Global Constitutionalism (2022), 11: 3, 494–517
doi:10.1017/S2045381722000077

CAMBRIDGE
UNIVERSITY PRESS

RESEARCH ARTICLE

Weak constitutionalism and the legal dimension of the constitution

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Abstract
This article offers a critical discussion of two influential positions in contemporary legal and political theory, which will be referred to as 'political constitutionalism' and 'strong popular sovereignty'. Despite their important differences, both share a sceptical approach to the dominant constitutional practice in liberal democracies, hence they are brought together here under the term 'weak constitutionalism'. They both highlight the political dimension of the constitution, arguing that democratic legitimacy requires institutional arrangements that give the people and/or their representatives the last word in settling fundamental issues of political morality. By contrast, this article underlines the legal dimension of the constitution as the repository of the moral principles that make possible a practice of public justification in constitutional states. It is from this second constitutional dimension that the critical arguments are developed, both against the desire to take the constitution away from the courts and the aspiration to recognize the constituent power as pre-legal constitution-making faculty.

Keywords: democratic legitimacy; legal constitutionalism; political constitutionalism; strong popular sovereignty; weak constitutionalism

I. Introduction

In this article, I use the term 'weak constitutionalism' to refer to a range of positions in legal and political theory for which the elected powers and/or the people themselves should be able to define the content of constitutional requirements. This article will distinguish and discuss the two main versions of this theoretical approach: 'political constitutionalism' and 'strong popular sovereignty'. The former calls for a weak-form judicial review in which the elected powers can override the judicial specification of the content and scope of fundamental rights. The latter supports the exercise of the people's constituent power in an unfinished constitution-making process, either through the continuous activity of a materially unrestricted constitutional amendment power or by the popular convening of constituent assemblies in exceptional moments of radical constitutional transformation. My main thesis is that political constitutionalism is not an alternative to the current paradigm of constitutionalism, but rather a more balanced version of it; meanwhile, strong popular sovereignty represents an ambitious attempt to overcome the limits of this paradigm.

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https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

The article has the following structure. After a brief description of the two faces of weak constitutionalism (section II), I will prepare my critical reflections by showing the important role that the legal or regulatory dimension of the constitution plays in the contemporary constitutional paradigm (section III). I will then take as a reference the legal constitutional dimension to argue against both the desire to take the constitution away from the courts (section IV) and the aspiration to leave the constitution always open to the exercise of constituent power on the part of the people (section V). I will conclude by presenting some further thoughts on the kind of constitution that the constitutionalist paradigm demands (section VI).

II. The two faces of weak constitutionalism

Advocates of weak constitutionalism are concerned about the risk of tyranny by some powerful minority, and argue that the last word on the content of constitutional values and principles should be 'in the hands of a majoritarian body: namely, the people'.[1] However, apart from this common ground, the two main ways of conceiving weak constitutionalism uphold very different normative positions. On the one hand, *political constitutionalism* asserts that the legislative process, or a flexible constitutional amendment provision, should allow the elected powers to void judicial determinations of fundamental rights. For political constitutionalists, weak constitutionalism aims to ensure a *weak judicial review* in which the courts only have the 'penultimate word'[2] on the meaning and scope of constitutional substantive requirements. Despite their radical beginnings – equating the rights-based judicial review with judicial tyranny – the subsequent evolution of the debate has led some of these authors to recognize that judges can play a key role in the interpretation of fundamental rights in a democracy.[3] In fact, they agree that the exercise of a weak or non-definitive form of judicial review may bring democratic benefits. As Rosalind Dixon points out, courts can contribute decisively to democracy by demanding the elimination of 'blind spots' and 'burdens of inertia' in the process of law-making and law enforcement.[4] From this viewpoint, the crucial issue in reviewing the constitutionality of legislation is the extent to which the elected powers

[1]JL Martí, 'Is Constitutional Rigidity the Problem? Democratic Legitimacy and the Last Word' (2014) 27 *Ratio Juris* 550, 552.

[2]M Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 38 *Wake Forest Law Review* 670.

[3]This evolution can clearly be seen in some relevant authors of this trend of thought. Compare, for example, Jeremy Waldron's work, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18 with 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346 (hereafter, 'The Core of the Case'). While in the former article the author rejects judicial review in all its forms, in the latter he accepts a weak form judicial review where courts may not decline to apply legislation (or moderate its application) simply because rights would otherwise be violated. Another example can be found in Mark Tushnet's work, between *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, NJ, 1999) and *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, NJ, 2008). Unlike the first book, the second presents different judicial control techniques through which collaboration between legislators and judges can be channelled to make socioeconomic rights more robust.

[4]R Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, 402–06.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

retain the ability to decide whether judicial resolutions reflect the most reasonably weighted judgments on the rights at stake in each particular context. Accordingly, some of these authors support the substantive judicial review model established in Canada, New Zealand and the United Kingdom.[5]

On the other hand, advocates of *strong popular sovereignty* argue that the constituent power of the people should be recognized as a constitution-making faculty radically detached from any legal restrictions. From this position, weak constitutionalism implies a *weak constitution* that is left open to the further exercise of constituent power. Thus, whereas political constitutionalism stresses the value of democratic procedures in interpreting the contents of a relatively stable constitution, strong popular sovereignty underscores the importance of the mechanisms for constitutional change that ensure the identification of citizens with their constitution. In this way, strong popular sovereignty deliberately seeks to overcome the dominant conception of democratic constitutionalism.

Strong popular sovereignty has two different instances, representing the two alternative ways of achieving the sought-after identification of citizens with their constitution. *Constitutional micromanagement* requires a kind of constitutional amendment provision that allows the popular majority to easily change the constitution so they can establish their will as specifically as possible.[6] By making the amendment process – or the organ with the power of constitutional reform – equivalent to constituent power, constitutional micromanagement seeks to establish detailed and all-embracing constitutional mandates that minimize the margin of interpretation of all public authorities. A representative example of this model is the Indian constitution, which was drafted as an extremely detailed document and has been amended regularly by the parliament (by virtue of its self-attributed unlimited constituent power) to include specific and comprehensive constitutional legislation.[7]

Conversely, *democratic re-constitution* draws a stark distinction between the power of constitutional reform and the exercise of constituent power. According to this view, any constitution contains a certain core of fundamental principles that the constituted powers, including the power to amend the constitution, cannot change. The transformation of such a core of principles must take place exclusively through the exercise of constituent power by the people, without being subject to any legal restrictions. Thus, democratic legitimacy not only demands an open and participatory constitution-making episode, but also constitutional forms that allow the people to engage in fundamental constitutional changes whenever they deem it necessary to do so. This view underlies the relatively recent constituent processes that define the so-called New Latin American

[5]This model covers the Canadian Charter of Rights and Freedoms (1982), the New Zealand Human Rights Act (1990) and the United Kingdom Human Rights Act (1998). For a detailed study of this model, see S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013). Although the Canadian version is controversial among political constitutionalists, the New Zealand and British versions are generally considered to conform to the principle of parliamentary sovereignty. See, for instance, Waldron, 'The Core of the Case'(n 3) 1370; R Bellamy, 'Political Constitutionalism and Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86, 111.

[6]The term is borrowed from M Versteeg and E Zackin, 'Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design' (2016) 110 *American Political Science Review* 658.

[7]For an extensive analysis of the Indian model of constitutionalism, see S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, Oxford, 2011).

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constitutionalism, which has given rise to the current constitutions of Venezuela, Ecuador and Bolivia.[8]

III. The Constitution of the constitutional state

To prepare my critical response, I will begin by showing the relevance of the legal dimension of the constitution in the contemporary constitutional paradigm. The rationale for starting this way is that the two main basic versions of weak constitutionalism tend to put the legal constitutional dimension in the background, emphasizing the *political constitution* instead. For supporters of weak constitutionalism, the constitution is above all the *constitutive* act that establishes the political process and allocates the competencies among public authorities. Interpreted from this perspective, the constitution does not play any relevant role in legal reasoning, as it is not considered to contain a set of norms that need to be interpreted and enforced by legal practitioners. Rather, it is up to the political actors and/or the people to control and enforce constitutional requirements.

However, the kind of constitutionalism that operates today in liberal democracies also includes the *legal or regulatory* dimension of the constitution. From its legal dimension, the constitution appears above all as the supreme norm of the legal order, which involves a notion of constitutional effectiveness that is different from the political constitution.[9] While the political dimension seeks to ensure the binding nature of constitutional values and purposes through the appropriate design of institutional arrangements that make the desired behaviour inevitable, or highly likely, the legal dimension is intended to transform the values and purposes of the constitution into norms that guide the action of public authority and social life in general. The constitution as the supreme legal norm permeates ordinary legal reasoning, since it is the primary source of regulatory standards through which public decisions can substantially be assessed.[10]

The two constitutional dimensions receive their respective normative foundation from two basic postulates: the principle of collective self-determination and the principle of limitation of political power. The divergent trend of these two principles explains the tensions within constitutionalism.[11] My aim in this section is to outline an integrative idea of these two principles based on the tradition of democratic egalitarian liberalism.[12] In short, my explanation appeals to the common root of both principles in the value of individual freedom, the protection of which is the ultimate purpose of the legal-political order in a constitutional state.

[8]See R Viciano and R Martínez, 'El Nuevo Constitucionalismo Latinoamericano: Fundamentos para una Construcción Doctrinal' (2011) 9 *Revista General de Derecho Público Comparado* 1.

[9]M Troper, 'La machine et la norme. Deux modèles de constitution', in *La Théorie du Droit, le Droit, l'État* (Presses Universitaires de France, Paris, 2001), 148–53.

[10]J Aguiló, 'Cuatro pares de concepciones opuestas de la Constitución', in J Aguiló, J Ruiz Manero and M Atienza (eds), *Fragmentos para una teoría de la Constitución* (Iustel, Madrid, 2007), 52–53.

[11]These tensions are reflected in the opposing conceptions of the constitution in contemporary debate. In very general terms, it can be said that while 'proceduralist' or 'negotiation-based' conceptions emphasize the political or constitutive dimension of the constitution, the 'substantive' or 'principle-based' conceptions stress its legal or regulative dimension.

[12]In my exposition, I will not follow any particular theoretical reconstruction of this tradition. My sole intention is to reflect the moral core included in the constitution of a liberal democracy. As I will argue, this moral core is supposed to be shared by the different moral and political positions that coexist in a democratic constitutional regime, making constructive communication between them possible.

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The political dimension of the constitution reflects the principle of self-determination. In its more widely accepted form, this principle means that the people of a country have the right to draw up their own political constitution without any interference from the outside. Now, according to the liberal doctrine behind constitutionalism, the entitlement of self-determination does not belong to 'a people' with its own identity, but is vested in anyone who lives permanently within a country's territory, regardless of the homogeneity or diversity of that population in ethnic or cultural terms. Self-determination is not based on a people's interest in preserving their culture or way of life, nor on the individuals' interest in protecting their membership of ethnic or cultural groups. From a liberal approach, self-determination 'is not the right of a group; instead it comprises the rights of millions of individuals participating in a common exercise of collective decision, under conditions of equality and fairness'.[13] This approach is based on an individualistic foundation of political community. The point of working out a political constitution granting public authorities the right to establish, interpret and enforce legal norms is to enable a type of social interaction in which individuals can enjoy their mutual independence.[14] The existence of public authority is justified to the extent that its main purpose is to create the conditions for individuals to determine and pursue their own purposes within the interdependence of social life.

From this approach, public authority is justified because in the absence of a legal order individuals could not interact with one another on terms of equal freedom. Thus, Immanuel Kant defines the rule of law as the 'freedom's general law' that makes it possible for everyone to exercise free will in the world of human relationships.[15] For Kant, the primary mission of the state is to coordinate the activities of its citizens, resolving their disputes authoritatively, regardless of the moral judgement that its norms may provoke in them.[16] The justification for public authority to establish, interpret, and implement general norms rests on the fact that it is the only way to enable individuals to pursue their own purposes despite their differing and incompatible conceptions of right and justice. If there is no public authority, private persons cannot interact with each other on terms of equal freedom without being subject to the arbitrary power of others. Coercion is justified as 'the prevention of a hindrance to freedom' – that is, under a principle 'connecting universal reciprocal coercion with the freedom of everyone'.[17]

Now, the legal order has to respond to the fundamental right of citizens to just governance, which means that public authorities must produce, interpret and implement their norms according to the ultimate purpose that justifies their authority. All branches of government must act in such a way that the existing legal system protects and promotes as much as possible the independence of any person subject to that system. The internal justification of public authority is the source of the moral standards relevant to assessing

[13] J Waldron, 'Two Conceptions of Self-Determination', in S Besson y J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2012) 408.

[14] See F Neuhouser, 'Freedom, Dependence and the General Will' (1993) 102 *The Philosophical Review* 363, 392. As the author shows, Rousseau's ethical state is the first theoretical reconstruction of the rule of law as an order based on maintaining the conditions for individual independence in social life.

[15] According to Kant, a legal system is 'the aggregate of those conditions under which the will of one person can be conjoined with the freedom of the other in accordance with a universal law'. I Kant, *Metaphysical Elements of Justice* (2nd ed, J Ladd trans, Hackett, Indianapolis, IN, 1999) 30.

[16] See J Waldron, 'Kant's Theory of the State', in P Kleingeld (ed), *Immanuel Kant. Toward Peace and Other Writings on Politics, Peace, and History* (Yale University Press, New Haven, CT, 2006) 188, 192.

[17] Kant (n 16) 31.

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the adequacy or justice of the publicly authoritative arrangements and the content of their legislation.[18] Those standards are the substantive moral principles that regulate the relationship between a government and its citizens, and are the content of the legal dimension of the constitution in constitutional states.

In the contemporary constitutional state, the principle of limitation of political power has evolved into a complex conception of how law disciplines power. On the one hand, the once uncontroversial idea that rights impose only negative obligations on the state has been transformed with the acknowledgement of socioeconomic rights and positive obligations. As Kai Möller has made clear, national constitutional rights share a 'global model' composed of some important structural similarities. Under this model, the point of constitutional rights 'is not to disable government', but rather to 'protect the ability of persons to live their lives according to their self-conceptions; thus, they are based on the value of personal autonomy'.[19] On the other hand, in constitutional states the validity of legal norms depends not only on their approval in accordance with legally prescribed organs and procedures, but also on their substantive consistency with the constitutional principles. This last point has come to make the proportionality test the central remedy in judicial adjudication when a legislative provision or executive action interferes with a constitutional right.

The legal constitution covers the substantive requirements that make it possible to assess the degree to which the legal system and the actions of the public authorities are in line with their main purpose – that is, to create and implement a system of equal freedom. Constitutional principles regarding justice and human dignity are evaluative or justificatory criteria that are used by elected politicians and legal practitioners to resolve social conflict through legislation and adjudication. They make possible a discursive or communicative practice through which the political community can produce, interpret and enforce legitimate legal norms.[20] In this sense, liberal public morality implies *a particular conception of legitimate legal authority*: law can claim legitimate authority only if its norms are demonstrably justifiable in terms that free and equal persons can accept.[21]

[18] J Weinrib, Dimensions of Dignity. *The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, Cambridge, 2017) 57–65. The author defends a 'unified theory' in which 'the principle of authority' and 'the principle of justice' are not in conflict because each one is incumbent on a different party to the public law relationship: while the former justifies the duty of citizens to obey the law, the latter grounds the government's duty to bring the legal order as a whole into conformity with the independence of each person bound by it.

[19] K Möller, 'From Constitutional to Human Rights: On the Moral Structure of International Human Rights' (2014) 3(3) *Global Constitutionalism* 381 (emphasis in original). Besides positive obligations, Möller describes the global model of constitutional rights with three other fundamental features: the inflation of rights, their horizontal effect and the proportionality test in their adjudication. See K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) *Ch* 1.

[20] In broader terms, this is the idea that underlies the communicative (or interactive) theories of legislation: see WJ Witteveen, 'Turning to Communication in the Study of Legislation', in N Zeegers, WJ Witteveen and B van Klink (eds), *Social and Symbolic Effects of Legislation Under the Rule of Law* (Edwin Mellen Press, Lewiston, NY, 2005) 17, 30–32; B van Klink, 'Legislation, Communication, and Authority: How to Account for the Bindingness of Law?' in AD Oliver-Lalana (ed), *Conceptions and Misconceptions of Legislation* (Springer, Berlin, 2019) 67, 70–72. According to these theories, law articulates community values in such a way as to provoke deliberation, interpretation and law-making in the community itself.

[21] See J Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) 137. Here I follow Rawls' conception of legitimacy, which can be described as both democratic and liberal. This does not mean that I assume his conception of constitutional rights and judicial review, which in my view does not conform to the contemporary constitutionalist paradigm.

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The legal dimension of the constitution shapes the rule of law as 'a discipline of public practical reasoning that provides a framework and forum for critical exploration as well as authoritative determination of public norms'.[22]

Authors who highlight the political dimension of the constitution tend to isolate the legal system from any substantive moral purpose – apart from the principle of self-government. Richard Bellamy, for example, on the basis of a republican conception of freedom as non-domination, explains that the separation of law and morals is a necessary implication of the reasonable disagreement around what the deep values of the community and its legal system should be. In a context of moral pluralism, the author says that 'attempts to forge consensus are more likely to solidify domination than dissolve it'.[23] The only way to avoid the domination of arbitrary rule is by conceiving the rule of law as the 'democratic self-rule of persons', which for the author means 'merely the reciprocal giving and responding to the reasons of others that comes from using public procedures that treat all equally'.[24] According to his view, moral disagreement implies the impossibility of justifying collective decisions on a shared political morality. No public form of reasoning can involve a common mode of justification. Democratic processes only serve as a means to legitimize collective decisions by acknowledging the equal moral right of all citizens to be considered as autonomous reasoners.

By contrast, constitutionalism assumes that the legal order of a constitutional state is inextricably linked to a certain substantive morality that makes possible a common mode of justification. Its link to morality makes constitutional legality an appropriate discipline to ensure the integrity of democratic processes and their results. The integrity of democratic processes cannot be taken for granted, but must be guaranteed before they can be used to settle disagreements on fundamental questions. This is the beginning of an 'instrumentalist' or 'epistemic' defence of judicial review based on the pathologies of democratic processes. Some political constitutionalists oppose giving the courts the role of guarantors of a fair democratic process because it allows judges to impose their own views on rights over the views of the legislature. However, this criticism does not take into account that behind the courts are citizens who seek to be heard on collective decisions that, from their point of view, cannot be publicly justified.[25] As some republican authors have pointed out, it is possible to make a legitimacy-based or non-epistemic case for judicial review.[26] The right to legal contestation by citizens has democratic significance as a complementary form of political participation. The same right to be heard as an autonomous reasoner is behind both the democratic process and the judicial review process. Both are mechanisms through which citizens can be co-creators of their own law. I will develop this point further in the next section. Here I want to stress the relevance of the legal constitution for understanding the role of judicial review in a democratic society.

[22]G Postema, 'Positivism and the Separation of Realists from their Scepticism: Normative Guidance, the Rule of Law, and Legal Reasoning', in P Cane (ed), *The Hart–Fuller Debate in the 21st Century* (Hart, Oxford, 2010) 271.

[23]RBellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007) 178.

[24]Ibid 82.

[25]A Harel and A Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review' (2012) 10 *International Journal of Constitutional Law* 950.

[26]P Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford University Press, Oxford, 1997); T. Hickey, 'The Republican Core of the Case for Judicial Review' (2019) 17 *International Journal of Constitutional Law* 288.

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The meaning of a rights-based judicial review is contingent on the legal dimension of the constitution. Only if one assumes that the constitution, as a legal norm, encompasses a system of legitimation based on a set of common moral principles can one perceive the role of judicial review in establishing a *culture of justification* – namely, a legal and political culture where public decisions are subjected to a public scrutiny of reasons in light of the latest commitments of a liberal democracy.[27] More specifically, a rights-based judicial review contributes to transforming the rule of law into a culture of justification in three complementary ways. First, judicial review allows citizens to contest public decisions when they think, and can reasonably prove, that their rights have been violated. Second, the institution of judicial review implies a 'public reason oriented justification'[28] – a public process for the assessment of public reasons – where the court's role consists of asking questions and evaluating whether the reasons provided by public authorities are consistent and plausible in a free and democratic society. Third, the institution of judicial review ensures the impartiality and independence essential to making this delicate operation immune from the pressures of ordinary political process.[29]

Furthermore, the legal dimension of the constitution also shows the futility of appealing to the people as a primary constituent power in order to account for the democratic legitimacy of the constitution. For the system of legitimacy contained in legal constitution, popular sovereignty is inherent in a well-ordered society in which the will of the people is the outcome of a democratic process governed by constitutional rules and constraints. By contrast, advocates of strong popular sovereignty invoke the idea of the people as the bearers of legally unlimited power to ground a democratically legitimate constitutional order. The two forms of strong popular sovereignty seek to always leave the constitution open to the popular will, thus going against the aspiration to permanence characteristic of modern constitutionalism. However, as I will show, the legal dimension of the constitution implies that certain content is necessary for the very existence of a democratic constitution. Aspiration to permanence is essential to the ideal of the rule of law. In this sense, the two forms of strong popular sovereignty are attempts to replace the rule of law with rule by the people, either by identifying the constituent power with the power to reform the constitution or through constitutional mechanisms that allow the people to engage in constitutional replacement when and if they wish.

IV. Reply to political constitutionalism

For political constitutionalists, even when there is a firm commitment on the part of most members of society to some list of basic rights, persistent and reasonable disagreement over the content and scope of those rights prevents them from being used to legitimize collective decisions. Rights-based judicial review of public decisions requires an uncontroversial standard by which one could measure the moral correctness of decisions about rights. However, since that standard is unavailable in the context of moral disagreement,

[27] D Dyzenhaus, 'What is a Democratic Culture of Justification?', in M Hunt, H Hooper and P Yowell (eds), *Parliament and Human Rights. Redressing the Democratic Deficit* (Hart, Oxford, 2015) 425. The particular institutionalization of this legal culture, and the specific role of the courts within it, will depend on the political circumstances and constitutional tradition of each society.

[28] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142.

[29] Ibid 154–55.

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the only way to ground legitimate law is by appealing to process-oriented reasons.[30] We can accept a collective decision as legitimate and binding even though we do not consider it a substantively just decision when it is the product of a fair decision-making process. Democratically elected branches should therefore retain responsibility for settling issues of rights embedded in legislation, as the democratic procedure gives every citizen an equal voice and thereby ensures that even decisions with which they disagree can be accepted as legitimate by all.

In this way, some political constitutionalists have considered that the argument from disagreement concludes in a purely procedural conception of democratic legitimacy.[31] However, any meaningful reference to legitimacy requires some kind of substantive presumption among participants regarding the value of the procedure chosen to settle their disagreement.[32] Most importantly, the same substantive requirements underlying the decision-making process should also be included as process-independent criteria for assessing outcomes.[33] This 'bounded proceduralism' is especially relevant when it comes to a procedure for settling reasonable disagreements on human rights. As Sandra Fredman points out, 'Human rights are not simply open moral questions; they are based on a consensus which has developed over time and is universally accepted as to what the fundamentals of being human in a political society require.'[34] This prior deliberative consensus is the minimum framework within which the democratic decision-making process must take place.

The argument from disagreement inevitably becomes self-defeating if it applies to a reasonable disagreement over this minimum deliberative consensus.[35] Indeed, how could the democratic process arbitrate disagreement over rights when a minority reasonably challenges that process on the grounds that it does not meet such a minimum standard? Therefore, the argument from disagreement does not allow denying the legitimacy of judicial review in all its possible forms. If democratic procedure must satisfy a certain threshold of human rights compliance before it can legitimately arbitrate the remaining disagreements over rights, there seems to be no democratic reason not to entrench that threshold constitutionally and to have it enforced by the courts.[36]

According to some political constitutionalists, a weak-form judicial review can be legitimate in light of the presence of specific institutional pathologies that do not allow the legislative and electoral systems to give equal voice to all citizens.[37] Yet it is one thing to concede that there could be pragmatic or contextual reasons for accepting a rights-based

[30]Waldron, 'The Core of the Case'(n 3) 1371.

[31]For some powerful defences of complete removal of judicially enforced substantive standards from biding law, see JAG Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1; T Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 *Journal of Law and Society* 6; A Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005).

[32]S Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart, Oxford, 2005) 221.

[33]Aguiló (n 10) 49.

[34]S Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote' in M Hunt, H Hooper and P Yowell (eds), *Parliament and Human Rights. Redressing the Democratic Deficit* (Hart, Oxford, 2015) 447, 452.

[35]See L Vinx, 'Republicanism and Judicial Review' (2009) 59 *University of Toronto Law Journal* 591, 593.

[36]For a defence of the role of courts in protecting both the preconditions of a deliberative democracy and personal autonomy, see CS Nino, *The Constitution of Deliberative Democracy* (Yale University Press, New Haven, CT, 1996) 187–216.

[37]See Waldron, 'The Core of the Case'(n 3) 1370; J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) 94.

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judicial review in a democratic society, but quite another to assert its democratic legitimacy as a matter of principle. In my view, there are process-related reasons that prove the democratic legitimacy of rights-based judicial review. The first part of my response to political constitutionalism will therefore be to show that constitutional justice is as fundamental a form of political participation as the electoral process based on equal voting rights. In the second step, I will question the idea that a weak-form judicial review refers to some institutional arrangement aimed at displacing the courts from the ultimate definition of rights. By contrast, I will argue that a democratic constitutional review – that is, without judicial supremacy – does not depend so much on constitutional design, but rather on how courts and legislators operate in practice as partners in the same undertaking while respecting each other's competence and legitimacy.

The democratic legitimacy of rights-based judicial review

In the contemporary constitutional paradigm, the democratic legitimacy of a rights-based judicial review comes from a qualified connection between constitutional justice and public deliberation.[38] This type of connection is normative in a double sense: not only should judges be attentive and close to public opinion, but the citizens must also share the same kind of arguments and values as the judges.[39] Robert Alexy has designated this double requirement as 'deliberative representation'. For Alexy, when constitutional justice overrules a statute or declares its incompatibility with fundamental rights, it represents the values and arguments that citizens would approve of if they took part in a rational legal-constitutional discourse.[40] In a similar sense, Lawrence Sager describes constitutional justice as a 'deliberative mode' of participating in the process of resolving disputes over what rights members of that community have.[41]

In my view, these arguments do not adequately underline the democratic significance of judicial review. The rationale is that these arguments conceive of deliberative representation or participation as non-political, namely as the price to be paid in terms of democratic self-government to enhance the protection of rights. Judicial review would therefore be a non-participatory decision-making mechanism, the sole merit of which would lie in its contribution to the quality of political decisions. Now, even if judicial review can be shown to ensure that collective decisions are in fact (or most likely) correct

[38]For a defence of constitutional justice as a decisive factor in the promotion of a vigorous deliberative democracy, see R Alexy, 'Balancing, Constitutional Review and Representation' (2005) 3 *International Journal of Constitutional Law* 572; V Ferreres, 'A Defense of Rigidity', in P Comanducci and R Guastini (eds), *Analyses and Right* (Biappichelli, Turin, 2000) 45–68; P Häberle, *Die Verfassung des Pluralismus: Studien zur Verfassungstheorie d. offenen Gesellschaft* (Athenäum, Königstein, 1980). All these authors consistently point out that the legitimacy of constitutional justice requires that the courts' arguments be connected to public debate and may reasonably be expected to be accepted without coercion by all citizens as free and equal after a public and deliberative process of justification.

[39]Since this defence of judicial review asserts a normative connection between judicial and public opinion, it cannot be seriously challenged by a critique based on an empirical analysis of that connection. For a critique of Alexy's theory through the analysis of the actual presence of judicial decisions in the media, see D Oliver-Lalana, 'Representación argumentativa y legitimidad democrática en las decisiones judiciales', in L Clérico, JR Sieckmann and AD Oliver-Lalana (eds), *Derechos fundamentales, principios y argumentación. Estudios sobre la teoría jurídica de Robert Alexy* (Comares, Granada, 2010) 147–76.

[40]See Alexy (n 43) 580.

[41]Lawrence G. Sager, *Justice in Plainclothes. A Theory of American Constitutional Practice* (Yale University Press, New Haven, CT, 2004) 203.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

or reasonable, it can only be considered legitimate from a democratic point of view if it helps to manifest them to people as such.[42] Hence, the proper way to show the democratic legitimacy of a rights-based judicial review is to explain how it contributes to enhancing political participation.

When it comes to the democratic legitimacy of the public decision-making process, the key principle is to ensure the free and reasoned assent of all those who will be bound by its outcomes. This is the main idea of procedural equality. As mentioned, collective decisions will be entitled to reasoned acceptance by all, including those who disagree with them on the merits, only if the decisions are brought about under a framework of rules and constraints that grants equal rights of participation to all citizens. Consequently, the relevant contribution of judicial review to democratic legitimacy will be related to the extent to which this institution broadens the free and reasoned acceptance of collective decisions – that is, how it helps to enhance the possibilities for citizens to see themselves as the authors of the legal norms to which they are bound. To show this, we must stress that judicial review 'is triggered by citizens' right to legal contestation'.[43] If we adopt the citizens' perspective, judicial review appears as an institution of democratic control that completes the electoral accountability of political authorities. While equal voting rights enable citizens to have equal opportunities to select those who make the political decisions to which they will be subject, judicial review allows citizens to challenge the acts of public authorities that limit them from exercising their constitutional rights. Entrenching rights in a judicially enforced constitution is a way of empowering people by a 'second channel of political action, parallel to parliamentary politics'.[44]

In Waldron's view, when a democratic process of decision-making is settled in good shape, judicial review implies 'a mode of citizen involvement that is undisciplined by the principles of political equality usually thought crucial to democracy' because people tend to engage in judicial review 'when they want *greater weight* for their opinions than electoral politics would give them'.[45] In order to respond to this criticism, it seems necessary to point out how the principle of political equality actually disciplines judicial review. And in this respect, three considerations can be put forward. First, every citizen has the same right to legal contestation. Just as equal voting rights reflect a commitment to the idea that every citizen's vote counts equally, equal access to judicial review expresses a commitment that every citizen has an equal right to demand justification in terms of public reason for any collective decision that limits their fundamental rights.

Second, because some people find it difficult to make their voices heard in parliamentary politics, due to differences in wealth, education or popular support, the institution of judicial review may be a means of achieving more effective equal participation for all.[46] Furthermore, given the inevitable presence of strong moral and political disagreements in a democratic society, judicial review is a required complement to the political process in

[42] See J Cohen, 'Deliberation and Democratic Legitimacy', in J Bohman and W Rehg (eds), *Deliberative Democracy* (MIT Press, Cambridge, MA, 1997) 67, 73.

[43] C Lafont,'Philosophical Foundations of Judicial Review', in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016) 265, 268.

[44] J Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27, 42.

[45] Waldron, 'The Core of the Case'(n 3) 1395 (emphasis added).

[46] Raz (n 44) 43: 'The politics of constitutional rights allows small groups easier access to the centres of power, including groups which are not part of the mainstream in society.' In a similar vein, see A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451, 481.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

order to ensure the effective participation of all citizens.[47] Even if there are reasonably well-functioning democratic institutions operating under a genuine commitment to the idea of individual and minority rights, there is no way to ensure that the political process provides reasoned justifications for every complaint that citizens may make. This is not only because it is impossible to anticipate the full impact of each piece of legislation on the fundamental rights of different citizens as a result of their application in changing circumstances; it is also because if the majority considers that minority or unpopular positions do not have much merit, they may well not try to refute them by offering publicly available reasons. However, unlike citizens and the legislature, judges must assess the claims and arguments of the litigants, having to provide a reasoned response even when they ultimately find that the challenged measure is compatible with the protected rights and therefore resolve against the litigants.

Third, citizens as rights-claiming litigants do not receive 'greater weight for their opinions'. Although judicial review expands citizens' political participation, it does not give them any additional authority to make collective decisions on a particular issue. The right to legal contestation guarantees that the outcome of the political process can be qualified as a 'a collective judgment of reason'[48] on the scope of rights in the specific circumstances addressed by the legislation. Judicial review contributes in this way to securing the voluntary and reasoned acceptance of collective decisions by all citizens, including those who consider such decisions to be unfair or incorrect. When judges strike down a piece of legislation because it violates a constitutional right (in a strong-form judicial review) or declare it incompatible with protected rights (in a weak-form judicial review), they do not attach greater weight to the opinions of litigants regarding what justice and good policy require, but rather declare that the litigants were right to argue that public authorities acted beyond the boundaries of reasonableness. Conversely, when judges rule against the litigants what they are actually saying is that the impugned measure can be justified in terms of reasons that litigants could reasonably accept – even if, in fact, they do not. Again, this does not mean that the litigants are wrong about what justice or the common good requires, but only that they do not adequately reflect what can be demonstrably justified as reasonable in a democratic society.

In summary, a rights-based judicial review grants additional power to citizens by allowing them to initiate a constitutional conversation about measures that the legislature has not considered to be rights-related or where it has not foreseen their impact on the rights of certain citizens. This kind of political empowerment is independent of the outcome of the litigation. Regardless of whether litigants win or lose, the legal process provides them with the opportunity to frame the public debate on a particular measure as a matter of fundamental rights. Issues such as prisoners' voting rights[49] or gay marriage,[50] for example, were only considered rights-related by legislators and public opinion when they were subject to substantive judicial review. Contrary to the opinion of its critics (and some of its advocates), judicial review does not isolate issues from politics, but

[47] Lafont (n 43) 274.

[48] Kumm (n 28) 168.

[49] For the role of the courts in constitutionalizing the vote of prisoners in South Africa and the United Kingdom, see Fredman (n 34) 455–68; in Canada, see Dyzenhaus (n 27); and in New Zealand, see A Geddis, 'Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed' (2011) *New Zealand Law Review* 443.

[50] See Lafont (n 43) 278–79.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

constitutionalizes political debate, forcing the elected authorities to justify certain issues taking into account the rights involved.

A democratic culture of justification

My second critical consideration about political constitutionalism concerns the extent to which we should rely on constitutional design to avoid judicial supremacy. In my view, the strength of the courts in interpreting fundamental rights derives from the legal dimension of the constitution. As I explained in section III, it is from this constitutional dimension that we can appreciate the role of rights-based judicial review in transforming the rule of law into a culture of justification. It therefore does not seem appropriate to seek to avoid judicial supremacy through any wise institutional arrangement in the political constitution that guarantees the final word on fundamental rights to elected powers. In my opinion, the best way to address the empowerment of judges in constitutional practice is to call for a more proactive legislature that prevents judicial supremacy through comprehensive and detailed acts of basic rights legislation. As Grégoire Webber and Paul Yowell have written, legislatures should be, and in liberal democracies commonly are, 'at the centre of human rights practice' due to their special suitability and responsibility 'to secure human rights as an integral part of promoting the common good of the political community in all its complexity'.[51]

In the constitutional state, there is no sharp distinction between strong and weak rights-based judicial review. An ordinary act of human rights requiring all public authorities, and judges in particular, to interpret the law in accordance with such rights can achieve, through the creative powers of judicial interpretation, similar results to a principle-based and rigid written constitution. As Aileen Kavanagh points out, the interpretative power conferred on judges by the UK Human Rights Act involves 'a form of reconstructive surgery on the legislation' that can hardly be considered weaker than the negative power to strike down legislation.[52] After all, British judges have the authority to decide the extent to which it is possible to render legislation compatible with Convention rights using the tools of interpretation, even if it means going against the unambiguous wording and clear intention of the statute. In the same vein, considering the experience of the New Zealand's judicial review, Paul Rishworth observes that a 'statutory affirmations of rights can replicate much of the effect of supreme law bills of rights'.[53] Therefore, it seems possible to speak of a continuum between a weak-form and a strong-form judicial review.

From the perspective of the current constitutional paradigm, the criterion for institutional design should be to ensure the kind of constitutional rigidity and judicial review necessary to achieve a culture of justification in the political circumstances and constitutional tradition of each country. A weak-form judicial review would then only be an attempt to achieve in a more balanced way the same objective as strong-form

[51]G Webber and P Yowell, 'Introduction: Securing Human Rights through Legislation', in G Webber, P Yowell, R Ekins, M Köpcke, BW Miller and FJ Urbina (eds), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press, Cambridge, 2018) 1, 3.

[52]A Kavanagh, 'What is So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act' (2006) 13 *International Journal of Constitutional Law* 1008, 1019.

[53]P Rishworth, 'The Inevitability of Judicial Review Under "Interpretative" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?', in G Huscroft and I Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis, Toronto, 2004) 233.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

review – namely, to assure the supremacy of constitutional principles by requiring public justification of all collective decisions insofar as they interfere with the exercise of individual rights.

But beyond the formal features of constitutional design, what is crucial to maintaining a *democratic* culture of justification is for public authorities to operate in practice by promoting the understanding of constitutional interpretation as a common project in which they all participate in respecting each other's constitutional roles. In this regard, there are a number of doctrines and techniques, both in a strong-form and a weak-form review, that judges can use to measure the intrusiveness of their scrutiny, seeking to respect the interpretation of rights by the elected authorities.[54] At the same time, this collaborative approach involves a conception of politics that rejects a reductionist notion of democratic law-making as if the legislature's main function were to promote general welfare by aggregating preferences or maximizing overall utility. Legislatures are able to engage in principled deliberation, striking the balance between the conflicting reasons that commonly converge in specifying the scope and content of rights. In terms of Webber and Yowell, 'both courts and legislatures are in principle tasked with promoting rights, and in principle both have the institutional capacity to do so.'[55]

V. Reply to strong popular sovereignty

The strong popular sovereignty I explore is an array of theories that share the idea that the people, in the exercise of their constituent power, have an unlimited capacity to change the constitution as they wish. Based on this idea, these theories aim to offer a new form of constitutionalism based on a radical application of the democratic principle. For strong popular sovereignty, democratic legitimacy does not require the selection of the most proper way to interpret the constitution from a democratic point of view, but rather finding the best form to maintain the identification of present-day majorities with the constitution. It is not enough that the people have the final say in the interpretation of a relatively stable constitution; rather, the constitution should be left open for future constituent activity on the part of the people as an unfinished project of collective self-determination. In this sense, strong popular sovereignty defends a definition of the constitution 'as a democratic resource through which the constituent power expresses its will on the configuration and limitation of the state and of society itself'.[56]

As stated at the beginning of this article, there are two main versions of strong popular sovereignty, and I shall examine them one at a time.

[54]The literature on judicial self-restraint techniques is extensive. See, for example, A Bickel, 'Foreword: The Passive Virtues' (1961–62) 75 *Harvard Law Review* 40; D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification', in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press, Cambridge, 2014) 234–58; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222; J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal Legal Studies* 409.

[55]Webber and Yowell (n 51) 6.

[56]R Viciano and R Martínez, 'Aspectos generales del nuevo constitucionalismo latinoamericano', in A Oleas (ed), *El Nuevo Constitucionalismo en América Latina* (Corte Constitucional, Quito, 2010) 16. My translation.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

Constitutional micromanagement

This version of strong popular sovereignty defends a type of constitutional design in which the amending power can easily change the constitution on behalf of the people to determine the action of public authorities with specific and all-embracing orders. In this manner, the distinction between constituent and constituted powers is blurred through 'the legalization of constituent power'.[57] According to constitutional micromanagement, since the constitutional laws governing constituted powers are the product of constituent power, amending those laws should be seen as an exercise of the same original power that established the constitution in the first place. Thus, for the constituent power to effectively govern the action of the constituted powers, its ability to amend the constitution must be materially unlimited, subject only to relatively flexible procedural hurdles.

For some authors, constitutional micromanagement is currently driving an emerging constituent process marked by the specification and flexibility of constitutional contents, as well as its inclusiveness.[58] In this alternative design, the constitutional protection of rights does not occur through open and relatively rigid clauses, whose materialization depends on interpretation, but through specific and flexible provisions that are directly applicable by the public authorities.[59] Constitutional requirements are concrete instructions issued by the people to law-makers and officials, in a relationship similar to that described in economic and political theory between the principal or manager and their agents.[60] In this subsection, my aim is to discuss this kind of constitutional design to the extent that it 'undermines the very notion of constitutionalism as a set of stable limits on ordinary politics'.[61] I leave the question of limits to constitutional amendment power as a legally restricted public authority for the next subsection.

In constitutional micromanagement, the objective pursued with minimal constitutional rigidity is not to guarantee constitutional supremacy in the most respectful manner with democratic procedure, but to restrict as much as possible the interpretative powers granted to constitutional judges and other public authorities. Clearly, this is not an extreme ideal in which all constitutional provisions must necessarily be specific and quasi-flexible, but a doctrinal approach that upholds the advantages of such clauses. In their study of the longevity of constitutions, Zachary Elkins, Tom Ginsburg and James Melton argue that constitutional specificity, together with easy-to-meet formal amendment provisions, increases the effectiveness of constitutions and thus their durability. Specificity involves both the 'precision and elaboration', and the scope or 'breadth of coverage', of constitutional provisions. The conclusion of their study is that the greater the detail and scope of a constitution, the longer it will endure, since both factors 'result from

[57]JI Colón-Ríos, *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power* (Routledge, London, 2012) 142.

[58]See Versteeg and Zackin (n 6) 660–61; R Dixon, 'Constitutional Drafting and Distrust' (2016) 13 *International Journal of Constitutional Law* 819.

[59]For a theoretical reconstruction of this model of constitutional design, see, among others, Z Elkins, T Ginsburg and J Melton, *The Endurance of National Constitutions* (Cambridge University Press, Cambridge, 2009) Ch 4; J Dinan, 'Foreword: Court-Constraining Amendments and the State Constitutional Tradition' (2007) 38 *Rutgers Law Journal* 983; V Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2008) 49 *William and Mary Law Review* 1249.

[60]Versteeg and Zackin (n 6) 658.

[61]Elkins, Ginsburg and Melton (n 59) 82.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

careful bargaining at the time of constitutional design and so can ameliorate problems of hidden information'.[62]

In my view, the findings of Elkins, Ginsburg and Melton on constitutional longevity take a very narrow view of the constitution, reducing it only to its constitutive or political dimension. For these authors, what is significant in a constitution are the terms of political negotiation, namely the institutional design that political actors are able to achieve and transform through agreement. In fact, it is difficult to deny that this contractual approach can be of great help to both consolidate a democratic transition process from an authoritarian regime – as in the former communist states of Eastern Europe[63] – and to maintain a relatively stable social unity in highly fragmented societies, such as India or Brazil.[64] However, in modern consolidated democracies, the political constitutional dimension coexists with the legal or regulatory dimension, which sheds a very different light on constitutional effectiveness. In the legal constitutional dimension, as described above, the emphasis is not on balancing or negotiating the interests at stake, but on regulating (or guiding) the behaviour of the relevant subjects by transforming the aims and values of the constitution into prohibitions and obligations, and by monitoring compliance. Seen from this dimension, the constitution requires abstract and open clauses to ensure its longevity. Abstraction and openness allow the constitutional text to adapt to the multiple circumstances in which its prohibitions and requirements should be applied without resorting to formal modifications. From a legal point of view, constitutional durability is associated with 'resistance' or the absence of a need for reform.[65]

Now, the regulatory dimension of the constitution is not absent from the proposal to make constitutions more flexible and specific. On the contrary, it can be argued that it is precisely the abstraction or openness of constitutional content that undermines this dimension, through a greater imprecision of the clauses, which adds to the usual sources of ambiguity and vagueness of the normative texts. Abstract constitutional clauses are filled with 'essentially controversial concepts'[66] that are the subject of ongoing controversy over their meaning, and among which a regulatory conflict inevitably arises. This imprecision is often found not only on the periphery of such concepts, but also at their core. So how can we speak of regulation when it comes to essentially controversial concepts?

The regulatory character of abstract clauses comes to the fore when we contemplate the constitution as a framework or forum for democratic deliberation based on common principles – namely, as the norm that allows for principled constitutional practice.[67] Unlike detailed clauses that require only enforcement, and whose normative function within the legal system is final wherever they apply, abstract clauses seek to establish a legal and political practice that offers solutions to problems by developing shared principles and values. Abstract clauses are intended to translate the moral and political

[62]Elkins, Ginsburg and Melton (n 59) 103.

[63]See S Holmes and CR Sunstein, 'The Politics of Constitutional Revision in Eastern Europe', in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton, NJ, 1995) 275–306.

[64]See A Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press, Cambridge, 1991) 80.

[65]F Tomás y Valiente, 'La resistencia constitucional y los valores' (1994) 15–16 *Doxa* 635.

[66]WB Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

[67]J Aguiló, 'Sobre el constitucionalismo y la resistencia constitucional' (2003) 26 *Doxa* 289, 315.

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conflicts of society into debates on how best to interpret and articulate the principles and values shared by all political and moral positions in a democratic society.[68] This is the rationalizing and stabilizing function of the legal constitution: to identify the values and principles on which to base the continuity of constitutional practice.

Moreover, reducing the constitution to a negotiation of interests or a political bargain makes its content dependent on the balance of power at any given time. The constitutional order thus becomes a mere *modus vivendi* in which social unity is contingent on such circumstances as not disturbing 'the fortunate convergence of interests'.[69] While it may be true that this approach is behind an emerging design among contemporary constitutions, it does not respond to the intrinsic rationality of constitutionalism. In any written constitution, it is possible to find specific clauses whose content arises purely from the bargaining power of political actors during the constitution-making process. Nevertheless, such constitutional particularisms not only pose a danger to the political unity that any constitution pursues, but are contrary to the justificatory nature of the norms contained in the legal dimension of the constitution. If the particularist clauses reflecting the bargaining power of political actors overcome abstract clauses that reflect the rational and impartial principles of political legitimacy, the constitution will hardly meet the requirements of constitutionalism.

Democratic re-constitution

The second instance of strong popular sovereignty states that the people, as the original constituent power, must always be able to propose, deliberate and decide on the fundamentals that define the identity or basic structure of their constitution. Under this view, democratic legitimacy does not stem from the rules and constraints that the constitution lays down for law-making, but from the procedures it establishes for its own transformation. The central concern 'is not about limits to ordinary lawmaking institutions, but about the lack of opportunities for *popular* constitutional change'.[70] For democratic re-constitution, however, it is important to highlight the distinction between fundamental and ordinary constitutional change, attributing the former exclusively to constituent power and marking a strong contrast between the exercise of constituent power and constitutional reform.[71] Unlike ordinary constitutional change, which must be made in accordance with the formal amendment provisions established by the constitution itself, fundamental constitutional change must be in the hands of the constituent power without being subject to any form of positive law. Thus, understanding constituent power in terms of its connection to the democratic ideal, democratic re-constitution asserts that fundamental constitutional change must occur through extraordinary and highly participatory

[68]Some examples of this approach include Rawls' idea of public reason and Ronald Dworkin's explanation of how moral and political conflicts should be dealt with in a democratic society. See Rawls (n 21) 216–20; and R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, Princeton, NJ, 2006).

[69]Rawls (n 21) 147.

[70]Colón-Ríos (n 57) 22 (emphasis in original); see also Viciano and Martínez, 'El Nuevo Constitucionalismo Latinoamericano' (n 8) 11.

[71]The classical formulation of this difference lays in Carl Schmitt's constitutional theory, which is the main reference for defenders of democratic re-constitution: see C Schmitt, *Constitutional Theory* (J Seitzer trans, Duke University Press, Durham, NC, 2008) 150–52.

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procedures.[72] The most prominent example of this type of constitutional re-making process is the convening of a constituent assembly by popular initiative, as appears in the recent constitutions of the so-called New Latin American Constitutionalism, specifically those of Venezuela (1999), Ecuador (2008) and Bolivia (2009).[73]

Following Joel I. Colón Ríos, who has made an ambitious theoretical reconstruction of this conception, the basic reasoning behind democratic re-constitution can be summarized as follows. Assessed from the perspective of constituent power, the democratic legitimacy of a constitutional regime requires that the constitution be the result of a participatory and open constitution-making process. However, a democratic pedigree does not guarantee the identification of future generations with the historical constitution and, what is worse, most of the existing constitutional regimes are far from fulfilling that requirement. Thus, it is necessary to consider the susceptibility to democratic re-constitution – the possibility of future exercises of constituent power – as the '*minimal* condition of democratic legitimacy'.[74] Unlike democratic governance, which is a continuous process of self-government through the process and constraints established by a constitution, democratic re-constitution refers to the rare and episodic moments when an active *demos* exercises its constituent power to adjust the constitution to its will. Its aim is to base the constitutional regime 'on a weak form of constitutionalism,' assuming that, 'at least episodically, democracy should triumph over constitutionalism'.[75]

Therefore, according to this view, full collective autonomy is the crucial principle of constitutional legitimacy. Adopting a constitution implies the modifiable choice of a people who exist above any law and who have the right to decide unilaterally on their institutional life free of any prior legal restriction. On the contrary, constitutional illegitimacy occurs when people are forced to live under a normative order that is not fully the result of their own choice, or that undermines their uncompromised or unrestricted full external sovereignty. Any breach of external sovereignty would infringe the inalienable constituent power of the people and endanger their existence as a self-determining political community.[76]

Supporters of democratic re-constitution seem to assume a metaphysical idea of constituent power, ranking it as a collective political agent that is fully independent and superior to constituted authorities. However, from the liberal perspective that I outlined previously, popular sovereignty does not imply a sovereign collective identity whose decisions legitimate the constituted power of government. From a liberal point of view, it is the legal-political system established by the constitution that creates a self-governed people. A constitutional order, with or without a written constitution, is not based on any historical fact, but on the moral right of every person to enjoy their

[72]Colón-Ríos (n 57) 126, 139.

[73]This extraordinary body is convened through the collection of signatures and is activated by popular referendum; its proposals must be ratified by the people before they come into effect. As a channel for the exercise of constituent power, constituent assembly is not subject to any substantive limits stemming from the established legal order.

[74]See Colón-Ríos (n 57) 9 (emphasis in original).

[75]See Colón-Ríos (n 57) 10.

[76]See Colón-Ríos (n 57) 39–40.

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independence in the context of the interdependence of social life. Thus, a constitution can be legitimate without any exercise of constituent power on the part of the people.[77]

Nevertheless, a liberal conception of constitutional legitimacy does not fail to recognise the constituent power as a public power with 'its own legislative authority' for drafting or revising a constitution.[78] What it does reject is its pre-legal political identity. Like all other public authorities, constituent power cannot exist outside a legal system and must respect its main purpose: to create and implement a system of equal freedom. Its basis is none other than the principle of equal citizenship that underpins a liberal democracy. According to this view, the democratic origin of the constitution depends not only on its popular pedigree, but also – and more fundamentally – on the deliberative quality of the constituent process.[79] To ensure public deliberation under conditions of equality and fairness, the institutions and political rights that are inherent in a democracy must be guaranteed, and this can only truly happen when individual rights are also protected.[80] Therefore, not everything chosen by the people's representatives in a constituent process should count as a constitution. In other words, constituent power does not involve 'an unlimited constitution-making faculty, a power that assumes the constitutional regime from the outside and that is authorized to alter it in any way that it considers appropriate'.[81]

For constitutionalism, self-determination is not a collective right authorizing the people to choose their own constitution at will; on the contrary, it is an individual right exercised collectively and grounded in the same principle that underlies the ordinary functioning of a liberal democracy. Just as legislators dictate their provisions on behalf of the citizens, the people's representatives should participate in the drafting of the community's fundamental laws on behalf of their constituencies.[82] Now, this latter requirement is particularly applicable to the constitutive part of the constitution, the institutional arrangements that define the structure of government, but it needs to be qualified when it comes to the regulative dimension of the constitution. The fundamental rights and principles that regulate legitimate political action according to constitutionalism cannot be replaced without the legal-political system ceasing to be a constitutional state. I will return to this point in the next section.

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[77]M Kumm, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia', in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 208.

[78]J King, 'The Democratic Case for a Written Constitution' (2019) 72 *Current Legal Problems* 27.

[79]See Colón Ríos (n 9) 10, 40, 118, where the author acknowledges that any exercise of constituent power presupposes those institutions and rights of political participation necessary for the very existence of democracy. However, in my view, the recognition of these presumptions is incompatible with the description of constituent power as radically unbounded by any form of positive law. I cannot see how it is possible to guarantee the exercise of such political rights without the discipline of a legal system.

[80]This point has received numerous theoretical formulations, among which Jürgen Habermas's co-originality thesis stands out. See J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) *Political Theory* 767.

[81]Colón-Ríos (n 57) 111.

[82]King (n 78) 8–9: 'One perceived mistake would be to invoke the idea of popular sovereignty by the people, a sovereign collective identity whose pronouncements for the people can persist over time … [Authorship] is a metaphor … The representatives participate in the joint-authorship exercise, in other words, in the name of their constituencies … Hence the final product is not indicative of unanimous actual authorial intention. It is rather the product jointly endorsed as being adopted under the most legitimate procedure.'

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According to democratic re-constitution, a constitution is itself legitimate only if it is an instance of collective self-determination of a people whose existence is prior to and apart from any law. The problem is that it is unclear how to define this pre-legal political identity without making any recourse to constitutional legitimacy unnecessary. For Carl Schmitt, whose work is behind the main ideas of this position, the pre-legal political identity of a people can be described according to the friend–enemy distinction.[83] In Schmitt's view, a people or nation exists as an autonomous political community only if it is able to defend its political identity against internal and external enemies that put it in jeopardy. The friend–enemy distinction comes from a particular marker of collective identity with the power to be the substantive or primary basis of identification for a group of people. Consequently, for Schmitt, a constitution is an act of collective self-determination only if it expresses the pre-legal political identity of a community, always being subject to replacement when the people judge that the substance of their political existence finds no expression in its basic structure or fundamental norms.[84] But if a political community can enjoy an internal homogeneity that prevents any significant heteronomy within it, recourse to the legitimacy of its constitutional or legal order is futile.

Now, even if the advocates of democratic re-constitution admitted disagreement and heterogeneity within the people, their conception of full external sovereignty would not allow them to account for constitutional legitimacy in many contemporary societies. Since these authors assert that any decision imposed on the people from outside is to be seen as an attack on their political autonomy, it seems that in their view constitutional law can never provide legitimacy to collective decisions in political communities that, like many modern societies, are divided into groups with profound differences in political identity.[85] Using a similar line of reasoning, any new constitution made by and for different political communities through the amendment of their own national constitutions in order to build a federal state should be considered illegitimate.[86]

Indeed, by opening the constitution to fundamental change, supporters of this conception want to leave room for disagreement over basic principles during the constituent process. However, once this process is completed, and for as long as it is not restarted, the constitution is legitimate regardless of its ability to address disagreements, resolve disputes and coordinate social action. From the point of view of these authors, constitutional legitimacy is independent of justification.[87] This position is in sharp contrast to that of constitutionalism, for which legitimacy and justification are two sides of the same coin. According to constitutionalism, the legitimacy of the constitution

[83]C Schmitt, *The Concept of the Political* (exp ed, G Schwab trans, University of Chicago Press, Chicago, 2007) 25–37.

[84]See L Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 *International Journal of Constitutional Law* 101, 108.

[85]In this sense, democratic re-constitution seems to be the driving conception behind the secessionist demands of some minority nationalisms that uphold their right to decide unilaterally on their own form of political life.

[86]This would be the position that refuses to turn the European Union into a federal state, however democratic its procedures, arguing that the principle of democracy requires states to have uncompromised external sovereignty. According to democratic re-constitution, a legitimate European federal state would only be possible through the exercise of constituent power by the European peoples acting as a single political community. For an analysis of this conception in the context of the German Federal Constitutional Court's decision on the compatibility of the Treaty of Lisbon with the German Basic Law, see Vinx (n 84) 114–24.

[87]Colón-Ríos (n 57) 104–07.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

as the supreme norm of the legal order can be accounted for by two complementary approaches, formal and material. From a formal or procedural point of view, a constitution is legitimate when its rules and constraints establish a fair decision-making process whose outcomes are entitled to be accepted as binding even by those who disagree with them on the merits.[88] From a material or substantial point of view, a constitution is itself legitimate and is therefore capable of legitimizing ordinary laws enacted in accordance with its rules and constraints, when it sets up 'a reasonableness standard of justification'[89] – that is, when it protects and enables individual autonomy within the framework of the interdependence of social life. In both approaches, the appeal to constitutional legitimacy is based on the ability of legality to make bearable the heteronomy that inevitably arises from living in a political community made up of individuals and groups with different values and preferences, and with divergent views on how society should be organized and managed.

On the other hand, democratic re-constitution shares the main rationale that underpins the standard approach to constitutional unamendability in contemporary constitutional theory.[90] According to this approach, the amendment power must respect the explicit (procedural and, where appropriate, material) limits formally stipulated in the constitution. Moreover, regardless of the presence of 'eternity clauses', the amendment power is constrained by the underlying identity of the existing constitution, or the basic structure containing the fundamental principles chosen by the constituent power. Both explicit and implicit limits come from the 'delegated' or 'derived' nature of the amending authority.[91] The people, through the constitutional amendment provision, delegate the power to reform the constitution to a constitutional organ that must function as their trustee within the legal framework of the delegation. Thus, using the amending provision in order to abrogate or modify the terms of this legal framework would mean a breach of the trust underlying the amendment authority.

As is obvious, this doctrine serves to protect any constitution from fundamental change, regardless of the moral content of its basic structure. The standard approach excludes from the scope of constitutional reform the possibility of eliminating fundamental freedoms in a well-functioning constitutional democracy, but equally rejects the use of the amendment provision to introduce democratic changes in a wicked constitutional order. All the limits to constitutional reform, including the fundamental principles that make up the basic structure of the constitution, have no other foundation than the hierarchical relationship between the amendment authority and the sovereign will of the primary constituent power. However, as I have reiterated, the constitution as the supreme legal norm entails a particular public morality that represents the system of legitimacy of any constitutional order. Such public morality shapes the rule of law as a culture of

[88]See section IV above.

[89]Möller, 'From Constitutional to Human Rights' (n 19) 376. See section III above.

[90]This standard approach is not only prevalent in constitutional theory but is also behind two of the main judicial doctrines on this topic: the Indian Supreme Court's 'basic structure doctrine' and the Colombian Constitutional Court's 'constitutional replacement doctrine'. See Y Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, Oxford, 2017) 42–69; see also Krishnaswamy (n 7) 118; and C Bernal Pulido, 'Unconstitutional Constitutional Amendments in the Case study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 339.

[91]For a broader analysis of the nature of constitutional amendment power from a theory of delegation, see Roznai (n 90) 117–20.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

justification in which all public authorities have to account for their decisions in terms of public reasons insofar as they interfere with the exercise of fundamental rights. Consequently, the constitutional amendment authority, like any other public authority, is subject to this same legal duty. The scope of the amending authority should not include proposals for constitutional reform that seek to impoverish or erode the right to public justification. The implicit basic structure of the constitution encompasses the imperative principles for protecting and maintaining a culture of justification. The first of these principles is constitutional supremacy, which involves considering the amendment provisions as genuine eternity clauses. In addition, the principles of the liberal system of legitimacy (including equal voting rights), as well as judicial review, represent the implicit material limits to the amendment power. These principles define the framework within which future constitutional reform aimed at improving the norms and institutional arrangements of a given constitution can take place.[92]

VI. Constitutional rigidity according to constitutionalism

I would like to conclude this article with some final comments on how I believe the constitution should be conceived within the constitutionalist paradigm. In neutral or non-valuative terms, every legal-political system has a constitution in which the fundamental principles that guarantee the identification, unity and stability of the system lie.[93] However, for constitutionalism, not every stable legal-political system counts with a constitution. First, not all legal systems have a more or less rigid written constitution, and second – and more significantly – a positive legal system may or may not satisfy the valuative requirements of constitutionalism. The constitution of constitutionalism has more to do with a particular set of values and principles than with a specific legal form. The decisive feature of the paradigm shift brought about by constitutionalism rests not so much in its structural aspects as in the value or ideological component it introduces into the legal-political system.

As I have argued in this article, the aim of any form of constitutional order within constitutionalism is to protect and promote a culture of justification. From this point of view, the criterion for institutional design should be the necessary rigidity needed to achieve this kind of political and legal culture in the political circumstances and constitutional tradition of each country. The degree of rigidity required to ensure the superiority of a principle-based constitution – or even whether a statutory charter of rights can suffice to protect the principles underlying those rights – is a contingent issue that depends on what the political and legal circumstances of the society are. Nonetheless, whatever the nature of such necessary rigidity is in each case, its basis will always be the same commitment to a culture of justification.

In any case, the rigidity or difficulty to change raises the problem of 'the tyranny of the past', as there seems to be a strong imbalance between the decision-making capacity of the

[92]Here I leave aside the question of whether such limitations should be subject to substantive judicial review. I believe that judicial review of constitutional amendments will be legitimate if it is a necessary practice to maintain a culture of justification in the political circumstances of a given society. In any case, even if constitutional judges are responsible for specifying the extent of the implicit limits to the amending power, there will still be room for interpretation so that the political powers can respond to judicial determinations.

[93]See R Guastini, *Teoria e dogmatica delle fonti* (Giuffrè, Milan, 1998) 310–13.

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

framers and the political action of the subsequent generations.[94] However, this problem only arises if the constituent process is conceived as an establishment process that closes deliberation. Obviously, that happens in the political dimension of the constitution, where 'stability is itself a value'.[95] The target of the political constitution is not to reach the right answer, but to establish a particular form of government within the various reasonable institutional arrangements that a polity can adopt. Notwithstanding, 'the right to self-government under the principle of equal basic liberty' requires that the institutional settlement be amendable, or even subject to reconsideration by a constituent assembly.[96] The need to stabilize a particular institutional arrangement in the constitution cannot prevent a later generation from finding another, equally reasonable, structure of government more suited to its own circumstances.

On the contrary, rigidity should not be a problem when the constituent power is limited to recognizing the moral principles of a constitutional regime. As advocates of living constitutionalism have argued, a rigid constitution overcomes the dead hand of the past by formulating its principles in rather abstract language.[97] Relatively rigid and abstract clauses unify a political society around an unfinished project in which each generation can contribute its own interpretation of them according to its circumstances and necessities. This does not imply that every generation has a homogeneous view of its needs and values, but that in each generation the same principles provoke a constant dispute or controversy among citizens who try to persuade each other about the best way to realize the constitutional plan and carry out its ends. Constitutional change is the product of this process of debate or struggle over how to give continuity to the initial project.

These principles are not a positive morality imposed by the constituent power that can be replaced by a later generation. They are the essential principles that must guide the legal authority in order to create and implement a system of equal freedom. In this sense, the only choice of the constituent faculty of a generation is whether to recognize them or not. These principles are implicitly irreplaceable. But even if they are formally protected by eternity clauses, this only means that they cannot be destroyed, not that they cannot be modified by a constitutional amendment fixing a specific interpretation of them.

VII. Conclusion

In this article, I have responded to some of the main criticisms that advocates of weak constitutionalism have directed against contemporary constitutional practice in liberal democracies. The main point of reference for my arguments has been the legal dimension of the constitution in the constitutional state. This dimension institutionalizes a culture of justification in which all public authorities are obliged to act according to public reasons

[94] This issue has been subject of extensive debate. Particularly noteworthy is its formulation by John Elster as 'the paradox of democracy' and the subsequent reply by Stephen Holmes. See J Elster, *Ulysses and the Sirens* (Cambridge University Press, Cambridge, 1979) 93–95, and S Holmes 'Precommitment and the Paradox of Democracy', in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 221–25.

[95] Ferreres (n 38) 45.

[96] King (n 78) 5–9.

[97] See, among others, J Balkin, *Living Originalism* (Harvard University Press, Cambridge, MA, 2011); D Strauss, *The Living Constitution* (Oxford University Press, Oxford, 2010); S Barber and J Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press, Oxford, 2007).

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press

compatible with the most fundamental commitments of a liberal democracy. In response to political constitutionalism, I have sought to show that the legal constitution both extends democratic control over collective decisions by providing citizens with a right to contestation and shapes the rule of law as a collaborative undertaking in which each public authority contributes from its own competence and legitimacy. In reply to strong popular sovereignty, I have argued that a legal constitution implies a system of legitimacy whose fate is that of the constitutional order itself. This system of legitimacy encompasses the moral principles essential to maintaining a culture of justification; these principles cannot be abolished or replaced without undermining constitutional legality. Hence, attempting to introduce any sovereign power within the constitutional state either in the form of an unlimited constitutional amendment power or through an unrestricted popular constituent assembly involves the aspiration to establish the rule by the people as a substitute for the rule of law. From a legal point of view, the drafting and amendment of a constitution is not an open choice for the people; on the contrary, only the prior choice of whether or not to live under a constitutional order remains open.

Cite this article: Melero MC. 2022. Weak constitutionalism and the legal dimension of the constitution. *Global Constitutionalism* 11: 494–517, doi:10.1017/S2045381722000077

https://doi.org/10.1017/S2045381722000077 Published online by Cambridge University Press