Nominee is...Article V*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51, 51-53 (William Eskridge & Sanford Levinson eds., 1998); Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

43. Of course, this aspiration to permanence is not limited to U.S. constitutional thought. For instance, a few weeks before the recent coup in Honduras (triggered by President Manuel Zelaya's proposal to call a constituent assembly to adopt a new constitution), a well known Honduran historian expressed that the Constitution of Honduras did not need any reforms, since it was "complete," and just needed "to be fully applied." *La Cuarta Urna es Una Locura en Honduras [The Fourth Ballot is Crazy in Honduras]*, EL HERALDO (Hond.) (Mar. 16, 2009), <http://www.elheraldo.hn/content/view/full/96983>.

scholars engaged in a defense of constitutionalism's democratic credentials. Christopher Eisgruber and Stephen Holmes provide two good examples.<sup>44</sup> Eisgruber argues that self-government is perfectly compatible with stable constitutional forms that are protected through an inflexible amendment procedure. "If a polity is consumed with endless debates about how to structure its basic political institutions, it will be unable to formulate policy about foreign affairs, the economy, the environment, zoning, and so on."<sup>45</sup> For Eisgruber, inflexible constitutions can be understood as a practical device for implementing a non-majoritarian conception of democracy.<sup>46</sup> Flexible amendment procedures, on the contrary, may encourage "improvident reforms" that would encumber later generations, and allow majorities to consolidate power at the expense of the whole people.<sup>47</sup> Although this Article cannot do justice to Eisgruber's highly sophisticated argument, his advice is, in the last instance, profoundly Madisonian: constitutional text is better left alone. Moreover, if any adjustments are needed, they can always be achieved through interpretation rather than through formal amendments (in this sense, it is not surprising that an important part of Eisgruber's book is dedicated to a defense of judicial review).

This approach finds an important theoretical backbone in Holmes's influential defense of constitutional pre-commitment. Holmes argues that the fact that constitutions are generally very difficult to amend does not mean they are inconsistent with basic democratic principles.<sup>48</sup> Rigid constitutions serve as a guarantee that future generations will not eliminate the possibility of the formation of a democratic public will.<sup>49</sup> By protecting basic political rights and setting up institutions that allow citizens to deliberate on important matters, constitutions become instruments of self-government,

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44. See *supra* note 4 and accompanying text.

45. EISGRUBER, *supra* note 4, at 13.

46. *Id.*

47. *Id.* at 12.

48. HOLMES, *supra* note 4, at 177 ("Only a rather inflexible pre-commitment to certain procedural rules (guaranteeing, for example, the continuing right of unpublished dissent) makes public learning possible.").

49. See *id.*

techniques by which citizens rule themselves.<sup>50</sup> Like the rules of a game or the rules of grammar, constitutions are primarily enabling: they allow a democratic form of political life to take place. Just as it would make little sense to change the rules of grammar or the rules of a game while writing or playing, it does not make much sense to worry about the reformulation of these enabling norms. It is fair to say, therefore, that Holmes's defense of pre-commitment is an endorsement of constitutionalism's Lycurgian tendencies: constitutional change should be difficult and unlikely, as a constitution is simply too valuable to be meddled with.<sup>51</sup>

To see how this view manifests in constitutional practice, one need only look at the amendment provisions of most modern constitutions. These provisions usually involve a set of requirements that are more difficult to meet than those followed when the constitution was originally adopted. That is to say, while most constitutions are adopted by some form of majority rule, constitutional amendments are traditionally associated with supermajorities and other obstacles designed to decrease the possibility of important transformations.<sup>52</sup> Some constitutions even place clauses outside the

50. *See id.* at 230.

51. A constitution does much more than allow democracy to take place. *See infra* Part II.A.

52. Despite the frequently repeated statement that constitutions bind present day majorities because they were adopted by supermajorities, the route usually followed by most constituent assemblies around the world is to adopt constitutions through simple majority rule (sometimes subjecting them to a popular referendum before they come into effect), while at the same time requiring legislative supermajorities (and, again, sometimes popular referendums) for constitutional amendments to the newly created constitution. For example, the most recently adopted constitution at the time of this Article, the Constitution of Ecuador, was adopted through a constituent assembly which had the power to approve the constitutional text (that would then be submitted to the electorate in a referendum) through the affirmative vote of a majority of its members. *See* Reglamento de Funcionamiento de la Asamblea Constituyente [Rules of Operation of the Constituent Assembly], arts. 39-47 (Dec. 12, 2010), [http://constituyente.asambleanacional.gov.ec/index.php?option=com\\_content&Itemid=72&id=733&task=view](http://constituyente.asambleanacional.gov.ec/index.php?option=com_content&Itemid=72&id=733&task=view). However, the amendment rule they created requires legislative supermajorities plus popular ratification. *See* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Sept. 2008, arts. 441-442.

The constitutions of nations with a federal form of government are not usually adopted by simple majority rule, as they require some form of ratification

scope of the amendment procedure, thus highlighting the fear of constitutional change that characterizes constitutionalism.<sup>53</sup> Moreover,

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from the states or provinces. Thus, the U.S. Constitution had to be ratified by state conventions. U.S. CONST. art. VII. It is also important to note that if only nine states had ratified the Constitution, the remaining four states would not have been bound by it. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 488 n.115 (1994). In that sense, the relevant rule was not the 9/13 majority, but the decision-making rule used in each of the ratifying states, which were at that moment considered *sovereign* entities. *See id.* at 487, n.112. It is well known that each of those conventions used majority rule as the decision-making method (in fact, in some states the vote was very close, like in New York, where the vote was 30-27). *Id.* at 486-87. In addition, the delegates to the Philadelphia Convention do not appear to have been bound by a supermajority rule for agreeing to send the draft constitution to the states for ratification (although thirty-nine out of fifty-five delegates signed it). *See* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 27 (1997). However, the amendment rule they proposed required a two-thirds majority of both legislative houses (or application of two thirds of state legislatures) to propose amendments, which had to be ratified by three-fourths of the states. U.S. CONST. art. V. Thus, the process that led to the adoption of the U.S. Constitution was actually much more majoritarian than is usually thought, and the amendment procedure of the U.S. Constitution involves requirements more difficult to meet than those present when the Constitution was adopted. This obviously raises questions from the perspective of democratic legitimacy (e.g., What entitles constitution-makers to establish procedures for changing the constitution that are more difficult to meet than the one they were required to use?) that are outside the scope of this Article.

53. The most famous example is Article 79.3 of the German Basic Law: “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 [Human Rights] shall be inadmissible.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79(3) (Ger.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 36 (Rüdiger Wolfrum & Gisbert H. Flanz eds., 2009); *see also* Art. 2 COSTITUZIONE [CONSTITUTION] (It.), *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: ITALY 1 (Rüdiger Wolfrum & Gisbert H. Flanz eds., 2006); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] arts. 288-289 (Port.), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL 122 (Rüdiger Wolfrum & Rainer Grote eds., 2005); TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 4 (Turk.), *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: TURKEY 3 (Rüdiger Wolfrum & Rainer Grote eds., 2010).

There are two examples of explicit unamendability in Article V of the U.S. Constitution: 1) the provision that prohibits any amendment made prior to 1808 from affecting Article I, Section 9, clauses 1 and 4; and 2) the provision that no

the amendment processes of most liberal constitutions are not characterized by being particularly participatory, in the sense that they do not give ordinary citizens a central role (other than the occasional vote in a referendum).

By making constitutional change difficult and unlikely, constitutions also make *popular* constitutional change difficult and unlikely. Typical amendment procedures not only prevent constitutional change by serving as the exclusive means through which a juridical system regulates its transformation; they cancel ordinary citizens' ability to transform their constitution in important ways, or to replace it with a new one. They treat constitutional change as a special type of law-making, one that takes place in the ordinary legislature but through special voting rules (i.e., supermajority requirements). In so doing, they prevent future exercises of constituent power (understood as the faculty for positing new constitutional regimes through highly participatory procedures) to take place.<sup>54</sup> In

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state, without its consent, shall be deprived of its equal suffrage in the Senate. U.S. CONST. art. V. Both these are examples of *partial* unamendability: in the first case, the prohibition was a temporary one; in the second case, there is no absolute prohibition of depriving a state of its equal suffrage in the Senate (any state can be deprived of its equal suffrage, as long as it consents to it and the requirements of the regular amendment process are met).

The concept of constituent power will be briefly discussed in Part IV of this Article, when weak constitutionalism is introduced.

54. John Locke's theory of popular sovereignty, which serves as one of the theoretical bases of liberal constitutionalism, provides a good example of this approach. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689). For Locke, the people's power to re-constitute government (the "supreme power" of the people) *only* appears after government dissolves itself by acting with "a calculated design to subvert the law and public liberty as such." JULIAN H. FRANKLIN, JOHN LOCKE AND THE THEORY OF SOVEREIGNTY; MIXED MONARCH & THE RIGHT OF RESISTANCE IN THE POLITICAL THOUGHT OF THE ENGLISH REVOLUTION 95 (1978). In the meantime, the re-constitution of government is not a "constitutional" possibility for the "sovereign people," and the people's constituent power is "channeled" through an amendment procedure operated exclusively by state officials. Cf. Amar, *supra* note 52, at 463 (arguing that, at least in the U.S., the Lockean right to revolution was *legalized* after the American Revolution, and from then on the people could exercise their right to re-constitute government "at any time and for any reason"). At a theoretical level, this is an interesting argument, but, at the level of actual constitutional practice, it seems clear that things work very differently.

countries with very rigid constitutions, like the United States, constitutionalism's insistence on permanence is not only reflected in the difficulty of amending the constitution or in the virtual prettification of the constitutional text.<sup>55</sup> Perhaps more important (and discouraging) is that this conception has had an important impact in the work of progressive constitutional theorists.<sup>56</sup> The fact that the U.S. Constitution (as most constitutions) can only be changed with difficulty has created among theorists a sort of fatigue, an internalization of the fact that the constitutional text *will not* change. This fatigue usually takes the form of promoting constitutional interpretation as the main site where constitutional change takes place, or in looking at the ordinary legislative process as the exclusive site for democratic or popular politics.

There is, of course, nothing wrong with finding new ways of understanding a constitution in order to procure particular political goals, or in attempting to influence ordinary legislation to further those goals. In fact, those are the ways in which the citizenry of a contemporary political community is more likely to advance its political preferences. The fatigue referred to here, however, is different. It is first characterized by scholars identifying an important institution, or principle, that would help realize arguably fundamental goals and recognizing it as an appropriate matter for

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55. Henry Monaghan has described the constitution as “practically unamendable.” Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35 (2004). The U.S. Constitution has been amended only twenty-seven times in over two centuries, and it is telling that the ratification of the Twenty-seventh Amendment (variance of congressional compensation) took 200 years. It was ratified in 1992, after being originally presented by James Madison in 1789. Richard Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 497 (1992). Constitutionalism's insistence on the permanence of the constitutional regime does not mean, however, that ordinary citizens, as well as legislators, do not engage in the activity of proposing constitutional changes. For example, it is estimated that since 1789 more than 10,000 amendments have been proposed in Congress. See *C-Span's Capitol Questions*, C-SPAN.ORG (2000), <http://www.c-span.org/questions/weekly54.asp>. It just means that those changes have little, if any, possibility of becoming a constitutional reality.

56. A very important exception here is Sanford Levinson, who engages in making specific proposals for the structural transformation of a constitution that he considers undemocratic in many aspects. See LEVINSON, *supra* note 7, at 167-80.



constitutionalization. Then, instead of suggesting the constitutional forms that could embody those principles or institutions, the theorist quickly mentions (or simply assumes) the difficulty in amending the constitution and/or claims that an amendment is in any case unnecessary. Finally, she moves to a discussion about how the desired goals can be achieved through interpretation of the existing constitutional text and/or about how the necessary institutions or principles can be brought into existence through ordinary legislation.

Consider, for example, Pamela S. Karlan's approach to voting rights. After demonstrating the various ways in which different groups of people are effectively disenfranchised in the United States, and insisting that the United States needs to transform the constitutional construction of the right to vote to recognize voting as "a fundamental structural element of our constitutional democracy,"<sup>57</sup> Karlan writes: "While some activists and legislators have suggested the need for a new constitutional amendment recognizing the affirmative right to vote, my own view is that the existing constitutional provisions are sufficient."<sup>58</sup> In a similar fashion, in an essay about social and economic rights in the United States, William E. Forbath argues that the idea of economic redistribution is "more likely to seem constitutionally suspect than constitutionally commanded."<sup>59</sup> Forbath asks: "What is to be done? How, if at all, should the Constitution be *interpreted* to safeguard social rights or a social minimum in the twenty-first century?"<sup>60</sup> While Karlan and Forbath insist on the potential of constitutional interpretation to bring about progressive constitutional change, Frank Michelman and Robin West look to the legislature. Here, the constitutional text also remains unchanged, and the idea is to "force" legislators to be faithful to what the constitution already promises.

Thus, while also promoting constitutional recognition of positive rights, West attempts to answer the question of "whether the

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57. Pamela S. Karlan, *Voting Rights and the Third Reconstruction*, in *THE CONSTITUTION IN 2020*, *supra* note 11, at 159, 160.

58. *Id.* at 164.

59. William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in *THE CONSTITUTION IN 2020*, *supra* note 11, at 55, 56 (emphasis added).

60. *Id.*

Fourteenth Amendment's guarantee of equality implies the existence of social or economic welfare rights."<sup>61</sup> However, distrustful of courts, West invites us to think of a "legislated Constitution . . . the Constitution that legislators are duty-bound to uphold"<sup>62</sup> and that is already equipped to become a vehicle for egalitarian politics. Michelman's proposal for the ways the U.S. constitutional regime should approach economic power provides another example of this strategy. In a recent essay, after identifying a set of background conditions for economic power's formation and distribution that most left liberals in the United States would happily endorse, Michelman writes: "Now, let's face it: Constitutional amendment is next to impossible under U.S. rules. In this instance, the effort would have to overcome ferocious partisan resistance on the substance."<sup>63</sup> He then adds, "The prospects for amendment do not appear bright, and it seems the political energy would be better spent on the ordinary politics of election and legislation . . . ."<sup>64</sup>

One should not necessarily reject these authors' analyses or prescriptions. They present attractive proposals and their diagnoses of the likelihood of a constitutional amendment are accurate. But the fact that constitutional theorists of progressive political persuasions, like Karlan, Forbath, West, and Michelman, have learned to operate and to develop their theories by taking the existing constitutional text as an unchangeable default evidences the power and effects of the prevailing notion of constitutionalism. More problematic, however, is the fact that this kind of approach, while resulting from the practical manifestation of constitutionalism's obsession with permanence (e.g., the difficulty in amending a constitution), also *reproduces* it. That is to say, if everything can be achieved through interpretation, why ever worry about changing the constitutional text? Or, if ordinary

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61. Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, *supra* note 11, at 79, 80.

62. *Id.* at 86.

63. Frank Michelman, *Economic Power and the Constitution*, in THE CONSTITUTION IN 2020, *supra* note 11, at 45, 53.

64. *Id.* For a similar approach, see CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 180 (2004). Michelman's approach rests on Sunstein's idea of "constitutive commitments," defined as "highest-priority, popular, canonical expectations for the conduct of government." Michelman, *supra* note 63, at 45-46.

legislation is enough to realize the set of principles and institutions that are thought desirable from a particular political perspective, why worry about designing more participatory mechanisms for constitutional change? The problems calling for changes in the design of participatory mechanisms for constitutional change will, however, become clear.

## II. DEMOCRATIC OPENNESS, THE FIRST BASIC COMPONENT OF DEMOCRACY

It is not difficult to understand why the prevailing conception of constitutionalism, as well as the political practice it produces is, at the very least, in tension with the idea of democracy and, at worst, incompatible with it. If my depiction of constitutionalism and its accompanying ideology is accurate, democrats stand for all constitutionalists fear. It is true that democracy is one of the most contested terms of our political culture, and it is far from clear what democracy requires in the context of large and complex societies. There are some basic ideas, however, that are inherent to the principle of “the rule by the people” (democracy’s specific and literal meaning).<sup>65</sup> Once one begins to depart from these ideas, democracy quickly becomes something else. First, a democratic society is an open society, that is, one in which even the most fundamental principles are always susceptible to being reformulated or replaced through democratic procedures. Democratic openness welcomes conflict and dissent, and is incompatible with untouchable abstract principles. A democratic society, like Cornelius Castoriadis’s vision of a just society, is “not a society that has adopted just laws, once and for all, rather it is a society where the question of justice remains constantly open.”<sup>66</sup>

The idea of an open society is directly related to the principle of the “rule by the people” in one fundamental sense. To say the people rule themselves is to say they are a “self-governing” people: a group

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65. Ellen Meiksins Wood, *Democracy: An Idea of Ambiguous Ancestry*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 59, 59 (J. Peter Euben et al. eds., 1994).

66. ALLAN C. HUTCHINSON, *IT’S ALL IN THE GAME: A NON-FOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* 258 (2000); *see also* Cornelius Castoriadis, *Socialism and Autonomous Society*, 43 *TELOS* 91, 104 (1980).

of human beings that come together as *political equals* and give themselves the laws that will regulate their conduct and the institutions under which they live. This involves two important and related points. First, for these rules to be the people's own, it must be today's people who rule, not past generations, however wise or well-intentioned their act of constitution-making was, or whatever the content of the provisions they adopted. The idea of pre-commitment (perfectly attuned to the logic of constitutionalism) cannot be brought to a final reconciliation with democracy.<sup>67</sup> A self-governing people must be able to reformulate their commitments democratically. Second, for there to be democratic self-rule, no rule can be taken for granted or be impossible (or virtually impossible) to change.<sup>68</sup> In this sense, the idea of placing stringent requirements on constitutional amendments, and of course, the less common practice of placing part of the constitutional text outside the scope of the amending procedure, are in a clear tension with the ideal of democratic openness.

As Claude Lefort put it, democracy allows "no law that can be fixed, whose articles cannot be contested, whose foundations are not susceptible of being called into question."<sup>69</sup> This openness, of course, is always a limited openness, because, for a rule to be truly open to change, practices such as criticism and dissent must also be possible,

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67. *But cf.* Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 226 (Jon Elster & Rune Slagstad eds., 1993) (arguing that constitutional pre-commitment is in principle both democratic and majoritarian).

68. *See* ALAN KEENAN, DEMOCRACY IN QUESTION: DEMOCRATIC OPENNESS IN A TIME OF POLITICAL CLOSURE 10 (2003). Although rare, there are some constitutions that make it "illegal" to propose certain constitutional changes. For example, Article 239 of the Constitution of Honduras establishes that whoever proposes to alter the rule prohibiting presidential re-election will be immediately removed from office and prevented from exercising any public function for a term of ten years. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS [CONSTITUTION] art. 239 (Hond.), *translated in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: HONDURAS 60 (Gisbert H. Flanz ed., Reka Koerner trans., 1997). This is, of course, the provision that the perpetrators of the 2009 coup used to legally justify their actions. Miguel Estrada, *Honduras' Non-Coup: Under the Country's Constitution, the Ouster of President Manuel Zelaya Was Legal*, L.A. TIMES (July 10, 2009), <http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10>.

69. Claude Lefort, *The Image of the Body and Totalitarianism*, in POLITICAL FORMS OF MODERN SOCIETY 292, 303-04 (John B. Thompson ed., 1986).

and rights such as freedom of speech and association must be respected as a matter of political practice. These limits to democratic openness, however, are limits to democracy itself. Consider the case of a people who decide to abolish a constitution that provides for institutions that allow for democratic self-rule and, instead, empower a sovereign dictator. In this situation, one must distinguish between the procedure by which a decision is taken (e.g., a democratic procedure) and its outcome, or, as Jeremy Waldron has put it, between democratic means and democratic ends.<sup>70</sup> Thus, if a political community chooses to establish a dictatorial regime, it does not follow that that regime would be *democratic*—even if it was born out of a democratic process.<sup>71</sup> These people would not have simply supplanted one set of institutions for another. Such a regime would be in violation of the very idea of democracy: it would preclude the possibility of “rule by the people,” supplanting it by the rule of one individual.<sup>72</sup>

To say that in a democracy everything is open for replacement, then, is to recognize that democracy always involves the risk of abolishing itself. Castoriadis put it clearly: “In a democracy people *can* do anything—and must know that they *ought not* to do just anything. Democracy is the regime of self-limitation; therefore it is also the regime of historical risk—another way of saying that it is the regime of freedom—and a tragic regime.”<sup>73</sup> Democracy, there should be no doubt about it, is always a risk, but a risk that a democrat—to remain a democrat—has no choice but to accept.<sup>74</sup> One might argue it

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70. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 291 (1999).

71. *Id.* at 255.

72. As Walter Murphy expressed, “[I]f citizens destroy their own right to have rights, they destroy their authority to legitimize a political system.” WALTER MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 507 (2007).

73. Cornelius Castoriadis, *The Greek Polis and the Creation of Democracy*, 9 *GRADUATE FAC. PHIL. J.* 79 (1983), *reprinted in* *THE CASTORIADIS READER* 267, 282 (David Ames Curtis ed., 1997).

74. Even Rawls seems to agree on this point:

I deny, then, that liberalism leaves political and private autonomy in unresolved competition. That is my first claim. The second is that the dilemma liberalism supposedly faces is a true dilemma, since, as I have said, the two propositions are correct. One says: no moral law can be externally imposed on a sovereign democratic people; and the other says: the sovereign people may not justly (but may legitimately) enact a law

is precisely as a result of these risks that there exist constitutions, fundamental and supreme laws that limit the actions of governments and peoples, and why the ideal of the “rule of law” as opposed to the “rule of men” is cherished. Moreover, one might argue, this is why constitutions must be difficult to change, and why altering them should only be done “reluctantly and at the last resort.”<sup>75</sup> But those arguments greatly overestimate the power of traditional constitutional protections. If there are some forms of oppression that we consider unthinkable in contemporary liberal societies, it is not because there are laws or constitutions against such practices, but because it would be hard to imagine any group or individual with a political force capable of imposing them.

If we can be reasonably certain that the re-establishment of slavery tomorrow in the United States or in a European country is extremely improbable, the “reasonable” character of our forecast is based *not* on the existing laws or constitutions (for then we would be simply idiotic) but on a judgment concerning the active response of a huge majority of the people to such an attempt.<sup>76</sup>

Respect for the rights and institutions that are usually cherished in liberal democracies, in the end, is less the consequence of the entrenchment of the relevant legal and constitutional protections than a result of what may be identified as a “political culture of mutual respect.”<sup>77</sup> Why not, a constitutionalist might nevertheless ask, protect these rights and institutions through a constitution that is difficult to change, just as an additional safeguard? My answer to that question, as argued in the next Part of this Article, is: by making constitutions impervious to change to protect principles and institutions that make

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violating those rights. These statements simply express the risk for political justice of all government, democratic or otherwise; for there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected.

RAWLS, *supra* note 18, at 416.

75. Sullivan, *supra* note 37.

76. See Castoriadis, *supra* note 73, at 283.

77. WALDRON, *supra* note 70, at 310. Robert Dahl makes a similar point in a hypothetical dialogue between a procedural and a constitutional democrat. ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 172-73 (1989).

democracy possible (the right to public debate for example), one also protects principles and institutions whose connection with democracy is weak (or non-existent). Those principles and institutions only weakly connected to democracy might have the potential to promote forms of inequality that run counter to the democratic ideal.<sup>78</sup>

### A. *The Extra-Democratic Effects of Constitutions*

If democratic openness is one of the basic components of democracy, and Lycurgian tendencies drive constitutionalism, how could we have reached a point in which democracy and constitutionalism appear as “partners in principle,”<sup>79</sup> to use Dworkin’s phrase? One possible answer is that, as suggested above, many of the rights and institutions traditionally protected by liberal constitutions are fundamental to the exercise of democracy or guarantee that individuals are treated as equal citizens by the state. In that sense, it is easy to see the limits to democratic openness as embodied in a liberal constitution or, to use constitutionalists’ preferred term, in a constitutional democracy. The problem, of course, is that this fear of constitutional change is not limited to the protection of the rights and institutions that, according to these theorists, are constitutive of democracy; it extends to the entire organization of government and the economy. Thus, when constitutionalists talk about making a constitution difficult to change to protect or advance democracy they are also advocating the protection of the traditional liberal system of governance and an understanding of the market as a central feature of democratic life.<sup>80</sup> That is, they are also making more difficult profound constitutional transformations that, while promoting progressive political goals and being perfectly consistent with basic democratic principles, are incompatible with aspects of liberal

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78. In the same way certain constitutional forms can contribute to inequality, constitutions can promote egalitarian political projects. The constitutional recognition of social and economic rights (which render the rights inalterable by ordinary legislative majorities) is perhaps the most obvious example.

79. Ronald Dworkin, *Equality, Democracy, and the Constitution: We the People in Court*, 28 ALBERTA L. REV. 324, 346 (1990).

80. C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 6 (1973).

governance whose connections to democracy are not very strong.<sup>81</sup>

It is surprising that the fact that constitutions do much more than simply establish “the rules of the game” (understood as the rules that make democratic decision-making processes possible and enable human beings to govern themselves) is absent from many discussions about the relationship between constitutionalism and democracy. This point is well exemplified in Holmes’s work, briefly examined above.<sup>82</sup> The problem, as David Schneiderman has written, is that Holmes, as a good constitutionalist, “chooses to stress the structural and procedural aspects of constitutional rules,” ignoring the fact that constitutions also contain other provisions, such “as those concerning liberty and property,” which are less obviously related to democratic will formation but have important implications for the daily lives of individuals.<sup>83</sup> Put bluntly, liberal constitutions can also promote

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81. See Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 770 (2001) (“The conclusion that the constitution is in some sense inherent in democracy is certainly plausible. But the argument put forth as justification is inadequate because it refers only to part of the basic law, the part immediately constitutive for institutions of opinion—and will—formation—that is, it refers only to rights of political participation and communication. But liberty rights make up the core of basic rights—habeas corpus, freedom of religion, property rights—in short, all those liberties that guarantee an autonomous life conduct and the pursuit of happiness.”). Habermas’s solution to this problem lies in his co-originality thesis. *Id.* at 767.

82. See *supra* notes 48-49 and accompanying text.

83. DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE 12 (2007). It is not that individual rights, such as the right to private property, freedom of religion, and rights to privacy in general cannot be understood as having important connections to the democratic ideal. Individual rights, after all, can be seen as a precondition for citizens’ full participation in a democratic polity: without a secure place in the world to think and act free of state interference, individuals can hardly form political opinions and develop their capacities to deliberate with others. For instance, Frank Michelman has argued the right to private property can be thought of as necessary “to imbue citizens with the independence” to engage in popular self-government. Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1334 (1987). More recently, Corey Brettschneider has argued that freedom of conscience is essential to democracy because it “ensures that self-rulers will be able to think for themselves about political problems without being subject to external coercion.” COREY BRETTSCHEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 45 (2007). But these rights, like fundamental rights in general, can be understood



different economic and political inequalities, and in doing so hinder rather than enable or protect democracy.<sup>84</sup>

An obvious example is property rights.<sup>85</sup> On its face, the right to private property is neutral: it guarantees that *any* individual's property will neither be confiscated by the state without compensation nor trespassed by strangers. But of course, if the allocation of property is unjustly unequal at the moment a constitution is adopted, the inevitable result is protection of an unjust status quo.<sup>86</sup> In this sense, the kind of neutrality that is protected is a "status quo neutrality," to use Cass Sunstein's phrase.<sup>87</sup> Arguably, those who possess greater amounts of property will tend to enjoy greater degrees of political influence, while those without property will frequently lack the time and energy to be involved in political activity. The anti-democratic character of Lysurgian constitutionalism can be observed clearly in this context. Suppose a progressive social movement promotes the adoption of a set of legal reforms directed at different forms of economic redistribution. The leaders of the movement discover that in order for those reforms to be legally valid, the constitutional

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and interpreted in ways that exceed their connection to the democratic ideal (for example, giving corporations an unlimited right to contribute to political campaigns or the right to sell certain medicines at prices that cannot be afforded by most people, has little to do with the right to freedom of expression and the right to property when understood in light of their democratic connections). If the objective of constitutionalism was actually protecting the rights and institutions required for democracy, then we would see constitutions that made an effort to entrench *only* those outgrowths of fundamental rights that are connected to democracy.

84. This is well exemplified in critiques posed by the left to liberal constitutionalism. See, e.g., Stephen Gill, *Constitutionalizing Inequality and the Clash of Globalization*, 4 INT'L STUD. REV. 46, 59-61 (2002).

85. For a helpful discussion of private property in American constitutionalism, see Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 67, at 241.

86. Of course, it is true that private property is, in a way, connected to democracy and its corollary of popular participation: Only human beings that are able to satisfy their needs are likely able to devote time and energy to political activities. See, e.g., Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981). My point is that there are *different* ways of understanding the right to private property, but only certain ways are constitutionalized and therefore protected from the ordinary avenues of democratic reformulation.

87. See CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 3 (1998).

regulation of property must be transformed in important ways. Accordingly, they direct their efforts toward a constitutional amendment.<sup>88</sup> When they attempt to do so, however, they are confronted with a constitution that is not only very difficult to change, but whose change lies in the exclusive hands of government (i.e., they cannot initiate the process themselves through some form of popular petition) and can easily be blocked by a minority of ordinary legislators. Even if one disagrees with this group's objectives, it is easy to understand why assurance that "the constitution is difficult to change in order to facilitate democracy" would probably not satisfy them.

There is an obvious constitutionalist rejoinder to this kind of argument. The problem is not the constitutional text or the fact that it can only be amended by supermajorities. Rights are abstract and can be interpreted in a number of ways. In fact, in most countries the scope and limits of rights are the result of how they have been interpreted by courts.<sup>89</sup> Courts, however, are not always on the side of social justice.<sup>90</sup> In fact, there are many reasons to be skeptical that "any significant durable successes in terms of egalitarian distribution of social resources can be achieved through federal constitutional litigation."<sup>91</sup> Moreover, as Frank Michelman has observed, courts that seek to enforce traditional constitutional protections can easily get in

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88. Some Latin American constitutions, for example, in addition to recognizing different forms of property (e.g., public, private, communitarian, mixed, collective, etc.), "condition" the enjoyment of private property upon a set of requirements (e.g., that a given use serves a social function). *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Sept. 2008, art. 321; NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Oct. 2008, art. 56 (Bol.), *translated in* 2 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: BOLIVIA 18 (Rüdiger Wolfrum & Rainer Grote eds., 2009).

89. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 100-01 (2004).

90. As Dworkin has recognized, "Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996).

91. Richard T. Ford, *Hopeless Constitutionalism, Hopeful Pragmatism*, in THE CONSTITUTION IN 2020, *supra* note 11, at 143, 146.

the way of different types of reforms:

Judges honouring claims to constitutional protection for freedoms of speech and association can stymie efforts to fashion a set of media policies aimed against undue concentrations of power to control public discourse, or a set of electoral practices designed to minimize conversions of economic into political power. Judges honouring claims to private liberty, property, and freedom from racial classifying may block employment legislation directed toward equal opportunity or decent conditions of work, or housing legislation aimed at giving everyone a chance for adequate housing.<sup>92</sup>

From the perspective of democratic openness, the problem is that judicial interpretations of rights become part of constitutional reality, alterable only through a subsequent ruling or through a constitutional amendment. In that sense, the constitutionalist rejoinder helps to stress the original point: the only way for a popular majority to *democratically* (i.e., through participatory procedures) alter those judicial interpretations is through constitutional re-making. Constitutions, as well as their official interpretations, can have important anti-democratic effects. Placing their content beyond the scope of democratic politics cannot be defended in terms of protecting democracy from itself, particularly when some of the changes that might be considered “unconstitutional” (like the ones enumerated by Michelman) would likely improve the quality of life, as well as the prospects for participation and deliberation on public issues by many citizens. A liberal constitution is not simply a charter that makes law-making possible, a charter not cluttered “with amendments relating to substantive matters” that present an “insidious danger [that] lies in the weakening effect they would have on the moral force of the Constitution itself.”<sup>93</sup> Liberal constitutions are *already* cluttered up with substantive matters, and do not merely set up the procedures through which ordinary laws are adopted.

Constitutions also set up the basic structure of government, and the types of structures and institutions they create might not be

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92. Michelman, *supra* note 63, at 49.

93. Lon Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 463-64 (1954).

particularly conducive to democracy. Yet these mechanisms can only be altered with great difficulty. There are, naturally, different sorts of arguments against this kind of structural change, particularly arguments that point towards a polity's need for stability.<sup>94</sup> Stability, however, cannot mean these structural elements can *never* be changed (that would be prettification rather than stability), and yet that is the practical effect rigid constitutions have. For example, in the United States as well as in other countries, there is a considerable amount of literature about the allegedly undemocratic character of judicial review.<sup>95</sup> There are also other mechanisms and institutions, such as national recall referendums,<sup>96</sup> the adoption of an electoral system based on the principle of proportional representation,<sup>97</sup> and unicameralism,<sup>98</sup> which perhaps would increase the quality of democracy.

Abolishing judicial review, or adopting any of the previously mentioned mechanisms and institutions, would require alterations in the constitutional text that, even if supported by great majorities of the population, would be very difficult to achieve in a system in which the traditional obstacles to constitutional amendments are present and in which the power of constitutional reform lies in the exclusive hands of

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94. See, e.g., EISGRUBER, *supra* note 4.

95. The best-known critic of U.S. style judicial review is Jeremy Waldron. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1388 (2006). See generally ALLAN C. HUTCHINSON, *WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS* (1995) (providing a critique of how the Canadian Charter of Rights and Freedoms has pushed individual rights interpretation into the courts); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (presenting a conception of judicial review as the process through which constitutional law is *interpreted* and *enforced* but not made); TUSHNET, *supra* note 24. For an excellent discussion and disaggregation of the different critiques of judicial review, see Larry Alexander, *What is the Problem of Judicial Review?*, 31 AUSTRALIAN J. LEGAL PHIL. 1 (2006).

96. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989).

97. See, e.g., M.L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN ONE VOTE* (2d ed. 2001).

98. For a discussion of unicameralism, see AREND LIPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* (1999).

government.<sup>99</sup> In short, there are many ways of democratizing a political system that require fundamental constitutional re-making, and the fact that those changes lie outside the scope of democratic politics can hardly be made consistent with a commitment to democracy. But democratic politics is not limited to ordinary law-making, that is, to the kind of activities that take place inside legislatures. Democracy requires the greatest degree of popular participation possible in the production of the laws that regulate citizens and their government.

### III. POPULAR PARTICIPATION, THE SECOND BASIC COMPONENT OF DEMOCRACY

Part II identified democratic openness as one of the basic components of democracy. In doing so, it presented democracy and constitutionalism as conflicting ideals. Democracy presupposes a political terrain that is never closed (or, put slightly differently, a constituent power that is not consumed with the adoption of a constitution). Constitutionalism, in contrast, is a system in which the people's ability to alter the constitutional forms appears to be severely constrained. This Part examines the other basic component of democracy: the ideal of popular participation in the positing of all laws.<sup>100</sup> Constitutionalism's fear of change not only makes constitutional change difficult and unlikely; it prevents ordinary citizens from proposing, deliberating, and deciding on any transformation it considers necessary. Democracy (and its component of *democratic* openness) requires not only that constitutions are susceptible to re-constitution, but also that they are susceptible to re-constitution through democratic, and hence participatory, procedures.

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99. Judicial review of federal legislation in the U.S. was established by a decision of its Supreme Court, *Marbury v. Madison*, 5 U.S. 137 (1803), but a constitutional amendment would probably be needed to abolish it as a juridical possibility.

100. In discussing the ideal of popular participation, I will sometimes refer to the demands democracy imposes on a constitutional regime on a day-to-day basis—to popular participation in the activity of governing and ordinary lawmaking. It should remain clear, however, that these references are merely meant to show that popular participation has always been part of the idea of democracy, but this Article's focus is with popular participation in *constitutional change*.

This is why, as mentioned earlier, a flexible constitution (flexible in the sense that it can be altered as if it were an ordinary law) will not do, at least not from a democratic perspective.<sup>101</sup>

That democracy involves popular participation is almost axiomatic. Democratic *self*-government not only entails a “community of citizens—the *demos*—[that] proclaims that it is absolutely sovereign” (i.e., the ideal of democratic openness); it also involves an affirmation of the “equal sharing of activity and power” of all citizens.<sup>102</sup> Democracy means “rule *by* the people.” The Greeks, who are usually attributed with the invention of democracy, attempted to institutionalize this very definition in their juridical arrangements. The most famous example comes from the fifth century Athenian assembly, which was open to all male, adult, and free citizens<sup>103</sup> and met more than forty times a year.<sup>104</sup> The assembly debated and decided all important issues, such as foreign relations and taxation, and its decisions were implemented by a committee of Magistrates subjected to regular elections.<sup>105</sup> Each citizen was free to speak his

101. Thus, there are constitutions that can be amended through the same procedures that are used to adopt and repeal ordinary legislation (e.g., the partially unwritten constitution of New Zealand) and in that sense they do not seem (at least in institutional terms) to reproduce constitutionalism’s fear of constitutional change. See PHILIP JOSEPH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND* 9-10 (1993). However, they rarely incorporate procedures designed to increase the degree of *popular participation* in the production and re-production of the fundamental laws. The ideal of popular participation is one of the basic components of democracy. This also applies to theories in which constitutional entrenchment is seen as illegitimate, but democracy is presented as exhausted in a system of parliamentary supremacy and the legislature is made equivalent to “the people.” See, e.g., WALDRON, *supra* note 70, at 283. For a critique of this aspect of Waldron’s approach, see Dimitrios Kyritsis, *Representation and Waldron’s Objection to Judicial Review*, 26 OXFORD J. LEGAL STUD. 733 (2006).

102. CASTORIADIS, *supra* note 73, at 275.

103. DAVID HELD, *MODELS OF DEMOCRACY* 19 (3d ed. 2006). These limitations on citizenship are of course unacceptable under today’s standards. However, one must not forget that until the twentieth century women did not have the right to vote in many countries, and it was only a few decades earlier that slavery was abolished in some of the world’s “oldest democracies.”

104. Claude Ake, *Dangerous Liaisons: The Interface of Globalization and Democracy*, in *DEMOCRACY’S VICTORY AND CRISIS* 282, 282 (Alex Hadenius ed., 1997).

105. *Id.* In the year 487BCE, the selection of magistrates changed from

mind, and was paid to attend so that even the poor could take time from work and participate in the affairs of the *polis*.<sup>106</sup> It is not clear how many Athenians regularly attended the assembly. A good measure might be Thucydides's statement that there were usually 5,000 citizens at the meetings, and the fact that the quorum required for some decisions was set at 6,000.<sup>107</sup>

These institutions rested on the premise that common people were not only competent to elect their governors, but to deliberate and decide substantive issues.<sup>108</sup> Athenians took popular participation so seriously that, according to their laws, a citizen that did not take sides while the city was in civil strife was deprived of political rights.<sup>109</sup> It should be clear that contemporary societies should not aspire to the kind of democracy practiced in Athens.<sup>110</sup> These juridical arrangements, however, underscore the practical implications of democracy's literal meaning and allow us to see how a full democracy would look, even if such a regime could not be fully put into practice today. If one wants to come close to democracy's realization, one should attempt to design and defend institutions that are consistent with it. The ideal of popular participation suggests that democracy, as a regime of popular self-government, requires the participation of citizens in positing and re-positing the laws that govern their lives, constitutional laws included. This is in fact how "[e]ighteenth century revolutionaries in Europe and the United States understood democracy

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election to lottery. PAUL WOODRUFF, *FIRST DEMOCRACY: THE CHALLENGE OF AN ANCIENT IDEA* 49 (2005).

106. Christopher W. Blackwell, *The Assembly*, in *DĒMOS: CLASSICAL ATHENIAN DEMOCRACY* 7 (A. Mahoney & R. Scaife eds., 2003), available at [http://www.stoa.org/projects/demos/democracy\\_overview.pdf](http://www.stoa.org/projects/demos/democracy_overview.pdf). In that respect, it is useful recalling Plato's statement in the *Protagoras* that although Athenians listened to experts when debating technical issues such as the construction of buildings, in the matter of politics "the man who rises to advise them on this may equally well be a smith, a shoemaker, a merchant, a sea-captain, a rich man, a poor man, of good family or of none." *Id.* at 3.

107. *Id.* at 21-22. For example, the adoption of a law conferring citizenship to a foreigner required a quorum of 6,000. *Id.* at 22.

108. See Wood, *supra* note 65, at 62.

109. Castoriadis, *supra* note 73, at 275.

110. However, I agree with Paul Woodruff that Athenian democratic *ideas* are still relevant in our times. WOODRUFF, *supra* note 105, at 16-17.

. . . : the rule of everyone by everyone.”<sup>111</sup> And it is also why some revolutionaries opposed it.<sup>112</sup>

For modern critics of democracy, popular participation was, by its very nature, problematic: it involved granting decision-making power to the lower classes of society and this was very discomfoting. These critics seemed to subscribe to Jean Bodin’s view, which described “popular states” as “the refuge of all disorderly spirits, rebels, traitors, outcasts who encourage and help the lower orders to ruin the great. The laws they hold in no esteem.”<sup>113</sup> For example, Adam Ferguson, speaking during the eighteenth century, doubted that poor majorities, people who all their lives had confined their efforts to their own subsistence, could be trusted with the government of nations.<sup>114</sup> Such men, he wrote, “when admitted to deliberate on matters of state, bring to its councils confusion and tumult, or servility and corruption; and seldom suffer it to repose from ruinous factions, or the effects of resolutions ill formed and ill conducted.”<sup>115</sup>

Not surprisingly, the founding fathers of the American republic had similar ideas. As Paul Woodruff noted, America’s founders were “men who feared government by the people and were trying to keep it at bay.”<sup>116</sup> Thus Madison famously warned that “[pure] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.”<sup>117</sup> Madison’s contempt of democracy can

111. MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* 240 (2004).

112. In the eighteenth century, democracy was generally understood in its direct, rather than representative, variant. This, of course, raised the stakes exponentially and made democracy an even more unattractive ideal. See BARRY HOLDEN, *UNDERSTANDING LIBERAL DEMOCRACY* 2 (1988).

113. Stephen S. Wolin, *Fugitive Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 37 (Seyla Benhabib ed., 1996) (citation omitted).

114. ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* 286 (2d ed., London, A. Miller & T. Cadel 1768) (1767).

115. *Id.*

116. WOODRUFF, *supra* note 105, at 4.

117. THE FEDERALIST NO. 10, *supra* note 30, at 46 (James Madison). Madison defines a pure democracy as a “a Society, consisting of a small number of citizens,



be understood as a result of his general fear of “tyranny” (defined as any severe deprivation of a natural right), particularly the “tyranny of the majority.” It is interesting to note, however, that Madison’s writings do not show much anxiety towards minority tyranny.<sup>118</sup> For instance, at one point he maintained that universal suffrage—a necessary but not sufficient component of the political equality implied by the idea of popular participation—would result in a “permanent animosity between opinion and property.”<sup>119</sup> It is not surprising that he was not sympathetic to the democracy practiced in Athens and its maximization of popular participation. In a frequently cited passage, Madison claimed that even if “every Athenian citizen [had] been a Socrates every Athenian assembly would still have been a mob.”<sup>120</sup>

For both the Greeks and the critics mentioned above, the meaning and practical implications of democracy were reasonably clear. Democracy meant *rule by the people* and it required the adoption of institutions that would result in the participation of all citizens in the activity of law-making. Moreover, they believed the rule of the people extended to all matters and all laws; no issue was to be removed from the democratic process.<sup>121</sup> In contemporary literature, the idea that

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who assemble and administer the Government in person.” *Id.*

118. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 9 (1970).

119. Ake, *supra* note 104, at 283. *See also* JENNIFER TOLBERT ROBERTS, ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT 183 (1994) (providing John Adams’s arguments in favor of restricting the vote to property owners).

120. THE FEDERALIST NO. 55, *supra* note 30, at 281 (James Madison). Madison’s negative views about democracy, universal suffrage, and popular majorities seem to have softened some years after the creation of the U.S. Constitution, where he appears more sympathetic to basic democratic principles. *See* ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 33-37 (2002).

121. This does not mean, however, that Athenian democracy never had procedures in place that placed limitations on popular decision-making (even if decisions about all matters took place through democratic processes). For instance, during the fourth century BCE, a distinction was made between making/revising laws and voting on policy decisions. WOODRUFF, *supra* note 105, at 33-34. Proposals made in the Assembly concerning policy decisions (sometimes called “decrees”) had to be consistent with the law (or, put in another way, had to be consistent with the Athenian Constitution). *Id.* at 34. New laws or changes to existing laws could only be framed by a legislative panel chosen by lot (the *Nomothetai*), and then approved by the Assembly. *Id.* If the Assembly wished to

actual participation in the production of the law is an essential component of democracy is no longer universal.<sup>122</sup> In fact, the very meaning of democracy has become a topic of great debate.<sup>123</sup> At least in part, this controversy is a result of the complexity of our time, the fact that we live in large societies, and the fact that citizens do not appear to be interested in public affairs.<sup>124</sup> In short, large and complex societies render the ideal of *rule by the people* anachronistic.<sup>125</sup>

That, however, cannot be the only answer, for the institutions that we call “democratic” are by no means the most democratic forms of political organization that could exist in societies like ours. Yet these institutions are not only considered “democratic” by many political and legal theorists, but are celebrated as the kind of institutions that democrats should defend. This Article will next briefly consider some approaches to democracy in which the “rule of the people” no longer seems to require institutions designed to realize the ideal of popular participation. These approaches to democracy come very close to describing what is taken to be “democratic” in the twenty-first century, and what passes for “democracy” in constitutional regimes that rest on the prevailing theory of constitutionalism.

#### *A. The Demise of Popular Participation and the Reformulation of Democracy*

Claude Ake sees in the contested nature of the term “democracy” a sort of false consciousness and argues that the supposed confusion over its meaning is a mystification.<sup>126</sup> Ake sees this “confusion” not as

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change the laws (e.g., the Constitution), it needed to refer any proposals to the *Nomothetai* before being able to vote on them. *Id.*

122. Ake, *supra* note 104, at 284.

123. *Id.*

124. The idea that people are not interested in public affairs needs, in any case, to be weighted against the lack of opportunities for popular participation in political decision-making and the fact that decisions about many important and interesting matters are usually left in the hands of a few (e.g., the courts). See RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* 72-73 (1994).

125. Cf. Sofia Näsström, *Representative Democracy as Tautology: Ankersmit and Lefort on Representation*, 5 EUR. J. POL. THEORY 321 (2006).

126. Ake, *supra* note 104, at 283.

the result of a lexical difficulty—for him the concept of democracy is uncharacteristically precise—but as “a manifestation of an endless political struggle raging over the appropriation of democratic legitimacy.”<sup>127</sup> Ake’s argument that debates over the meaning of “democracy” are merely struggles for political legitimacy goes too far, however, because, in his presentation of democracy as unquestionably precise, Ake fails to consider the practical importance of questions on the meaning of democracy, such as what an increase in democracy in contemporary societies would mean or how to adopt institutions that allow a greater degree of self-government. But when one examines the treatment that democracy receives in the work of some influential democratic theorists, as well as what passes for democracy in actual political practice, it is inevitable to suspect that there is some truth to Ake’s statement.

Take the example of Joseph Schumpeter, whose *Capitalism, Socialism and Democracy*<sup>128</sup> influenced a wave of works in democratic theory that appeared after the Second World War.<sup>129</sup> Schumpeter wanted to offer a non-normative account of democracy, a description of how democracy worked in the real world. With very good reason, some authors identify in Schumpeter and his followers “an ideology which is grounded upon a profound distrust of the majority of ordinary men and women”<sup>130</sup> and a lack of enthusiasm for democracy.<sup>131</sup> But, regardless of the merits of his approach, Schumpeter’s conception exemplifies what democracy is normally thought to require from peoples and their governments in the twenty-first century. Schumpeter described democracy as a certain type of institutional arrangement designed to arrive at political decisions.<sup>132</sup> Democracy was to be understood as a method and disassociated from

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127. *Id.*

128. J.A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1976).

129. *See, e.g.*, DAHL, *supra* note 118; ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1956); HARRY ECKSTEIN, *A THEORY OF STABLE DEMOCRACY* (1961); GIOVANNI SARTORI, *DEMOCRATIC THEORY* (1962).

130. PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 93 (1967).

131. C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 43 (1977).

132. SCHUMPETER, *supra* note 128, at 243.

any particular ends, such as the achievement of justice or the improvement of people's lives.<sup>133</sup>

According to Schumpeter, the institutional arrangement that we call democracy had to be defined in a realistic way; the definition had to be true to what "sponsors of the democratic method really mean by this term."<sup>134</sup> Thus, his conception rejected the premise of what he called the "classical doctrine" (identified with authors such as Rousseau), which attributed to "the people" a participatory and decision-making role that rested on empirically unrealistic foundations.<sup>135</sup> Schumpeter thus advanced the following definition of the democratic method: "That institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."<sup>136</sup> Under Schumpeter's theory, the competition for leadership, or political power, is what distinguishes democracy from other political methods. The people's only role in a democracy is to *vote* occasionally for candidates in competitive elections, not to decide policies: citizens have to understand that "once they have elected an individual, a political action is his business and not theirs."<sup>137</sup>

The main problem with Schumpeter's definition of the "democratic method," and his exclusion of popular participation from it, is *not* that it might encounter theoretical difficulties or offend democratic sensibilities. The main problem is that Schumpeter comes very close to describing the kind of system that is routinely called democratic in our times. Samuel Huntington expressed this well in his triumphal claim, "By the 1970s, the debate was over and Schumpeter had won."<sup>138</sup> Consider, for example, the following statement by

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133. MICHAEL SAWARD, *DEMOCRACY* 39 (2003).

134. SCHUMPETER, *supra* note 128, at 269.

135. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 4 (1970).

136. SCHUMPETER, *supra* note 128, at 269.

137. *Id.* at 295. The minor role Schumpeter assigns to popular majorities rests on the view that most people are ignorant about political issues, irrational in their preferences, and easily manipulated by politicians, etc. See SAWARD, *supra* note 133, at 42. This view is also shared by many contemporary scholars. See, e.g., BRYAN D. CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 2 (2007); Russell Hardin, *Ignorant Democracy*, 18 *CRITICAL REV.* 179, 179-84 (2006).

138. SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE*

Joseph Nye, a leading liberal political thinker: “Democracy requires government by officials who are accountable and removable by the majority of people in a jurisdiction.”<sup>139</sup> Or consider the definition of “conventional” democratic theory provided by Barry Holden: “In conventional democratic theory the people have the negative role of choosing, at elections, among options presented to them. The options involve personnel and policies—different candidates and their various plans—and the choice of personnel is important as well as the choice of policies.”<sup>140</sup> This radical separation between rulers and the ruled is far away from what democracy involved just a few centuries ago. Democracy has become a form of government that most eighteenth century anti-democrats would be willing to support and champion.<sup>141</sup>

This change in the practical implications of democracy and the demise of popular participation are exemplified in Robert Dahl’s arguments on the prospects for democracy in contemporary societies.

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LATE TWENTIETH CENTURY 6 (1991).

139. JOSEPH S. NYE, JR., POWER IN THE GLOBAL INFORMATION AGE: FROM REALISM TO GLOBALIZATION 202 (2004).

140. HOLDEN, *supra* note 112, at 60.

141. Of course, not all democratic theorists support popular participation’s relegation to a secondary role. There are certainly authors who consider popular participation an essential component of democracy, even if their proposals for increased popular participation are rarely included (or if included, quickly dismissed) in most contemporary discussions about what democracy requires from constitutional regimes. *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 8 (1984); ALLAN HUTCHINSON, THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED 170 (2009); MACPHERSON, *supra* note 131, at 108-15; PATEMAN, *supra* note 135, at 1. There are also some theorists, usually defenders of some form of deliberative democracy, who have advanced proposals that seek to improve the quality of public discussion and debate, or to discover what the population would want if it was able to come together and deliberate about different issues. Although valuable for many reasons, these proposals rarely involve giving ordinary citizens the power to *decide* on important constitutional changes. Instead, these theorists maintain that, in a democracy, participation also means being able to play a role in the decision-*making* process, and, in the context of *popular* participation, that role should be decisive (i.e., not subject to changes through the ordinary institutions of government). *See, e.g.*, BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 4-5 (2004); ANNA COOTE & JO LENAGHAN, CITIZEN JURIES: THEORY INTO PRACTICE 6-8 (1997); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 1 (1991); ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 12 (2004).

As Dahl acknowledges, the idea of democracy has become nearly universal today, and it is the standard that almost all contemporary regimes claim to uphold and praise as the sole criterion of legitimacy for any political system.<sup>142</sup> Nevertheless, for Dahl, countries that call themselves “democratic” are no more than polyarchies. A polyarchy exists in a country whose institutions satisfy only the *minimal* requirements for the democratic process.<sup>143</sup> In very general terms, these minimal requirements amount to a system that allows for the regular election of representatives and the protection of basic political rights.<sup>144</sup> A polyarchy is perfectly compatible with the rule of elites (Schumpeter’s conception of democracy, for example, can be made consistent with the institutional requirements of a polyarchy), and does not require the actual participation of the ruled in political decision-making.<sup>145</sup> In this sense, Dahl’s theory of polyarchy can be understood as recognition of a failure of contemporary states to meet the demands of democracy. As Sheldon Wolin argued, although the official spokesmen of most industrialized countries would insist on the democratic character of their governments, few would argue “the people” actually rule in any of them.<sup>146</sup>

The democracy of contemporary societies thus consists of two principal elements: a liberal constitution that enables all citizens to “participate” in government through the election of officials at pre-

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142. DAHL, *supra* note 118, at 233.

143. *Id.* at 233. These institutions require: (1) that elected officials have control over government decisions about policy; (2) that officials are elected in relatively frequent, fair, and free elections; (3) that the right to vote is extended to all adults; (4) that most adults have the right to run for public offices; (5) that freedom of expression is protected; (6) that citizens have access to alternative sources of information that are not monopolized by the government or any single group; and (7) that citizens have the right to form autonomous associations, such as political parties, that attempt to influence the government by competing in elections and other peaceful means. *Id.* As Sheldon Wolin has stated, the requirements of “democracy” are so precise that world powers periodically dispatch experts to countries of the so-called Third World to determine whether they have been met. Wolin, *supra* note 113, at 42.

144. DAHL, *supra* note 118, at 233.

145. HELD, *supra* note 103, at 163.

146. Sheldon S. Wolin, *Norm and Form: The Constitutionalizing of Democracy*, in ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY, *supra* note 65, at 29, 38.

determined intervals and free competition between highly organized economic and social interests (e.g., political parties).<sup>147</sup> This is the democracy of “public opinion,” “opinion polls,” and voting every few years in general elections. This democracy, that retains little of the ideal of popular participation, has become the standard in *constitutional democracies*. It is a democracy that fits well with constitutionalism’s fear of constitutional change and, according to the prevailing constitutionalist attitude, results in institutions that, by attempting to make constitutional change difficult and unlikely, do not allow ordinary citizens to become the actual authors of fundamental laws. The absence of opportunities for popular participation in constitutional change is highly compatible with a conception of democracy in which popular participation no longer figures as a priority.

In this respect, it is interesting to note the ways in which the ideal of popular participation figures into U.S. progressive constitutional thought. Now people are not expected to *participate* in the production of the fundamental laws, but to *mobilize* in favor of particular changes. The emphasis on “popular mobilization” in the context of constitutional change was popularized by Bruce Ackerman and his theory of constitutional moments.<sup>148</sup> During a “constitutional moment” (Ackerman’s classic examples are the Founding, the Reconstruction, and the New Deal), changes that amount to a constitutional amendment are “ratified by a *mobilized* mass of American citizens expressing their assent through extraordinary institutional forms.”<sup>149</sup> This emphasis on popular mobilization (which is accompanied by a conspicuous absence of references to actual popular *participation* in the process of constitutional re-making) is now present in the work of various progressive legal scholars, including those who see interpretation as the main site of constitutional change.<sup>150</sup> For example, Jack Balkin argues that members of each generation must figure out what the Constitution’s promises mean for them and that “[m]any of the most significant

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147. See Wolin, *supra* note 113, at 33.

148. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 22 (1991).

149. Bruce Ackerman, *Neo-Federalism?*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 67, at 153, 163-64.

150. See *infra* notes 153-154 and accompanying text.

changes in constitutional understandings . . . occurred through mobilizations and countermobilizations by social and political movements that offered competing interpretations of what the Constitution really means.”<sup>151</sup>

In a similar vein, Robert Post and Reva Siegel have advanced a “democratic constitutionalism [that] affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution.”<sup>152</sup> What does *mobilization* mean? What do these theorists have in mind when they speak about “popular mobilization,” “mobilized majorities,” or getting the “mobilized support of the people”? According to Ackerman, mobilization seems to be equivalent to getting the *support* of the people (usually expressed through general elections), thus the need for leaders to “return to the People and mobilize their considered support before foundational principles may be revised in a democratic way.”<sup>153</sup> Getting the support of the people (i.e., being able to “mobilize” public opinion in favor of a particular change) is, of course, different from promoting citizen participation in formulating fundamental laws through constitutional mechanisms (such as constituent assemblies triggered by popular initiatives).<sup>154</sup> Now, mobilization might also include a spectrum of different political acts: massive public manifestations, acts of civil disobedience, and other kinds of protests. Authors such as Balkin, Post, and Siegel have these kinds of political

151. Jack Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, *supra* note 11, at 11, 21.

152. Post & Siegel, *supra* note 9, at 379.

153. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS 6* (1998). Consider, for example, Ackerman’s proposal for the “Popular Sovereignty Initiative,” a democratically superior alternative to Article V:

Rather than aiming for an Article Five amendment, the vehicle for constitutional change should be a special statute that I will call the Popular Sovereignty Initiative. Proposed by a (second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court.

*Id.* at 415.

154. *See infra* Part IV.



acts in mind when they use the term “mobilization.”<sup>155</sup> While these informal activities, through which ordinary citizens insist on making their government responsive to their needs and interests, are fundamental in any democratic polity, they should not be the only means available for citizens to transform the constitutional regime in important ways, at least not in a democratic constitutional regime.

The realization of the ideal of popular participation, of democracy at the level of the fundamental laws, requires that ordinary citizens have a central *decision-making* role, not just the possibility of *influencing* the actions of ordinary government (imagine, for example, a dictator that claims democratic credentials because he only adopts policies that are “responsive” to “popular mobilization”). Formal mechanisms of participation, in which citizens are able to propose, deliberate and decide on changes to the content of their constitution, are also an important part of a commitment to the democratic ideal. In this sense, it is important to note that in some twentieth century literature, the term “mobilization” had a negative connotation.<sup>156</sup> Mobilization was identified with mass activity in countries led by authoritarian governments, and authors talked about “the pseudoparticipation of totalitarian mobilist regimes.”<sup>157</sup> Mobilization occurred when popular engagement was stimulated and led by the authorities, while actual popular participation involved a greater degree of initiative from ordinary citizens. Of course, when progressive constitutional theorists talk about a mobilized citizenry today, they are not referring to mobilization in this negative way. There is still, however, an enormous difference between government being more or less responsive to public opinion and citizens proposing, deliberating, and deciding on the future of their constitutional regime.<sup>158</sup>

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155. See, e.g., Balkin, *supra* note 151, at 21; Robert Post & Reva Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 11, at 25, 25.

156. See JACK H. NAGEL, *PARTICIPATION* 3-4 (1987).

157. DAVID HAPGOOD, *THE ROLE OF POPULAR PARTICIPATION IN DEVELOPMENT* 21 (1969).

158. Moving in the direction of giving ordinary citizens the power to alter the fundamental laws under which they live, however, might make progressives nervous. There seems to be a widespread distrust of ordinary citizens and a widespread belief that these citizens would not make the kinds of decisions

## IV. THE DE-CONSTITUTIONALIZATION OF DEMOCRACY

Constitutional democracy, the liberal attempt at balancing democracy and constitutionalism, is not a true balance. Rather, it is an imbalance in favor of constitutionalism, and one that negates democracy in important ways. This view of constitutional democracy presumes that democracy and constitutionalism are complementary ideals, that democracy can only be realized in a liberal constitutional form, and that the only realistic and desirable conception of democracy in the context of contemporary societies is something akin to Dahl's polyarchy. Under this conception, to speak about constitutional democracy is to speak about constitutionalism in its typical, liberal form. Constitutional democrats, like Eisgruber and Holmes, insist on emphasizing the importance of constitutionalism to democracy while repressing those features of the democratic ideal that appear to endanger the established constitutional regime.<sup>159</sup> The idea is that the purpose of constitutional democracy is to protect democracy from itself.<sup>160</sup> However, the argument presented in this Article suggests it is actually the other way around: constitutional democracy, by remaining loyal to constitutionalism's tenets, protects the established constitutional regime *from* democracy. Constitutional democracy is concerned with the constitutionalization of democracy, not with the democratization of constitutionalism. In the words of a leading constitutional democrat, "Constitutionalism, though it has adopted under modern conditions some of the elements of the democratic political process, attempts to tame the people's democratic rule."<sup>161</sup>

Although constitutional democracy is the dominant theory on the ideal relationship between constitutionalism and democracy, it is certainly not the only theory possible. This Article concludes by outlining the basic premises of a conception of constitutionalism that

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progressives cherish. Richard T. Ford has nicely captured this attitude, which he characterizes as "a combination of defeatism and smug condescension," in the following passage: "Well, *of course*, our position is unpopular because so many people are prejudiced; that's why we need the courts." Ford, *supra* note 91, at 149.

159. See Bennie Honig, *Dead Rights, Live Futures: A Reply to Habermas's Constitutional Democracy*, 29 POL. THEORY 792, 800 (2001).

160. See Holmes, *supra* note 67, at 197.

161. SAJÓ, *supra* note 1, at 53.

is more sensitive to the ideals of popular participation and democratic openness. This conception is called weak constitutionalism. Weak constitutionalism sees the constitution as “the creation and property of a free and democratic people,”<sup>162</sup> not as the exclusive domain of governmental authorities, jurists, or experts.<sup>163</sup> Because it takes seriously the ideals of democratic openness and popular participation, it does not perceive an active citizenry as a threat (even when its actions might result in the destruction of the existing constitution and the emergence of a new one). Instead, weak constitutionalism sees constitutional changes as opportunities to correct existing injustices. By taking constitutions as what they inevitably are—the product of human beings and the result of political struggle—weak constitutionalism recognizes the necessity of keeping the constitutional regime open, or keeping the political terrain never closed. In this respect, weak constitutionalism is an attempt to de-constitutionalize democracy—to liberate it from particular constitutional forms that impede rather than promote the realization of the ideals of democratic openness and popular participation.

#### A. *Weak Constitutionalism and Constituent Power*

The main characteristic of weak constitutionalism is its approach to the people’s constituent power: instead of seeing constituent power as a threat, it sees it as the possibility of correcting existing injustices through highly participatory procedures. Constituent power, a concept

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162. Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 521 (1998) (reviewing ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996)).

163. Weak constitutionalism inevitably has a “populist” bent. Today, the term populism is used in a derogatory way: populist regimes are basically dictatorships covered by a thick layer of democratic rhetoric and a populist regime is what occurs when a democratic process goes wrong (that is, when citizens opt for a government or system of government repudiated by whoever is calling it populist). Needless to say, I do not use the term “populism” in this way, but as a way of describing a regime based on democratic self-rule. See ERNESTO LACLAU, *ON POPULIST REASON* 3-16 (2005) (providing an account of the historical uses of the word “populism”); Frank Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 64, 76 (Larry Alexander ed., 1998) (discussing populism and proceduralism).

until recently absent from Anglo-American constitutional theory,<sup>164</sup> means constitution-making power, the source of the production of juridical norms.<sup>165</sup> In its classical formulations (those of Emmanuel Sieyes and Carl Schmitt), constituent power is seen as an unlimited power, a power that assumes the constitutional regime is radically open. Constituent power, wrote Sieyes and Schmitt, “puts an end to positive law, because it is the source and the supreme master of positive law,”<sup>166</sup> and is capable of “producing from itself . . . ever

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164. At the time of the American Revolution, however, there were authors whose ideas came very close to the theory of constituent power. Consider the following statement by James Wilson: “The consequence is, that the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them.” 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 432 (Jonathan Elliot ed., J.B. Lippincot Co. 2d ed. rev. 1891). In fact, Claude Klein argues that the origins of this concept are to be found in the American Revolution, not the French Revolution as is usually maintained. Klein, *supra* note 21, at 31-32. There is a growing bibliography on constituent power (which is partly a result of the renewed interest in Carl Schmitt’s work, now increased with the translation of his CONSTITUTIONAL THEORY (Jeffrey Seitzer ed., trans., 2007) into English). See, e.g., THE PARADOX OF CONSTITUTIONALISM, *supra* note 22; Andrew Arato, *Carl Schmitt and the Revival of the Doctrine of Constituent Power in the United States*, 21 CARDOZO L. REV. 1739 (2000); Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L.J. 185 (2006); Renato Cristi, *The Metaphysics of Constituent Power: Schmitt and the Genesis of the Chile’s 1980 Constitution*, 21 CARDOZO L. REV. 1749 (2000); Renato Cristi, *Carl Schmitt on Sovereignty and Constituent Power*, in LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM 179 (David Dyzenhaus ed., 1998); Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223 (2005) [hereinafter Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*]; Andreas Kalyvas, *Hegemonic Sovereignty: Carl Schmitt, Antonio Gramsci and the Constituent Prince*, 5 J. POL. IDEOLOGIES 373 (2000); Ulrich K. Preuss, *Constitutional Power Making for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639 (1993).

165. The most famous formulations of constituent power can be found in the works of Emmanuel Sieyes and Carl Schmitt. See generally EMMANUEL JOSEPH SIEYES, WHAT IS THE THIRD ESTATE? 126-32 (1963); SCHMITT, *supra* note 164. For contemporary discussions of this concept see Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, *supra* note 164; THE PARADOX OF CONSTITUTIONALISM, *supra* note 22 (providing essays by various authors).

166. SIEYES, *supra* note 165, at 128.

renewing forms and organizations.”<sup>167</sup> To say that the people are the bearers of the constituent power is to say that they ought to be sovereign and that, in the exercise of that sovereignty, they should be allowed to have any constitution they want.

Contemporary conceptions of constituent power, in addition to recognizing the constituent subject’s unlimited faculty to create and re-create constitutions, emphasize constituent power’s collective character.<sup>168</sup> Thus, some authors define constituent power as the power to create a constitution *together*, with the participation of those subject to it.<sup>169</sup> Preuss has expressed this idea clearly: “Essentially, the constituent power is the power of a collective body, which by the very act of constitution-giving, exercises its right to self-rule.”<sup>170</sup> As the reader may note, constituent power seems to have a direct relationship with the ideals of democratic openness and popular participation: it expresses the idea of an *unlimited* power to re-create the fundamental laws through *participatory* mechanisms. This is not a coincidence, since democracy and constituent power are related in important ways: constituent power can be understood as the expression of the democratic ideal at the level of fundamental laws.<sup>171</sup> In most

167. SCHMITT, *supra* note 164, at 128.

168. There are some authors, however, that consider constituent power mostly in the context of Schmitt’s theory of the state of emergency or that identify it with the power that individuals in the state of nature exercise when they decide to enter civil society. See David Dyzenhaus, *The Politics of the Question of Constituent Power*, in THE PARADOX OF CONSTITUTIONALISM, *supra* note 22, at 129, 129; Murray Forsyth, *Thomas Hobbes and the Constituent Power of the People*, 29 POL. STUD. 191, 192 (1981). These approaches, in my view, neglect constituent power’s democratic potential.

169. As Andreas Kalyvas has explained, the term *constituere*, which is formed by the prefix *con* (“with,” or “together”) and the suffix *statuere* (“to set up,” “to construct,” or “to place”), literally means “the act of founding together, founding in concert, creating jointly, or co-establishing . . . . The correct use of the term ‘to constitute’ prescribes that if one wants to constitute a new constitution, for example, one *ought* to *co*institute it, to institute it jointly with others.” Andreas Kalyvas, *The Basic Norm and Democracy in Hans Kelsen’s Legal and Political Theory*, 32 PHIL. & SOC. CRITICISM 573, 588-89 (2006).

170. Preuss, *supra* note 164, at 647.

171. As Antonio Negri has noted, “To speak of constituent power is to speak of democracy. In the modern age the two concepts have often been related . . . .” NEGRI, *supra* note 23, at 1; see also Joel I. Colón-Ríos, *The Legitimacy of the Juridical: Democracy and the Dilemmas of Constitutional Reform*, 48 OSGOOD

constitutional regimes, however, constituent power is buried under a complicated amendment procedure that places the power to alter the constitutional text in the hands of government. We have seen the anti-democratic consequences of this traditional approach throughout the previous pages.

In attempting to de-constitutionalize democracy, weak constitutionalism seeks to change the traditional approach in at least three ways. *First*, unlike the prevailing conception of constitutionalism, weak constitutionalism does not maintain the precedence of the constitutional forms over the constituent power of the people. It rests on the idea that there is a permanent tension between constitutional forms and constituent power, between constitutionalism and democracy. Instead of privileging the supremacy of the former by adopting a constitution that is difficult or impossible to change, it seeks to leave the door open for the future re-emergence of constituent power. In doing so, weak constitutionalism does not seek to resolve this tension. On the contrary, it recognizes the tensions between constitutionalism and democracy as an inevitable consequence of having a constitution and makes tensions even more obvious by giving citizens the institutional means for acting together to take precedence over the constitutional text, even if only episodically.<sup>172</sup>

*Second*, weak constitutionalism supposes that important constitutional transformations should not be the work of ordinary institutions. These institutions are designed to operate at the level of daily governance, where intense episodes of popular participation are not always possible. In this respect, it cannot be stressed enough that

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HALL L.J. 199 (2010) (discussing the concept of constituent power and its relationship to democracy, constitutional change and democratic legitimacy).

172. The way weak constitutionalism approaches popular participation in constitutional change distinguishes it from the work of Sanford Levinson (despite the similarities with that author's approach). Levinson maintains his proposal for a constitutional convention would be irrelevant if the structural changes he considers necessary could be achieved through other methods (like judicial interpretation). LEVINSON, *supra* note 7, at 164. In contrast, weak constitutionalism seeks to perpetuate the people's ability to re-model the fundamental laws, to institutionalize some means for ordinary citizens to engage in profound and participatory episodes of constitutional change whenever they consider it necessary and *regardless* of the substance or the "defective" character of the constitution in question.

weak constitutionalism is not about a constitution that, just like ordinary law, can be changed by democratic majorities if the term “democratic majorities” simply refers to a majority of state officials sitting in a legislature. When an important constitutional transformation is needed, weak constitutionalism recommends changes to the constitution be made through an exercise of constituent power similar to that present when the constitution was adopted in the first place. The issue here is not simply one of representative versus direct democracy.<sup>173</sup> Popular participation cannot be limited to a process in which experts draft the constitutional text and then submit it to a “yes” or “no” vote in a referendum (which is usually subject to mass advertising and does not necessarily promote discussion and debate among citizens).<sup>174</sup> Weak constitutionalism requires mechanisms through which citizens are allowed to participate, as much as possible, in the modeling and re-modeling of their constitutional regime, mechanisms through which citizens trigger, propose, and decide the content of their constitution.

*Third*, weak constitutionalism rests on a participatory conception of the citizen. Citizens are not merely seen as human beings with rights to participate in politics through the election of officials every few years. Instead, citizens are those allowed to take part in the (re)positing of the norms that govern the state. In other words, a citizen is someone who participates in the democratic legitimation of the constitutional regime and knows that, despite all the imperfections

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173. For example, weak constitutionalism requires a degree of openness that is neither possible nor desirable in the context of an ordinary legislature. Legislatures, regardless of their relationship to the judiciary, operate under a constitutional regime. If a legislature is granted the power to freely alter the constitution (even if subjected to procedural hurdles not present in the adoption of ordinary laws) without the intervention of citizens, democratic legitimacy is affected: it should be ordinary citizens that decide the content of their constitution in a context of democratic openness. In addition, re-writing a constitution often means altering the ways in which legislative power is exercised (e.g., substituting a bicameral legislature with a unicameral one, introducing institutions such as recall referendums, etc.). Having the legislature deliberating and deciding about those kinds of changes would amount to a violation of the old principle that no one should be a judge in his own case. See Andrew Arato, *Dilemmas Arising From the Power to Create Constitutions in Eastern Europe*, 14 CARDOZO L. REV. 661, 688 (1993).

174. James Tully, *The Unfreedoms of the Moderns in Comparison to their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204, 213 (2002).

of such an order, it can be changed. Not only is this conception of the citizen more consistent with democracy, it also results in citizens developing a sense of identification with the constitutional regime. It encourages citizens to see the constitution as theirs, as their work-in-progress, and not simply as the embodiment of the will of a mysterious “People” or as the product of judicial interpretation.<sup>175</sup> When important constitutional transformations are needed, this active citizenry engages in different forms of political participation in order to create the political climate necessary for constituent power to be activated. The specific mechanisms through which constituent power can be exercised vary. For example, one promising way in which constituent power may be exercised includes a constituent assembly convened “from below” (triggered by a referendum initiated by the citizens) and composed of elected delegates, whose work is subject to ratification in a special election.<sup>176</sup>

Ironically, these types of mechanisms are beginning to appear, not in the fundamental laws of established Western liberal democracies, but in the new constitutions of Latin America.<sup>177</sup> These constitutions

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175. See Frances Hagopian, *Latin American Citizenship and Democratic Theory*, in *CITIZENSHIP IN LATIN AMERICA* 11, 27 (Joseph S. Tulchin & Meg Ruthenburg eds., 2007) (providing an overview of the ways in which an active citizenship can enhance civic virtue and improve the quality of democratic governance); see also ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 87-88 (1993).

176. This mechanism should be distinguished from the “popular initiative” mechanism used to amend a constitution in several states in the United States, as well as in several national constitutions. The popular initiative mechanism allows citizens to propose a constitutional amendment through the collection of a number of signatures, to be ratified in a referendum. Such a mechanism does not involve the convening of an extraordinary assembly that would deliberate about the context of a new or importantly transformed constitution. For a recent discussion of the history and nature of the popular initiative mechanism to amend the constitution in the State of Montana, see Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 *MONT. L. REV.* 325 (2010). See also Joel I. Colón-Ríos, *The End of the Constitutionalism-Democracy Debate*, 28 *WINDSOR REV. LEGAL & SOC. ISSUES* 25, 47 (2010) (discussing the constituent assembly convened “from below,” and how it is consistent with the idea of constituent power).

177. See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Sept. 2008, arts. 441-442; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, arts. 347-348, translated in 20 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: VENEZUELA* 68



contain provisions that allow citizens to trigger the convocation of a constituent assembly through popular initiative (involving the collection of a number of signatures ranging from 15% or 20% of the registered electors). A constituent assembly triggered by this mechanism is then considered a sovereign body, independent of the ordinary (or constituted) powers of government. The assembly is therefore not subject to any form of positive law, and operates according to its own rules. It is commissioned to deliberate the content of the current constitution and is authorized to replace the existing juridical order and create an entirely new one. In the United States, the recent attempt of a group in California to propose ballot initiatives (labelled by some as verging “on the radical”) with the objective of calling a constitutional convention that would revise the current state constitutional regime, bears important similarities to these constituent assemblies.<sup>178</sup> The adoption of this kind of mechanism, which would

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(Gisbert H. Flanz ed., Anna I. Velve Torras trans., 2000). Article 411 of Bolivia’s constitution reads as follows:

The total reform of the Constitution, or those modifications that affect its fundamental principles, its recognized rights, duties, and guarantees, or the supremacy of the constitution and the process of constitutional reform, will take place through a sovereign Constituent Assembly, activated by popular will through a referendum. The referendum will be triggered by popular initiative, by the signatures of at least twenty percent of the electorate; by the Plurinational Legislative Assembly; or by the President of the State. The Constituent Assembly will auto-regulate itself in all matters. The entering into force of the reform will require popular ratification through referendum.

NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Oct. 2008, art. 411 (Bol.), *translated in* 2 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: BOLIVIA 124-25 (Rüdiger Wolfrum & Rainer Grote eds., 2009). For an example of a “constitutional convention” convened “from below” in a state constitution, see MONT. CONST. art. XIV (setting the threshold of signatures at 10% of the qualified electors).

178. See Jennifer Steinhauer, *Ballot Issues Attest to Anger in California*, N.Y. TIMES, Jan. 9, 2010, at A1, *available at* <http://www.nytimes.com/2010/01/10/us/10calif.html?pagewanted=all>. Repair California, the group proposing the popular initiatives, recently announced the need to put the campaign on hold due to a shortage of funds. *California Constitutional Convention Campaign Put on Hold*, REPAIRCALIFORNIA.ORG (Feb. 12, 2010), <http://www.countyofsb.org/uploadedFiles/ceo/legis/Att%20d-%20News%20articles-%20Constitutional%20convention%20effort%20on%20hold.pdf>. Not surprisingly, these kinds of initiatives, as well as the very idea of a constitutional convention, are viewed with

allow citizens to participate in the production of the democratic ideal both directly (through the presentation of popular initiatives and a vote on a referendum) and indirectly (through the institution of the constituent assembly), is only possible under a *weak* conception of constitutionalism.

## V. FINAL THOUGHTS

Constitutionalism is characterized by an insistence on the permanence of the established constitutional order and a fear of constitutional change. This feature of constitutionalism is exemplified in the writings of both classical and contemporary American constitutional theorists, as well as in the amendment rules of most modern constitutions. Democracy is inconsistent with constitutionalism's Lysurgian tendencies. Its basic components, the ideal of democratic openness and popular participation, point towards a constitution that is not only susceptible to change, but is susceptible to *democratic* change, change that comes about through highly participatory procedures. Constitutional democracy, by embracing constitutionalism in its traditional version, rejects democratic openness and abandons the ideal of popular participation by supporting a weak version of democracy: a democracy detached from its basic components.<sup>179</sup> This Article follows the opposite route. It argues that organizing our constitutional regimes in ways that promote the realization of democratic openness and popular participation requires leaving constitutions permanently open to profound (and democratic) transformations.

This Article calls for constitutional theorists not to succumb to the temptation of limiting themselves to finding new ways to interpret the existing constitution. Constitutional theorists should devote their energies to the parallel project of proposing structural constitutional transformations that would facilitate the realization of the ideals of democratic openness and popular participation. In defending a weak

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suspicion by supporters of the traditional conception of constitutionalism. A good example is the recent *New York Times* editorial about the proposed constitutional convention in New York. See Editorial, *The New York Convention Con*, N.Y. TIMES, Aug. 10, 2010, at A18, available at <http://www.nytimes.com/2010/08/09/opinion/09mon3.html>.

179. See SAJÓ, *supra* note 1, at 49 (defending "weak democracy").

form of constitutionalism, this Article takes a small step in that direction. Weak constitutionalism takes constituent power seriously and demands the development of constitutional forms in which the constituent subject is given the means to manifest from time to time. This approach, it should be clear, in no way supposes that liberal constitutionalism and democracy can be brought to a final resolution. On the contrary, it recommends a different type of constitutionalism, one that rests on the premise that a constitution is never finished and that the “sovereignty of the people” is not consumed in the constitution-making act.