Research Report No. 3/2009

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The End of the Constitutionalism-Democracy Debate

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THE END OF THE CONSTITUTIONALISM-DEMOCRACY DEBATE

JOEL I. COLÓN-RIOS


Cite this paper as 1 VUWLRP 19/2011
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Abstract: There is something strange about the literature produced in the 1990s by North American constitutional theorists on the relationship between constitutionalism and democracy. The problem, I believe, has two different roots: an excessive focus on the legitimacy of judicial review and an insistence in defending the constitutional status quo. On the one hand, the emphasis on judicial review usually ended up obscuring what should have been at the center of the debate: the way in which ordinary citizens could or not re-constitute the fundamental laws under which they lived. On the other, these approaches rarely involved recommendations for institutional changes (other than the occasional proposal for the abolition of judicial review) in the constitutional regimes they were operating. These 'happy endings' were particularly surprising, since one would think there must be many ways of upsetting the 'balance' between constitutionalism and democracy in favor of the latter. In fact, it would be astonishing that constitutional traditions which originated in an attempt to protect certain institutions from the passions of disorganized multitudes would not be wanting, even a bit, from the point of view of democracy. With these limited ends, it is no surprise that the constitutionalism-democracy debate appears to have stagnated.

This paper will advance a different approach to the debate, one that emphasizes popular participation in constitutional change and that recommends institutional transformations that would contribute to the realization of democracy in contemporary constitutional systems. I begin by reviewing the works of Ronald Dworkin, Jeremy Waldron, and Bruce Ackerman. The take of these three authors on majority rule, judicial review, and constitutional amendments, exemplify very well the shortcomings of the literature on constitutionalism and democracy. The implications of Dworkin's constitutional theory are fatal for any democratic project: the prettification of a constitutional regime that is reputed to rest on the 'right' abstract principles. Waldron's approach, although attributing to 'the people' the right to have the constitution they
want, ends up identifying people and legislature, thus neglecting any actual participation of citizens in constitutional change. Ackerman's constitutional politics, although insisting in keeping citizens and representatives separate, replaces the flesh and blood human beings that live under the constitutional regime with a mythical 'People' (always with a capital P) whose acts are identified ex post facto.

In contrast to these theories, I propose a conception of constitutionalism according to which the constitution should remain permanently open to important transformations. Under this 'weak' constitutionalism, there is no such thing as a 'good' or 'finished' constitution, contrary to what Dworkin's analysis implies. Only such a conception of constitutionalism, I believe, is consistent with a serious commitment to the democratic ideal. However, this supposes that democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the constitution. In this respect, and in contrast to Waldron, I will defend a distinction between two dimensions of the democratic ideal: democracy at the level of daily governance and democracy at the level of the fundamental laws. By their very nature (daily vs. episodical), each of these dimensions demand different levels of popular engagement. Finally, I consider the institutional implications of this approach to the constitutionalism-democracy dilemma. Unlike Ackerman, I suggest a series of mechanisms designed to allow for the actual participation of ordinary citizens in the constitution and re-constitution of government.

Keywords: constitutionalism, democracy, constitutional reform, popular participation, constituent power, Ronald Dworkin, Jeremy Waldron, Bruce Ackerman

JEL classification: K10, K30

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THE END OF THE CONSTITUTIONALISM-DEMOCRACY DEBATE

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There is something strange about the literature produced in the 1990s by North American constitutional theorists on the relationship between constitutionalism and democracy. The problem, I believe, has two different roots: an excessive focus on the legitimacy of judicial review and an insistence in defending the constitutional status quo. On the one hand, the emphasis on judicial review usually ended up obscuring what should have been at the center of the debate: the way in which ordinary citizens can or cannot re-constitute the constitution under which they live. On the other, these theorists rarely advanced recommendations for institutional changes in the constitutional regimes they were operating (other than the occasional proposal for the abolition of judicial review). These happy endings—in which constitutionalism and democracy were usually presented as two sides of the same coin—were particularly surprising, since one would think there must be many ways of upsetting the 'balance' between constitutionalism and democracy in favor of the latter. In fact, it would be astonishing that constitutional traditions which originated in an attempt to protect certain institutions from the passions of disorganized multitudes would not be wanting, even a bit, from the point of view of democracy. With these limited ends and inclinations, it is no surprise that the constitutionalism-democracy debate appears to have stagnated.

It is tempting to say that behind the lack of recognition of any real conflicts between these two ideals and the absence of proposals directed toward an increase in the participation of citizens in the re-reproduction of the fundamental laws laid a profound fear of what could result from popular involvement in constitutional change. In other words, a mistrust in the ability of fellow citizens to engage in discussions of high principle, an insuperable attachment to the 'beauties' of judicial interpretation, and a

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self-imposed responsibility to find arguments that support the less popular features of the established constitutional tradition. But this would be unfair: constitutional theorists engaged in the constitutionalism-democracy debate (including those whose work I will consider here) generally had an honest commitment to some version of the ideal of 'the rule of the people'. Perhaps the very framework of the debate prevented these theorists from assuming stronger democratic positions, even if in a few cases this attitude was the result of a political commitment to liberal constitutionalism pure and strong; its anti-populist splendor at its maximum. The actual reasons for this apparent deficit of democratic enthusiasm, however, is not what interests me here. Rather, my goal is to explore the main tendencies to the constitutionalism-democracy debate, identify its shortcomings, and build from there the basic contours of a decidedly and unrepentant democratic constitutional theory, one in which citizens have a real possibility of becoming protagonists of important constitutional transformations.

Accordingly, this paper presents an approach to the constitutionalism-democracy dilemma that emphasizes popular participation and considers some specific mechanisms that would contribute to the realization of democracy in contemporary constitutional systems. I begin with a short introduction to the dilemma and a brief account of the work of Ronald Dworkin, Jeremy Waldron, and Bruce Ackerman. The take of these three authors on majority rule, judicial review, and constitutional amendments, exemplify very well what I believe are the three main tendencies in the literature on constitutionalism and democracy. The implications of Dworkin's constitutional theory are fatal for any democratic project: the prettiﬁcation of a constitutional regime that is reputed to rest on the 'right' abstract principles. Waldron's approach, although attributing to 'the people' the right to have the constitution they want, ends up identifying people and legislature, thus neglecting any actual participation of citizens in constitutional change. Ackerman's constitutional politics aims at keeping citizens and representatives separate, but at the price of replacing the flesh and blood human beings that live under the constitutional regime with a mythical 'People' (always with a capital P) whose acts are to be identified ex post facto.

In contrast to these theories, I propose a conception of constitutionalism according to which the constitution should remain permanently open to democratic transformations. Under this 'weak' constitutionalism, there is
no such thing as a 'good' or 'finished' constitution (which might evolve through constitutional interpretation, but whose provisions must be insulated from democratic majorities), contrary to what Dworkin's analysis implies. Only such a conception of constitutionalism, when accompanied by a strong democracy, is consistent with a serious commitment to the democratic ideal. However, this supposes that democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the constitution. In this respect, and in contrast to Waldron, I will defend a distinction between democracy at the level of daily governance and democracy at the level of the fundamental laws. By their very nature (daily vs. episodical), each of these dimensions demand and allow different levels of popular engagement. Finally, I consider some of the institutional implications of my approach to the constitutionalism-democracy dilemma. Unlike Ackerman, I suggest a series of mechanisms designed to allow for the actual participation of ordinary citizens in the constitution and re-constitution of government. These mechanisms include constituent assemblies convened 'from below' and popular initiatives to amend the constitution, institutions already present in some constitutional regimes. Although an important part of the paper is devoted to the examination and critique of the work of three American authors, my substantive proposals are not directed toward any specific country. They are, rather, examples of ways in which constitutionalism might be 'democratized', and in that respect, invitations to move the constitutionalism-democracy debate to more strongly democratic grounds.

I. CONSTITUTIONALISM AND DEMOCRACY

The constitutionalism-democracy dilemma, the idea that constitutionalism and democracy are in tension (or in conflict) which each other, is not only a matter of constitutional theory. In fact, this problem has been the object of judicial treatment in several cases which, in one way or another, touched upon the fundamental principles of the juridical order in question. In North America, one of these cases is the Secession Reference, where the Supreme Court of Canada considered the question of the unilateral secession of Quebec. In an attempt to balance democratic and
constitutional principles, the court held that the Canadian constitution (which does not contain a provision allowing provinces to secede from Canada) could not be legitimately circumvented even if a majority of Quebeckers voted in favor of secession. According to the court, the Canadian conception of democracy is not a mere system of majority rule but, taken in conjunction with other constitutional principles, involves the idea “that the political representatives of the people of a province have the capacity and the power to commit to be bound into the future by the constitutional rules being adopted.” In this sense, far from negating democracy, constitutionalism creates an orderly framework that allows people to make political decisions: “Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.”

One year later, the Supreme Court of Justice of Venezuela examined a similar issue. The case before the Supreme Court did not involve the secession of a political unit from a federation, but the creation of a new constitutional regime through a procedure not contemplated by the constitution's amendment rule. The controversy originated when the then recently installed government called for a referendum that asked the Venezuelan electorate whether they wanted to convene a constituent assembly in order to re-constitute the republic. The amendment procedure of the 1961 Constitution, however, placed the amending power exclusively in the ordinary legislature. Not surprisingly, many jurists argued that to convene a constituent assembly was contrary to the established juridical order and would require a previous constitutional amendment. In a decision that accepted the existence of a tension between constitutionalism and democracy, the court held that the limits established in the constitution regarding the Congress’ power of amendment applied only to that body and not to the people in the exercise of their constituent power.

The decisions of these two courts, operating in different contexts and in countries with dissimilar political histories, exemplify with unsuspected clarity one of the basic problems of constitutional theory: democrats finding in constitutions a nuisance and constitutionalists perceiving democracy as a threat. A preliminary overview of the central characteristics of these two ideals suffices to show why. Democracy, in the most traditional sense, is about self-government. Its basic idea is that citizens themselves decide the content of the laws that organize their
political association and regulate their conduct. This supposes not only popular participation in the constitution of government, but that there can be no fixed law, that is, a law that has to be taken for granted and that is not or should not be subject to revision. A democratic regime is a regime in which citizens not only adopt ordinary and fundamental laws, but can also change them: a system that remains open to democratic transformations. These democratic features (which I will elaborate later) appear to be contradicted by constitutionalism in two related but not identical ways. First, constitutionalism seeks to limit the kinds of laws that can be created by legislative majorities, a limit that is usually institutionalized through the adoption of judicial review of legislation. Second, and as part of a general concern with constitutional stability and supremacy, constitutionalism also places limits on the faculty of citizens to alter the fundamental law; it mandates a constitution that can only be altered with difficulty, usually by legislative supermajorities. As I will argue below, the solutions given by Dworkin, Waldron, and Ackerman to this apparent conflict are too deferential of constitutionalism and, as a result, come short of giving democracy its due.

A. THE CONSTITUTIONALISM AS DEMOCRACY SOLUTION

Through his career, Ronald Dworkin has insisted that the alleged tension between constitutionalism and democracy is the result of a misunderstanding and exaggeration. In his view, those who maintain that there is something undemocratic about constitutionalism fail to understand what democracy is really about. It is true, he says, that democracy means government by the people, but the majoritarianism defended by some democrats is simply based on a mistaken conception. Such a view cannot explain what is good about democracy, incorrectly assuming that the mere weight of numbers, on its own, contributes something of value to a political decision. The correct understanding of the ideal of the 'rule by the people' is to be found in what he calls the 'constitutional conception' of democracy (and more recently the 'partnership view'). Not surprisingly, this view rejects the majoritarian premise and replaces it with a result oriented view of democracy: “that collective decisions be made by political institutions whose structure, composition, and practices treat all
members of the community, as individuals, with equal concern and respect\textsuperscript{xiii}.

This means that democracy is about protecting individual rights, because they are the rights that will guarantee that the state treats (or abstain from treating) citizens in certain ways. It is easy to see how Dworkin derives a defense of judicial review of legislation from this approach: if the decision of a court strikes down a statute adopted by a legislative majority (or by the unanimous vote of the population for that matter) because it violates individual rights, there is no loss to democracy but a democratic victory. When one translates this view into the language of constitutional law and into a specific type of constitution, Dworkin's solution to the constitutionalism-democracy dilemma can be seen more clearly. For him, a constitution serves democratic ends insofar as it contains the right abstract principles. Who created the constitution, who is allowed to change it and how is secondary: the democratic credentials of a country's fundamental laws depend not on when or by whom those laws were made, but on their content.\textsuperscript{xiv}

Thus, for example, if the fundamental laws provide for “more-or-less popularly accountable day-to-day government based on a more-or-less equally distributed franchise; for non-discriminatory law making and prohibition of caste distinctions; for protection against arbitrary and oppressive uses of state powers; [and] for strong rights of moral autonomy…”, we have a democratic regime.\textsuperscript{xv} Understood in this way, democracy is not only compatible with the disabling provisions of a traditional liberal constitution, but is identified with the existence of those provisions. Dworkin, as a good constitutionalist, would not want a constitution that contains the right content to be easily changed, so he defends a difficult and state-driven amendment procedure. In his view, the kind of constitution necessary for democracy is identical to the one required by constitutionalism: one that contains certain rights, that sets limits to popular decision making, and that cannot be easily altered.\textsuperscript{xvi} His preferred constitution promises permanency to the principles and institutions that it protects, whose scope and meaning is to be determined by judges. According to Dworkin, there is no conflict whatsoever between constitutionalism and democracy, because if one looks closely, they are really one and the same.
B. THE LEGISLATURE AS THE PEOPLE SOLUTION

Some readers will be surprised to see Jeremy Waldron's name included in a group of scholars whose work is supposedly wanting from a democratic perspective. After all, Waldron has denounced, together with a radical democrat like Roberto Mangabeira Unger, the dirty little secret of contemporary jurisprudence: its discomfort with democracy.\textsuperscript{xvii} Shouldn't Waldron's focus on popular participation, his defense of legislatures, and his sustained attack against judicial review, be enough to satisfy even the most recalcitrant democrat? For this author the democratic character of laws depends on who made them and by what procedures they came into existence, and he appears to leave no space for constitutionalism's insistence on legal limits to popular decision-making. The problem is that Waldron does not take his democratic instincts far enough, that popular participation does not mean much if it is thought to take place inside a parliament. And in his procedural conception of democracy this is precisely what happens.

For Waldron, people have a right to participate in equal terms in all aspects of their community’s governance, that is, not just in interstitial matters of social and economic policy but also in social decisions of high principle.\textsuperscript{xviii} The very idea of rights is based on a view of the rights-bearer as a thinking agent, someone who is capable of moral deliberation and of transcending personal interest, and this involves giving a special place to the right to participate in all aspects of the community's governance.\textsuperscript{xix} This does not mean that the right to participate has moral priority over other rights, but that when there is disagreement about what rights people have or about what those rights entail (and disagreement about rights is simply inevitable), the exercise of the right to participation is the most appropriate for settling the dispute.\textsuperscript{xv} This is another way of saying that there cannot be a democracy unless the \textit{demos} has the last word on important political decisions, and that “the people or their representatives” determine (using majority-rule as a decision-making method)\textsuperscript{xxi} the principles of their association and the content of their laws.\textsuperscript{xxii}

This approach is of course incompatible with judicial review of legislation, which gives the judiciary the power to trump the decisions of the majority. Even if Waldron agrees with Dworkin on key questions of political
morality (such as abortion or the death penalty) he thinks that legislatures, as the duly representatives of the people, are the ones to deliberate and provide an answer to these questions: “In countries that do not allow legislation to be invalidated in this way [through judicial review], the people themselves can decide finally, by ordinary legislative procedures, whether they want to permit abortion, affirmative action, school vouchers, or gay marriage”xxiii. Accordingly, a system that gives the citizens or their representatives (notice here Waldron’s problematic identification of people and legislature)xxiv the power to decide what will be the content and scope of constitutional guarantees is potentially a true and complete democratic victory. Thus, the tension between constitutionalism and democracy is nothing but a product of the limits imposed by judicial review on a democratically elected legislature. If the power to impose these limits is abolished, the tension between constitutionalism and democracy would disappear.

C. THE PEOPLE AS ‘THE PEOPLE’ SOLUTION

Bruce Ackerman’s constitutional theory is very well known and has been the object of many discussions and critiques. Although focused in the U.S. constitutional tradition, I think it is possible to extend his theory to other liberal democracies. Ackerman’s central claim emerges from the idea that the United States has a dualist constitution. By that, he means that the constitution seeks to distinguish between two different kinds of decisions: (a) decisions by the government; and (b) decisions by ‘the people’.xxv Ackerman identifies the former as normal politics and the latter as constitutional politics. These latter periods of higher law making conform the ‘highest kind of politics’, the moments in which ‘We the People’ speak without being restrained by pre-established constitutional forms. Because of its extraordinary character, constitutional politics should be permitted to take place only during the rare moments of what Ackerman calls “heightened political consciousness”xxvi.

During times of normal politics, in contrast, it is only the government who speaks. Political representation must be seen with suspicion, and the actions of the legislature should not be mistaken for the genuine voice of
‘We the People Assembled’. The idea is that the legislative and executive powers merely represent the people in a manner of speaking, “each is a metaphor that should never be confused with the way the People express their will during those rare periods of constitutional politics when the mass of American citizens mobilizes itself in a collective effort to renew and redefine the public good. Ackerman is easily able to derive a defense of judicial review from this conception: because ordinary representatives are only ‘stand-ins’ for the People, they might attempt to jeopardize the fundamental laws created during moments of constitutional politics. The role of judicial review is precisely to protect the achievements of the People during those extraordinary episodes: “Until a constitutional movement successfully amends our higher law, the Court’s task is to preserve the People’s judgments against their erosion by normal lawmaking.”

This author’s approach to the constitutionalism-democracy dilemma is quite different from that of Dworkin and Waldron. For him, constitutionalism and democracy are neither about the protection of individual rights through judicial review nor about parliamentary supremacy: they are about preventing ordinary politicians from taking the place of the People. In fact, he rejects both ‘right foundationalism’ (the idea that the first and foremost concern of the constitution is to protect rights, even if this means invalidating the decisions taken by democratic institutions) and ‘monism’ (the idea of granting plenary making authority to the winners of the last election). Instead, he urges us to distinguish between decisions made by the People and decisions made by the legislature, and as goods democrats, to accept that the former should take precedence over the latter. However, his approach is not about providing ways for ordinary citizens to participate in constitutional change, but about the ways in which government might be able to get the support of We the People and speak in its name. Solving the tension between constitutionalism and democracy, then, does not require any major institutional transformations (as constitutionalism does not place any limits on dualist democracy’s People), but theorists that, sensible to dualist democracy, are able to discern between constitutional and normal politics.
II. A DEMOCRATIC APPROACH TO THE CONSTITUTIONALISM-DEMOCRACY DEBATE

The previous review of Dworkin's, Waldron's, and Ackerman's contributions to the constitutionalism-democracy debate hinted on what I think are some of the democratic shortcomings of these author's proposals. Dworkin and Ackerman are perfect apologists of the constitutional status quo: according to them, there is a way of understanding the prevailing 'balance' between constitutionalism and democracy that cherishes and respects the democratic ideal. And while Waldron sees a problem in some contemporary constitutional regimes, it is a problem which is solved by the abolition of the institution of judicial review of legislation. However, as will become clear later, regardless of the position one takes on the democratic or undemocratic character of giving judges the power to strike down ordinary laws, one will still come short of advancing a truly democratic project if arguing in favor or against this institution is all one does. Democracy is of course inconsistent with permanent constitutions and appeals to a People that acts in mysterious ways, but it is not exhausted by parliamentary supremacy either. It is, on the contrary, a much richer ideal, and if the constitutionalism-democracy debate is to be taken to another level the approaches represented in the work of these three authors must be subject to a democratic critique, one that defends a strong and participatory conception of democracy.xxxii

In this section of the paper I will confront the proposals of these three authors with an alternative approach. Against Dworkin, I will argue that the constitutional conception is in conflict with democratic openness (the idea that all laws, including fundamental ones, must be permanently open to important transformations through highly democratic procedures). Democratic openness, together with popular participation, is one of the basic components of the democratic ideal. Against Waldron, I maintain that there is more to democracy and popular participation than majoritarian decision making inside legislatures: democracy has a second dimension that asks us to look at the ways ordinary citizens can change the fundamental laws. Finally, against Ackerman, I argue that a genuinely democratic constitutional change mandates the actual participation of citizens in constitutional politics, which is quite different from getting the support of the People or being able to speak in its name.
A. DEMOCRATIC OPENNESS AND THE CONSTITUTIONAL CONCEPTION

What Dworkin's constitutional conception of democracy does is to set the traditional content of a liberal constitution as democracy's precondition. Under this view, democracy is exhausted by the right content; the only objective of such a conception is to ensure the protection of an 'exemplary' constitution, a constitution whose provisions meet Dworkin standards. In fact, the very idea of ordinary people meddling with the content of a 'good' constitution is a threat to this conception of democracy, and that is why Dworkin favors an amendment procedure that makes constitutional change difficult and unlikely. For him, majorities should not be allowed, "whenever they wish, to change the basic constitutional structure that seems best calculated to ensure equal concern".\textsuperscript{xxxiii} Put in a different way, under the constitutional conception, there could be a democracy under a 'given' constitution. That is to say, someone (say a group of Western experts) writes a constitution that provides for an elective legislative assembly and the protection of traditional liberal rights and tells a group of people: 'here is your democratic constitution, now follow it (but don't change it) and govern yourselves 'democratically'.'

Contrary to what Dworkin believes, this approach is in clear and direct conflict with democracy, as it negates one of the basic components of this ideal. It is true that democracy is one of the most contested terms of our political culture, and that it is far from clear what it requires in the context of large and complex societies. However, there are some basic ideas that are inherent to the principle of 'the rule by the people' (democracy's specific and literal meaning).\textsuperscript{xxxiv} Once one begins to depart from these ideas democracy quickly becomes something else. One of these ideas is 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. Democratic openness welcomes conflict and dissent, and it is incompatible with untouchable abstract principles. To paraphrase Castoriadis, a democratic society is "not a society that has adopted just laws, once and for all, rather is a society where the question of justice remains constantly open".\textsuperscript{xxxv}
The conception of an open society is directly related 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. This involves two important and related points. First, for these rules to be the people’s own, it must be today’s people who rule, not past generations or political philosophers, however wise or well-intentioned their act of constitution-making was, or whatever the content of the provisions they adopted. The idea of pre-commitment (perfectly attuned to the logic of constitutionalism) cannot be brought to a final reconciliation with democracy. Second, for there to be democratic self-rule, no rule can be taken for granted or removed from critique and revision. A self-governing people must be able to reformulate their commitments democratically. In this sense, the idea of placing stringent requirements for constitutional amendments, or of placing part of the constitutional text outside the scope of democratic politics, is in clear tension with the ideal of democratic openness and with the very idea of the rule by the people. 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.”

Dworkin's approach, in which there is such a thing as a constitution that contains the right abstract principles, negates democratic openness in important ways. His conception of democracy is perfectly consistent with a finished constitution: a constitution that might be improved by correcting some historical mistakes here and there (through judicial interpretation), but whose fundamental principles and the governmental structure it creates should not be susceptible to change by highly democratic procedures. If a constitution contains the right abstract principles (the rights and institutions that promote equal concern and respect) and if judges are allow to interpret and re-interpret its provisions, why should we be concerned about how it came into existence, or why would someone ever want to re-write its fundamental provisions? Dworkin's solution to the constitutionalism-democracy dilemma might promote the production of ‘good’ laws (under his standards), but it is much more about keeping constitutionalism untouched than about realizing democracy. Now, it is true that to say that in a democracy everything is open for replacement is to accept that democracy always
involves the risk of replacing itself. Democracy, there should be no doubt about it, is always a risk, but a risk that a democrat-if she wishes to remain a democrat- has no choice but to accept. To do otherwise would mean sacrificing the creativity of ordinary people together with the possibilities of creating more just societies for the fear of a citizenry that, through highly participatory and inclusive procedures, is willing to give up the very institutions that make their self-government possible.xli

B. THE TWO DIMENSIONS OF DEMOCRACY AND PARLIAMENTARY SUPREMACY

Unlike Dworkin, Waldron takes seriously the ideal of democratic openness. For him, the meaning and scope of every constitutional provision (if there happens to be a written constitution), should be determined by the elected legislature, not by a group of judges. I believe that Waldron's approach is democratically superior to that of Dworkin's. It has, however, an important limitation: it only seems to conceive democratic openness in the context of what I will call the first dimension of democracy (democratic governance). If the legislature and the people are identified with each other (as in Waldron) the actual role of the latter in debating and reformulating the basic principles of the constitutional regime will be quite limited, to say the least. It should be clear that this is not an argument against representative democracy, but an argument that points to a (second) dimension of democracy (democracy at the level of the fundamental laws) in which ordinary representative institutions should give way to more participatory mechanisms. Democratic openness must be an openness accessible to ordinary citizens, not confined to the four walls of a legislature. In this section I will distinguish between these two dimensions of the democratic ideal and argue that Waldron's conception (like most theories that focus in the legitimacy of judicial review) operate exclusively in the domain of democratic governance.

When people say that a certain country is ‘democratic’ they are usually referring to democracy at the level of governance. That is, they are saying that that country’s laws and institutions provide for frequent elections, that citizens are allowed to associate in different organizations (including
political parties) and to express their political opinions without fear of punishment. In short, they are making the observation that the country in question satisfies the requirements of what Robert Dahl has identified as polyarchy. In this sense, democratic governance has to do with the daily workings of a state’s juridical apparatus and with the processes that result in the adoption of the ordinary laws and policies. For instance, an unelected upper house (like the Canadian Senate) and the debate over districting in countries such as the United States are problems of democratic governance, as well as issues like the restriction of campaign finances, the legitimacy of judicial review, proportional representation, and the equal treatment of citizens by a state bureaucratic apparatus. In this respect, democratic governance is also related in important ways with the content of the fundamental laws: Does the constitution provide for universal suffrage? Does it establish an elected legislature? Does it respect basic liberties? If in the context of a particular constitutional regime questions like these are to be answer in the negative, democratic governance would be impossible.

The second dimension of democracy deals with other questions. It is not about the daily workings of the state’s political apparatus, but about the relation of the people to their constitution. It does not focus on the adoption or content of ordinary laws or on who should have the final word to interpret existent constitutional provisions, but on how constitutional regime came into existence and how it can be altered. These are questions about the ways in which citizens can participate in constitution-making and constitutional reform and, as I stated in the introduction, I think they should be the natural focus of the constitutionalism-democracy debate. With regards to constitution-making, the second dimension of democracy is incompatible with ‘given’ constitutions, regardless of how liberal or wise their content might be: the (democratic) constitution-maker should not find any principles already sedimented into the future constitutional regime. In the context of constitutional reform, democracy is incompatible with the idea of a constitution that, reputed to contain the right abstract principles, should never be meddled with. When important juridical transformations are needed, it mandates a process that attempts to reproduce a democratic constitution-making episode. Because the exercise of democracy at the level of the fundamental laws is episodical by nature, it is more compatible with extraordinary and highly participatory
processes which are difficult or impossible to put in practice at a daily level.\textsuperscript{xliii}

While Waldron's approach is more consistent with democracy than that of Dworkin's, both authors proceed as if democratic governance enclosed all forms of democratic politics. Waldron limits himself to give to the legislative assembly what he takes away from the judiciary, rendering the actual participation of citizens in framing the content of the fundamental laws unnecessary. His assertion that every time there is a disagreement about rights “the people whose rights are in question have the right to participate on equal terms in that decision”\textsuperscript{xliv} does not mean much if an ordinary legislature will do all the work and the only role of the citizens is that of electing legislators every few years. Waldron might not actually think that democracy can be exhausted in a legislature, but his defense of parliamentary supremacy and of the right to participate has nothing to say about democracy at the level of the fundamental laws. To be fair to Waldron, one might say that his approach does not exclude an account of the second dimension of democracy, and that, in fact, it would be entirely compatible with it. But this is precisely my critique: that his solution to the constitutionalism-democracy dilemma, which involves a problematic identification of people and legislature, operates only within the realm of democratic governance. Accordingly, it is not surprising that Waldron never addresses the fact that there might be more democratic and participatory procedures for taking important decisions than the simple rule of legislative majorities, especially for altering the content of the constitution and expanding (or limiting) the scope of fundamental rights.

\textbf{C. Popular Participation in Constitutional Change}

Ackerman avoids some of the problems that characterize Dworkin's and Waldron's approaches. First, his theory expressly rejects the 'rights foundationalism' of Dworkin and explicitly embraces democratic openness: the People should be able to change the constitution in whatever form it wishes, even in ways that circumvent the formal amendment procedure. Second, Ackerman rejects Waldron's 'monism', clearly distinguishing the People from the legislature. Failing to make this
distinction, he thinks, is to misunderstand America’s dualist democracy. Although Ackerman’s theory has important similarities with the distinction between the two dimensions of democracy, it has an important and decisive difference: it does not tell us if constitutional politics require the actual participation of citizens in important constitutional transformations, other than expressing their assent for change. Even if the periods of constitutional politics he identifies in American history were characterized by mass mobilizations (which is by no means clear), they were mostly driven by political elites. Ackerman’s take on popular participation in constitutional reform is mainly about getting the support of the People, about being able to speak in the People’s name. Constitutional politics is a complex process that involves Congress, the Executive, and the Supreme Court, and in which ordinary citizens only play the minor role of expressing their support for change (in regular elections in particular). xlv

In other words, his conception of constitutional politics does not come accompanied by mechanisms that would increase the participation of citizens (like constituent assemblies convened 'from below' and popular initiatives) in re-constituting the juridical system. The problem, of course, is that the maximization of popular participation is, together with democratic openness, one of the basic components of the democratic ideal. That democracy mandates popular participation in the production of all laws is almost axiomatic. Democratic self-government not only entails a “community of citizens -the demos- [that] proclaims that it is absolutely sovereign” (e.g. the ideal of democratic openness); it also involves an affirmation of the “equal sharing of activity and power” of all citizens. xlvii Democracy means ‘rule by the people’, and the people who invented it, the Greeks, institutionalized this very definition in their juridical arrangements. The most famous example is the 5th century Athenian assembly, which was open to all male, adult, and free citizens and met more than forty times a year. xlviii This institution rested on the premise that common people were not only competent to elect their governors, but to make political judgments about substantive issues. xlix

This is also how eighteenth century revolutionaries in Europe and the United States understood democracy: as the rule of everyone by everyone. li Modern critics, such as Jean Bodin and Adam Ferguson, also understood it in this way, and it is also why they opposed it. lii For them, popular participation was by its very nature problematic: it necessarily
included granting political power to the lower classes of society and that was considered by itself a very good reason for discomfort. The American Federalists were also in this ‘group’ and were not shy to show their fear of democracy. For instance, James Madison warned that “[pure] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.” The Federalists not only understood democracy as requiring popular participation, but offered ‘representative democracy’ as an alternative. Madison even argued that the voice of the representatives would be “more consonant to the public good than if pronounced by the people themselves, convened for the purpose,” and at some points seemed to recommend a large federation (as opposed to a confederation of autonomous entities) in order to make the kind of representative system he favored necessary. For both the Greeks and modern critics of democracy, the meaning and practical implications of this ideal were reasonably clear: democracy meant rule by the people and it required the adoption of institutions that would result in the participation of all citizens -to the extent possible- in all aspects of the activity of governing. For them the rule of the people extended to all matters (which is why popular participation represented a threat), including the creation and re-creation of the fundamental laws; no issue was to be removed from the democratic process.

It is not difficult to understand why popular participation is a basic component of democracy: it respects the equality of all citizens, recognizing their capacity to govern themselves by engaging in discussions about fundamental substantive issues. A process of constitutional change lead by experts or political elites expresses a discomfort with democratic self-government, suggesting that some people are better equipped to decide what is best for everyone. Popular participation, however, has been moved to a secondary plane by many influential accounts of democracy. The usual argument for this move is that, no matter how desirable, the maximization of popular participation is not possible in large and complex societies. That, however, might be true with respect to democracy at the level of daily governance (and in fact that is the focus of those theories), but not with respect to episodes of constitutional change. As such, any democratic theory of constitutional change must engage in the production of proposals directed at increasing
the role of ordinary citizens in the production of constitutional norms. A constitutional theory that does not make such an effort, but instead focuses on the production of arguments directed at showing that despite all evidence to the contrary democracy reigns in liberal constitutional regimes, hardly deserves the label 'democratic'. Unfortunately, Ackerman does present neither arguments nor proposals for an increase in popular participation, unless one understands popular participation to be exhausted in the actions of a government that claims to act with the support of ‘We the People’. Thus, while doing away with Waldron's identification of people and legislature, Ackerman proceeds in a highly theoretical way, without attempting to provide ways for flesh and blood human beings to directly deliberate and decide about the content of their constitution.

III. RECOMMENDATIONS FOR INSTITUTIONAL CHANGE

Each of the approaches to the constitutionalism-democracy dilemma considered in this paper suffers from an important democratic deficit. It is nevertheless possible to retrieve some democratic lessons from each. First, Dworkin's emphasis on rights reminds us that regardless of the limitations that some rights impose on popular decision-making, there is an important connection between democracy and rights. That is, there are some rights (such as freedom of association, the right to vote, and freedom of expression) without which any meaningful democratic exercise would be close to impossible. Second, Waldron's rejection of judicial review points toward an inescapable consequence of any democratic constitutional theory: important decisions should be, at the very least, in the hands of elected institutions. Third, Ackerman's dualist theory forces us to see that there is more to democracy than what happens inside parliaments, and that democratic constitutional change does not always take place through ordinary procedures. If one wants to construct a democratic constitutional theory, however, these insights will not do: it is necessary to pushconstitutionalism toward democracy instead of pulling democracy closer to it, to upset the 'balance' between these ideals in favor of the latter. This is precisely what the rest of the paper attempts to do: to move constitutionalism toward a terrain in which citizens, not untouchable
principles, rule. In this next and final part of the paper I will consider the institutional implications of the previous critique and advance a set of substantive proposals.

A. Weak Constitutionalism

Constitutional democracy is the dominant theory (defended, in different degrees and emphasis, by Dworkin, Waldron, and Ackerman) about what should be the relationship between constitutionalism and democracy, an attempt to balance these two ideals. But it is neither the only theory nor the only balance. It is possible to develop a conception of constitutionalism that is more sensitive to the ideals of popular participation and democratic openness. I call this conception weak constitutionalism, which serves as the backbone of the proposals that I will introduce in the next two sections. Weak constitutionalism, to use Unger’s phrase, sees the constitution as “the creation and property of a free and democratic people”, not as the exclusive domain of jurists and experts. Because it takes seriously the idea of democracy at the level of the fundamental laws, it does not perceive an active citizenry as a threat (even when its actions might result in the destruction of the established constitution and the emergence of a new one) but as the possibility of correcting existing injustices. Unlike the traditional version of constitutionalism, it does not see the liberal constitution as the incarnation of just and universal principles. On the contrary, by taking constitutions as what they inevitably are -the creation of human beings and the result of political struggle- it recognizes the necessity of keeping the constitutional regime open, or what is the same thing, the political terrain never closed. In what follows, I outline the basic premises of a theory of weak constitutionalism.

First, weak constitutionalism does not see constituent power (the power to create and re-create constitutional regimes) as a threat. Unlike Dworkin’s conception of the relationship between constitutionalism and democracy, it does not maintain the precedence of the constitutional forms over the constituent power of the people. It rests on the idea that there is a permanent and juridically unsolvable tension between the constitution and
the political power under which it rests. Instead of privileging the supremacy of the constitutional forms through a constitution that is difficult or impossible to change, it recognizes the constitution as higher law while leaving the door open for constituent power's future re-emergence. By so doing, weak constitutionalism does not seek to resolve this tension. On the contrary, it recognizes it as an inevitable consequence of having a constitution and makes it even more obvious by giving citizens the institutional means for acting together and take precedence over the constitutional text, even if only episodically. Put differently, it allows for the distinction between democratic governance and democracy at the level of the fundamental laws to assume a real and practical meaning.

Second, weak constitutionalism comes accompanied by the idea, absent in Waldron's approach, that important constitutional transformations should not be the work of ordinary institutions. These institutions are designed to operate at the level of daily governance, where the maximization of popular participation is not possible. Weak constitutionalism is not about a constitution that, just like ordinary law, can be easily changed by democratic majorities if the term ‘democratic majorities’ simply refers to a majority of state officials sitting in a legislature. When an important constitutional transformation is needed, it recommends that changes to the constitution be made through an exercise of popular participation similar to that present when the constitution was adopted in the first place (which does not necessarily mean that it will be easier to alter the constitutional text, but that the process for altering it must be highly participatory). The issue here is not simply one of representative versus direct democracy. Popular participation cannot be limited to a process in which experts draft the constitutional text and then submit it to a ‘yes’ or ‘no’ vote in a referendum; it involves a process in which citizens are allowed to propose, debate, and decide on the content of their constitution.

Third, weak constitutionalism rests on a participatory conception of the citizen. The citizen is not seen merely as a human being with rights that participates in politics through the election of officials every four of five years, but as someone who is allowed to take part of the (re)positing of the norms that govern the state. In other words, a citizen is someone who participates (not in Ackerman's sense but through actual extraordinary mechanisms) in the democratic legitimation of the constitutional regime and knows that, despite all the imperfections of such an order, it can be
Not only this conception of the citizen is more consistent with democracy but it might result in citizens developing a sense of identification with the constitutional regime, seeing the constitution as theirs, as their work-in-progress and not simply as the embodiment of the collective will of a mysterious People. When important constitutional transformations are needed, this active citizenry engages in different forms of political participation in order to create the political climate necessary for extraordinary mechanisms to be activated. The paradigmatic institutions of weak constitutionalism are the constituent assembly convened 'from below' and the popular initiative to amend the constitution, which I consider in the next two sections of this paper. Different versions of these institutions are already present in some constitutional regimes. I present them here as mechanisms that a few polities have adopted in order to ease the tension between constitutionalism and democracy and as examples of the types of proposals for change that a new wave of the constitutionalism-democracy debate should focus on.

B. CONSTITUENT ASSEMBLIES CONVENED 'FROM BELOW'

Constituent assemblies are usually convened for the adoption of a new constitution or for a complete constitutional overhaul. In their 'democratic variant' they are composed of directly elected delegates who have the responsibility of drafting a new constitution or a set of amendments to an already existing one (which are to be accepted or rejected by the electorate in a referendum). The extraordinary power of these bodies is usually defended through an appeal to their highly participatory and deliberative nature. Ideally, such an assembly is convened in an episode of intense popular mobilization for the specific task of altering the constitutional regime, elected in a way that maximizes the participation of all sectors of society (this is why some form of proportional representation is usually present in constituent assemblies), and it is not subject by any limits found in positive law. The constituent assembly avoids the most salient shortcomings present in the three approaches considered previously. As a mechanism for the exercise of constituent power, it allows the citizenry to approach the constitutional regime as radically open, susceptible to any
kind of modification. As an extraordinary body, it is based on a distinction between the ordinary legislature and the people, between constituted and constituent powers. Finally, its episodical nature facilitates intense popular participation in constitutional change: in its more democratic version (which I will consider below), it can be triggered by citizens even with the opposition of ordinary government.

There are at least two ways in which a constituent assembly can be convened. The first is the most common of all, and it is present in several constitutional regimes.\textsuperscript{lxvi} It consists of an extraordinary body convened by the ordinary representatives for introducing important changes to the constitution. Because it is convened by the government and not by the electorate, this kind of assembly only provides (from the perspective of the citizens) the mere possibility of constitutional re-making through an extraordinary and popularly elected body. There is, however, another method for convening a constituent assembly. The constituent assembly convened ‘from below’, \textit{triggered at the initiative of the citizenry} as opposed to that of the legislature, is a superior mechanism from the perspective of democracy and weak constitutionalism. In fact, it alters the conception of the relationship between constitutionalism and democracy under which most Anglo-American constitutional theorists operate by seeing the citizenry as an extra-constitutional power (the constituent power) that survives the adoption of a constitution. In that respect, it is alien to the traditional conception of constitutionalism, according to which a constitution signifies the beginning of the rule of law: the ‘channeling’ of constituent power through a settled (and ideally permanent) constitutional form.\textsuperscript{lxvii} The popular initiative to convene a constituent assembly contradicts all of this. It attributes the people (as the mythical creator of the constitution)\textsuperscript{lxviii}, the faculty of re-activating its constituent power and becoming the real founder of a radically transformed constitutional regime.

This mechanism is about recognizing a power superior to the constitution and giving the people, acting outside the ordinary institutions of government, the institutional means for exercising it. The convocation of such an assembly would be initiated by the collection of a number of signatures that could range, say, from 15\% to 20\% of the electorate.\textsuperscript{lxix} After the required number is collected, a referendum would take place in which the entire citizenry has the opportunity to decide whether the
assembly should be convened. If the majority votes in the affirmative, the
election of the delegates to the constituent assembly would take place.
From then on, the assembly would be 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, of
course, would have to be ratified by the electorate in an additional
referendum in order to enter into effect. Ironically, this type of mechanism
is beginning to appear not in the national constitutions of established
Western liberal democracies but in the recently adopted constitutions of
several Latin American countries. lxx

When triggered by the citizens themselves, a constituent assembly would
facilitate the realization of democracy at the level of the fundamental laws
and would come very close to embody the ideals of democratic openness
and popular participation. On the one hand, a constituent assembly, as a
means for the exercise of constituent power, has no competencies and can
make any change in the constitutional regime, no matter how
fundamental. lxIx It can even result in the (unlikely) abolishment or
modification of the rights that make any democratic exercise possible 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 beginning to end. For it to be a truly
open and participatory process, the onus that must be met in order to
activate the 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. It is true that after the initial stage of the process, a simple
majority of the electorate can reject the convocation of the constituent
assembly, but the public discussion about the future of the constitutional
regime that can take place around these exercises is by itself a valuable
democratic process.
C. The Popular Initiative to Amend the Constitution

Any democratic constitutional theory must recommend a participatory means to propose and decide on changes that do not involve major constitutional overhaul. This is the role that a popular initiative to amend the constitution would play in a constitutional regime based in the theory of weak constitutionalism: a more participatory version of the ordinary amendment process. This mechanism of 'direct democracy' is present in several European and Latin American constitutions, as well as in the constitutions of several states of the U.S. It usually works in the following way. A group of citizens drafts a proposal for amending the constitution and collects the required number of signatures (usually around 10% to 15% of the registered electors) in order to be able to present the proposal to the authorities. Once the proposal is presented and the signatures validated, governmental authorities are required to submit it to the people for their approval or rejection in a referendum. If the proposal is approved, it immediately becomes part of the constitutional text. The legislature is thus bypassed altogether (although in some countries, like Uruguay, the legislature can present a counterproposal to be submitted to the electorate together with the popular initiative), and the official authorities have no choice but to provide the administrative tools that allow citizens to exercise their power to change the constitutional text 'by themselves'.

Although this mechanism departs from the tradition of top-down, elite-driven, constitutional change, it does not involve the level of deliberation and participation that is present in constituent assemblies. Nevertheless, the fact that this kind of mechanism depends on the collection of the signatures of a great number of citizens creates the potential of activating different sectors of society and promoting public discussion. At the same time, however, it is more susceptible to manipulation by state officials or private interests than constituent assemblies. For instance, it would be relatively easy for a powerful economic actor to collect the required number of signatures and then launch a persuasive media campaign in order to obtain an affirmative vote in a referendum. Nevertheless, the influence of powerful economic actors in popular initiatives should not be exaggerated, and must be weighted with the power these actors already
have over ordinary legislators, as well as with the fact that this mechanism gives the citizenry an additional method for change. The scope of popular initiatives would be the same as that of the ordinary amending power. That is, they would be used to make those kinds of changes that the citizens deem necessary but that do not warrant the convocation of a constituent assembly. They would play the role, as John Calhoun once said of the amending power in general, of the *vis medicatrix* of the constitutional regime, the power to repair the constitution and not of radically transforming it. At the same time, they could be used to overrule the decisions of the courts regarding the constitutionality of ordinary legislation (if the system at hand allows for judicial review), and would become especially useful to adopt changes that a legislature would not be eager to adopt through the ordinary amendment procedure.

I want to end this final section with a brief comment about referendums. Referendums play a central role in popular initiatives to amend the constitution and are also present in the constituent assembly convened 'from below'. Democratic constitutional change, of course, is not equivalent to the celebration of a referendum. From a democratic perspective referendums are simply insufficient, and the widespread assumption that they are an expression of the ultimate sovereignty of the people, an exercise of constituent power, is based in an unfortunate confusion. A referendum presents citizens with a set of pre-designed alternatives that they cannot change, it does not 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, 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 might turn into a mere ‘plebiscitary’ exercise, in which voters simply express against or in favor of the government. A referendum does not guarantee the degree of discussion 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. Popular referenda can also be manipulated by the media and strong executives, they can send mixed messages when the turnout is low, and
they do not involve the deliberation present in representative assemblies.\textsuperscript{lxvii}

It is not surprising, then, that referendums have a bad reputation: from Napoleon to Hitler, they have been used as a way of legitimating authoritarianism and dictatorship.\textsuperscript{lxviii} Referendums are risky business, but I think they are worth the risk. They are the method through which the citizenry controls the work of the delegates elected to draft a new constitution or the proposals presented by a group of citizens, the mode in which the people decides that the constitutional changes in question are ‘theirs’. Of course, a referendum unaccompanied by public discussion is never a good idea. As Sieyes argued more than two hundred years ago, the exercise of popular sovereignty does not take place when people form their opinions at home and simply bring them to the voting booth: deliberation is essential.\textsuperscript{lxix} But in a process of constitutional change that involves a high degree of popular mobilization and debate, a positive referendum result can only add democratic legitimacy. Nevertheless, as Margaret Canovan has suggested, the added legitimacy “is due not so much to the referendum procedure as to the popular mobilization that has taken form around it”\textsuperscript{lxxx}. In this sense, referendums are a central, but flawed component of any democratic approach to the relationship between constitutionalism and democracy.

\section*{IV. Final Thoughts}

The constitutionalism-democracy debate did not live up to its potential. The general approach followed by North-American constitutional theorists, exemplified here through the works of Dworkin, Waldron, and Ackerman, was characterized by presenting constitutionalism as the democratic telos. Even theorists with strong democratic inclinations, like Waldron, embarked in a defense of parliamentary supremacy and directed their energies to attack judicial review, with the result of moving the participation of ordinary citizens in constitutional change to a secondary plane.\textsuperscript{lxxi} To approach the relationship between constitutionalism and democracy from a decidedly democratic perspective, I have argued, is to think about the ways in which citizens relate to the constitutional regime.
In that sense, the adoption or rejection of judicial review is not as central as the possibilities citizens have for proposing and deciding on important constitutional transformations. The institution of judicial review of legislation, in the context of democracy at the level of the fundamental laws, is not a problem as long as it, like every other institution and principle, is open to democratic reconsideration. A people might opt wrongly but through a democratic process to experiment with judicial review in the same way they might opt to experiment with other institutions that suffer from fundamental democratic deficits (notice, however, that in contemporary constitutional regimes this is not the case, and judicial review presents itself almost as a 'natural' and immutable feature of a just society).

Moving beyond the question of the legitimacy of judicial review allows us to think about the relationship between constitutionalism and democracy in a new light. We are forced to look at the relationship between citizens and constitutions, to the means of realizing democracy at the level of the fundamental laws, instead of focusing our attention on who should have the final word about the meaning of a constitutional provision. This, of course, raises the stakes exponentially: constitutional theorists are no longer supposed to decide which of two more or less predictive institutions should enjoy more power (the judiciary or the legislature), but obliged to test their confidence and prejudices about ordinary citizens. In other words, the choice becomes that of trusting the political creativity of the citizenry and proposing mechanisms to increase popular participation in constitutional change, or to openly declare an honest and well intentioned fear in giving political power to disorganized multitudes. It is an overly political decision that does not sit comfortably with the world of constitutions, principles, and reasoned adjudications, but that has the potential of producing a new way of thinking about what it means to propose a 'democratic constitutional theory' in the 21st century.

The proposals that I have considered here, the constituent assembly convened 'from below' and the popular initiative to amend the constitution, are examples, already present in a few constitutional regimes, of institutions designed to increase the role of citizens in the production and re-production of the laws that govern the state. In the same way, they are consistent with weak constitutionalism's insistence in permanently open constitutions. The adoption of institutions like these, if they ever
become a regular component of the constitutional practice of modern states, would signify a profound change from the 18th century tradition of looking at "constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched" and a move to a conception in which constitutional change appears as the possibility of correcting existing injustices, and citizens as democratic constitution-makers.

In discussing the work of these three authors, my aim is to present an example of three different tendencies in contemporary constitutional theory. The first of these tendencies, represented in Dworkin's identification of constitutionalism and democracy and his emphasis in the content of the constitution is also expressed in Stephen Holmes' theory of constitutional pre-commitment. See Stephen Holmes, Passions and Constraints: On the Theory of Liberal Democracy (1997). The second tendency, which I exemplify through the work of Waldron and that focus on the counter-majoritarian character of judicial review is also more or less present in the approaches of John Hart Ely, Mark Tushnet, and Richard Parker. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Mark Tushnet, Taking the Constitution Away from the Courts (2000); Richard D. Parker, Here the People Rule: A Constitutional Populism Manifesto (1994). In Canada, the work of Michael Mandel, the Charter Dialogue between Courts and Legislatures: Or Perhaps the Charter of Rights isn't such a Bad Thing After All, 35 Osgoode Hall Law Journal 75 (1997); Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (2001). Finally, the third tendency, represented here in Ackerman's defense of the distinction between people and legislature, is also present, in different degrees, in the work of authors such as Akhil Reed Amar and Sanford Levinson. Although these authors make a genuine effort of finding ways for a new non-Article V constitutional convention to be convened, they do not engage in proposing specific institutional changes for increasing the participation of ordinary citizens in the production of the fundamental laws. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Columbia L. Rev. 457 (1994); Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (2006). In Canada, Peter Russell has implicitly adopted Ackerman's approach in his analysis of Canadian constitutional history. See Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? (1993).


Ibid. at para. 76. It is interesting to note here that the 'political representatives' of the province of Quebec did not 'consent' to the 1982 constitutional changes (which among
other things created a new amending procedure).

iv Ibid. at para. 77-78.

v Fallo Núm. 17 of the Supreme Court of Justice of Venezuela, January 19, 1999.


vii FRANK MICHELMAN, BRENNAN AND DEMOCRACY 5-6 (1999).

viii There are, of course, other type of approaches that could be also considered as 'solutions' to the constitutionalism-democracy dilemma (in the sense that they seek to ease the tension between these ideals) that depart in different ways to the ones represented by Dworkin, Waldron, Ely. See for example Lawrence B. Solum, “Semantic Originalism”, *Illinois Public Law & Legal Theory Research Paper Series* No. 07-24 (November 22, 2008); W. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2007); Jack M. Balkin, “Framework Originalism and the Living Constitution”, *Yale Law School Public Law & Legal Theory Paper Series*, Research Paper No. 182 (February 16, 2008).


xi Ibid. at 143.

xii RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 134 (2006)

xiii DWORKIN, FREEDOM'S LAW, supra note 10, at 17.

xiv MICHELMAN, supra note ?, at 16-18.

xv Ibid.

xvi “We may better protect equal concern by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities”. Ibid. at 144. The problem is that this fear of constitutional change is not limited to the protection of the political rights and institutions that allow democracy to take place; it extends to the entire organization of government and the economy. Thus, when constitutional democrats talk about protecting or advancing democracy by a constitution that is difficult to change and protects basic democratic rights, they are protecting at the same time the traditional liberal system of governance which comes accompanied by a conception of the market as a central feature of democratic life. They are also making very difficult more profound constitutional transformations that, while protecting and expanding basic democratic rights, are incompatible with other aspects of liberal governance whose connection with democracy is weak or non-existent.

xvii Jeremy Waldron, *Can there be a Democratic Jurisprudence?*, NYU SCHOOL OF LAW, PUBLIC LAW RESEARCH PAPER No. 08-35, 1; ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996).

xviii JEREMY WALDRON, LAW AND DISAGREEMENT 213 (1999).

xix Ibid. at 250.

xx Ibid. at 232.

xv Waldron is a defender of the principle of majority rule as a superior democratic
decision making method because it is “neutral between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions”. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale Law Journal 1346, 1388 (2006).

**xxiii** Waldron, *Can there be a Democratic Jurisprudence*, supra note 17, at 7.

**xxiv** Waldron, *The Core of the Case Against Judicial Review*, supra note 21, at 1349.


**xxv** Bruce Ackerman, *We the People: Foundations* 6 (1991).

**xxvi** Bruce Ackerman, *Neo-Federalism?* in *Constitutionalism and Democracy*, supra note 6, at 163. Ackerman identifies three periods of constitutional politics in U.S. history (the founding, the Civil War amendments, and the judicial triumph of the New Deal).


**xxix** Ackerman, *Foundations*, supra note 25, at 72.

**xxx** *Ibid.* at 11. For Ackerman, constitutional protection of human rights depends of a prior democratic affirmation of higher law making. Nevertheless, Ackerman argues that it would be a good idea for the U.S. to follow the lead of the German Constitution and to entrench fundamental rights against abridgment by the People. Bruce Ackerman, *Rooted Cosmopolitanism*, 104 Ethics 516, 533 (1994).

**xxxi** *Ibid.* at 8.

**xxiii** I take the phrase strong democracy from Allan C. Hutchinson, *The Province of Jurisprudence Democratized* (2009) and Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (1984). I don’t think that the idea of ‘strong democracy’ is merely ‘one version’ of the democratic ideal; I think it is the only version that is consistent with the idea of the ‘rule by the people’.


**xxvi** For a defense of pre-commitment, see Stephen Holmes, *Precommitment and the Paradox of Democracy* in *Constitutionalism and Democracy*, supra note 6.


It is true that Dworkin's constitution can be expanded through judicial interpretation (what might make some constitutional theorists characterize it as being in a permanent state of flux, rather than as a fixed document). See for example Waluchow, *supra* note 8. Nevertheless, Dworkin's theory of constitutional interpretation involves important limits: “Even a judge who believed that abstract justice requires economic equality cannot
interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history of practice, or the rest of the Constitution”. DWORKIN, FREEDOM’S LAW, supra note 10, at 11. To the extent that there are certain changes that are simply out of the scope of a reasonable constitutional interpretation (at least at particular historical moments), giving judges the power to expand the constitution, of making constitutional principles “grow”, is not equivalent to the ideal of democratic openness (of course, even if it were, there would still be an objection based on the democratic aspect of democratic openness, since judicial interpretation is very far away from being a democratic and participatory exercise). For the limits to “living tree constitutionalism”, see also Edwards v. A.G. of Canada, [1930] A.C. 124: “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits” (emphasis added).

xix John Rawls’ view on the limits of constitutional reform is telling in this respect. Rawls maintains that to be valid, a constitutional amendment must do one of the following: (1) adjust basic constitutional values to changing political and social circumstances or incorporate a broader understanding of those values (e.g. the Nineteenth Amendment, which granted women the vote); (2) to remove weaknesses that come to light in subsequent constitutional practice (e.g. the Twenty-second Amendment, limiting the president to two terms). For Rawls, an amendment that goes beyond this objectives (like one repealing the First Amendment) should be declared invalid by the courts. JOHN RAWLS, POLITICAL LIBERALISM 238-239 (2005)

xlii Constitutionalists frequently forget that if there are some forms of oppression (e.g. slavery) that we consider unthinkable in contemporary liberal societies, it is not because there are laws or constitutions against such practices, but because it would be hard to imagine any group or individual with a political force capable of imposing them. See Cornelius Castoriadis, The Greek Polis and the Creation of Democracy in CASTORIADIS READER 283 (David Ames ed.) (1997). The existence of the institutions that are usually associated with democracy (e.g. freedom of expression, association, and the right to vote), in the end, are less the consequence of the entrenchment of the relevant legal and constitutional protections than a result of what may be identified as a “political culture of mutual respect”. WALDRON, LAW AND DISAGREEMENT, supra note 18, at 310. See also ROBERT DAHL, DEMOCRACY AND ITS CRITICS 172-173 (1989). Every constitutional regime unaccompanied by a democratic culture, no matter how liberal its constitution and how stringent its procedures for constitutional change, is always at risk. As Richard D. Parker has put it: “Even if you feel a desire to believe in ‘constitutionalism’ strong-and-pure, you should recognize that, like so many strong desires, this one can be satisfied only in the clouds of fantasy. There are no supra-political guarantees of anything. All there is is politics”. RICHARD D. PARKER, HERE THE PEOPLE RULE: A CONSTITUTIONAL POPulist MANIFESTO 113-114 (1994).

xvii DAHL, supra note 41.

xviii This distinction is not meant to suggest that democratic governance and democracy at the level of the fundamental laws are not related with each other: only the citizenry of a strongly democratic polity, accustomed to vigorous democratic debate and participation about the content of the ordinary laws, is likely to engage in the democratic reconstitution
of the fundamental laws. For the idea of democracy as episodical by nature, see Sheldon Wolin, *Fugitive Democracy* in *Democracy and Difference: Contesting the Boundaries of the Political* (Seyla Benhabib ed.) (1996).

xlv Waldron, Law and Disagreement, supra note 18, at 244.

xlv Consider, for example, Ackerman’s proposal of the ‘Popular Sovereignty Initiative’ as a democratically superior alternative to Article V: “Rather than aiming for an Article Five amendment, the vehicle for constitutional change should be a special statute that I will call the Popular Sovereignty Initiative. Proposed by a (second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court”. Bruce Ackerman, *We the People II: Transformations* 415 (1998).


xlviii This limitations on citizenship are of course unacceptable under today’s standards, but one must not forget that until the 20th century women did not have the right to vote in many countries, and that it was only a few decades earlier that slavery was abolished in some of the world’s ‘oldest democracies’.

xlviii Claude Ake, *Dangerous Liaisons: The Interface of Globalization and Democracy* in *Democracy’s Victory and Crisis* 282 (Alex Hadenius, ed.) (1997). It is not clear how many Athenians attended the assembly regularly. A good measure might be Thucydides’ statement that there were usually 5,000 citizens at the meetings, and the fact that the quorum required for some decisions was set at 6,000. See Christopher W. Blackwell, *The Assembly* in *Demos: Classical Athenian Democracy* (A. Mahoney and R. Scaife, eds.) (2003).

lix Meiksins Wood, supra note 34.


ii Bodin wrote described ‘popular states’ as “the refuge of all disorderly spirits, rebels, traitors, outcasts who encourage and help the lowers orders to ruin the great. The laws they hold in no esteem”. Jean Bodin, *Six Books of the Commonwealh* 192-193 (1955).

iii Ferguson, speaking during the 18th century, doubted that poor majorities, people who all their lives had confined their efforts to their own subsistence, could be trusted with the government of nations. Such men, he wrote: “when admitted to deliberate on matters of state, bring to its councils confusion and tumult, or servility and corruption; and seldom suffer it to repose from ruinous factions, or the effects of resolutions ill formed and ill conducted”. Adam Ferguson, *An Essay on the History of Civil Society* 187 (1978).

iv Ake, supra note 48.


vi Ake, supra note 48, at 283. See also Meiksins Wood, supra note 34, at 77. The problem here is not the principle of representation itself (and it is not my purpose to pose a conflict between direct and representative democracy), which is an inevitable part of any contemporary political system, but the idea underlying it in the context of the American experience: that the people should alienate their political power and that substantive decisions must be left in the hands of ‘others’.
The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations: In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice. In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters. See The Federalist no. 10, supra note 77. See also Ake, supra note 48, at 283 and Meiksins, supra note 34, at 77.

The most famous formulations of constituent power can be found in the works of Emmanuel Sieyes and Carl Schmitt. EMMANUEL JOSEPH SIEYES, WHAT IS THE THIRD ESTATE? (1963); CARL SCHMITT, CONSTITUTIONAL THEORY (2007). For a contemporary discussion of this concept, see Andreas Kalyvas, Popular Sovereignty, Democracy, and the Constituent Power, Constellations, Vol. 12, No. 2 (2005) and the essays contained in The Paradox of Constitutionalism: Constituent Power and Constitutional Form (Martin Loughlin & Neil Walker eds.) (2007).

Weak constitutionalism requires a degree of openness that is neither possible nor desirable at the in the context of an ordinary legislature. Legislatures, regardless of their relationship to the judiciary, operate under a constitutional regime. If a legislature is granted the power to freely alter the constitution (even if subjected to procedural hurdles not present in the adoption of ordinary laws) without the intervention of citizens, democratic legitimacy is affected: it should be ordinary citizens the ones deciding on the content of their constitution in a context of democratic openness. In addition, re-writing a constitution often means altering the ways in which legislative power is exercised (e.g. substituting a bicameral legislature with a unicameral one, introducing institutions such as recall referendums, etc.). Having the legislature deliberating and deciding about those kinds of changes would amount to a violation of the old principle that no one should be a judge in his own case. On this point, see Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 CARDOZO LAW REV. 661, 668 (1993).

Ibid. at 211.

For an overview of the discussion about the ways in which an active citizenship can

It is possible to label any kind of body as 'constituent assembly', even one composed by a set of 'delegates' appointed by a dictator.

The first of these two requirements are directly connected with what I identified earlier as the ideal of popular participation, and the third, to the ideal of democratic openness.

See for example the constitution of Russia (Article 135) and Colombia (Article 376). It can be argued that the convention contemplated by Article V of the U.S. Constitution is the equivalent of a constituent assembly. There are at least two problems with thinking about Article V in terms of constituent power, when this concept is understood in light of its democratic implications. The first problem has to do with the ideal of popular participation. Although an Article V convention could well result from pressure from below, the process to convene it is perfectly attuned to top down constitutional change. Moreover, there are no clear rules about how the members of this convention would be elected or whether it could be formed of ordinary legislators, and the text of the article does not require proposals to be ratified by the electorate. The second problem has to do with democratic openness: the process required for the convocation of an Article V convention is so difficult that it has never been used in more than 200 years of constitutional history. For an analysis of the difficulties in calling an Article V convention, see Levinson, supra note 1.


Mythical because, in practice, most constitutions are not adopted through highly democratic procedures and people are usually born into an already constituted constitutional regime.

The idea here is not to set the threshold too high so as to make the triggering of the constituent assembly impossible, but at the same time not setting it so low that a minority that does not have the support of large sections of the population (but perhaps plenty of economic resources) can easily initiate a process of constitutional reform. The few constitutions that allow for the convocation of a constituent assembly 'from below' require 12% - 20% of the signatures registered electors (Ecuador 12%, Venezuela, 15%, Bolivia 20%).

For instance, the constitution of Venezuela (Articles 347-348) and Ecuador (Article 444), as well as the new constitution of Bolivia recognizes the constituent assembly convened from below. The case of the Bolivian constitution is the most interesting, as its Article 408 not only attributes to ordinary citizens the power to convene a constituent assembly, but specifically states that important 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”.

I think that this mechanism, although contained in the constitution and in that sense part of the legally constituted order, should be understood as a means to exercise constituent power (at least in those moments in which it is used to radically transform the established constitutional order or to create a new one, in a context of intense popular mobilization). Moreover, I maintain this is consistent even with Schmitt’s theory of constituent power. What I mean by this is the following. Schmitt argued that constituent power could not be limited by positive law or regulated by any legal procedures; the will of the constituent subject was for him an “unmediated will”. Schmitt, supra note 60, at 132. In other words, no constitution can confer constituent power or prescribe the ways it is initiated: the constituent subject (the people in a democracy) can (re)determine its form of political existence whenever it decides such an action necessary. Ibid. But while constituent power activates itself through the making of a fundamental political decision, the “further execution and formulation of a political decision reached by the people in an unmediated form requires some organization, a procedure, for which the practice of modern democracy developed certain practices and customs. These are considered below [he goes on to consider (a) the national assembly that drafts and passes constitutional legislation; (b) The assembly that drafts constitutional norms followed by a popular vote or other express confirmation, direct or indirect, of the drafts by the state citizens with the right to vote; (c) constitutional conventions of federal states that are submitted to the people of each state; (d) general popular vote of a proposal or a new order and regulation of indeterminate origins”]. Ibid. at 132-134 (emphasis added). Otherwise, the constituent subject would remain in a state of powerlessness and disorganization, unable to transform its will into law.

See for example Article 138 of the Constitution of Switzerland and Article 331 of the Constitution of Uruguay. The increasing use of the popular initiative to amend the constitution in states of the U.S. has been the object of many critiques. One of the most pressing concerns is the development of a commercial industry devoted to the collection of signatures. See for example, Raymond Ku, Consensus of the Governed: The Legitimacy of Constitutional Change, 64 FORDHAM L. REV. 535 (1996). It is also interesting to note that while in the context of the several states of the U.S. the popular initiative has been used to adopt amendments that affect the rights of some groups (the most recent example being the constitutional prohibition of same sex marriage adopted in California in 2008) it has also been used to make modifications of a progressive nature. So, while in Colorado and Oregon the popular initiative was used in 1992 with the purpose of discriminating against homosexuals it was also used to recognize women’s suffrage in the 19th and 20th centuries. See David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. OF COLORADO L. REV. 13 (1995).

This mechanism has been used recently in Uruguay in order to stop the
privatization of state enterprises. For instance, in 2004, a popular initiative was used to include the ‘right to water’ in the constitutional text in order to prohibit the privatization of the water sector. In this particular case, after the signatures were presented to the government, the required referendum took place and 64% of the population voted in favor of the proposed amendments (with a participation of 90% of registered voters). See CARLOS SANTOS, AGUAS EN MOVIMIENTO: LA RESISTENCIA A LA PRIVATIZACIÓN DEL AGUA EN URUGUAY (2006). More generally, see David Altman, Democrazia Directa en el Continente Americano: ¿Autolegitimación Gubernamental o Censura Ciudadana?, POLÍTICA Y GOBIERNO, Vol XII, Núm. 2 (2005).

1xxiv See JOHN CALHOUN, THE WORKS OF JOHN CALHOUN (Richard K. Cralle ed.) (1968). There is a body of literature that focuses on the distinction between a constitutional amendment and the adoption of a new constitution (which usually is presented in the context of an argument in favor of the doctrine of unconstitutional constitutional amendments. That distinction if relevant here, but to consider it would require a new paper. See for example, William L. Marbury, The Limitations upon the Amending Power, 33 HARVARD L. REV. 223 (1920); Schmitt, supra note 60; CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA (1950); Walter Murphy, An Ordering of Constitutional Values, 53 SOUTHERN CALIFORNIA LAW REVIEW 703 (1980); WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION (1993); Gary Jeffrey Jacobson, An Unconstitutional Constitution? A Comparative Perspective, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, Vol. 4, No. 3 (2006). For a recent judicial consideration of the theory of unconstitutional amendments in a state of the United States, see Strauss v. Horton, ________ (2009), where the Supreme Court of California upheld the constitutional prohibition of same-sex marriage.

1xxv Consider for example the following statement by Pierre Trudeau, on 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, RENÉ LÉVESQUE AND THE PARTI QUÉBÉCOIS IN POWER 298 (2001).


1xxvii James Tully, The Unfreedoms of the Moderns in Comparison to their Ideals of Constitutional Democracy, THE MODERN LAW REVIEW, Vol. 65 (March 2002) at 213. There is empirical evidence that contradicts the common argument that referendums are easily manipulated by strong executives. For example, David Altman has demonstrated that in Latin America, referendums convened by the executive have around a 50% success rate. See David Altman, Democrazia Directa en el Continente Americano: ¿Autolegitimación Gubernamental o Censura Ciudadana?, POLÍTICA Y GOBIERNO, Vol. XII, Núm. 2 (2005).

Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. JOURNAL 364, 387 (1995). John Dewey expressed this view clearly when he wrote: “Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is merely majority rule…The means by which a majority comes to be a majority is the most important thing: antecedent debates, modification of views to meet the opinions of minorities…The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion”. *John Dewey, The Public and Its Problems* 207 (1954).

A notable exception here is Allan C. Hutchinson which, in addition to being a critic of judicial review, moves beyond the judicial/parliamentary supremacy dichotomy towards an emphasis in popular participation in ordinary law making and constitutional change (including a proposal for Jeffersonian assemblies to be convened every decade or so). Allan C. Hutchinson, *A ‘Hardcore’ Case Against Judicial Review*, 121 HARV. LAW. REV. FORUM 57, 58 (2008).