The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform

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Abstract
This article asks and answers the question of what conditions must be met for a constitutional regime to enjoy democratic legitimacy. It argues that the democratic legitimacy of a constitutional regime depends on its susceptibility to democratic re-constitution. In other words, it argues that a constitution must provide an opening, a means of egress for constituent power to manifest from time to time. In developing this argument, the article advances a distinction between ordinary constitutional reform -- understood as subject to certain limits -- and the exercise of constituent power through which a society produces novel juridical forms without being subject to positive law.

Keywords
Constitutional law; Democracy

This article is available in Osgoode Hall Law Journal: http://digitalcommons.osgoode.yorku.ca/ohlj/vol48/iss2/1
The Legitimacy of the Juridical: 
Constituent Power, Democracy, and the 
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JOEL COLÓN-RÍOS*

This article asks and answers the question of what conditions must be met for a constitutional regime to enjoy democratic legitimacy. It argues that the democratic legitimacy of a constitutional regime depends on its susceptibility to democratic re-constitution. In other words, it argues that a constitution must provide an opening, a means of egress for constituent power to manifest from time to time. In developing this argument, the article advances a distinction between ordinary constitutional reform—understood as subject to certain limits—and the exercise of constituent power through which a society produces novel juridical forms without being subject to positive law.

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* Lecturer, Victoria University of Wellington. This article is based on part of my doctoral dissertation. I would like to thank Allan C. Hutchinson (my supervisor), Leslie Green and Bruce Ryder (members of my supervisory committee), and Brian Tamanaha (external examiner) for their comments and critiques on some of the ideas contained here. I am also grateful to Richard Albert, Andrew Arato, and Martin Hevia for their comments on a previous version of this article.
NOT ALL CONSTITUTIONAL REGIMES emerge out of highly democratic constitution-making episodes. In fact, many countries that enjoy a reasonable degree of democratic governance frequently operate under constitutions adopted by state officials and with little or no participation from ordinary citizens. Other countries suffer from a different problem: they operate under constitutions that were imposed from the outside, even if drafted by an elected constituent assembly and ratified in a referendum. Can constitutional regimes like these, adopted from the top down or characterized by a dubious democratic pedigree, ever enjoy democratic legitimacy? This article will argue that the fact that a constitutional regime originates from a non-democratic constitution-making episode does not necessarily mean it is (or always will be) illegitimate from a democratic perspective. Its claim to democratic legitimacy might lie in the fact that, although it

1. The case of Canada in 1982 is telling in this respect. Canada—a wealthy, democratic country—engaged in important constitutional transformations through a process that was driven from the top down and in which the participation of citizens was limited to occasional consultation in committees that lacked decision-making power. See generally Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, 3d ed. (Toronto: University of Toronto Press, 2004) [Russell, Constitutional Odyssey].

2. An example of this kind is Puerto Rico’s Constitution, adopted through an elected “constituent assembly” and ratified in a series of referendums after its content had been limited by the US Congress. See generally José Trías Monge, Historia Constitucional de Puerto Rico, vol. 3 (Río Piedras: Editorial de la Universidad de Puerto Rico, 1982). One of the most recent examples of a constitution imposed from the outside but adopted through formal “democratic” procedures is that of Iraq. See Andrew Arato, Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq (New York: Columbia University Press, 2009). See also Noah Feldman, “Imposed Constitutionalism” (2005) 37 Conn. L. Rev. 857.
was adopted in an undemocratic way (say, by a group of well-intentioned jurists), it can be *re-constituted* democratically. Accordingly, this article will examine what it means for a constitutional regime to be susceptible to democratic reconstitution. In other words, it will ask and answer the question of what conditions must be met for a constitutional regime to enjoy democratic legitimacy. In so doing, the article will advance a distinction between ordinary constitutional reform—understood as subject to certain limits—and the exercise of constituent power through which a society produces novel juridical forms without being subject to positive law.

To achieve this objective, the article must do three different things. First, it must provide an account of what is meant by *democratic legitimacy*, an idea used by many authors in ways that differ from the way it is used here. The conception of democratic legitimacy defended in this article is highly procedural and is connected in important ways to the concept of constituent power. It is different, for example, from both the “sociological” and “philosophical” conceptions of legitimacy. As suggested above, this article maintains that, in the context of constitutional regimes, democratic legitimacy depends on one basic condition: a constitutional regime must be susceptible to democratic re-constitution. This means that in addition to recognizing basic rights of political participation, it must have some institutional mechanism(s) in place designed to allow citizens to trigger, deliberate, and decide on fundamental constitutional changes; it must have an outlet for constituent power to manifest when important constitutional transformations are needed. The conception of democracy on which this account of legitimacy rests requires that citizens be allowed to become authors of their constitution, even if they were not so when the constitution was originally created. Moreover, it sees the exercise of constituent power as a manifestation of democracy at the level of a society’s fundamental laws and as not being exhausted in a constitution-making episode.

Second, the article must consider the implications of this conception of democratic legitimacy for the very institution of constitutional reform. The democratic legitimacy of a constitutional regime, after all, depends on the ways in which it approaches constitutional reform and the opportunities it provides

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3. The theory of constituent power will be discussed in Part I, below.
4. The term “citizen” is used broadly here to include those who live under a constitutional regime and who should therefore be allowed to participate in its re-constitution.
for popular participation in constitutional change. However, if it were necessary for every constitutional change to be made through extraordinary and highly participatory procedures, the approach to democratic legitimacy presented here would hardly have any practical applications. Constitutions sometimes need to be changed in order to correct a small defect or to replace or alter a provision that has become anachronistic. A system in which all amendments have to be adopted through a process that involves intense levels of popular participation is neither practical nor desirable. The solution, however, cannot be found in the opposite extreme—that is, a system in which legislative supermajorities (like in Canada or the United States) can make any constitutional change whatsoever, and in which the participation of the citizenry is minimal or non-existent. The solution to this problem, in my view, involves a distinction between ordinary and fundamental amendments, each of them requiring a different set of procedures and only the latter involving the exercise of constituent power.

Third, the article must give examples of mechanisms that would make democratic constitutional change possible. A constitutional regime in which one or more of these mechanisms is present would be susceptible to democratic reconstitution and could be considered legitimate from a democratic perspective. The specific mechanisms I consider are the constituent assembly convened by the legislature and the constituent assembly convened "from below." Authorized by the constitutional text and therefore not necessarily equivalent to a revolution in the legal sense, if convened in a context of heightened political mobilization, these mechanisms can amount to an exercise of constituent power; they can serve as a channel to a democratic force that cannot manifest itself through ordinary juridical means. Moreover, the second modality of the

5. In the context of Canada, an example of a constitutional amendment that, while important, did not seem to warrant a highly participatory process of constitutional change was the amendment to change the name of the "Province of Newfoundland" to the "Province of Newfoundland and Labrador." *Constitution Amendment, 2001 (Newfoundland and Labrador)*, S.C. 2001, c. 1.

6. As will be argued in Part 1, below, democratic legitimacy is a matter of degree, and some of these mechanisms, as well as their availability in actual constitutional practice and the political context in which they exist, would result in different degrees of democratic legitimacy.

assembly is generally triggered through the collection of signatures, requiring popular engagement from its early stages. As means for the (potential) exercise of constituent power, these mechanisms can be used for an entire constitutional overhaul and should not be subject to any substantive limits found in the constitutional text.\(^8\)

The article is organized in the following way. First, I introduce the concepts of constituent power, democracy, and democratic legitimacy. Part I thus begins by outlining the basic tenets of the theory of constituent power and examines the relationship between this concept and the democratic ideal. Moreover, it explains how the basic condition of democratic legitimacy (susceptibility to reconstitution) emerges from the democratic reading of the theory of constituent power. In Part II, I examine the distinction between ordinary and fundamental constitutional change through a discussion of Carl Schmitt and John Rawls's thoughts on the limits of constitutional reform. As will be shown in Part III, this distinction is central to my argument: only the latter kind of change amounts to an act of constitution-(re)making, and would therefore involve and require an exercise of constituent power. Finally, in Part IV, I consider the constituent assembly convened by the legislature and the constituent assembly convened “from below” as devices that, as means for the exercise of constituent power, would make constitutional regimes susceptible to democratic reconstitution and consistent with the idea of democratic legitimacy.

I. CONSTITUENT POWER AND DEMOCRATIC LEGITIMACY

One could examine, attack, or defend the democratic legitimacy of a government, of a decision of a legislature, or of a particular government official. In this article, however, the question of democratic legitimacy is directed at constitutional regimes. The constitutional regime encompasses the constitution, written

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8. Any institutional device for constitutional change, including a constituent assembly that operates according to its own rules, creates procedural limits on the exercise of constituent power. In this respect, it necessarily takes something away from constituent power, either from its creative force or its capacity to express itself in novel ways. Nevertheless, at least from the perspective of democracy at the level of a society's fundamental laws, it is better to have devices that allow for this "imperfect" manifestation of constituent power than to have nothing.
or unwritten,\(^9\) and the juridical structures it creates (e.g., the legislative, judicial, and executive branches of governments, as well as the official interpretations and beliefs about what the constitution requires). In other words, a constitutional regime is the legal apparatus that shapes the exercise of power in a given jurisdiction, and its most fundamental component is the document or the set of principles known as “the constitution.” In that respect, to talk about the emergence of a constitutional regime and the emergence of a new constitution is more or less the same. The conception of a “constitutional regime” and “of the constitution” used here is strictly domestic: obligations created by international treaties (e.g., the World Trade Organization), that for all practical purposes constitute a sort of supra-constitution, are therefore excluded.\(^10\) As stated in the introduction, the conception of democratic legitimacy that I will present here rests in an important way on the concept of constituent power. I will therefore begin by introducing the concept of constituent power and by stressing its connections to democracy and democratic legitimacy.

A. OUTLINING THE THEORY OF CONSTITUENT POWER

Constituent power, a concept that until recently was absent from Anglo-American constitutional theory,\(^11\) means constitution-making power, the source

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\(^9\) An important clarification is in order here. Introducing fundamental changes in an unwritten constitution is, at least theoretically, easier than doing the same in the context of a written constitutional text. I say “at least theoretically” because, while unwritten constitutions can generally be amended by simple legislative majorities, constitutional traditions are sometimes so embedded in a country’s juridical culture that their modification is in practice very hard to achieve. Constitutions that are unwritten or mostly statutory (like the Constitution of New Zealand), and are thus susceptible of being amended by simple legislative majorities, are generally thought to be less vulnerable to the traditional democratic objection. Nevertheless, they would not necessarily meet the “test” of democratic legitimacy proposed in this article. That is, democratic legitimacy mandates that a constitution can be altered through highly participatory procedures akin to those used during democratic constitution-making episodes, not through the acts of an ordinary legislature.

\(^10\) This is certainly an important discussion, but it is outside the scope of this article. See e.g. Stephen Clarkson, *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State* (Toronto: University of Toronto Press, 2002); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008).

\(^11\) Lately, constituent power has begun to appear in the work of Anglo-American constitutional scholars. See e.g. Martin Loughlin & Neil Walker, eds., *The Paradox of Constitutionalism:*
of production of juridical norms. The classical theory of constituent power rests on a distinction between a will that predates the constitution and is superior to it (the constituent power) and the positive constitutional forms created by the constituent subject (the constituted powers), which determine how public power is to be exercised and how ordinary laws are to be created. More controversially, the most famous formulations of the theory, those of Emmanuel Sieyès and Carl Schmitt, attribute to constituent power not only the extraordinary faculty of constitution making, but also the capacity of not being absorbed by the adoption of a constitution (and, therefore, the capacity of taking precedence over the established constitutional forms).

The first major elaboration of the distinction between constituted and constituent power was developed by Sieyès in his influential political pamphlet, *What is the Third Estate?*, published in 1789. There, Sieyès identified the nation as the rightful possessor of the constituent power and, as such, as having the faculty to adopt a constitution for France. "The nation," he wrote, "is prior to everything. It is the source of everything. Its will is always legal; indeed it is the law..."

Constituent Power and Constitutional Reform (Oxford: Oxford University Press, 2007). However, it is still common to find major works in which references to constituent power are scarce or notoriously absent. See Bruce Ackerman, *We The People*, vol. 1 (Cambridge: Harvard University Press, 1991) [Ackerman, *We The People*]; Akhil Reed Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V" (1994) 94 Colum. L. Rev. 457; Sanford Levinson, *Our Underdemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006) [Levinson, *Underdemocratic Constitution*]; and Walter Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2007) [Murphy, *Constitutional Democracy*].


itself. Prior to and above the nation, there is only natural law.” By suggesting that the nation, as the subject of constituent power, was in a position similar to the individuals living in the state of nature, Sieyès was able to argue that the exercise of its will was superior to and independent of any constitutional form or specified procedure. Constituent power, in that sense, signified a legal beginning, an ability to stand outside the established juridical order, assess its desirability, and replace or transform it in important ways:

[the national will ... never needs anything but its own existence to be legal. It is the source of all legality. Not only is the nation not subject to a constitution, but it cannot be and it must not be; which is tantamount to saying that it is not.]

Unlike other social contract theorists (such as George Lawson and John Locke), Sieyès did not restrict the exercise of constituent power to instances of tyranny or despotism in which government dissolves itself and power reverts back to the community. He thought that the people cannot be permanently

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15. Sieyès, ibid. at 124 [emphasis in original]. It must be noted that for Sieyès, constituent power is not an arbitrary power, but is always limited by the imperatives of natural law. According to Scheuerman, Sieyès, the social contract theorist, speaks openly of the "sacred" right of property, and he argues in great detail that the "will of the nation" is legitimate only when it acts in accord with the "common security, the common liberty and, finally, the common welfare." Thus, representative bodies are forbidden to undertake nongeneral legal acts, and they have no authority "to regulate the private affairs of individual citizens." Only if an assembly representative of the pouvoir constituant respects such standards can it "justify in the name of reason and fair-play its claim to deliberate and vote for the whole nation without any exception whatsoever" (ibid. at 260 [footnotes omitted]).

Moreover, Sieyès understood the exercise of constituent power as subject to three general limits: it must result in the production of a new constitution, it must follow the people's mandate, and it cannot be permanent (its exercise ends with the adoption of a new constitution, even if it can be re-activated whenever a new constitution is needed). Sieyès, ibid. at 131.

16. Sieyès, ibid. at 126 [emphasis in original]. The association of constituent power with the state of nature might have the effect of making its exercise equivalent to the transition from the state of nature to civil society, an idea rejected by Sieyès himself. (As we will see later, Schmitt took additional efforts to dispel this source of confusion.) There is no doubt that the idea of constituent power can be used in the context of the founding of a new state and can therefore be linked with the works of Locke, Rousseau, and Hobbes. However, in contemporary societies the idea of constituent power already presupposes that the state of nature has been superseded and instead points to the creation and recreation of a constitutional regime. Cf. Murray Forsyth, "Thomas Hobbes and the Constituent Power of the People" (1981) 29 Political Stud. 191.
subject to any constitution, that the living cannot waive their right to will, even after a juridical order is in place, and "cannot lose the right to alter [their decisions] as soon as [their] interest requires."17

The legal and political institutions created through the exercise of constituent power are identified by Sieyès as the constituted powers. These bodies (e.g., the executive, legislative, and judicial powers) are always limited by the constitutional forms that grant their existence and cannot legitimately engage in acts of constitution making.18 For example, an ordinary legislature must adopt statutes in the manner prescribed in the constitution and, if granted the power to amend the constitution, can only do so according to the specific procedures and limits contained in the constitution. In this respect (and this idea will become crucial later in the article), for Sieyès the ordinary power of constitutional reform is a constituted, not a constituent, power. However, this only helps to identify a series of further questions, which, as I argue later, have important implications for the idea of democratic legitimacy. Is it possible for the constituted power of constitutional reform to be exercised ultra vires? That is, even if the procedure mandated by the established amendment process is strictly followed, can the substantive content of an amendment invade the terrain of the constituent power and amount to an act of constitution making?

Some of these questions were considered by Schmitt and will be examined in Part II, below. For now, we should briefly review the ways in which this author developed Sieyès's theory. In his comprehensive study of the Weimar Constitution,19 Schmitt attempted to disengage Sieyès's concept of the constituent power from its traces of political theology—that is, the constituent power as the natura naturans, the un-generated source of all forms.20 For Schmitt, constituent power is exemplified in the will of a subject capable of deciding its own mode of political existence.21 He thus rejected the Kelsenian22 doctrine, according to

17. Sieyès, ibid. at 127.
18. "A body subjected to constitutional forms cannot take any decision outside the scope of its constitution." Ibid. at 134. "The power exercised by the government has substance only in so far it is constitutional; it is legal only in so far as it is based on the prescribed laws" (at 126).
20. Ibid. at 126. See also Renato Cristi, "Carl Schmitt on Sovereignty and Constituent Power" in Dyzenhaus, supra note 14, 179 at 189.
which the validity of a constitution rests on an abstract norm, and instead contended that it could only rest on a sovereign decision: "[t]he constitution is valid by virtue of the existing political will of that which establishes it."\(^2\) Schmitt identified constituent power with sovereignty, which he understood as the ability to go beyond the legally constituted order, and so its exercise could not be limited or regulated by law. This does not mean, however, that constituent power is to be identified with the arbitrary will of a supreme commander that had been granted the authority to violate the law whenever it wished.\(^2\) The constituent subject (as in Sieyès) cannot be subject to any positive norm because it is the origin of all positive norms; it is a creative force that only ignores the established constitutional regime in order to create a new one—not to perpetuate itself as a supreme lawgiver.

Schmitt also defended and developed Sieyès's idea that constitutions are born and may die, but that the constituent power on which they rest cannot be destroyed or consumed by the object of its creation: "[t]he [constituent power]\(^2\) is not thereby expended and eliminated, because it was exercised once.


\(^{23}\) Schmitt, Constitutional Theory, supra note 12 at 76.

\(^{24}\) This is the conclusion that some authors reach from Schmitt's famous formulation in Political Theology: "[the sovereign] is he who decides on the exception." Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty, trans. by George Schwab (Cambridge: MIT Press, 1985) at 5. See e.g. Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Stanford: Stanford University Press, 1998). However, as Andreas Kalyvas has argued, this view does not take into consideration Schmitt's distinction between "commissarial" and "sovereign" dictatorship. While the commissarial dictator is granted unlimited power with the purpose of achieving the specific task of eliminating a threat to the existing constitutional regime (e.g., during a state of exception), the sovereign dictator (which can take the form of an individual or an assembly) is the one who establishes a new legal order and drafts a new constitution. Unlike the former, the latter form of "dictatorship" should not be identified with an authoritarian executive invested with the necessary power to restore order, but with sovereignty, understood as the faculty of establishing new constitutional regimes. Andreas Kalyvas, "Carl Schmitt and the Three Moments of Democracy" (2000) 21 Cardozo L. Rev. 1525 at 1533-34.

\(^{25}\) In the English translation of Constitutional Theory, "constituent power" (verfassungsgebenden Gewalt) was translated as "constitution-making power." For the sake of consistency, I will
The political decision, which essentially means the constitution, cannot have a reciprocal effect on its subject and eliminate its political existence. This political will remains alongside and above the constitution. The idea is that constituent power does not disappear after the adoption of a constitution; far from being a “one-time” event, which is the practical reality of most liberal constitutional regimes, its exercise remains an ever-present possibility. As Scheuerman has noted, for Schmitt, constituent power “continues to have a very real existence above and beyond the institutional complex of liberal constitutionalism.” This is why, at least in part, constituent power should not be identified with the founding of a new state. For Schmitt, constituent power presupposes the existence of the state: the existence of a people already organized politically. In the language of modern political theory, it is premised on the idea that the “social contract” is already in place and so the transition from the state of nature to civil society has already occurred. It is a power that, while permanently threatening the existing constitutional regime, has the potential to become a legally unlimited democratic force.

B. CONSTITUENT POWER, POPULAR PARTICIPATION, AND DEMOCRATIC OPENNESS

“To speak of constituent power,” writes Antonio Negri, “is to speak of democracy. In the modern age the two concepts have often been related.” Constituent power, like democracy, points toward a self-determining demos, a populace that adopts the constitution that will regulate its political association. In that sense, 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, whenever they want it. It

replace the phrase “constitution-making power” with “constituent power” when quoting directly from the English translation. Schmitt, Constitutional Theory, supra note 12.
26. Ibid. at 125. Schmitt’s conception of the “Constitution” will be discussed in Part II, below.
27. Scheuerman, supra note 14 at 257.
28. “The social contract, consequently, is already presupposed in the theory of constitution-making power of people when one considers its construction necessary at all.” Schmitt, Constitutional Theory, supra note 12 at 112.
is thus not surprising that constituent power and democracy have historically been accused of the same flaws: instability, revolutions, and lack of respect for the rule of law. A multitude always getting what it wants, continually making and unmaking the fundamental agreements of a society, represents the antithesis of good government—the rule of people’s ever-changing wishes against the empire of law and reason. This is the kind of disaster constitutions seek to avoid: the popular will that needs to be protected from itself and domesticated through the adoption of various juridical forms.

But constituent power is not merely the faculty of making a constitution without being subject to any form of positive law; it is the power of making a constitution together. By the exercise of constituent power, the constitution makers create the constitutional forms that will regulate their political association. In other words, constituent power mandates that those living under a set of fundamental laws participate in the creation and recreation of those laws. The very meaning of the concept of constituent power requires that the constitutional forms be jointly created. As Andreas Kalyvas has explained, the term constituere, which is formed by the prefix con ("with," "together") and the suffix statuere ("to set up," "to construct," "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 coinstitute it, to institute it jointly with others."31

Even Carl Friedrich, who identified constituent power with the "right to revolution," defined it as the power of a group to establish a constitution.32 Similarly, Ulrich Preuss writes, "Conceptually [constituent power] cannot be attributed to any single person, even a monarch."33 The constituent power, he

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adds, "is the power of a collective body, which by the very act of constitution-giving, exercises its right to self-rule." Although constituent power is by definition a democratic power, its absolute and unconstrained nature means that it can put at risk the democratic content of a constitutional regime. However, as suggested above, despite its unlimited nature (unlimited only with regard to established law), constituent power comes (inherently) accompanied by an important procedural limitation: its exercise must include in the process of making a constitution those that will become subject to it. The connection of this aspect of constituent power to democracy is obvious: democracy, as constituent power, requires the participation of citizens in the positing of all laws, fundamental laws included.

Democracy involves an affirmation of the "equal sharing of activity and power" of all citizens. It requires the participation of the citizens in the production of the law, even if for practical reasons (e.g., the size of a complex modern society) they cannot always participate directly and fully. For example, at the level of day-to-day politics, it would be impossible, and perhaps undesirable, for citizens to propose, deliberate, and decide on the content of each and every ordinary law. But when the real opportunity of citizens' direct involvement in the making of political decisions is present, such as in an episode of constitutional change, democracy demands that the means are available for heightened popular participation—one of the basic features of the democratic ideal—to become a reality. In fact, it would be very strange to find anyone that, while committed to the democratic ideal, would say that, as a matter of principle, it is

Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution" (2000) 21 Cardozo L. Rev. 1749. Schmitt accepted the possibility that a monarch (or any entity with the power of adopting a constitution) could be the subject of constituent power, and even identified as "constitutional annihilation" what occurred when there was a change in the identity of the constituent subject (e.g., a constituent monarch replaced by a constituent people or vice versa). He nevertheless maintained that in a democracy—a political form to which he was not committed—the only legitimate subject of constituent power could be the people. Schmitt, Constitutional Theory, supra note 12 at 138, 142, 147.

34. Preuss, ibid. at 647.
36. On this point, see Ackerman, We The People, supra note 11. For a critique of Ackerman's theory of constitutional politics that argues that his conception does not require the actual participation of citizens in constitutional change, see Colón-Ríos, supra note 7.
better if citizens are left out of the process of recreating a constitution—that they should not be allowed to become the authors of the constitutional regime to which they are subject. However, that is precisely how many constitutions approach constitutional reform. In Canada, for example, the existing amendment rules leave constitutional reform in the exclusive hands of the federal and provincial legislatures. This deficit of popular participation in constitutional change, as I will argue in the next subsection, has profound implications for the democratic legitimacy of a constitutional regime.

Constituent power, by virtue of being unlimited by any form of positive law, is also directly related to another basic feature of democracy, which can be identified as the ideal of democratic openness: the idea that a democratic society is an open society—that is, one in which even the most fundamental principles are open for discussion and are always susceptible of being reformulated or replaced through democratic procedures. Democratic self-government not only requires the participation of the citizenry in the production of the laws, but entails a “community of citizens—the demos—that proclaims that it is absolutely sovereign.” As Claude Lefort has 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.” Constituent power is a conceptual expression of the ideal of democratic openness, the faculty of human beings to make the laws that regulate their political association, and the capacity to alter their fundamental commitments democratically. As noted above, one of the most important—and controversial—aspects of the classical theory of constituent power is precisely this: that the pouvoir constituant cannot be extinguished and can be exercised any moment after the original act of constitution making.

The amendment procedures of most modern constitutions, like the American or Canadian ones, which purposively make change difficult and unlikely—

37. See Constitution Act, 1982, Part V, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. It has been argued, however, that since the failed Charlottetown Accord, a constitutional convention has been emerging according to which constitutional amendments must be subject to a referendum. See Russell, Constitutional Odyssey, supra note 1 at 239. As will be argued later, a referendum, by itself, is not a sufficient mechanism from the point of view of popular participation.

38. Castoriadis, supra note 35.

in the case of the Canadian Constitution, this difficulty is present at least with regard to certain types of amendments—is of course in direct conflict with all this. Typical amendment procedures usually involve a set of requirements that are characterized not only by being difficult to meet, but that are sometimes more difficult to meet than those followed when the constitution was originally adopted. (Again, the Canadian experience is telling in this respect, requiring provincial unanimity for some changes, while having been adopted with the objection of the province of Quebec.) Amendments are thus traditionally associated with supermajorities and other obstacles designed to decrease the possibility of important transformations. Moreover, as we will see later, some constitutions put certain clauses outside the scope of the amending power. Now, this does not mean that a flexible constitution—for instance, an unwritten constitution that can be altered by simple legislative majorities—is necessarily consistent with the ideal of democratic openness. Democratic openness requires an openness that can be accessed by the citizenry, one that is accompanied by real opportunities for the participation of ordinary citizens.

C. CONSTITUENT POWER AND DEMOCRATIC LEGITIMACY

The conception of democratic legitimacy advanced in this article looks at the ways in which a constitutional regime can be changed—at its susceptibility to democratic alteration. Put differently, it asks whether a constitution is consistent

40. See e.g. U.S. Const. art. V. In the case of Canada, see Part II(A), below.
41. Despite the frequently repeated statement that constitutions bind majorities because they are adopted by supermajorities, the route usually followed by most constituent assemblies throughout the world is to adopt constitutions through majority rule (sometimes subjecting them to a popular referendum before they come into effect), but at the same time to require legislative supermajorities (and, again, sometimes popular referendums) for constitutional amendments. For example, the most recently adopted constitution at the time of writing 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 simple majority of its members, while the amendment rule they created involved legislative supermajorities plus popular ratification.
42. This type of clause will be discussed further in Part III, below. See also Richard Albert, “Nonconstitutional Amendments” (2009) 22 Can. J.L. & Jur. 5 [Albert, “Nonconstitutional Amendments”].
43. The question of democratic legitimacy is addressed in a direct manner by Schmitt, who maintained that “the logically consistent democratic theory knows no legitimate constitution other than a constitution based on the people’s [constituent power].” Schmitt, Constitutional
with the ideals of popular participation and democratic openness, whether it provides an opening for constituent power to manifest from time to time. Under this view, democratic legitimacy is not about the procedure that the constitution establishes for law making, but about the procedures it establishes for its own transformation; it is a conception heavily informed by constituent power and its democratic implications. Not everyone thinks about the legitimacy of constitutional regimes in this way. It is frequently argued, for example, that the legitimacy of a constitution depends on whether "those who are governed by it, including the organs of the state, acquiesce to its terms." Under that view, "legitimacy will almost invariably be relative, since there will always be those citizens who have views diverging from the precepts even of a well-established and popular constitution."4

This kind of approach, reminiscent of Max Weber's sociological conception of legitimacy, is not only at odds with the idea of democratic legitimacy, but—at least potentially—with the very idea of democracy. For example, it would consider legitimate a constitution imposed by an external agent according to which a sole individual exercises unlimited power, as long as the relevant group of human beings "acquiesce[s] to its terms." There are other approaches to legitimacy that reject this sociological conception, arguing instead that the

Theory, supra note 12 at 143. It should be clear that I decisively depart from the Schmittian conception of democratic legitimacy in one fundamental sense. Schmitt's conception, while resting on the theory of constituent power, is highly problematic: it accepts the mere "consent" of the electorate, as expressed in the participation in regular elections, for example, as evidence that the constitution is based on the people's constituent power:

[a] conclusive action is discernible in the mere participation in public life a constitution provides, for example, an action through which the people's constitution-making will expresses itself clearly enough. That is valid for the participation in elections, which brings with it a certain political condition (at 138-39)

In contrast to this conception, my approach to constituent power supposes an episode of heightened popular participation, different from the acts of participation that take place in the course of ordinary politics.


45. Ibid.


47. Venter, supra note 44.
legitimacy of a constitution depends on whether its content can be justified according to normative principles that any rational and unbiased person would agree to. This conception of legitimacy, which can be identified as the "philosophical approach," is exemplified in the work of John Rawls.\(^4\) According to Rawls's conception of political legitimacy,

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\text{[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.} \(^{49}\)
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Despite their sophistication and appeal, these approaches are insufficient from the perspective of democratic legitimacy insofar as they can be made entirely consistent with constitutions adopted from the top down, not susceptible to democratic re-constitution. I make reference to them in order to stress that democratic legitimacy is a broader idea than "legitimacy" as such. Its "democratic" element connects the idea of legitimacy to democracy and its corollaries of openness and popular participation. In that respect, it is also more specific than other conceptions of democratic legitimacy. For instance, Joshua Cohen maintains that "[t]he fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of a society who are governed by that power."\(^{50}\) But this definition is too general; it leaves to one's imagination how collective decisions are to be made, how citizens are supposed to authorize the exercise of state power, and whether, and how, they can later decide to change the ways in which state power is to be exercised. It is better to say that the basic condition for democratic legitimacy is the realization of democracy at the level of the fundamental laws—that ordinary citizens have the real possibility of participating in the re-constitution of

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49. Rawls, *ibid.* at 137. For a discussion that challenges the separateness of different conceptions of legitimacy, see Richard Fallon, Jr., "Legitimacy and the Constitution" (2005) 118 Harv. L. Rev. 1787.

the norms that govern the state through highly participatory procedures. In other words, the democratic legitimacy of a constitutional regime depends on the way in which it approaches the question of constituent power.  

There are, however, degrees of democratic legitimacy, and the susceptibility to democratic re-constitution should be understood as the minimal condition of democratic legitimacy. That is to say, there are institutional forms that could increase the democratic legitimacy of a constitutional regime well above this minimum. For example, a "fully" democratically legitimate constitutional regime would also have originated in a democratic constitution-making episode, one characterized by intense episodes of popular participation and by the absence of any external or internal limits—other than those self-imposed by the constitution maker, such as those limits found in a country’s political culture—on the content of the new constitution. Most constitutional regimes (especially, but not only, those with very old constitutions) would not even come close to meeting the requirement of a democratic pedigree, a defect that can only be superseded by the adoption of a new constitution or by the ratification of the existing one through a special participatory procedure.  

Most modern constitutions were adopted by

51. Andreas Kalyvas has connected constituent power to the idea of democratic legitimacy, but his conception seems to focus on the democratic origins of the constitution and not on the possibility of it being altered through highly democratic means: “In a democratic regime, the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of citizens is during the extraordinary and exceptional moment of constitution making.” Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12 Constellations 223 at 237. This kind of passage suggests that constituent power is only relevant at the time of making a new constitution. Perhaps what Kalyvas means is that every important constitutional transformation counts as an act of "constitution making" in itself, thus implicitly recognizing the possibility of constitutional (re)making.

52. This conception of democratic legitimacy is put under great stress in constitutional regimes in which there are competing claims to constituent power. For instance, in a constitutional regime that faces a demand of secession by a segment of the citizenry, the question of democratic legitimacy seems more like a luxury than a real political aspiration: when the objective is keeping the constitutional regime from falling into pieces, the idea of democracy at the level of the fundamental laws is not a priority. In this kind of situation, the central question becomes: what group(s) has the constituent power? The answer to this question is decisive with respect to democratic legitimacy because whoever has the constituent power has the power to legitimate the constitutional regime or to establish a separate, potentially legitimate one. This is an answer that is profoundly political: it is to be found in political struggle and argumentation and not in established domestic or international law. Suffice it to say that while the competing claim to constituent power might have its roots in nationalism,
political elites, with the exclusion of large sectors of the population. 53 But a constitutional regime which lacks a democratic pedigree can rest its claims to democratic legitimacy in its susceptibility to re-constitution through mechanisms that facilitate the exercise of constituent power, that attempt to replicate a democratic constitution-making episode. (That said, it is unlikely that a constitution produced by an authoritarian government or by an external lawgiver would ever be able to enjoy something more than the weakest degree of democratic legitimacy possible, even in the unlikely situation that it contains mechanisms that allow for democratic re-constitution. In those extreme cases, a new constitution-making episode may in fact be a democratic necessity.) 54

Now, for the possibility of democratic re-constitution to mean something, it must have actual institutional implications. 55 In other words, the constitutional forms must provide the means for constituent power to reappear after the constitution is in place, and, if needed, to put the entire institutional arrangement into question. To begin with, basic political rights must be in place: freedom of association, freedom of speech, the right to vote—in short, those rights of political participation necessary for the very existence of democracy and for any

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53. Again, the history of the making of the US Constitution is telling in this respect.
54. Moreover, a recently created constitution that was not adopted democratically but is susceptible to democratic alteration would have a much weaker claim to democratic legitimacy than a regime whose constitution was adopted by previous generations but can be altered democratically.
55. The basic condition of democratic legitimacy is also connected to the principle of the "rule by the people" in one fundamental sense. To say that the people rule themselves is to say that they are a "self-governing" people: a group 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. A self-governing people must be able to reformulate their commitments democratically: for there to be democratic self-rule, no rule can be taken for granted or be impossible (or virtually impossible) to change. See Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford: Stanford University Press, 2003) at 10.
exercise of constituent power. Of course, there could be a political revolution in which, through an act of popular participation, those guarantees are abolished. But even when the constituent subject is free to adopt any constitution it wants, the abolition of the rights of political participation would be inconsistent with the future exercise of constituent power, eliminating the possibility of democratic re-constitution, and therefore inconsistent with any prospects of democratic legitimacy. Like democracy, constituent power negates itself when it violates the conditions that make it possible; although, even after a situation like this, constituent power might reappear through some sort of popular revolution. In this last respect, democratic legitimacy would be inconsistent with, for instance, a dictatorship established through a democratically elected constituent assembly and ratified by the people in a referendum. Such a regime would not be susceptible to democratic re-constitution—that is, it would not meet the basic condition of democratic legitimacy—as it would not contain the guarantees and institutions that allow citizens to deliberate and decide on the future of their constitutional regime.

Beyond the recognition of basic rights of political participation, a constitutional regime must have some mechanisms in place (in addition to the ordinary amendment procedure) designed to allow citizens to propose, deliberate, and decide on fundamental changes to the constitution. These institutions, the specifics of which will be discussed in Part IV, below, should allow for the greatest

56. For a good, concise discussion, see Walter Murphy, "Constitutions, Constitutionalism, and Democracy" in Douglas Greenberg et al., Constitutionalism and Democracy: Transitions in the Contemporary World (Oxford: Oxford University Press, 1993) 3 at 3-5.

57. Perhaps this is what the delegates to the Venezuelan Constituent Assembly had in mind when, after recognizing the unlimited constituent power of the people, they included a constitutional provision that states, "The people of Venezuela, loyal to the republican tradition, to their independence struggle, to peace and freedom, will not recognize [desconocer] any regime, law, or authority that is inconsistent with the democratic values, principles, and guarantees or that erodes human rights." Constitución de la República Bolivariana de Venezuela (Constitution of the Bolivarian Republic of Venezuela, 1999), art. 350 [translated by author] [Constitution of Venezuela, 1999]. The original text in Spanish reads, "El pueblo de Venezuela, fiel a su tradición republicana, a su lucha por la independencia, la paz y la libertad, desconocerá cualquier régimen, legislación o autoridad que contrarie los valores, principios y garantías democráticos o menoscabe los derechos humanos."
possible degree of popular participation in constitutional change, and, as facilitators of the exercise of constituent power, must not be subject to any substantive limits originating in the established juridical order. It is not clear, however, when these extraordinary institutions should be activated, or whether they can co-exist with more traditional methods of constitutional reform. Does democratic legitimacy require an exercise of constituent power every time a constitution is amended? These questions will be the object of Part II.

II. THE LIMITS OF CONSTITUTIONAL REFORM: CONSTITUENT POWER AND ORDINARY AMENDMENTS

Amendment rules are a central component of any constitutional regime: such rules help to differentiate between ordinary and higher laws, a distinction important for democratic legitimacy and constituent power. These rules involve different types of limits, the most common being procedural ones. Not just any act of a legislature or manifestation of a large group of individuals produces a formal amendment to a constitution. For instance, and as stated in Part I(B), above, most constitutional texts include an amendment formula that contains different types of obstacles (such as the requirement of legislative supermajorities) that must be surpassed before any change is adopted, and some constitutions also contain explicit substantive limits (sometimes called “eternity,” “intangibility,” or “entrenchment” clauses) to constitutional reform. For instance, Article 139 of the Constitution of Italy establishes that “[t]he republican form of the state may not be changed by way of constitutional amendment.” Article 112 of the Norwegian Constitution is much more general, establishing that amendments “must never ... contradict the principles embodied in this Constitution.” Most constitutions, however, do not contain these types

58. As Sujit Choudhry has expressed, rules governing constitutional amendments stipulate where the ultimate locus of political sovereignty lies. They are “the most basic statement of a community's political identity.” Sujit Choudhry, “Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities” (2005) 37 Conn. L. Rev. 933 at 939.
59. For a recent discussion, see Albert, “Nonconstitutional Amendments,” supra note 42. See also Richard Albert, “Counterconstitutionalism” (2008) 31 Dal. L.J. 1.
60. Costituzione della Repubblica italiana (Constitution of the Italian Republic), 1947, art. 139.
61. Kongeriget Norges Grundlov (Norwegian Constitution), 1814, art. 112.
of limits and, perhaps partly to fill that void, some constitutionalists have developed the doctrine of implicit limits. The doctrine has been summarized in the following way: “[a]ny amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority.”

The idea that the power to reform a constitution is subject to implicit substantive limits is not new. Aristotle seems to have suggested it when he asked, "On what principles ought we to say that a state has retained its identity, or, conversely, that it has lost its identity and become a different state?" The answer provided by Aristotle was that a polis’s identity changes when its constitution is altered as a result of an interruption of its essential commitments. A change in the polis’s identity cannot be considered a mere reform, but the birth of a new regime. This idea is also reflected in Article 16 of the French Declaration of the Rights of Man and Citizen of 1789, which reads, “Any society in which the guarantee of rights is not secured, or the separation of powers not determined, has no constitution at all.” If the existence of a constitution depends on the protection of certain rights and on the separation of powers, an attempt to suppress these principles (even an attempt that respects the formal amendment formula) cannot be understood as a mere amendment: it would amount to the destruction of the constitution as opposed to the modification of an already existing one. In fact, French constitutional theory has developed the doctrine of “constitutional fraud” (fraude à la Constitution) to identify the act of using the formal amendment rule in order to create a different constitutional regime.


64. Ibid.

65. France, Déclaration des droits de l’Homme et du Citoyen de 1789 (Declaration of the Rights of Man and of the Citizen, 1789), art. 16.

66. For a discussion, see Pedro de Vega, La Reforma Constitucional y la Problemática del Poder Constituyente (Madrid: Técnos, 1985) at 268.

67. Ibid. at 291.
Courts in countries such as Germany, Colombia, India, and Peru have adopted, on different grounds, the doctrine of implicit limits to constitutional reform. This doctrine is of fundamental importance for the conception of democratic legitimacy presented here: it allows us to differentiate between mere amendments and (re)constituent-making episodes.

A. SCHMITT AND RAWLS ON CONSTITUENT POWER AND CONSTITUTIONAL REFORM

The doctrine of implicit limits points toward a distinction between ordinary constitutional change and the exercise of constituent power. The thinking of Schmitt and Rawls on constitutional reform also points in this direction. It is not commonplace to find similarities in the thoughts of authors with such different intellectual and political orientations as Rawls and Schmitt. The former was a leading liberal political philosopher and the latter was directly involved with Nazism after 1933; it is hard to find two scholars with more radically opposing trajectories. Rawls and Schmitt, however, share a fundamental conception about the limits of constitutional reform. They both believed that a constitutional amendment, even if adopted with the strictest respect for the procedures established in the constitutional text, could be unconstitutional if it resulted in the creation of a different constitutional regime.

Schmitt, whose conception of constituent power was discussed in Part I, developed a theory of constitutional amendments that draws a clear distinction...
between the power of constitutional reform and constituent power. Schmitt defended a distinction between the “Constitution” (understood as the conscious decision of the constituent subject on the determinate mode of its political existence) and mere “constitutional laws” (understood as individual constitutional clauses enumerated in the document called “the constitution” but lacking a truly fundamental character). The kind of decisions that make the Constitution different from particular constitutional laws can often be identified in the constitutional text, usually in those articles that refer to the basic structure of government. For instance, in the context of the Weimar Constitution (Schmitt’s specific frame of reference), these decisions included Article 1’s adoption of democracy as a form of government, rejection of monarchy, adoption of a federal structure of government, parliamentarism, and the institutions of the “bourgeois Reschstaat with its principles, fundamental rights, and separation of powers.” Moreover, Schmitt maintained that an alteration of Article 76 (the amendment procedure) would also amount to the elimination of the Constitution: the power to reform the constitution cannot be used to modify the legal provision to which it owes its existence.

Constitutional laws, in contrast, are simply norms that have been included in the written constitution in order to protect them from ordinary parliamentary majorities. To continue with the Weimar Constitution, one could refer to Article 149 as an example of a constitutional law: “[u]niversities will maintain

73. Schmitt, Constitutional Theory, supra note 12 at 75-80. See also Jeffrey Seitzer, “Carl Schmitt’s Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis” in Dyzenhaus, supra note 14, 281 at 290.


75. Schmitt, Constitutional Theory, ibid. at 78 [emphasis in original].

76. Ibid. at 150. This point is especially relevant when a democratic amendment formula is seen as one of the guarantors of democratic legitimacy. The problem of amending the “amendment formula” through the amendment formula itself has also been approached from the perspective of the logic and coherence of a constitutional system. See Alf Ross, “On Self-Reference and a Puzzle in Constitutional Law” (1969) 78 Mind 1. See also Peter Suber, The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change (New York: Peter Lang, 1990).

77. Schmitt, Constitutional Theory, ibid. at 67.
Faculties of Theology." Schmitt believed that constitutional laws were the proper object of the ordinary power of constitutional reform, as opposed to the fundamental decisions contained in the Constitution, which can only be touched by the constituent subject. Thus, an alteration or suppression of the above-mentioned Article 149 through the ordinary amendment procedure would be perfectly valid, while the substitution of Article 1 for a clause that reads, "All power stems from the King," regardless of how respectful one is of the amendment formula, would signify the annihilation of the Constitution and the revolutionary creation of a new one. It is not that constitutional laws are unimportant; they were considered important by the constitution makers and that is why they were included in the document called "the constitution." However, constitutional laws fall short of having the fundamental character of the decisions pertaining to a people's political existence. It is thus absurd, according to Schmitt, to attribute equal status to all constitutional provisions, to see a Constitution simply as a collection of clauses that are different from ordinary laws by virtue of not being susceptible to amendment by a simple legislative majority.

For Schmitt, those constitutions that contain explicit limits to the amending power, like the Italian and Norwegian Constitutions (mentioned above), simply make clear the distinction between amendment and revolution, between constitutional reform and an act of constituent power: if something is put outside the scope of the amending power, it must be because it is of such a fundamental character that it can only be altered by an exercise of constituent power. In

78. Weimar Constitution, supra note 74, art. 149.
79. Schmitt distinguished between "constitutional elimination," "constitutional annihilation," and "constitutional change." Constitutional elimination involves the alteration of the substantive core of the constitution, constitutional annihilation involves a change in the identity of the constituent subject, and constitutional change involves a revision of the constitutional laws (leaving the fundamental political decisions intact). Schmitt, Constitutional Theory, supra note 12 at 147.
80. Ibid. Of course, the principles protected by Article 1 could also be changed, while leaving the text of that article untouched and inserting into the constitution several clauses that result in its abolition for all practical purposes.
81. Ibid. at 152. As Dietrich Conrad has expressed, "Such provisions [that establish explicit limits on the power to reform a constitution] are valuable indications that the power to amend does not by the nature of things participate in the supposed omnipotence of constituent sovereignty but is a constituted, and hence legally definable, power." "Limitation of
fact, he argued that, even in the context of those constitutions that explicitly allow for the "total revision"82 of the constitutional text, or in countries with unwritten or partially unwritten constitutions, a change in the basic form of government (e.g., replacing a republic with a monarchy) would go beyond the realm of constitutional reform and could not be considered constitutional.83 The idea is that the power to reform a constitution, a constituted power, does not include the power to produce the kind of profound changes proper of an exercise of constituent power.84 Only the constituent subject is capable of altering the Constitution, understood as equivalent to the fundamental decisions about its form of political existence. When this happens, it does not make sense to speak about constitutional reform, but about constitution making, about the creation of a new and different Constitution. The fundamental political decisions "are a matter for the [constituent power] of the German people and are not part of the jurisdiction of the organs authorized to make constitutional changes and revisions."85 Accordingly,

\[\text{the boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority to "amend the constitution," granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved. This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution... . The offices}\]

Amendment Procedures and the Constituent Power" (1966-1967) 15-16 The Indian Y.B. Int'l Aff. 375 at 379. Nevertheless, Conrad argued that the ambiguity of these kinds of clauses makes them "little more than guide-posts to systematic interpretation and doctrine." Consider, for instance, that commentators in France disagree on the correct interpretation of a constitutional clause that reads, "The republican form of government shall not be the object of an amendment." France, La Constitution de 1958 (Constitution of France, 1958), art. 89. For some, this clause should be understood only as a prohibition of the restoration of monarchy; for others, it should be interpreted more broadly, as including other principles such as secularism, the rule of law, etc.

82. See e.g. Constitution fédérale de la Confédération suisse (Federal Constitution of the Swiss Confederation), 18 April 1999, art. 192: "[t]he Federal Constitution may be subjected to a total or a partial revision at any time."

83. Schmitt, Constitutional Theory, supra note 12 at 152.

84. Ibid. at 151.

85. Ibid. at 74, 152.
with jurisdiction over a decision on a constitution-amending statute do not thereby become the bearer or subject of the constitution-making power. Rawls reached a similar conclusion in Political Liberalism, where he embraced the “radical idea” that not every change introduced into the US Constitution according to Article V, its amending provision, produces a valid amendment. For Rawls, the adoption of a “democratic constitution” should be understood as an expression of the constituent people of governing itself in a certain way and of fixing, once and for all, certain constitutional essentials. These constitutional essentials refer to: (1) fundamental principles that specify the general structure of government and the political process, such as the powers of the legislature, executive, and the judiciary, and the scope of majority rule; and (2) basic political rights and liberties that legislative majorities are to respect, such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, and the protections of the rule of law. Constitutional essentials are to be considered higher law (and as such, an expression of the people’s constituent power) and are to be distinguished from the creations “of Congress and of the electorate.”

Must an amendment touching and altering these constitutional essentials, asked Rawls, be necessarily accepted as valid by the Supreme Court? For Rawls, the answer is a clear “no.” He maintained that to be valid, a constitutional amendment of this sort must do at least one of the following things: (1) alter basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice (e.g., the Twenty-second Amendment, limiting the president to two terms); or (2) adjust basic constitutional values to changing political and social circumstances or incorporate a broader understanding of constitutional essentials.

86. Ibid. at 150-51.
88. Rawls, supra note 48 at 232.
89. Ibid.
90. Ibid. at 231. On this point Rawls followed Bruce Ackerman’s theory of dualist democracy. However, Ackerman rejected the possibility of an unconstitutional constitutional amendment. See Bruce Ackerman, “Constitutional Politics/Constitutional Law” (1989) Yale L.J. 453 at 469-70.
91. Rawls, ibid. at 233, 238.
92. U.S. Const. amend. XXII.
those values (e.g., the Nineteenth Amendment, which granted women the right to vote). As examples, Rawls considered an amendment to repeal the First Amendment of the US Constitution in order to establish an official religion, and the suppression of the Fourteenth Amendment with its equal protection of the laws. Rawls argued that even if these amendments were enacted according to the amendment rule, they should be declared invalid by the judiciary. When confronted with the question of their validity, courts should say that they contradict "the constitutional tradition of the oldest democratic regime in the world." The idea is that the constitutional text might be amended in order to make its protections more inclusive or to correct weaknesses in the basic institutions, but not to repeal or reverse its essential protections:

[s]hould that happen, and it is not inconceivable that the exercise of political power might take that turn, that would be a constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place restrictions on what can count as an amendment, whatever was true at the beginning.

Both Schmitt and Rawls defended the view that the power of constitutional reform is not unlimited, and that there can be such a thing as an unconstitutional constitutional amendment. Although Schmitt focused on those principles that tend to express the basic form of the polity, and Rawls stressed the recognition of fundamental rights (whose non-amendable character appears to be connected to the fact that they have been respected for a long period of time), they agreed that there are certain constitutional provisions that cannot be the object of constitutional reform. It is not clear, and this is where these two authors differ, whether the limits created by Rawls's "constitutional tradition" also apply to the people in the exercise of constituent power. The "confusion" stems from Rawls's apparent identification of constituent power and the power to amend a constitution through the ordinary amendment procedure (e.g., Article

93. U.S. Const. amend. XIX.
95. Rawls, ibid. at 239.
96. Ibid. at 233, 238.
97. Ibid. at 239.
As Samuel Freeman has noted, for Rawls, "[n]ot everything that the people actually will in the exercise of their constituent power can count as a valid amendment." This, combined with Rawls's Lockean conception of constituent power as only appearing after government is dissolved, makes this aspect of his approach puzzling: either constituent power appears every time Article V is used (which would run counter to the distinction between the constituted power of constitutional reform and constituent power), or it only appears after government is dissolved (which would mean that constituent power is not exercised through Article V, or that every time Article V is used government dissolves).

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98. "We assume the idea of a dualist constitutional democracy found in John Locke: it distinguishes that people's constituent power to form, ratify, and amend a constitution from the ordinary power of legislators and executives in everyday politics." Ibid. at 405-06.

99. Freeman, supra note 87 at 662. And this is true even when, according to Rawls in his response to Habermas, "whether the modern liberties are incorporated into the constitution is a matter to be decided by the constituent power of a democratic people, a familiar line of constitutional doctrine stemming from George Lawson via Locke." Rawls, ibid. at 415. This seems to suggest that for Rawls, even when constitution makers, in the exercise of constituent power, determine whether the constitutional essentials will be protected, they cannot abolish them later through the exercise of that same power (because any attempt to do so should be struck down by the courts).

100. "[The] constituent power of the people ... sets up a framework to regulate ordinary power, and it comes into play only when the existing regime has been dissolved." Rawls, ibid. at 231.

101. Ibid. at 231. One could understand Rawls as adopting the distinction made by some European and Latin American constitutionalists between pouvoir constituant institué and pouvoir constituant derivé. See e.g. Luis Sánchez Agesta, Principios de Teoría Política, 7th ed. (Madrid: Editora Nacional, 1983) at 333-34; Luis Sánchez Agesta, Lecciones de Derecho Político, 6th ed. (Granada: Libreria Pietro, 1959) at 384-86. Pouvoir constituant institué is the power to create a new constitution, whereas pouvoir constituant derivé is the power to change it through the amendment procedure. However, what this distinction does is assign the term pouvoir constituant derivé to the ordinary power of altering the constitution through the legal procedures provided by it (by definition a constituted power), and it does not change in any way the fundamental distinction between acts of constituent power and acts of constitutional reform.

102. I do not consider here the possibility of amending the US Constitution through a convention called by two-thirds of the state legislatures and ratified by three-fourths of said legislatures, as this method has never been used and there is no indication that Rawls was referring to it when writing about Article V. For a discussion, see Levinson, Undemocratic Constitution, supra note 11.
Schmitt is much clearer in this respect. For him, the power to reform the constitution and the constituent power must never be identified with each other, and the limits that apply to the former do not apply to the latter: the subject of constituent power can create and destroy constitutions at will. On this point I agree with Schmitt. Placing limits on the subject of constituent power, the sovereign people, amounts to a negation of democracy at the level of fundamental laws. Accordingly, the conception of constitutional reform and democratic legitimacy that I present in this article is incompatible with the part of Rawls’s view that appears to hold that the constituent power is subject to substantive limits found in the existing juridical order. Instead, it rests on the idea (which follows from the very concept of constituent power) that these limits only apply to the ordinary institutions of government. In that sense, I adopt Schmitt’s conception, but with an important addition: an act of constituent power must be understood in light of its connections to the democratic ideal.

III. CONSTITUTIONAL REFORM AND ACTS OF THE PEOPLE

The objective of this part of the article is to show how the doctrine of implicit limits provides a way of understanding the requirements of democratic legitimacy in the context of constitutional reform. A problem seems to emerge here. If the doctrine of implicit limits is about certain constitutional provisions that cannot be changed, and democratic legitimacy requires that everything in a constitution be open to change, this doctrine seems to run counter to the argument presented in this article. Nevertheless, what the doctrine of implicit limits does (at least, the conception of the doctrine favoured here) is to point toward a distinction between fundamental and ordinary constitutional change, placing the former in the exclusive hands of the constituent subject and making obvious the distinction between constitutional reform and the exercise of constituent power. Thus, if constituent power is understood in terms of its connections to the democratic ideal, the doctrine provides additional footing to the argument that fundamental constitutional change should only result from a participatory and open process.

Moreover (and this follows from the last point), the idea of implicit limits, when looked at from the theory of constituent power, suggests that there must be a correlation between the substance of an amendment and the procedure used for its adoption. The more fundamental the change, the more participa-
tory and open the amendment process should be. The correlation, however, is not based on making the procedures for important transformations difficult or impossible, but in making them more democratic. This does not mean that non-fundamental changes cannot (or should not) be adopted through participatory procedures, but that the most participatory procedures are demanded by the idea of democratic legitimacy only in the context of fundamental changes. The doctrine of implicit limits to constitutional reform, in its traditional formulation, is in a way a reflection of liberal constitutionalism’s discomfort with constitutional change (particularly popular constitutional change), a fear of giving citizens the power of altering the most fundamental principles of a juridical order. Nevertheless, my intention here is to adopt the underlying theoretical premise of this doctrine—the distinction between constituent power and constitutional reform—and use it against this discomfort with popular constitutional change. Under my approach, the fear of the constitutionalist—the ever-present possibility of popular meddling with the fundamental laws—becomes an essential component of a democratically legitimate constitutional regime.

103. As this shows, procedure and substance are not always easily separable: it is precisely because of the substance of the amendment that a special procedure is required. See William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993) at 175.


105. According to many contemporary constitutional theorists, a liberal constitution is always in flux—a “living tree” that is always changing. See e.g. W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007). These kinds of changes have a limited democratic potential. To begin with, they 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 replacing bicameralism with unicameralism, or the other way around, through interpretation.) A similar point has been raised by Levinson, *Undemocratic Constitution*, supra note 11 at 160. But 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 (which is the kind of change that interests me here) must take place through procedures in which popular majorities assume a central role.
A. CITIZENS AND IMPORTANT CONSTITUTIONAL TRANSFORMATIONS

Even if one were to agree with Schmitt and Rawls and accept the idea that certain modifications are out of the scope of the ordinary power of amendment, important questions remain. What counts as a fundamental constitutional change? How are we to distinguish between fundamental and ordinary constitutional principles or clauses? These questions are important to my argument because, as seen earlier, I believe that only fundamental constitutional transformations must take place through a process that amounts to an exercise of constituent power—in other words, through a process that attempts to replicate a democratic constitution-making episode. In distinguishing between the fundamental and non-fundamental, one option would be to return to Schmitt and Rawls. The former stressed those constitutional clauses that reflected a decision of the constituent subject regarding its mode of political existence, such as the adoption of a “democratic form of government,” federalism, the decision in favour of parliamentarism or presidentialism, and the amendment formula itself. Rawls also considered fundamental the basic structure of government (including the scope and limits of majority rule as a decision-making method), as well as basic liberal rights and liberties (including the protections of the rule of law).

While Schmitt and Rawls provide a good indication of the kind of provisions that would be considered fundamental in most contemporary societies, the distinction is highly dependent on a society’s history and political culture and thus will vary from country to country. In Canada, for example, as early as 1927, Ernest Lapointe proposed a formula for the amending of the constitution according to which “ordinary amendments” could be adopted by parliament with the consent of a majority of the provinces. For “fundamental amendments”—that is, those involving questions of provincial rights, the rights of minorities, or rights affecting “race, language and creed”—the unanimous consent of the provinces would have been required. The current amendment formula, adopted in 1982, rests on similar distinctions. Under the current for-

106. In his study of Article V of the US Constitution, Lester B. Orfield provided a list of more than 25 topics that had been identified as outside the scope of the amending power by different authors and lawyers during the first part of the twentieth century in the United States (e.g., the establishment of a monarchy, the creation of nobility titles, and an amendment creating special taxes for certain states). See Lester B. Orfield, The Amending of the Federal Constitution (Ann Arbor: University of Michigan Press, 1942) at 87-88, n. 12.

107. See Russell, Constitutional Odyssey, supra note 1 at 55-56.
mula, changes touching issues related to the national languages, the monarchy (e.g., the offices of the queen and the governor general), provincial representation in parliament, the composition of the Supreme Court of Canada, as well as amendments to that part of the amendment rule, require provincial unanimity (as well as approval by the two houses of the national legislature). Even within specific countries, however, the fundamental or non-fundamental character of constitutional provisions is not static, but may be in a permanent state of flux: what is considered fundamental in a particular historical context might not be so considered at another time.

Now, while different societies will produce and assume different conceptions of the distinction between fundamental and non-fundamental constitutional change, the rights and institutions (whatever specific form they take) that are necessary for the exercise of constituent power present a special case. They are necessary for the very existence of democracy, as they are constitutive of the ability of the citizenry to put into question any principle(s) of the constitutional regime. As such, they should only be altered or abolished through an exercise of constituent power: only citizens can deprive themselves of their sovereignty, and in that very act deprive their constitutional regime of democratic legitimacy. As this (rather extreme) example shows, the fact that certain institutions and principles are out of the scope of the ordinary amendment process does not mean that they are unchangeable. It just means that they must be changed through an exercise of constituent power.

B. DOING AWAY WITH CONSTITUENT POWER

As we have seen, the idea of having a special procedure in place for fundamental constitutional change is not alien to actual constitutional practice. But the fact that a constitution establishes special procedures for certain types of amendments does not necessarily mean that these "special procedures" seek to increase

108. Constitution Act, 1982, s. 41(a)-(e), being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. See also Constitution of Venezuela, 1999, which establishes a different set of procedures for "amendments," "reforms," and for the transformation of the state or the adoption of a new constitution. Supra note 57, arts. 340, 343, 347.

109. Who is to determine what is fundamental and what is not? One alternative would be to leave that task to the judiciary, which would be responsible for determining what kind of constitutional change can be made by the ordinary amendment process and what requires a more participatory procedure, such as the convocation of a constituent assembly.
opportunities for popular participation. For instance, the Spanish Constitution establishes two different mechanisms for constitutional change. The first procedure, outlined in Article 167, requires the affirmative vote of three-fifths of each of the houses of parliament. This procedure, which Spanish constitutional theory calls "general," requires a referendum if requested by a tenth of the members of either of the houses. However, the procedure cannot be used for the total revision of the constitution, or a partial revision that affects basic constitutional principles and fundamental rights. In order to reform such provisions, one must utilize the "exceptional" procedure established in Article 168, which not only requires the affirmative vote of two-thirds of each house, but the immediate dissolution of parliament and the calling of general elections. The new parliament must approve, again by two-thirds, the proposed changes, and the modifications must be submitted to the electorate in a referendum.

The emphasis in the Spanish Constitution seems to be (as is also the case of the Canadian one with respect to changes that require provincial unanimity) not so much in making the process leading to important transformations more participatory (unless one sees the ideal of popular participation exhausted in a referendum), but in making it more difficult. In fact, the process established in Article 168 of the Spanish Constitution seems to have the purpose of making fundamental transformations nearly impossible. As I already stated, my approach does not seek to make the adoption of fundamental changes more difficult or unlikely, but more democratic. The idea is not that a legislature should be able to adopt these types of changes easily (as in a flexible constitution), but that there should be procedures in place that allow citizens to become protagonists of important constitutional changes. In other words, it would not mean much if a constitutional regime required that important transformations be effected through "democratic" mechanisms if these mechanisms were very difficult or impossible to activate. The constitutional regime must possess a true escape valve for the constituent power, not merely recognize that it continues to exist.

111. De Vega, supra note 66 at 143.
112. Ibid.
114. The limits of the referendum as a mechanism of popular participation will be briefly discussed in Part IV, below.
after the constitution is in effect, while at the same time “doing away” with it. Democratic constitutional change would not mean much if there was no way for constituent power to manifest itself in actual political practice.

There are at least four methods of “doing away” with constituent power: (1) mystifying constituent power, (2) displacing constituent power, (3) legalizing constituent power, and (4) hiding constituent power. The mystification of constituent power can easily coexist with the other three methods. The idea is to recognize (at the level of constitutional discourse) the people’s power to adopt a new or radically modified constitution, but without providing any institutional means for this power to be exercised. This seems to be the most common approach: while most constitutionalists and politicians would agree that the people have an unlimited power to recreate their juridical order, they generally abstain from proposing mechanisms that would allow something that resembles the exercise of that power to take place. The displacement of constituent power by ordinary government takes place in countries which, like the United Kingdom, have an unwritten (or partially unwritten) constitution and operate under the principle of parliamentary sovereignty. Here, there is an almost complete identification of “parliament” and “people”; the former appears as a constituent assembly in a potentially permanent session, and the latter rarely makes an appearance other than voting in regular elections.

115. See e.g. Murphy, *Constitutional Democracy*, supra note 11. This problem is also exemplified in the judicial decisions that adopt the doctrine of implicit limits to constitutional reform. These decisions usually stress the idea that even when the ordinary institutions of government cannot make certain changes, the people, in the exercise of their constituent power, can make any change they want, even when there is no institutional mechanism in place for this to occur. See e.g. the Indian case of *Golaknath v. Punjab*, A.I.R. 1967 SC 1643.


117. For a famous formulation of the theory of parliamentary sovereignty, see A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1959). Although Dicey rejected the distinction between higher and ordinary laws, and even accepted Alexis de Tocqueville’s characterization of the British Parliament as a constituent assembly in permanent session (at 83), late in his life he supported the institution of the referendum in the context of constitutional change. In so doing, he also defended a distinction between parliament and “people” (or “nation”), describing the latter as the “true sovereign.” A.V. Dicey, “The Referendum” (1894) 23 Nat’l Rev. 65 at 70 (originally published under the pseudonym “Farrer”). For an analysis, see Rivka Weill, “Dicey Was Not Diceyan” (2003) 62
The legalization of constituent power is similar to its displacement, but occurs in the context of written constitutions. Under this kind of arrangement, the power of amendment is also technically unlimited, but its procedural requirements are so easy to meet—often they only require a legislative majority, as is the case with some types of amendments of the Indian Constitution—that the amendment process becomes “equivalent” to the constituent power.\(^\text{118}\) Contrast this with the hiding of constituent power, exemplified in rigid constitutions (that is, constitutions that are very difficult to amend, such as the US and Canadian Constitutions).\(^\text{119}\) This type of constitution “buries” constituent power under an amendment formula that can technically be used to change any constitutional provision, but whose requirements are extremely difficult to meet.\(^\text{120}\) Thus, the very existence of an “unlimited” power of constitutional reform makes an exercise of constituent power seem unnecessary and, at the same time, the stringent requirements of the amendment procedure tend to prevent important transformations from taking place.

In these four situations the result is the same: popular participation in constitutional reform is reduced to a minimum, and the modification of the fundamental laws becomes a difficult enterprise (as in constitutions that can be amended only by legislative supermajorities, sometimes followed by ratification in a referendum) or just a special kind of ordinary law making (as in a flexible
or unwritten constitution). A constitutional regime that does away with constituent power is inconsistent with the idea of democratic legitimacy. It is not enough to have a constitution in which every single disposition can be changed if the procedures for amendment are so stringent as to make any kind of modification highly unlikely. In the same way, it is not enough to have a constitution that can be easily amended if the ordinary legislature will do all the work and highly participatory procedures are simply out of the equation. Democratic openness requires an openness that can be accessed by the citizenry, one that comes accompanied by opportunities for popular participation. In this respect, the ideals of popular participation and democratic openness are radically intertwined, and their separation sometimes becomes unstable. To be democratically legitimate, a constitutional regime must not mystify, displace, legalize, or hide constituent power; on the contrary, it must provide a real possibility for its exercise.

IV. DEMOCRATIC CONSTITUTIONAL CHANGE

As briefly suggested in Part III, above, democratic constitutional change is not equivalent to the use of a popular referendum for the ratification of the constitutional changes proposed by the legislature. From a democratic perspective this is simply insufficient; in my view, the widespread assumption that a referendum is an expression of the ultimate sovereignty of the people is mistaken.\textsuperscript{121} In the context of constitutional reform, a constitutionally mandated referendum is nothing but a juridical exercise required by the amendment procedure itself: when citizens express their support or reject a constitutional amendment, they exercise constituted, rather than constituent, power. As Pedro de Vega argues, a constitutional referendum “does not have the objective of legitimating constitutional change through an act of the sovereign people,”\textsuperscript{122} but of making change more difficult. For de Vega, the constitutional referendum is part of the system of checks and balances typical of the constitutional state, not a device for the

\textsuperscript{121} Consider, for example, the following statement by Pierre Trudeau, upon the announcement that nine Canadian provinces (Quebec excepted) reached an agreement regarding the patriation of the constitution and the adoption of an amendment formula: “I have only one regret. I put it on record. I will not return to it. I have the regret that we have not kept in the amending formula a reference to the ultimate sovereignty of the people as could be tested in a referendum.” Cited in Graham Fraser, \textit{Rend Lévesque and the Parti Québécois in Power} (Montreal: McGill-Queen’s University Press, 2001) at 298.

\textsuperscript{122} De Vega, \textit{supra} note 66 at 302.
exercise of constituent power. When one examines the institution of the constitutional referendum from a democratic perspective, it is easy to see why de Vega’s point should be taken seriously. The main problem is this: a constitutional referendum, by itself, cannot satisfy the ideals of democratic openness and popular participation.

A referendum presents citizens with a set of pre-designed alternatives that they cannot change; it does not necessarily allow citizens to put into question and deliberate about different constitutional provisions, much less about the constitutional regime as a whole. Dietrich Conrad expressed this clearly when he wrote that the value of a constitutional referendum is dubious, since it must be restricted “to a few questions to be answered yes or no, [and] since it does not give the people an active part in molding constitutional details and is, at its best, more in the nature of an ultimate veto power.” Moreover, if citizens are asked to vote on a set of disparate and complex proposals, the referendum can easily turn into a mere “plebiscitary” exercise in which voters simply express their support or dislike of current government officials, particularly of the executive. A referendum does not guarantee the degree of deliberation and debate necessary for the maximization of the ideal of popular participation either: citizens do not become authors of their amended constitution, but merely “consent” to the proposed changes. A democratic process of constitutional change mandates a degree of openness and participation similar to that present in a (democratic) constitution-making episode.

A. OF CONSTITUENT ASSEMBLIES AND POPULAR INITIATIVES

The democratic legitimacy of a constitutional regime, I have argued, depends on its susceptibility to democratic re-constitution. This susceptibility is far from being exhausted in the recognition of basic political rights. Beyond allowing citizens to associate with each other and express their political opinions freely, a constitutional regime must have some institutional mechanism(s) in place (in addition to the ordinary amendment procedure) designed to allow citizens to propose and decide on fundamental constitutional changes. There is no single or correct set of arrangements that must be adopted in order to meet the de-

123. Conrad, supra note 81 at 405.
mands of democratic legitimacy. Their basic feature, of course, must be the fac-
ciliation of the exercise of constituent power through a participatory and open
procedure. My objective here, therefore, is not to provide a list of the institu-
tional mechanisms necessary for the realization of democracy at the level of the
fundamental laws, but to give examples of the kind of arrangements that would
meet the demands of democratic legitimacy. There are at least two modes of
amendment consistent with a democratically legitimate constitutional regime:
(1) the constituent assembly convened by the legislature, and (2) the constituent
assembly convened from below. These mechanisms do not exclude each other
and, as we will see, they are more or less present in the national constitutions of
several countries.

1. THE CONSTITUENT ASSEMBLY CONVENED BY THE LEGISLATURE

The first of these mechanisms is the most common of all. It consists of a con-
stituent assembly composed of delegates elected for the sole purpose of engag-
ing in the re-constitution of the juridical order, and is convened by ordinary

124. Both of these mechanisms involve a voting procedure. In the case of constituent assemblies, a
referendum must take place in order for them to be convened and another to ratify their
proposals. Moreover, the approval of the changes by the assembly requires an internal voting
procedure. These voting procedures, in my view, should be based on the principle of
majority rule. There are at least four reasons for this. First, it must be stressed that we are not
talking about a legislature making changes in a constitution as if it were an ordinary law: the
voters here are the citizens themselves or their delegates to a constituent assembly, who enjoy
a higher degree of legitimacy than ordinary legislators. Second, majority rule (unlike
supermajority rule or unanimity) is consistent with the ideal of political equality among
citizens and at the same time (unlike the tossing of a coin) is sensitive to the actual preferences
of the majority of voters. Third, majority rule is more consistent with the very idea of the
democratic legitimacy of a constitutional regime than any other voting method. That is,
because citizens usually live under a constitution in whose creation they did not participate, a
voting rule more demanding than the rule of the majority would offend the principle of
popular sovereignty (understood as the constituent power of the people). Finally, in the case
of the internal voting procedures of a constituent assembly that is drafting a whole new
constitution, it guarantees that a decision will be produced. Once a constituent assembly is
convened with the objective of drafting a new constitution, a lack of success in producing a
new fundamental law could have severe political consequences, as the old constitutional
regime is likely to suffer from an important defect or deficit of political legitimacy (which
probably was the reason why the constituent assembly was convened in the first place).
government (usually by the legislature).\textsuperscript{125} Because it is convened by government and not by the people, this kind of assembly guarantees only the most minimal degree of democratic legitimacy: the mere possibility of constitutional re-making through an extraordinary and elected body. The fact that this modality of the constituent assembly is convened by the ordinary legislature comes accompanied by at least two major difficulties. First, it would allow a legislature that wants to alter the constitution in order to increase its own powers to convene a constituent assembly in the absence of popular support. Second, it would give the ordinary institutions of government the key to opening the door for important constitutional transformations. That is, the legislature could reject a popular claim for a constituent assembly, even in times of heightened popular mobilization.

The first of these concerns can be diminished by a requirement that the electorate ratify the legislature's proposal for a constituent assembly in a referendum. To guarantee that the referendum evidences considerable popular sup-

\textsuperscript{125} In Canada, there have been, at different moments, calls for a constituent assembly. See e.g. Philip Resnick, \textit{Toward a Canada-Quebec Union} (Kingston: McGill-Queen's University Press, 1991); Constitutional Task Force on the Future of Canada, \textit{Citizens and Government: Who Decides?} (Calgary: Canada West Foundation, 1991). It is also significant that the Beaudoin-Edwards Committee reported that the constituent assembly was "[b]y far the most commonly suggested alternative to executive federalism" in the course of its hearings. The \textit{Process for Amending the Constitution of Canada: The Report of the Special Joint Committee of the Senate and the House of Commons} (Ottawa: Ministry of Supply and Services, 1991) at 43. There have also been calls for an "appointed" constituent assembly. Under this type of proposal, the assembly would complement the existent amending procedure, and serve only as a "negotiating instrument." See Peter Russell, "Towards a New Constitutional Process" in Ronald L. Watts & Douglas M. Brown, eds., \textit{Options for a New Canada} (Toronto: University of Toronto Press, 1991) 141 at 150-51. See also Clyde Wells, "Reforming the Amending Formula: The Case for a Constitutional Convention" (1991) 2 Const. Forum Const. 69; Fédération des Francophones Hors Québec, \textit{Resolving the Impasse: The Need for a Constituent Assembly} (Brief presented by the Fédération des Francophones hors Québec to the Special Joint committee on the Process for Amending the Constitution of Canada) (Ottawa: Fédération des Francophones Hors Québec, 1991). There were also several studies published in Canada regarding the idea of a constituent assembly from a comparative perspective. See e.g. Patrick Monahan, Lynda Covello & Jonathan Batt, \textit{Constituent Assemblies: The Canadian Debate in Comparative and Historical Context} (North York: York University Centre for Public Law and Public Policy, 1992); Patrick Fafard & Darrel R. Reid, \textit{Constituent Assemblies: A Comparative Survey} (Kingston: Institute of Intergovernmental Relations, 1991).
port for important constitutional change, there could be a requirement of participation (e.g., 75 per cent of the citizens that voted in the previous election must vote in the referendum or it would have no legal effect). The second concern is more difficult to address, and this is why this modality of the constituent assembly guarantees only a minimal degree of democratic legitimacy: it might simply result in the prettification of the constitutional order and the hiding of constituent power behind a procedure that—although available—will never be used. The potential and the limits of this kind of mechanism, therefore, will greatly depend on the political culture of the country in question and the democratic responsiveness of its ordinary political institutions.

This mechanism also has certain advantages. The fact that the initiative to convene the constituent assembly lies within the exclusive jurisdiction of the legislature might contribute to the development of different forms of informal political actions, such as popular demonstrations, civil disobedience, and other types of protests, and rally large parts of the population around the need for constitutional change. In other words, it provides an opportunity for citizens to use non-institutional methods to draw public attention to what they think are necessary changes to the laws that regulate their association and push for a public dialogue that could end in the convocation of a constituent assembly by the legislature. At the same time, it gives lawyers and philosophers the opportunity, as active citizens (not as experts to whom the rest should defer), to convince majorities of what they think are (or are not) necessary constitutional changes.

An example of this kind of mechanism can be found in Article 376 of the Colombian Constitution. The constituent assembly that drafted the 1991 constitution was convened informally, in an express confrontation with the constitutional regime (in the sense that the old constitution did not contemplate that mechanism). Not surprisingly, the assembly inserted into the new constitution a provision that expressly authorizes the legislature to convene a constituent assembly. As the Colombian Constitutional Court stated in 2003, by inserting this provision the assembly attempted to allow for the possibility of the

126. As we will see in Part IV(A)(2), below, there is no need for a legislature to have the exclusive jurisdiction to convene a constituent assembly.

127. Naturally, these activities will only be possible if basic political rights are respected. This is an example of the direct connection between basic political rights and democratic legitimacy.

future exercise of constituent power, thus creating an opening that the previous constitution lacked. Nevertheless, since the adoption of the 1991 constitution, no constituent assembly has been convened. Of course, this is not necessarily a problem and could, in fact, be a sign of a constitutional regime that is working well. However, this is not the case, as, since 1991, the Colombian Constitution has been the object of controversial changes adopted through an amendment process (the ordinary amendment process) in which the executive and the legislature have played the central role.

2. THE CONSTITUENT ASSEMBLY CONVENED FROM BELOW

The constituent assembly convened “from below,” triggered at the initiative of the citizenry as opposed to that of the legislature, is a superior mechanism from the perspective of democratic legitimacy. It attributes to the people (as the mythical, extra-legal founder of the constitution) the faculty of re-activating its constituent power and becoming the author of a radically transformed constitutional regime. This mechanism is about recognizing a power superior to the constitution and giving citizens, acting outside the ordinary institutions of government, the institutional means to exercise it.

The convocation of such an assembly could be initiated by the collection of a number of signatures that could range from 15 to 20 per cent of the electorate. After the required number of signatures is collected, a referendum would...
take place in which the entire citizenry would have the opportunity to decide whether the assembly is to be convened. If the majority votes in the affirmative (as in the previous type of assembly, there could be a requirement of minimum participation), the election of delegates would take place. From then on, the assembly would deliberate as a sovereign body, independent of the ordinary (or constituted) powers of government and would operate according to its own rules. It would be authorized to replace the existing constitutional regime and create an entirely new one. Its proposals, however, would have to be ratified by the electorate in an additional referendum in order to enter into effect. This is in fact the way in which the constitutions of Venezuela,132 Ecuador,133 and Bolivia134 conceive of this extraordinary body. The case of the Bolivian Constitution is the most interesting (at least from the perspective of the argument presented in this article), as it not only attributes to ordinary citizens the power to convene a constituent assembly, but—in Schmittian fashion—specifically states that fundamental constitutional transformations must be adopted through this kind of body:

[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.135]

convocation of a constituent assembly "from below" require 12-20 per cent of the signatures of registered electors (Ecuador: 12 per cent, Venezuela: 15 per cent, Bolivia: 20 per cent).

132. *Constitution of Venezuela, 1999*, supra note 57, arts. 347, 348. In the case of the Venezuelan Constitution (Article 348), it is not clear if a referendum is required to convene the assembly or if the collection of signatures (15 per cent of the electors) is all that is needed. A literal reading of the text certainly suggests the latter, but such reading would likely be rejected in practice. Interestingly, the set of constitutional reforms recently rejected by the electorate included an amendment that would have increased the number of signatures required from 15 per cent to 30 per cent.


A constituent assembly, when triggered by the citizens themselves, would facilitate the exercise of constituent power and come very close to embodying the ideals of democratic openness and popular participation. On the one hand, a constituent assembly, as repository of the constituent power, has no limits to its competencies and can make any change in the constitutional regime, no matter how fundamental. It can even result in the abolition of democracy and in the alteration of the very amendment formula that provides for its convocation, although if it does, it would destroy its very democratic legitimacy together with that of the constitutional regime. On the other hand, and unlike the constituent assembly convened exclusively by the legislature, it recognizes the citizenry as the protagonist of important constitutional transformations from the beginning to the end of the process. For it to be a truly open and participatory mechanism, the onus that must be met in order to activate the process that could lead to a constituent assembly should not be too high. The collection of the signatures of less than a fifth of the registered electors seems reasonable in this respect—this is, in fact, the kind of burden established in the constitutions that contain this mechanism. After the initial stage of the process begins, the electorate can reject the convocation of the constituent assembly by a simple majority in a referendum, but the public discussion about the future of the constitutional regime that can take place around these exercises is in itself a valuable democratic event.

136. The sovereign nature of the constituent assembly seemed to have been taken quite seriously in the countries mentioned above. For instance, it was considered necessary that, once convened, the assemblies issued a decree ratifying the legitimacy of those individuals already in office (including the president), as a way of asserting its (constituent) power to remove and replace those currently exercising constituted power. This does not mean, however, that a constituent assembly cannot impose limits on itself (such as specific voting rules) or on its delegates. For example, the French Constituent Assembly adopted a rule proposed by Robespierre according to which the members of the assembly were banned from entering the first ordinary legislative assembly elected under the new constitution. See Andrew Arato, “Forms of Constitution Making and Theories of Democracy” (1995) 17 Cardozo L. Rev. 191 at 227; Jon Elster, “Legislatures as Constituent Assemblies” in Richard W. Bauman & Tsvi Kahana, eds., The Least Examined Branch: The Role of Legislatures in the Constitutional State (Cambridge: Cambridge University Press, 2006) 181 at 192. A similar rule was adopted by the Colombian National Constituent Assembly of 1991. See Colombian Constitution, supra note 128, art. 2, “Transitory Provisions.”

137. For a provision apparently intended to prevent this, see Constitution of Venezuela, supra note 57, art. 350.
A constitutional regime that grants the citizenry the power to convene a constituent assembly, even against the will of government officials, would certainly have a stronger claim to democratic legitimacy than a system that leaves amendments in the hands of the ordinary political institutions. The mechanism combines institutions of direct (collection of signatures, referendums) and representative (the assembly) democracy; of all the other methods of constitutional change, it has the better chance of maximizing popular participation. Of course, this type of mechanism is not likely to be used frequently and has never been used in the few constitutional regimes that recognize it. In fact, frequent resort to the convocation of a constituent assembly (in any of its variants), instead of being a symptom of an active and lively democracy, could be an indication of a profound political problem. What democratic legitimacy requires is not a constitutional regime that is constantly altered in fundamental ways through highly participatory procedures, but one that can be altered in that way.

V. CONCLUSION

This article addressed the question of what it means for a constitutional regime to be susceptible to democratic re-constitution and therefore to enjoy democratic legitimacy. Re-constitution here does not merely mean "constitutional change," but a type of constitutional change that, because of its fundamental character, should come accompanied by intense levels of popular participation and democratic openness. Democratic re-constitution involves an exercise of constituent power, an activation of the faculty of citizens to alter the fundamental laws under which they live through extraordinary mechanisms. Only a constitutional regime that is open to this kind of transformation, I have argued, can be considered legitimate from a democratic perspective, and even one that did not originate in a democratic constitution-making episode can enjoy democratic legitimacy if it is susceptible to re-constitution. In most modern states, the adoption of the mechanisms that make this possible would itself involve an

138. It is ironic that these types of mechanisms are beginning to appear not in the fundamental laws of established Western democracies, but in the new constitutions of Latin America. Nevertheless, a group of citizens in California have recently presented initiatives (labelled by some as verging "on the radical") with the objective of calling the first constitutional convention in that state in over a century. See Jennifer Steinhauer, "Ballot Issues Attest to Anger in California" The New York Times (10 January 2010), online: <http://www.nytimes.com/2010/01/10/us/10calif.html>.
important constitutional overhaul, amounting to a change in the balance of power that would take away from the legislature the exclusive jurisdiction to alter the constitution.

I have also maintained that, for a constitutional regime to meet the demands of democratic legitimacy, it should distinguish between ordinary and fundamental constitutional change. In the absence of such a distinction, every single change in the constitution would require a degree of mobilization that would trivialize constituent power and/or make constitutional change as remote and infrequent as the founding of a new state. If these democratic processes were simply made parallel to the ordinary amendment procedure—that is, if the people and the legislature were granted the same powers with regard to the constitutional text—the former's constituent power would become indistinguishable from a constituted power, with all that implies in terms of democracy. That is, not only would the ordinary legislature become a sort of constituent assembly in a potentially permanent session, duplicating the people as the subject of constituent power, but it would have the power to abolish the institutions that allow for the very possibility of democratic re-constitution. To say that a constitutional regime must be susceptible to democratic re-constitution to enjoy democratic legitimacy, is therefore to say as well that an exercise of constituent power is the only kind of re-constitution acceptable from a democratic perspective.

The mechanisms considered in Part IV, above, are examples of institutions that facilitate democratic constitutional change, reveal that a democratically legitimate constitutional regime is possible, and demonstrate that constituent power does not have to be a one-time event nor relegated to the occurrence of a political revolution. While the modalities of the constituent assembly discussed in the article can be used as means for the exercise of constituent power, they have an interesting relationship with legality: they cannot be easily classified as legal or extra-legal. That is, because they are engaged in constituent activity, they seem to belong to the political, rather than to the juridical, terrain. They address the constitutional regime from the outside, and after they are convened, they are not bound by any form of positive law.139 At the same time, they are

139. Because a constituent assembly is generally understood as a means for the exercise of constituent power, its proposals for change are not normally subject to judicial review, regardless of their content. However, as noted above, their validity usually depends on their ratification in a referendum. For unusual cases of a constitutional court reviewing the
not exactly extra-legal (or even illegal), as they emerge from the very fundamental laws they seek to transform.

This, however, should not come as a surprise, as both democracy and constituent power are characterized by a political terrain that is never closed and a constitution that is never finished. Democratic legitimacy cannot be granted by well-conceived or well-intentioned constitutional forms, but arises from popular political practices that threaten to question the most fundamental principles of the constitutional regime. That constituent power has been ignored by Anglo-American constitutional theory is unfortunate but understandable: if its importance were recognized, most constitutional regimes would be seen as suffering from an important deficit of democratic legitimacy. And the history of constitutional theory is a history of finding ways of defending the democratic legitimacy of constitutional regimes, not of putting their legitimacy into doubt.
