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## Democracy and Revolution: An Enduring Relationship

## DEMOCRACY AND REVOLUTION: AN ENDURING RELATIONSHIP?

JOEL COLON-RIOS<sup>†</sup> AND ALLAN C. HUTCHINSON<sup>††</sup>

“[F]or in a rebellion, as in a novel, the most difficult part to invent is the end.”

—Alexis de Tocqueville<sup>1</sup>

Democracy and revolution are juxtaposed in history and its academic commentary. As a general rule, they are considered to be unrelated and occasionally antagonistic practices. But this is a far too sweeping and misleading statement. While there are some revolutions that bear little connection to democratic motives or aspirations, there are others that are done in the service of a democratic impulse. These democratic revolutions bear little resemblance to the *coup d'états* that tend to replace one elite with another. There is a world of difference between those political transformations that usher in a more democratic regime and those that do not. Whereas one occurs under conditions of popular participation and support, the other does not. In short, not all revolutionary struggles are the same in terms of their democratic legitimacy.

In this Article, we take the view that, as understood from a thoroughly democratic standpoint, certain revolutions can be seen as part and parcel of a vigorous democratic culture and sensibility. Indeed, we contend that a democratic revolution can not only occur in cases in which a popular majority succeeds in overthrowing the established constitutional order illegally (that is, without recourse to the constitutionally recognized rule of change) but also when challengers self-consciously adopt and use *constitutional* means to transform the state. For us, there is no sharp or enduring distinction between some revolutions and constitutional changes: a robust democracy will incorporate constitutional means by which to facilitate periodic revolutions. To paraphrase de Tocqueville, there is no need in a true democracy to invent the end of revolution as it becomes a continuing and integral part of democratic arrangements themselves.<sup>2</sup>

This Article is divided into three parts. The first part is devoted to explaining how democratic revolutions can be profitably understood as

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1. ALEXIS DE TOCQUEVILLE, *THE RECOLLECTIONS OF ALEXIS DE TOCQUEVILLE* 56 (J.P. Mayer ed., Alexander Teixeira de Mattos trans., Meridian Books, Inc., 1959) (1896).

2. See DE TOCQUEVILLE, *supra* note 1, at 64.

exercises of constituent power unmediated by any particular way of proceeding; reference will be made to contemporary developments in global politics. The second part contends that the democratic legitimacy of a revolution does not depend only on whether it was supported by citizens or on whether the regime it creates governs in the name of the citizenry, but also on whether it attempts to re-produce its democratic impulse through a *weak* constitutional order that provides participatory procedures for its own transformation. Finally, in the third part, we defend the radical proposal that an unconditional commitment to democracy would require that revolutionary-initiated constitutions leave the door open for future exercises of constituent power or, what is the same thing, for future democratic revolutions. Throughout, we develop and stand by an account of democracy as both a theory and a practice that re-orders the traditional relationship between popular sovereignty and constitutional supremacy.

### I. REVOLUTIONS AND CONSTITUENT POWER

A usual starting-point for an analysis of revolutions is Hans Kelsen's work.<sup>3</sup> Kelsen was interested in *legal* revolutions. His focus was on changes in the constitutional regime that could not be legally justified; these were situations in which an "order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated."<sup>4</sup> Most importantly, Kelsen's account of legal revolutions does not involve an inquiry into the political morality of the historical facts and forces that brought about the founding of a new legal system. Kelsen was not concerned with whether the revolutionaries had just cause or were driven by a genuinely democratic impulse. On the contrary, since according to Kelsen, norms can only derive their validity from other norms, his attention to the ultimate origins of the legal system was only directed at explaining the "objective" validity of the revolutionary constitution.<sup>5</sup> Put differently, he was not interested in examining the democratic character of the constitution-making act that brought the revolutionary constitution into existence. From the perspective of his pure theory of law, it is simply irrelevant if a new and effective constitution was posited "by an individual usurper or by some kind of assembly."<sup>6</sup>

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3. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1945) [hereinafter *KELSEN, GENERAL THEORY*]; see also generally HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cali. Press 1967) (1934) [hereinafter *KELSEN, PURE THEORY*].

4. *KELSEN, GENERAL THEORY*, *supra* note 3, at 117.

5. *Id.* at 116-17 (looking at the origins of the legal system not to determine whether those origins were consistent with any moral or political principles, but in order to explain why a constitution adopted in violation of the established rules of constitutional change can be seen as resting on a higher norm (i.e. the newly presupposed basic norm that accompanies a successful revolution)).

6. *KELSEN, GENERAL THEORY*, *supra* note 3, at 115.

While Kelsen's theory allows a better understanding of the relationship between revolutions and constitutions as well as that between lawful and unlawful constitutional change, it is not intended to provide the tools needed to distinguish between a democratic re-constitution and a military *coup d'état*.<sup>7</sup> Consequently, instead of looking at Kelsen's pure theory of law for understanding revolutions, democrats might be better advised to consult the theory of constituent power, developed during the American and French Revolutions. Constituent power, as will be seen below, is the power to create new constitutions or the source of the production of fundamental juridical norms. In its modern formulation, constituent power is always considered to rest with the people who possess a legally unlimited faculty to give themselves any constitution they want. In that sense, the theory of constituent power is particularly concerned with the *identity* of the creator of the constitution and with the constitution-making *process*. As such, it is much more palatable and appealing to the democrat than a Kelsenian pure theory.

Although receiving its first major theoretical formulation in France, the concept of constituent power was already present in revolutionary North America. "[T]he people . . ." wrote Thomas Young in 1777 in a letter to the citizens of Vermont, "are the supreme constituent power and, of course, their immediate [r]epresentatives are the supreme [d]elegate power."<sup>8</sup> Similarly, but at the eve of the revolution in France, Emmanuel Sieyès wrote that the constitution was not "the creation of the constituted power, but of the constituent power," and that the bearer of the constituent power was "the source and the supreme master of positive law."<sup>9</sup> In this line of thinking, a political community could not be permanently subject to any constitution; the constituent power always remained free to unbind itself from the established constitutional regime and create a new juridical order. It is a view that places democratic legitimacy ahead of theoretical purity.

But Sieyès combined his theory of constituent power with a strong commitment to the principle of representation. He explicitly rejected more participatory forms of democracy and even suggested that members

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7. This does not mean, however, that Kelsen was uninterested in democracy. See Hans Kelsen, *On the Essence and Value of Democracy*, in WEIMAR: A JURISPRUDENCE OF CRISIS 84, 84–85 (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

8. Letter from Dr. Young to the Inhabitants of Vermont (April 11, 1777), in RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT (E.P. Walton ed., 1873); see also Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199, 199 (2010) (presenting a contemporary discussion of the theory of constituent power and its connections to democracy and democratic legitimacy).

9. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 124, 128 (1963). Sieyès's theory is not an invitation to continuous revolutionary activity. In fact, it can be said that Sieyès saw that one of the fundamental tasks of politics was that of ensuring that a situation of unbinding, an exercise of constituent power, does not occur once a constitutional order is in place. MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 63 (2003).

of the ordinary legislative assembly could transform themselves into a constituent body. He thus maintained that “[t]he people, I repeat, in a country which is not a democracy (and France would not be one), the people may only speak and may only act through its representatives.”<sup>10</sup> Of course, Sieyes’s ideas did not carry the day for everyone.

A prominent critic was Carl Schmitt, the controversial German jurist, who rejected this aspect of Sieyes’s thought.<sup>11</sup> Schmitt insisted that the constituent power of the people could not be effectively represented. He stressed that constituent power could not be reduced to any specific forms or procedures. This is why he had a critical attitude towards the French Revolution. In particular, he disagreed with the decision of the National Constituent Assembly of not submitting the Constitution of 1791 to popular ratification and of adopting instead the Sieyesean view of a “represented” constituent power. “It would have been consistently democratic,” wrote Schmitt, “to let the people itself decide, for the [constituent] will of the people cannot be represented without democracy transforming itself into an aristocracy. Nonetheless, democracy was not at issue in 1789. It was, rather, a constitution of a liberal, bourgeois Rechtsstaat.”<sup>12</sup>

Despite his democratic rhetoric, Schmitt was far from being a democrat himself. However, his radicalization of the theory of constituent power provides the basis for a more thoroughly democratic conception of revolutions. For example, building on Schmitt, Andreas Kalyvas has argued that from the perspective of constituent power, “phenomena such as civil disobedience, irregular and informal movements, insurgencies, and revolutionary upheavals retain all their dignity and significance even if they directly challenge the existing constitutional structure of power.”<sup>13</sup> In this conception of the relation between democracy and constitutionalism, democracy is something much more earthy and organic than the purist ambitions of many legal theorists. Its disruptive and unmanageable dimensions are something to be celebrated, not lamented.

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10. Lucien Jaume, *Constituent Power in France: The Revolution and Its Consequences*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 67, 80 (Martin Loughlin & Neil Walker eds., 2007). In fact, Sieyes opposed democracy to the idea of representation: where representation was necessary, like in France, there could not be a democracy: “‘No aristocracy’ ought to become a kind of rallying-cry for all the friends of the nation and good order. The aristocrats will think that they can resort by crying: ‘No democracy’. But we will repeat ‘No democracy’ with them and against them. These gentlemen do not realize that representatives are not democrats; that since real democracy is impossible amongst such a large population, it is foolish to presume it or to appear to fear it . . .” SIEYES, *supra* note 9, at 196; *see also* RAYMOND CARRÉ DE MALBERG, *TEORIA GENERAL DEL ESTADO* 1165 (1948) (arguing that through the introduction of the principle of representation, Sieyes weakened the scope of his system of popular sovereignty).

11. *See* CARL SCHMITT, *CONSTITUTIONAL THEORY* 128, 132 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

12. *Id.* at 128 (citation omitted).

13. Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 *CONSTELLATIONS* 223, 230 (2005).

It is not surprising, therefore, that many contemporary scholars of constitutionalism have worked to contain the unsettling impact of constituent power in both theory and practice. The very term *constituent power* has almost entirely disappeared from even the most populist approaches to constitutional change.<sup>14</sup> When mentioned, it is only to be discarded as an undesirable political concept. For instance, in the sequel to *We the People*, Bruce Ackerman identified constituent power as an arbitrary will that manifests itself in acts of upheaval in which “law ends, and pure politics (or war) begins.”<sup>15</sup> In distancing his theory of dualist democracy from the idea of constituent power, he describes constituent power as a lawless activity; it takes place during a political crisis in which an arbitrary will that fails to respect the constitution triumphs over the existent constitutional regime.<sup>16</sup> However, it is worth noting that, even though Ackerman’s recommended constitutional politics do not involve the “sheer acts of will” that allegedly characterize constituent power, his celebrated revolutionaries (e.g., the Founding Federalists, the Reconstruction Republicans, and the New Deal Democrats) failed to follow the established rules for constitutional change, even if they “experienced powerful institutional constraints on their revisionary authority.”<sup>17</sup>

In an earlier vein, Hannah Arendt shared similar concerns, maintaining that a juridical order could never achieve sufficient stability if it was conceived as originating in the ever-changing will of a disorganized multitude. She maintained that any structure built on the will of the multitude as its foundation “is built on quicksand.”<sup>18</sup> Although these scholars are writing in a much later era, it is likely that those were the types of concerns that drove North American and French revolutionaries to close the doors of their constitutions for any future exercises of constituent power. The well-known North American debate between James Madison and Thomas Jefferson provides the classical example.

Madison reacted against Jefferson’s insistence in periodic constituent assemblies designed to allow the people to exercise its “right to choose for itself the form of government it believes most promotive of its own happiness.”<sup>19</sup> For Madison, Jefferson’s proposal suggested to the citizenry that their current system of government was somehow defec-

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14. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (highlighting how the government may enact change without actually going to the people); see also SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT) 18 (2006).

15. BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 11 (1998).

16. *Id.*

17. *Id.*

18. HANNAH ARENDT, ON REVOLUTION 163 (Penguin Books 1977) (1963).

19. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE PORTABLE THOMAS JEFFERSON 552, 560 (Merrill D. Peterson ed., 1975).

tive, depriving the government of “that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>20</sup> Instead of periodic assemblies that, by opening the Constitution to the “decisions of the whole society” interested “too strongly the public passions,”<sup>21</sup> Madison favored a complicated amendment procedure. That is, a process that involved a series of extraordinary majorities at the federal and state levels, and this made even minor constitutional changes difficult to propose and unlikely to succeed. Justice John Marshall provided judicial support to this approach when he declared that, while “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . [t]he exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated.”<sup>22</sup> He went on to add that, since “the authority from which they proceed . . . can seldom act, [these principles] are designed to be permanent.”<sup>23</sup>

Even in France, where the theory of constituent power was originally voiced, there was a conscious attempt to prevent constituent power’s future exercise and relevancy. In the very last article of the French Constitution of 1791, this approach received a concise legal formulation: “The National Assembly, having heard the reading of the above Constitutional Act, and having approved it, declares that the Constitution is completed and that nothing may be altered therein.”<sup>24</sup> Probably in a similar mood, Isaac Le Chapelier, the French eighteenth century jurist and member of the National Constituent Assembly, claimed that “[t]he revolution [was] finished” because there were “no more injustices

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20. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

21. *Id.* at 315.

22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

23. *Id.*

24. 1791 CONST. VII. The French Constitution of 1791 also contained a complicated amendment provision, which is prefaced by the following statement:

The National Constituent Assembly declares that the nation has the imprescriptible right to change its Constitution; nevertheless, considering that it is more in conformity with the national interest to use only the right of reforming, by the means provided in the Constitution itself, those articles which experience has proven unsatisfactory, decrees that it shall be effected by an Assembly of Revision in the following form.

*Id.* See Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (or the Absence Thereof)*, *ISR. L. REV.* (forthcoming 2010) (describing how contemporary French constitutional theory generally sees constituent power as susceptible of being exercised by the ordinary legislative assembly). A similar approach is found in John Locke’s draft constitution for the Carolinas, which stated, “These fundamental constitutions . . . shall be and remain the sacred and unalterable form and rule of government of Carolina forever.” *The Fundamental Constitutions of Carolinas*, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, available at [http://avalon.law.yale.edu/17th\\_century/nc05.asp](http://avalon.law.yale.edu/17th_century/nc05.asp) (last visited Nov. 17, 2011). See also THE CONSTITUTION OF THE GREAT SOCIALIST PEOPLE’S LIBYAN ARAB JAMAHIRIYA Dec. 11, 1969, art. 37 (“The present constitutional proclamation shall be in effect until a permanent constitution is issued. It will be amended by the Revolutionary Command Council only in case of necessity and in the interest of the Revolution.”).



to overcome, or prejudices to contend with.”<sup>25</sup> Some years later, Napoleon echoed this view and with characteristic bombast declaimed that “Citizens, the revolution is determined by the principles that began it. The constitution is founded on the sacred rights of property, equality, freedom. The revolution is over.”<sup>26</sup>

These fabled exchanges set the stage for contemporary debate and still manage to dominate it. The exercise of constituent power, of a power that threatens to replace the existing constitutional regime, has been relegated to the terrain of the exceptional.<sup>27</sup> This is hardly unexpected; the quest for constitutional stability seems to have trumped all other ambitions. Interestingly, democracy has historically been seen as carrying with it similar risks. For many, the prospect of the mass of ordinary people always getting what they want and continually making and unmaking fundamental laws represents the antithesis of good government; it is considered to be the rule of persons’ ever-changing wishes against the empire of law and reason.<sup>28</sup> Yet the concepts of constituent power and democracy have a natural affinity: constituent power is not simply a power to create new juridical orders, but to create them with those who will be subject to it. The concept of constituent power, in this respect, points toward a self-determining *demos*, a populace that adopts the laws that will regulate their political association. This amounted to what Carl Friedrich called “the right to revolution,”<sup>29</sup> which the people could invoke and exercise at will.

Indeed, it is this collective aspect of constituent power that connects it so intimately and effectively with democracy; they both reinforce each other in their commitment to the notion that there can and should be mass, direct, and continuing participation in constitution-making. The recent events in the Middle East and North Africa demonstrate this phe-

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25. Jaume, *supra* note 10, at 71 (citations omitted).

26. ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE 2* (Maurizia Boscagli trans., Univ. of Minn. Press 1999) (1992) (referencing Napoleon’s statement made on December 15, 1798). But these sentiments are not only of historical interest. The very same words find an expressive echo in contemporary constitutional theory. As a prominent political commentator observed, “By making a constitution, the revolutionary forces are digging their own graves; the constitution is the final act of the revolution.” Ulrich Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 *CARDOZO L. REV.* 639, 641 (1993). Similarly, even the fabled John Rawls took the view that the adoption of a “democratic constitution” should be understood as an expression by the people of a profound demand to govern itself in a certain way and of fixing, “once and for all,” certain constitutional essentials. JOHN RAWLS, *POLITICAL LIBERALISM* 232 (expanded ed. 2005).

27. See generally ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT* (2008) (providing an excellent discussion of the relationship between constituent power and the exception).

28. See JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 193 (M.J. Tooley trans., 1955); see also ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* 257 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995).

29. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 129 (Ginn & Co. 1950); see Preuss, *supra* note 26, at 647; see also Kalyvas, *supra* note 13, at 238.

nomenon. Unorganized throngs of people have come together to demand political freedom. This has manifested in the rallying-cry *Al-sha'b yurid isquat al-nizam* (The people want the downfall of the regime!).<sup>30</sup> With warts and all, this is an undeniable embodiment and manifestation of constituent power at its most insistent and immediate. These popular uprisings are reminiscent of Schmitt's view that "[t]he will of the people to provide themselves a constitution can only be made evident through the act itself and not through observation of a normatively regulated process."<sup>31</sup> As such, they represent not a step towards democracy, but a feral exercise of the democratic instinct; they are as much a part of the democratic initiative as more stable and less spontaneous political engagements.

The despotic regimes that have been overthrown (and those which are currently being challenged by popular movements in the Arab world) denied citizens the traditional liberal protections enshrined in the constitutions founded in the American and French Revolutions (and this is, of course, part of the reason why they are being overthrown). But, at a different and deeper level, all these societies (i.e., United States, France, Libya, Egypt, etc.) share a fundamental similarity in constitutional terms. Like the constitutions established by the American and French revolutionaries, the juridical systems being challenged and overthrown in the Middle East and Africa lack an opening for constituent power to manifest from time to time. By prioritizing constitutional supremacy over popular sovereignty and subordinating the latter to the former, these institutional arrangements attempt to avoid future revolutions and democratic re-constitutions. Strong constitutionalism trumps weak democracy.

This prioritization of constitutionalism over other political values and commitments leaves those who decide to engage in democratic revolutions in an unfortunate position. Once they have exhausted the limited range of conventional political avenues for change, they have to resort to the unmediated, disorganized, and occasionally violent exercise of constituent power. And that is part of the reason why the French and American Revolutions are not as *democratic* as it might otherwise be suggested. Although to varying degrees and with varying consequences, these upheavals suffer from and share the same democratically-debilitating tendency to stifle and de-legitimize constituent power as those regimes in

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30. Perry Anderson, *On the Concatenation in the Arab World*, 68 NEW LEFT REV. 5, 9–10 (2011).

31. SCHMITT, *supra* note 11, at 131. "Self-evidently", he added, "it can also not be judged by prior constitutional laws or those that were valid until then." *Id.* They are also reminiscent of Sheldon Wolin's invitation to embrace democracy's inclinations towards revolution and re-conceive it as fugitive and episodic in character. See Sheldon S. Wolin, *Fugitive Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 31, 43 (Seyla Benhabib ed., 1996). "Democracy," says Wolin, "is a rebellious moment that may assume revolutionary, destructive proportions, or may not." *Id.*

the Middle East and North Africa.<sup>32</sup> Constitutionalism tends to efface, not simply channel or contain constituent power.

## II. LIMITING CONSTITUTIONAL CHANGE

The prevailing conception among “constitutional democrats”—according to which the democratic character of a constitution depends on its substantive content<sup>33</sup>—allows us to celebrate the democratic features of the French and American Revolutions, but not to offer a critical assessment of their democratic shortcomings. Yet it is in those shortcomings that the key to assessing the democratic legitimacy of a revolution, and of the constitution it inaugurates, lies. Put shortly, a revolution, as an exercise of constituent power, should not be seen as a one-time event, or as the extraordinary founding of a permanent juridical order that is supported by the citizenry and that purports to permanently govern with their consent. It is both much more and much less than that.

The dominant conception of revolution, in which a revolution is a highly exceptional (and usually undesirable) event, is inconsistent with the idea of the people’s constituent power.<sup>34</sup> More pointedly, it is gravely problematic from the perspective of democratic legitimacy. Most of the revolutions that would be considered democratic under this approach generally follow a similar pattern: a movement supported by the people is successful in transforming the state in a way that was not anticipated by the extant rules of change of the established constitutional order, and the new regime replaces the existing constitution with a new one. Moreover, this new constitution protects a set of political and individual freedoms that were not respected by the previous regime. Those political and individual freedoms would normally take the form of a bill of rights and underpin a republican form of government. So constituted, the new regime would be showcased as being governed and legitimated by the consent of the people.

This conception, however, does not address the crucial way in which the constitution established by a successful “democratic revolution” permits or facilitates the possibility of any future exercise of constituent power. That is to say, there is no account taken of whether the new constitution provides the citizenry with the means of engaging in the type of constitutional overhaul that the previous regime prohibited and that made an “illegal” revolution necessary in the first place. The consti-

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32. See generally JOEL COLON-RIOS, *WEAK CONSTITUTIONALISM: CONSTITUENT POWER AND THE QUESTION OF DEMOCRATIC LEGITIMACY* (2012); ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* (2009).

33. See RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

34. The classical formulation of this view is found in Locke, who although defending the people’s right to revolution, limited its exercise to situations of extreme injustice in which the government engaged in a “long train of Abuses, Prevarications, and Artifices.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 433 (Peter Laslett ed., 1963).

tutional regimes present in modern states are in fact characterized by institutions designed to ensure that a democratic revolution never occurs. In that respect, they share the spirit of Isaac Le Chapelier's and Napoleon's dictums—if the constitution established a just and democratic regime, why not protect it from future revolutions? Indeed, why not hinder rather than facilitate the reemergence of constituent power?

The problem, of course, is that no constitution can establish a permanent, and democratic regime: the very idea of a just, finished constitution that seeks to prevent instances of popular constitutional change is incompatible with democracy. Instead of treating important constitutional transformations as occasions for establishing more just constitutional forms and superior mechanisms for democratic engagement, most modern constitutions attempt to regulate their own transformation through very limited and highly technical mechanisms. They make change difficult and unlikely, even if supported by great majorities of the population. These amendment rules are driven by an aspiration to consolidate the permanency of the constitutional regime, not by an urgent impetus to maintain and preserve the revolutionary spirit that brought the constitutional regime into existence.

For example, take Article V, the amendment rule of the U.S. Constitution.<sup>35</sup> While it was created by a successful revolution, it makes future changes in the Constitution extremely difficult to effect. Indeed, it is one of the most demanding constitutional amendment processes in the world.<sup>36</sup> Under Article V, two-thirds of both houses of Congress may propose amendments or two-thirds of the state legislatures may apply for a constitutional convention for proposing amendments. These proposals must then be ratified by three-fourths of state legislatures or by three-fourths of special state conventions. With such formidable hurdles, it is not surprising that the U.S. Constitution has been amended only twenty-seven times in over two centuries. Moreover, it is equally telling that the ratification of the Twenty-seventh Amendment took 200 years to be completed; it was ratified in 1992, after being originally presented by James Madison in 1789.<sup>37</sup> All told, Article V seems to be less an amendment rule and more a non-amendment rule.

Again, from a strong democratic viewpoint, Article V not only makes constitutional amendments almost impossible to adopt, it also makes their (unlikely) adoption non-participatory; amending the Constitution is left in the exclusive hands of government officials, albeit elected

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35. U.S. CONST. art. V.

36. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS*, 102 (2009); see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 260 (Sanford Levinson ed., 1995).

37. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 498 (1992).

representatives. This is true even when the initiative to propose constitutional changes is not only placed in Congress, but states are provided with the faculty of applying for a (unprecedented) convention which would arguably have an unlimited power to propose amendments or even an entirely new fundamental law.<sup>38</sup> Such a convention, at least in theory, could be seen as an attempt to reproduce the process through which the Constitution was established in the first place. Even leaving aside the difficulties involved in calling a convention (created in part by the supermajority rules in the initiative and ratification processes and by the possibility that Congress might refuse to call it or to send its proposals for ratification),<sup>39</sup> there are certain ambiguities in the text of Article V that make its democratic credentials questionable. For example, would the members of the convention be democratically elected? If they are elected, would they be elected by the people at large or according to the principle of state equality (e.g., one delegate for each state regardless of the size of the state's population)? Would the convention have the power to adopt its own internal rules? Does the convention or Congress have the power of creating an alternative ratification procedure (such as a binding national referendum)? Could Congress transform itself into a convention?<sup>40</sup>

Of course, the upshot of having a next-to-impossible-to-use amendment process is not that no changes in constitutional arrangements happen. On the contrary, it is that change occurs by other, even less democratic means than that provided by the written constitution itself. It is difficult to identify or imagine any society whose constitution, even if its form remains the same, remains fixed in substance over any extended period of time. This is especially the case in common law jurisdictions, like the United States, the United Kingdom, and Canada. While jurists and politicians may pay lip-service to a nation's founding and enduring documents, they know that this is only the beginning of the search for constitutional meaning. Amendment is simply one kind of change that is more formal, less technical, and often, although not always, more significant. Changes, even of a large and significant nature, occur even though the formal process of constitutional change itself remains unused and unchanged. While there is no simple or fixed causal relation, the informal amendment process is inextricably linked to the formal amendment

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38. See Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1623 (1979) (discussing states calling for a constitutional convention).

39. In fact, according to some interpretations, the number of applications required to call an Article V Convention was surpassed in 1993, but Congress did not call the Convention. Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837, 856 (2011). By 2010, the number of states asking for a Convention had decreased from forty-five to thirty-three (thirty-four being the requisite number of states). *Id.* at 857–58.

40. Some of these questions are considered in Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1523 (2010).

process in “that an informal amendment process exists because formal amendment is so difficult.”<sup>41</sup>

In the United States, changes in constitutional law have happened at a steady and continuous pace. While taking place under the guise of interpretation, there have been some monumental changes in the regime of constitutional structures and rights. If *Brown*<sup>42</sup> and *Roe*,<sup>43</sup> for example, are treated as merely interpretive adjustments, then the supposed distinction between interpretation and amendment becomes blurred and unreliable. Constitutional history shows that there is no change that is so big that it could not be achieved informally (and in spite of the written constitution) if the political forces are sufficiently aligned to demand or facilitate it.<sup>44</sup> It is only when there is insufficient support for change (particularly from the elites) that the formal amendment process will appear as a brute obstacle to change.<sup>45</sup> Otherwise, change will proceed with little concern for the distinction between legal interpretation and constitutional amendment and between the formal and informal practices of change.

More importantly, by exploring how such changes have occurred, it becomes possible to glimpse and uncover the fundamental and operative assumptions about political power and democratic legitimacy at any point in history. In particular, the actual institutional levers and location of such constitutional changes disclose where a society situates the actual seat of sovereignty and where it locates the actual locus of legitimacy, regardless of what formal constitutional provisions might suggest or recommend. As regards the United States, this site is most definitely not the people themselves. It is the courts, especially the Supreme Court, which have become the preferred site for effecting important changes in the constitutional order. By design and default, the Court has claimed the ultimate authority to act on behalf of the American citizenry as a self-governing and self-constituting nation: judges have become the filters and proxies for the citizenry.<sup>46</sup>

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41. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 933 (2007).

42. *Roe v. Wade*, 410 U.S. 113 (1973).

43. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

44. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

45. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457, 1464 (2001). See generally Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1984 (2003) and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1, 34 (2003), focusing on the ways social movements and other socio-political forces shape constitutional culture.

46. This approach finds one of its earlier expressions in *Marbury*, and is also echoed in Ackerman, which seems to attribute the Supreme Court with the ability to speak in the people's name. See *Marbury v. Madison*, 5 U.S. 137, 166 (1803); see also Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63, 82 (Sanford Levinson ed., 1995).

In a society that claims to be devoted to the ideas and practice of democratic legitimacy, it is far from clear why the courts are the suitable or appropriate institution to speak and act on the people's behalf. To put it more pointedly, if the courts are assumed to have democratic legitimacy, then democratic legitimacy is a very thin device and counts for little in the general political scheme of things. The courts are neither operated nor constituted in line with popular will or representative viewpoints. Indeed, the democratic legitimacy of the courts is somewhat perversely grounded in their willingness to act as a check on popular and direct expressions of constituent power.<sup>47</sup> This seems to put democracy firmly under the control of the constitution. At best, democracy is reduced to merely one value in a much broader range of constitutional commitments.

### III. DEMOCRATIC LEGITIMACY

It should be uncontroversial to conclude that formal amendment processes, like Article V, and more informal practices of judicial interpretation do not sit at all well with a commitment to a strongly democratic approach to constitutional ordering. These mechanisms empower narrow minorities (both political and judicial) with the right to veto any proposal for change and disallow almost all forms of direct citizen participation. Democracy is brought under the disciplinary aegis of a strong constitutionalism and is relegated to, at best, a secondary or fringe position in political engagement.

However, it is not clear that a constitution's amendment rule, no matter how phrased or constructed, could be seen as creating a genuine opening for constituent power to manifest itself; amendment rules, it may be said, are precisely designed to *prevent* revolutions (democratic or otherwise) from taking place. As mentioned earlier, one of the main features of a revolution, according to most analysis, is that it must involve the overthrowing of the existing regime through a violation of the established rules of constitutional change. In other words, a revolution must be accompanied or immediately followed by the coming into force of a new *Grundnorm*.<sup>48</sup> This approach creates several theoretical and democratic difficulties.

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47. Cf. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). Friedman has attempted to show that the Supreme Court of the United States has historically been responsive to the views of the majority of the people. The point here, however, is not judicial responsiveness or non-responsiveness to the views of popular majorities (i.e., a dictator can be very responsive to popular majorities as well), but the fact this mode of constitutional change allows non-elected officials to set aside decisions made by more democratic institutions.

48. The *Grundnorm* or basic norm, according to Kelsen, is the last presupposition upon which the validity of all the norms of a legal order depends; it postulates that "one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained". KELSEN, *GENERAL THEORY*, *supra* note 3, at 115. When a revolution takes place, a new basic norm needs to be presupposed. *Id.* at 118.

First, as many critics of Kelsen's theory of revolution have pointed out, new constitutional regimes are often born without the sort of legal rupture that the Kelsenian approach requires.<sup>49</sup> For example, India achieved its independence as a result of a set of events that can be characterized as revolutionary; however, there was arguably no legal rupture with respect to the United Kingdom, who reluctantly passed the Indian Independence Act in 1947.<sup>50</sup>

Second, this view supposes that there is a fundamental incompatibility between a democratic constitution and revolutionary change. Under that perspective, there cannot be such a thing as a constitution that presents itself as open for future democratic revolutions. That is to say, regardless of how participatory and radical the relevant constitutional change is, if it does not take place through a violation of the established constitutional order, it is not a revolution. This is not only a matter of terminology, for it invites the type of approach to constitutional change that characterizes the currently dominant conception of constitutionalism. Constitutional change is thus seen as a special type of law-making, one which is subject to stringer procedures but that is not to be associated with, or attempt to facilitate, the exercise of constituent power. This approach sees democratic revolutions as something that *happens* to undemocratic or authoritarian constitutional arrangements, but that has no place in a properly functioning constitutional state that governs with the support and in the name of the people. Such a conception runs the risk of betraying the very basis of a democratic revolution: a politically engaged citizenry that gives itself a new constitution through the exercise of constituent power.

In a weakly democratic or non-democratic constitutional structure, as that present in countries such as the United States and Syria, the exercise of constituent power would of course be non-constitutional, as it would require a violation of the established amendment rules (which are not characterized by creating meaningful and direct opportunities for popular participation in constitutional change). But there is no reason why all constitutional regimes have to be like that. Instead of looking at constituent power and revolutions as a threat to a constitution that has already achieved the desirable degree of democracy, constitutions should approach revolutions and constituent power as offering opportunities for correcting existing injustices through radical and participatory change. It is in providing *that* possibility, where an important part of the democratic legitimacy of a revolution and of the constitutional regime that it inaugu-

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49. See, e.g., J. M. Finnis, *Revolutions and the Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 44, 52–53 (A.W.B. Simpson ed., 2d ser. 1973) (discussing this idea in the context of Australia's independence); see PETER C. OLIVER, *THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND* 7–9 (2005).

50. Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30, pmb1. (U.K.).



rates rests. Instead of seeing as legitimate a regime that governs with the *consent* or *support* of the people, democratic legitimacy is only consistent with a constitution that sees citizens as potential *authors* of a new constitutional regime and that have the capacity of triggering future democratic revolutions.

As part of a practice of empowered democracy, there is a commitment to the institutional challenge of constructing and implementing a practical set of constitutional arrangements that approximates to what Roberto Unger has termed “the structure of no-structure.”<sup>51</sup> This is the effort to incorporate an element of perpetual revolution into a constitutional set-up. The ambition is not to do away with any constitution (which seems as a hopeless and unachievable ideal anyway), but to develop a constitutional tradition that ensures that no legal institution is immune to revision and transformation. In the attempt to diminish the distance between structure-preserving routines and structure-transforming conflicts, “no hard-and-fast distinction separates criticism and construction.”<sup>52</sup> An integral dimension of such a political program of strong democracy would be, among other things, a genuine attempt to entitle citizens to challenge, de-stabilize, and disrupt established institutions and practices, including and especially the constitutional ones. This would enable the closing of both an existential and institutional gap between ordinary and constitutional politics, between routine and radical engagement, and between revolutionary and evolutionary change.

Understood in this way, a vigorous theory of democratic legitimacy would be obliged to take the concept and practice of constituent power seriously. Constituent power, according to its traditional formulation, is not binding on itself. The problem, of course, is that the typical liberal constitution treats constituent power as exhausted in the activity of establishing a new constitution. As such, the original power of the citizenry to re-create their constitution through extraordinary procedures in which popular involvement is at its highest and most meaningful is nowhere to be found in the constitutions of the world’s greatest revolutions. These constitutions proceed as if the people relinquish its sovereignty after establishing a juridical order. Such a conception, even if it might symbolically appeal to “the people” every now and then, neutralizes popular sovereignty in actual political practice under the ideal of constitutional supremacy.

In contrast to this common and limited view of the relation between democracy and constitutionalism, the democratic potential of the theory of constituent power lies precisely in its insistence that the people’s constitution-making power can be exercised at any moment after a constitu-

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51. ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 46 (1987).

52. *Id.* at 143.

tion is in place. This is in fact one of the major challenges that Sieyes and Schmitt pose for the tradition of liberal constitutionalism.<sup>53</sup> As has been correctly noted, for them the “*pouvoir constituant* remains a force to be reckoned with well after the revolution.”<sup>54</sup> As showcased in the practical operations of the American constitutional order, the constituent power has not only been tamed and neutered, but it has been recast as an illegitimate force.

Accordingly, the democratic legitimacy of a revolution and of any ensuing constitution is to be found as much in its openness to future exercises of constituent power as in its pedigree and the form of government it establishes. Thinking about constituent power in this way, as being facilitated by a constitution, might appear contrary to some of its defining features, such as its unmediated character and its irreducibility to any pre-established legal forms. But this would be mistaken. A closer look at the theory of constituent power shows that, while the constituent power is to be construed as “independent of any procedures,”<sup>55</sup> this does not mean that a constitution may not facilitate its exercise by making participatory constitutional change its preeminent and central feature. It is true, of course, that constituent power cannot be limited or regulated by any form or procedure; the bearer of the constituent power can give life to a new constitutional order through any extra-constitutional mechanism (as long as the mechanism is consistent with the very idea of constituent power, that is to say, of a people giving itself a constitution). However, it does not follow that constituent power *cannot* be exercised through established procedures that attempt to come as close as possible to a popular constitution-making episode or, what is the same thing, to a democratic revolution.

In fact, Schmitt considered this possibility. He maintained that, even though the *initiation* of constituent power could not be regulated by any institution, the *execution* and *formulation* of the decisions of the constituent subject normally required certain organization and procedure.<sup>56</sup> If this were not the case, the constituent subject might remain in a state of powerlessness and disorganization; it would be unable to transform its will into law. In the absence of mechanisms that facilitate the execution and formulation of the decisions of the constituent power, the success of

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53. For Sieyes, “a nation can neither alienate nor waive its right to will; and whatever its decisions, it cannot lose the right to alter them as soon as its interest requires.” SIEYES, *supra* note 9, at 127. Agreeing with Sieyes, Schmitt saw the exercise of constituent power as an ever present possibility. The constituent power, he wrote, “is not thereby expended and eliminated, because it was exercised once”, but always “remains alongside and above the constitution.” SCHMITT, *supra* note 11, at 125–26.

54. William E. Scheuerman, *Revolutions and Constitutions*, in *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 257 (David Dyzenhaus ed., 1998). Scheuerman is referring here to specifically to Schmitt, but the point applies with the same force to Sieyes’s conception.

55. SIEYES, *supra* note 9, at 128.

56. SCHMITT, *supra* note 11, at 132, 138, 140.

a popular movement in producing important constitutional change depends on many—sometimes democratically irrelevant—factors such as how effective is the state’s repressive apparatus, how effective is a mass political movement in persuading people to engage in different forms of protest that might even involve the risk of death, how is the challenge to the existing regime, and the regime itself, perceived by the international community, etc. This helps to explain why in some countries (e.g., Tunisia and Egypt) the popular movements were successful in overthrowing the existing regimes, while in other places (e.g., Bahrain and Syria) the regimes in question have been able to survive for longer.<sup>57</sup>

However, even in those places in which protestors were able to initiate the exercise of constituent power that ended in some sort of constitutional change, those changes were not adopted through participatory processes.<sup>58</sup> Not surprisingly, those initiatives have been criticized for failing to meet some of the main demands of the citizenry.<sup>59</sup> In those cases, to paraphrase Schmitt, the constituent power was not able to transform its proposals into law.<sup>60</sup> It is exactly this desire to divert the future exercise of constituent power into a constitutional blind alley that offends the commitment to a mode of strong democratic governance.

### III. CONCLUSION

The role of the democratic constitutional theorist, as well as that of the revolutionary constitution-maker, should be to provide novel ways of exercising the “right of revolution.”<sup>61</sup> This will entail the continuing responsibility to devise institutional mechanisms that would allow constituent power to manifest and assert itself from time to time. Of course, the exercise of constituent power would normally be initiated in the streets, in the form of informal gatherings (as those now taking place in Greece and Spain),<sup>62</sup> civil disobedience, and other types of protests. However, a truly democratic constitutional order would not only allow those types of popular manifestations to occur without state interference, it would also establish more formal and less complex processes which citizens could

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57. For a discussion of some of these events, see Tarek Masoud, *The Upheavals in Egypt and Tunisia: The Road to (and from) Liberation Square*, JOURNAL OF DEMOCRACY, July 2011, at 20, and Jason Gluck, *Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia*, U.S. INST. OF PEACE, PEACEBRIEF (April 29, 2011), <http://www.usip.org/files/resources/PB92.pdf>.

58. For example, the constitutional changes recently approved in Egypt (via referendum) were drafted by a committee of experts appointed by the Supreme Council of the Armed Forces. *Army Council Issues Statement on Constitutional Amendments*, EGYPT ST. INFO. SERVICE (Feb. 27, 2011), <http://www.sis.gov.eg/en/Story.aspx?sid=53903>.

59. See, e.g., Gregg Carlstrom *Deep Divisions Over Egypt's Referendum*, ALJAZEERA, (Mar. 18, 2011), <http://english.aljazeera.net/indepth/spotlight/anger-in-egypt/2011/03/20113159273349129.html>.

60. See SCHMITT, *supra* note 11, at 132.

61. FRIEDRICH, *supra* note 29, at 129.

62. Nicholas Kulish, Ethan Bronner & Jim Yardley, *As Scorn for Vote Grows, Protests Surge Around Globe*, N.Y. TIMES, Sept. 28, 2011, at A1.

trigger and through which they could deliberate and decide on important constitutional transformations. In other words, a constitutional mode of democratic governance would promote rather than combat the occurrence of revolutions. The constitutional journey of democracy never ends, but occasionally pauses for breath.