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# Two internal critiques of political constitutionalism

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*The antagonism between legal and political constitutionalism has almost monopolized the discussion on constitutional theory during the last years. For this reason, political constitutionalism has been assessed mainly as an alternative to legal constitutionalism. Moving beyond this perspective, this article intends to focus exclusively on political constitutionalism and its internal tensions. After having outlined the main tenets of this theory, two internal critiques are put forward, both concerning the understanding of the political aspect of constitutionalism: first, political constitutionalists propose a reductive account of the principle of political equality; second, their exclusive focus on ordinary politics as the centre of constitutional life is misleading and precludes a correct evaluation of constitutional politics.*

## Introduction

This article intends to put forward two internal critiques to a cluster of works whose core theoretical proposal is known as political constitutionalism.<sup>1</sup> Political constitutionalists are those authors who have stressed, in particular during the last decade, the perils of adopting a strong form of judicial review to protect individual rights<sup>2</sup> at the national and transnational levels.<sup>3</sup> This process of juridification, advocated by the

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<sup>1</sup> This expression is used by RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007), and ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005). Among the works that can be ascribed to the canon of political constitutionalism, at least two should be noted: JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Tushnet refers to a political approach to constitutionalism in MARK TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS* (2008), but it is necessary to point out that his version of political constitutionalism is embedded in the American model of strict separation of powers. Of course, the works that I group here diverge on certain issues (some claim to belong to republican theory, some to liberalism or democratic theory), but this is true for almost every family of political philosophy.

<sup>2</sup> The main focus of political constitutionalism is on judicial review of rights rather than structural judicial review (e.g., conflict among powers). See Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 *OXFORD J. LEGAL STUD.* 1 (2008).

<sup>3</sup> The most recent accomplished example being Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006) [hereinafter *The Core of the Case*].

so-called new constitutionalism,<sup>4</sup> has also been severely criticized for its depoliticizing effects. But this point does not exhaust the depth and scope of the theory of political constitutionalism. The basis of this approach must be found in a different understanding of the relationship between constitutional law and politics.<sup>5</sup> This article focuses especially on this aspect of political constitutionalism. Its aim is specifically to show that some of the foundational tenets of political constitutionalism are presented at best in a reductive way. Since the political critique of judicial review has already been dealt with by several authors,<sup>6</sup> this article will concentrate mainly on other aspects of political constitutionalism. However, the critiques presented here do not arise from the point of view of an external observer, but from an internal perspective that accepts some of the main features of political constitutionalism. In a nutshell: the politics put forward by political constitutionalists needs to be supplemented and depicted in a more accurate and, as it were, deeper way.

To prove this point, this article proceeds in the following way. The first section outlines the main tenets of political constitutionalism, so as to arrive at a general understanding of the principles of this stream of thought. Section 2 evaluates the way political constitutionalists theorize and apply the basic normative principle of political equality. In particular, two points are examined: the political conception of the idea of public reason and the exclusive focus on the right to vote. Section 3 is concerned with the weaknesses of the political conception of the constitution as a process rather than as a norm and, accordingly, of how this theory portrays higher law one-sidedly as an essentially juridified concept. This critique recognizes the valuable aspects of certain tenets of political constitutionalism; nonetheless, it puts forward the hypothesis that if political constitutionalism wants to take things like rights, political equality and constitutionalism seriously,<sup>7</sup> it needs to introduce other elements into the picture of politics and its relationship with constitutional law.

Overall, the problem affecting some of the political constitutionalists' proposals is that the idea of politics undergirding this theory appears to be largely incomplete at least under two aspects with which this article deals in sections 2 and 3. The first aspect concerns the pillar of political equality; the second—the temporal-extended dimension of political action, which is all but ignored by political constitutionalists, even when they concentrate on the parliamentary style of politics. It is unrealistic

<sup>4</sup> See MIGUEL CARBONELL ED., *TEORIA DEL NEOCONSTITUCIONALISMO* [The Theory of New Constitutionalism] (2007); Ran Hirschl, *The New Constitutionalism and the Judicialization of Politics Worldwide*, 75 *FORDHAM L. REV.* 721 (2006).

<sup>5</sup> On this relationship see MARTIN LOUGHLIN, *SWORD AND SCALES. AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* (2000).

<sup>6</sup> The following is not an exhaustive list; Lars Vinx, *Constitutional Indifferentism and Republican Freedom*, 38 *POL. THEORY* 809 (2010); Alec Walen, *Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism*, 7 *INT'L J. CONST. L.* 329 (2009); Tom Hickman, *In Defence of the Legal Constitution*, 55 *UNIV. TORONTO L.J.* 981 (2005); Iseult Honohan, *Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?*, in *LEGAL REPUBLICANISM* 83 (Samantha Besson & José Luis Martí eds., 2009); Paul Craig, *Political Constitutionalism and Judicial Review*, in *EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE* 19 (Christopher Forsyth ed., 2010).

<sup>7</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 156.

to portray political action as free from formal and material constraints. As any other practice, political action does not take place in a vacuum. And even though judicial reasoning may be performed in a more constrained environment, neither is politics exempt from a series of temporal and immanent limits. For these reasons, the ideas of political equality and of a constitution cannot be set uniquely against the model proposed by legal constitutionalism. They need to be further developed in order to fulfill some of the promises that political constitutionalism carries with it. One of the assumptions underlying the political constitutionalists' enterprise is, for example, the belief that parliamentary sovereignty and a constitution understood as a process are enough to get around the pitfalls of neoliberalism and provide a political space for the expansion of liberties and rights.<sup>8</sup> Unfortunately, such a model rests on contentious premises about political power. This means that political constitutionalists' claims are often too optimistic and too generous toward the *status quo*.

This article hopes to convey a different and more nuanced argument: recognizing the value of voting and of parliamentary politics should not inhibit us from recognizing the redemptive potential of other kinds of politics. Quite the contrary: an enriched conception of political action may bring with it a re-definition of the right to vote and of the centrality of the legislature without adopting a strong anti-constitutionalist stance. It is in the spirit of an internal critique of political constitutionalism that some remarks are offered in the conclusion.

## 1. The model of political constitutionalism: four tenets

In this section, the main tenets of the model of political constitutionalism will be sketched out in order to bring out their common theoretical core. This does not claim to be a complete or exhaustive list, but an attempt to carve out a common ground from different versions of political constitutionalism.

### 1.1. The primacy of politics: disagreement and rights

The foundational aspects of this doctrine boil down to four tenets. According to the first one, politics precedes and founds law. The recognition of this foundational trait renders the position of political constitutionalists quite original in two ways. First, legal and constitutional theorists have focused on the question of the relationship between morality and law, a question that, since the debate between Fuller and Hart, has never

<sup>8</sup> This idea has been expressed by Keith Ewing with reference to the British constitution: "for those wishing to promote social change, the British constitution provided one of the best opportunities for this to be done, particularly after the introduction of universal suffrage and the reform of the House of Lords in 1911 and 1949 . . . there were no institutional restraints on a legally sovereign legislature and a politically sovereign electorate": Keith Ewing, *The Unbalanced Constitution*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 104 (Tom Campbell, Keith Ewing & Adam Tomkins eds., 2001). For a critique of the ancillary role of constitutionalism in the raise of the neoliberal doctrine see DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* (2010).

ceased to be at the center of contemporary legal philosophy.<sup>9</sup> Seen from the perspective of morality, politics looks inferior and potentially dangerous. In a well-known study on the mentality of liberal legalism, Judith Shklar aptly summarized this view: “politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies.”<sup>10</sup> While morality is mainly associated with rationality, politics is depicted as the realm of interests or passions,<sup>11</sup> inevitably inferior to the ambit of rationality.<sup>12</sup> Law should be inspired by morality, and politics should be practiced only within the realm designed by legal norms. In a nutshell, politics is made possible only by the previous recognition of a series of fundamental legal and moral principles.<sup>13</sup> Political and legal authority should be judged according to substantive moral outcomes.

Political constitutionalists try to turn this approach on its head and to establish at least the relative primacy of politics. This move implies shifting the focus from morality to politics by adopting an agnostic attitude toward morality: Political constitutionalists do not take any specific stance concerning the nature and the knowledge of moral values. Moral objectivity is, for them, irrelevant.<sup>14</sup> This position entails that in politics (and in law, too) there is no privileged access to knowledge.<sup>15</sup> In epistemic terms, this means that no institutional actor can claim to possess the best way to detect or track moral truths more accurately. The primacy of the political comes as a necessary assumption grounded on what are known to be the two “circumstances of politics.”<sup>16</sup> The first one is the recognition that the human condition is marked by radical plurality (to be distinguished from the fact of pluralism) because, as Hannah Arendt puts it, “not man but men inhabit the earth and form a world between them.”<sup>17</sup> The second circumstance is constituted by the presence of a pervasive reasonable disagreement as a logical consequence of this plurality. The challenge of politics is to find a way to reach an authoritative decision despite this immanent disagreement.<sup>18</sup>

No wonder, therefore, that disagreement is at the forefront of the concerns of political constitutionalists. The recognition of its importance runs parallel to the downplaying of consent as the grounds of constitutional legitimacy. Disagreement and conflict are at the core of politics; but at the same time political constitutionalists believe that

<sup>9</sup> See PETER CANE, ED., *HART–FULLER DEBATE IN THE TWENTY-FIRST CENTURY* (2010) for the most recent contribution to this debate.

<sup>10</sup> JUDITH SHKLAR, *LEGALISM* 111 (1964).

<sup>11</sup> This is a sketchy presentation that does not give justice to the complexities of the argument.

<sup>12</sup> The trope reason/passion fits very well in liberal constitutionalism. The topic has been neglected by constitutional and political theorists, but it may lead to some interesting insights.

<sup>13</sup> See, e.g., GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (new edn. 2009).

<sup>14</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 164–187.

<sup>15</sup> On the objectivity of legal knowledge, see GEORGE PAVLAKOS, *OUR KNOWLEDGE OF THE LAW* (2007).

<sup>16</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 108–113; ALBERT WEALE, *DEMOCRACY* 8–13 (1999).

<sup>17</sup> HANNAH ARENDT, *ON REVOLUTION* 175 (1963).

<sup>18</sup> For a normative account of the role of disagreement in law see SAMANTHA BESSON, *THE MORALITY OF CONFLICT. REASONABLE DISAGREEMENT AND THE LAW* (2005).

politics itself represents the best way to deal with them. Law, in this scheme, is only one of the possible tools that politics has at its disposal for managing conflict and disagreement. The authority of a constitutional order cannot be based on conventions or on moral principles (as it is in Dworkin's interpretivism). The former presupposes at least tacit consent to follow the relevant legal conventions.<sup>19</sup> The latter buttresses a form of moral objectivity that is ill-fitting when one thinks of the role of disagreement in political life. Likewise, deliberative democracy cannot constitute a viable alternative for grounding a political conception of authority. Deliberative theorists, too, look for a rational procedure to enhance the integrating force of communication and bring to an ideal consensus, but for these theorists (and this is where they diverge from political constitutionalists) the presence of disagreement, at the end of the deliberative process, represents the sign of failure.<sup>20</sup>

Disagreement is not only an essential feature of the political condition. It also has jurisgenerative properties. In this sense, political constitutionalists believe that there is a mutual relationship between law and disagreement. Law has a role to play in coping with disagreement; but disagreement remains a creative force which brings with it many positive effects, such as plurality of opinions, epistemological benefits, mutual learning, and political accountability through constant challenges to political power.<sup>21</sup> This means that disagreement needs to be limited but must not be eliminated from political life.

Seen in the light of pervasive reasonable disagreement, it should be clear that the main good to be protected in a constitutional polity, i.e., individual rights, also remain subject to the political circumstances. Indeed, the content of rights is open to contestation as much as any other political question.<sup>22</sup> Here, the separation between legal and political models of constitutionalism is neat.<sup>23</sup> In the legal model of constitutionalism, fundamental rights precede the political process and are entrenched in a constitution or in a declaration of rights. People can enter the political process insofar they are endowed with certain rights which lie outside the realm of politics. As these rights are recognized as being evident on the basis of reason or as natural rights, their content should not be left to the bargaining that typically characterizes political decision-making. More specifically, rights are considered to trump notions such as public or common good whose appropriate sphere is politics. A strong individualistic perspective animates this view on rights which are considered as individual good. As such, they should not be left to the exclusive protection of legislation which is more prone to be guided by utilitarian considerations in its decision-making process. But if disagreement is an inherent feature of social life, then it must extend to cover

<sup>19</sup> But for an exception in the realm of legal conventionalism see ANDREI MARMOR, *LAW AND THE OBJECTIVITY OF LAW* 5 (2001). Marmor rightly explains that the depiction of conventionalism as a doctrine of consent is due to Ronald Dworkin, *Law's Empire* 114–150 (2d edn. 1998).

<sup>20</sup> See, e.g., the articles collected in JON ELSTER ED., *DELIBERATIVE DEMOCRACY* (1998).

<sup>21</sup> BESSON, *supra* note 18, at 116–118.

<sup>22</sup> I am grateful to an anonymous reviewer for having pointed out the opportunity to underline this point.

<sup>23</sup> On the use of models as applied in the debate on political constitutionalism see Graham Gee & Grégoire Webber, *What is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273 (2010).

individual rights. It must be remarked that, with some notable exceptions,<sup>24</sup> the theory proposed by political constitutionalists is often rights-based. Their account of rights is not conceived in an individualistic fashion, but sees them as common goods. For legal constitutionalists, rights usually serve individual interests and shield them from the government, while for political constitutionalists rights also—or rather, primarily—protect the common good.<sup>25</sup> As noted by a liberal perfectionist like Joseph Raz, the right to freedom of expression is prized and valuable because it contributes to an open and tolerant society based on democracy, and this is a common good for all citizens, whether or not politically active.<sup>26</sup> In that respect, *contra* Dworkin, “rights do not ‘trump’ notions of the collective good because they only make sense in so far as they contribute to that good and provide a suitable range of individual opportunities for all members of the community.”<sup>27</sup> If rights were regarded as absolute, it would make no sense to plead for a political interpretation because they would not be negotiable and open to compromise.<sup>28</sup> As such, the best method to interpret and implement rights is to leave the determination of their content to the political process. Courts cannot claim an epistemic primacy in the adjudication of rights, certainly not superiority over the capacity of legislatures.<sup>29</sup>

Viewed from the perspective of disagreement’s role in law, judicial review of rights entails at least two problems.<sup>30</sup> The first one is that it shows a lack of respect for individual citizens by circumscribing the issue of the determination of the content of rights within the perimeter of its own jurisdiction. Waldron has noted the fact that leaving the enforcement of rights to processes of legal interpretation can bring about undesirable side-effects: “it is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of scraps of some sacred text, in a tendentious exercise of constitutional calligraphy.”<sup>31</sup> A discourse on rights based only on their purely legal dimension weakens the vitality of the political debate because it turns out that “to embody a right in an entrenched constitutional document is to adopt a certain attitude towards one’s fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust.”<sup>32</sup> In other words, judicial review of rights does not respect citizens as people capable of political judgment on fundamental

<sup>24</sup> Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

<sup>25</sup> For an overview on the debate on the nature of rights see JEREMY WALDRON ED., THEORIES OF RIGHTS (1984); PETER JONES, RIGHTS (1994); TOM CAMPBELL, RIGHTS. A CRITICAL INTRODUCTION (2006).

<sup>26</sup> JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 146 (1995).

<sup>27</sup> *Id.* Dworkin’s account of rights has changed over time. On this point see Paul Yowell, *A Critical Examination of Dworkin’s Theory of Rights*, 52 AM. J. JURIS. 93 (2007).

<sup>28</sup> See GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION (2009). On the role of compromise in political constitutionalism see RICHARD BELLAMY, LIBERALISM AND PLURALISM. TOWARDS A POLITICS OF COMPROMISE 93–114 (1999).

<sup>29</sup> Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT’L J. CONST. L. 2 (2009).

<sup>30</sup> Political constitutionalists have given other reasons to reject strong judicial review. These reasons will be discussed in section 1.3. Here, only the reasons against judicial review of legislation based on the importance of disagreement are treated.

<sup>31</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 1, at 290–291.

<sup>32</sup> *Id.*, at 221.

questions such as the content of rights.<sup>33</sup> The second problem affects the epistemic advantages that might be generated by political decisions regarding rights. In particular, by taking disagreement out of the political sphere, judicial review reduces constitutional adjudication of rights to adversarial litigation and prevents the plurality of opinions on the content of the contested rights from expressing itself. In this way, rights are not decided upon following a proper consideration of the plurality of perspectives entailed by the circumstances of politics.<sup>34</sup> This is detrimental to the public interest which should constitute, according to the political approach, the reason for enforcing rights. Since, for political constitutionalists, the best way to track the public interest is to let the plurality of views on an issue express itself, decisions on rights (since these are a common good) should be taken following the same process. To sum up: Judicial review is not the best watchdog of rights because it violates the most important of them: the right to equal participation.<sup>35</sup> This brings us to the second tenet of political constitutionalism.

## 1.2. Political equality

Given the role of disagreement in politics outlined above, the only possible principle on which to ground authority is political equality. As a condition of legitimacy and, as we shall see, a guide to judgment, political equality is the reference point around which political constitutionalism defines its goals and its language. It is both the engine of the democratic process and the mirror that reflects the citizens' critical judgment. While equality before the law (*isonomia*) is certainly to be counted among the founding principles of legal constitutionalism, political equality as the equal chance to have one's voice heard (*isegoria*) constitutes the building block of democratic politics. The key determinant of political equality is clearly the right to vote.<sup>36</sup> But political equality is respected only if the vote carries an equal weight: one head, one vote.<sup>37</sup> Moreover, in order to let everybody have an equal say on common matters, one has to adopt the principle of majority rule. These two aspects are to be applied to both the level of general elections and of parliamentary debate. Contrary to what is usually assumed, the justification of majority rule is not to be found in the utilitarian idea that

<sup>33</sup> Jeremy Waldron, *Representative Lawmaking*, 89 B.U.L. REV. 335, 353 (2009).

<sup>34</sup> This criticism does not consider the use of proportionality in European case law. For a concise, yet effective treatment of the rationality underlying proportionality analysis see Matthias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 2 (2007).

<sup>35</sup> Waldron defines this right as "a right to participate on equal terms in social decisions on issues of high principle": LAW AND DISAGREEMENT, *supra* note 1, at 213.

<sup>36</sup> Political constitutionalists seem to ignore the *status* of those who have not the right to vote (i.e., residents and aliens but not citizens), but they are nonetheless affected by political decisions. This *lacuna* can be explained by reducing the idea of citizenship to the "right to have rights." This issue can not be treated adequately here and will be discussed in another paper. For an introduction to the problem of citizenship in contemporary constitutional law see the issue *The Evolving Concept of Citizenship in Constitutional Law*, 8 INT'L J. CONST. L. 6 (2010).

<sup>37</sup> See, for a different view that takes into account the intellectual capacities of citizens, J.S. Mill, *Considerations on Representative Government* [1861], in ON LIBERTY AND OTHER ESSAYS 205 (2008).

this institution permits the aggregation of preferences.<sup>38</sup> But if the political process is understood as aggregation of preferences, then, as David Estlund has pointed out, even a clever dictator may accurately track the preference profile of the electorate, but this would not make him democratically legitimate.<sup>39</sup>

On the contrary, political constitutionalists ground the justification of the majority rule principle in the “equal distribution of decision-making power.”<sup>40</sup> In that sense, Waldron has reminded us that equal votes and majority rule show equal concern and respect for citizens:

majority-decision respects individuals in two ways. The first is by respecting the fact of their differences of opinion about justice and the common good. Majority-decision does not require anyone’s view to be played down or hushed up because of the fancied importance of consensus.<sup>41</sup>

The second way of showing respect in a majority-based decision lies in giving positive decisional weight to the fact that a given individual member holds a certain view. Instead of delegating to a Hobbesian sovereign the resolution of collective problems, majority rule accords to citizens a fair method of decision making. It is not that the Hobbesian approach does not recognize disagreement, but the point is that it does fail to recognize the second sense of respect, that is, the sense of counting equally when choosing a solution. The authority of law stems from the recognition of equal respect and concern for citizens implied in the principle of majority rule and the equal right to vote.<sup>42</sup> The normative basis of this conception of authority lies in showing respect to citizens by treating them as autonomous reasoners.<sup>43</sup> Authoritative directives are intended as binding not because people agree or give their consent to them, but because they have had a fair say in the process that led to the adoption of the law. Given the conditions of politics, equal votes and majority rule form political constitutionalists’ public reason by securing the respect of publicness in several senses (public rules, public scrutiny and public forum where political projects can be debated, for example)<sup>44</sup> while they secure accountability through the same electoral process.<sup>45</sup>

<sup>38</sup> Authors like Kenneth Arrow and William Riker have criticized the majoritarian aspect of democracy on the basis that no aggregation rule can produce a determinate outcome while satisfying reasonable normative conditions. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982). Riker insists that the only rational way to understand democratic politics is to analyze the process in terms of individualistic decisions made by voters and politicians, as if they were maximizing their own transitive preferences. For an empirical critique of the Arrow-Riker position see GERRY MACKIE, *DEMOCRACY DEFENDED* 5–9 (2003).

<sup>39</sup> DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 76–79 (2008). Henry Richardson made a similar example referring to a want-collation machine that registers and aggregates each person’s preferences: HENRY RICHARDSON, *DEMOCRATIC AUTONOMY* 63–64 (2002).

<sup>40</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 230.

<sup>41</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 108.

<sup>42</sup> For a justification of majority rule from the social choice theory perspective, see AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 71–74 (1970). The classic defense is Kenneth May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 *ECONOMETRICA* 680 (1952).

<sup>43</sup> RICHARDSON, *supra* note 39, at 78–83.

<sup>44</sup> On equal votes as a public way of providing citizens with equal political resources, see Thomas Christiano, *The Authority of Democracy*, 12 *J. POL. PHIL.* 266, 274–277 (2004).

<sup>45</sup> TOMKINS, *supra* note 1, at 6–7.

### 1.3. Neo-parliamentarism

Having established that the building block of political constitutionalism is the idea of political equality, it is still necessary to outline the constitutional values that this conception entails and, in particular, the institutional design that instantiates these values. The third tenet of the political version of constitutionalism supports the idea that all politics are constitutional. Therefore, legislative politics are always constitutional and exhaust, in that respect, the whole space of public reason. At the level of institutional design the crux of the argument lies in the rejection (although it may be presented in different ways) of strong judicial review.<sup>46</sup> The embodiment of such a practice in a constitutional or in a supreme court violates the principle of political equality. To understand this firm rejection of judicial review, one has to look at the difference between input- and output-related reasons. The latter are usually taken to be those authoritative reasons for designing procedures in a way that will ensure appropriate outcomes. This is, for example, the *rationale* behind Raz's service conception of authority, according to which a directive is authoritative not in virtue of the way it was enacted, but because it provides exclusionary reasons.<sup>47</sup> Another example of an outcome-related line of thinking is John Rawls's idea that the fundamental parameter for judging a procedure is given by how just its likely results are.<sup>48</sup> Outcome-related reasons are reasons for adopting a procedure that will secure the appropriate result; while input-related reasons insist that people participate in the decision independently of considerations about the appropriate outcome.<sup>49</sup>

Usually, there are four arguments based on outcome reasons in support of judicial review of legislation.<sup>50</sup> First, constitutional courts deal with individual cases and so they find themselves in a better position to decide on individual rights. However, by the time cases reach the high appellate levels, they have almost lost any trace of the right holder. Therefore, the dispute takes place around quite abstract issues. The second type of outcome-related reasons is the reference to a bill of rights as a constraint on the arbitrary power of judicial interpretation and as an aid allowing disputants to focus on the abstract issues at stake. In this case, political constitutionalists have remarked that the constraints imposed by legal texts and precedents, given the vagueness inherent to language and the relative ease with which supreme courts depart from previous decisions, cannot be deemed to be particularly relevant. The third reason concerns the fact that judicial decisions come in the form of reason-giving. As Dworkin famously put it, courts are "forums of principle."<sup>51</sup> But this aspect depends

<sup>46</sup> On the difference between strong and weak judicial review see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. C. L. REV. 1, 9–21 (2004).

<sup>47</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23–108 (1986). Raz dismisses input reasons as secondary: Joseph Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 25, 45–46 (1998).

<sup>48</sup> John Rawls, *A Theory of Justice* 202 (rev. edn. 1999).

<sup>49</sup> Waldron, *The Core of the Case*, *supra* note 3, at 1371–1372.

<sup>50</sup> *Id.* at 1379–1386.

<sup>51</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69–71 (1985).

on contextual institutional designs and it is by no means exclusive to judicial power. Nothing prevents parliaments or other political institutions from giving reasons on the basis of principles. The last argument, probably the most important, is based on the idea that judicial review is a necessary presupposition of the legitimacy of democratic processes and a remedy for certain potential drawbacks of democratic decision-making.<sup>52</sup> In particular, as output-based procedure, judicial review can check the risk of majoritarianism when democracy, aggregating votes, risks sacrificing individuals to collective welfare. Fundamental rights, being “individual political goals,” should not be subordinated to “notions of the general interest.”<sup>53</sup> The claim is that, from the point of view of political constitutionalists, judicial review of legislation violates the principle of political equality because it decides on issues of general interests as rights and powers without giving to every citizen the possibility to participate and to have a fair say in the process.<sup>54</sup>

While outcome reasons do not constitute a clear case in support of judicial review, input reasons, concerning fundamentally those who participate in a process, are clearly, or, as the argument goes, at least in support of voting mechanisms that give everyone an equal say. The only way to achieve a non-arbitrary form of government lies in giving substance to people’s quality as equal political actors in some form of popular rule.<sup>55</sup> On the other hand, judicial review does not comply with input reasons. Its adversarial institutional form, however interpreted, does not take into account, when deciding on rights and powers, more than two perspectives, narrowing down the perimeter of deliberative communication. For political constitutionalists, the best way to track down the common good, so to speak, is a system of “equal votes, majority rule and party competition.”<sup>56</sup>

In light of this discussion, it turns out that the only institutional equilibrium that guarantees the principle of political equality can be defined as neo-parliamentarism. Parliament is seen by political constitutionalists as the only institution which can express the plurality of opinions and respect disagreements while at the same time reaching an authoritative decision. Waldron has elegantly summed up the authoritative character of the activity of the parliament in the following terms: “the authority of a law is its emergence, under specified procedures, as a ‘*unum*’ out of a plurality of ideas, concerns, and proposals, in circumstances where we recognize a need for one decision made together, not many decisions made by each of us alone.”<sup>57</sup> As an institution, a legislative assembly is normally composed by an elevated number of people

<sup>52</sup> See Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 *LAW & PHIL.* 327 (1990); CHRISTOPHER EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 46–108 (2002). See also the classic work by JOHN ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>53</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 269 (1977).

<sup>54</sup> For a critique of this argument see Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 *LAW & PHIL.* 451 (2003). Aron Harel proposes a right to judicial review as a spin-off of the right to have one’s voice heard: *The Right to Judicial Review*, 92 *Vir. L. Rev.* 991 (2006).

<sup>55</sup> RICHARDSON, *supra* note 39, at 47–48.

<sup>56</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 220.

<sup>57</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 144.

(a feature which constitutes a guarantee against corruption and for better deliberation<sup>58</sup>) and it follows the principle of majority rule, therefore representing a real and balanced space for deliberation.<sup>59</sup>

#### 1.4. The value of ordinary politics and the rejection of higher law

Along this line of reasoning, we come to the last tenet which affirms that there is no space in political constitutionalism for a higher law or superior norms (a legal constitution). If democracy is a political process based on the principle that everybody can have an equal say on common issues, then any constraint or limit imposed by legal instruments appears as illegitimate and arbitrary over the following generations. Even worse, constitutionalization is equated with a process that reinforces a given elite or perpetuates the power of social groups that fear that they might lose their ascendancy in the future.<sup>60</sup> Even though they should probably be distinguished as different phenomena, constitutionalization is deemed to be prodromic to pervasive judicialization.<sup>61</sup>

From this outline of the legalist conception of a constitution stems one of the most challenging claims of political constitutionalism. This claim entails a commitment to a particular idea of constitution.<sup>62</sup> The most explicit is Bellamy who affirms that “according to this political conception, the democratic process is the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself.”<sup>63</sup> From this perspective, constitutions cannot be considered norms or laws *stricto sensu*.<sup>64</sup> Democracy is self-constituting and does not need superior norms to regulate this process, or at least, this process cannot be constrained by laws. It is not by accident that political constitutionalism does not deal with the idea of constituent power. Indeed, the idea of politics which permeates this theory does not allow for a distinction between the constitutive and the constituted. Since it is a process, democracy can police itself in virtue of the deployment of its own logic.

In the following two sections only the second and the fourth tenet will be discussed. As for the first tenet, while its basic correctness is going to be acknowledged, some remarks will be made at the end of this article in light of the considerations advanced on political equality and the idea of a constitution. The issue of judicial review will not be discussed in much detail, but since the rejection of judicial review is based on a

<sup>58</sup> This point was made by Condorcet and has been recently revived by JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 32–35 (1999).

<sup>59</sup> Parliament is also seen as the most suitable institution for political accountability: cf. Adam Tomkins, *What Is Parliament For?, in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION* 53 (Nicholas Bamforth ed., 2003). On the idea of political accountability see RICHARD MULGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES* (2003); ROBERT BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* (2001).

<sup>60</sup> This is the thesis proposed by RAN HIRSCHL, *JURISTOCRACY* (2004).

<sup>61</sup> On judicialization see the in-depth analysis of ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000).

<sup>62</sup> Graham Maddox, *A Note on the Meaning of Constitution*, 76 AM. POL. SC. REV. 1805 (1982).

<sup>63</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 5.

<sup>64</sup> This view of the constitution is strikingly close to the political conception that was dominant at least until the beginning of the French Revolution. See APOSTOLOS PAPANOLIAS, *CONCEPTION MÉCANISTE ET CONCEPTION NORMATIVE DE LA CONSTITUTION [Mechanistic and Normative Conceptions of the Constitution]* (2000).

minimalist conception of political equality, a different understanding of this principle may lead to different conclusions on the legitimacy of judicial review.

## 2. Public reason in political constitutionalism: Electocracy<sup>65</sup>

At the core of the political interpretation of constitutionalism lies a full-fledged (if minimal) idea of public reason. As already remarked, this conception consists of two ingredients: equal votes and majority rule. Understood in this way, public reason shall guarantee the two most cherished political values: political equality and accountability. This minimal understanding of public reason should also leave the public space open to the inclusion of other voices and the emergence of new issues of discussion. In other words, this thin conception recognizes the fact that public reasoning shapes and regulates public debate, but it must also be grounded by that very debate. This allows challenges to received or established reasons that are counted among public reason while, at the same time, the fact that disagreement in public reason is part and parcel of the “imagination and creativity”<sup>66</sup> immanent to politics is taken properly into account.

On this point a political conception of public reason differs sharply from its legal counterpart. For legal constitutionalists, there are pre-political features that constrain public reasoning. Fundamental rights, for example, are deemed pre-political in their nature and they represent a limit on majority rule. On certain issues, a sort of general consensus can be achieved after proper deliberation and exposure to public debate. Once a conclusion is reached, these issues are placed beyond reasonable disagreement. To understand the split between political and legal conceptions of public reason, it is quite instructive to focus on Bellamy’s and Waldron’s critique of Rawls’s idea of it.<sup>67</sup> Public reason, according to Rawls, is limited to “constitutional essentials” and matters of basic justice.<sup>68</sup> The conceptual setting for Rawls’s construction of public reason is the original position. Through this device, citizens endowed with dual moral power (a sense of justice and a conception of the good) and deprived of the knowledge of their own social and economic status,<sup>69</sup> choose two principles of justice on which two rational agents can apparently reach an agreement. It is easier and more probable that individuals placed in the original position will find “a shared point of view” in the

<sup>65</sup> I borrow the term from Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 MOD. L. REV. 1 (2008).

<sup>66</sup> Jeremy Waldron, *Religious Contributions in Public Deliberations*, 30 SAN DIEGO L. REV. 838 (1993).

<sup>67</sup> BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 1, at 184–188; WALDRON, LAW AND DISAGREEMENT, *supra* note 1, at 149–163.

<sup>68</sup> JOHN RAWLS, POLITICAL LIBERALISM 214 (2d edn, 2006). This is how Rawls defines these two ideas in the revised version of the idea of public reason: “Constitutional essentials concern questions about what political rights and liberties, say, may reasonably be included in a written constitution, when assuming the constitution may be interpreted by a supreme court, or some similar body. Matters of basic justice relate to the basic structure of society and so would concern questions of basic and social justice and other things not covered by a constitution” (*id.* at 442 n 7).

<sup>69</sup> *Id.* at 23–25.

principles of justice and, since constitutional essentials have to be designed “to choose the most effective just constitution,”<sup>70</sup> the same principles will constitute guiding output reasons. For Rawls, in a well-ordered polity, citizens legitimately expect their representatives to act and decide according to the idea of public reason. Although Rawls concedes that the Supreme Court is not the only possible seat of public reason,<sup>71</sup> traces of his legalistic understanding of public reason are disseminated throughout his texts. The test Rawls proposes to adopt as a way of checking whether a citizen is acting according to the idea of public reason is quite telling: we should ask “how would our argument strike us presented in the form of a supreme court opinion?”<sup>72</sup>

On the view of political constitutionalists, Rawlsian public reason does not take disagreement seriously because it already filters some of its more unsettling expressions through an idealized procedure.<sup>73</sup> Rawls’s words seem to corroborate the following remark: “the idea of right and just constitutions and basic laws is always ascertained by the most reasonable political conception of justice and not by the result of an actual political process.”<sup>74</sup> Effectively, the price to be paid for the removal of constitutional politics in designing constitutional essentials is high. Rawls’s method of building public reason “has struck all but its supporters as either too indeterminate to produce its favoured conclusions, or somewhat circular—building its results into its premises.”<sup>75</sup> Despite its numerous references to a political conception of liberalism, the idea of public reason’s weakest aspect is precisely to be found in the absence, in Rawls’s account, of any concrete political process. In that sense, Rawls “depoliticizes” public reason and insulates constitutional essentials from possible channels of contestation.<sup>76</sup> Overall, we are told by political constitutionalists, Rawls’s public reason is the practice of a reason where conflict is reduced as primarily involving doctrines and overcome by resorting to a device that enables the emergence of consensus.<sup>77</sup>

The problem is that, while partially correct, this critique may also be applied, to a certain extent, to political constitutionalists themselves. One of the crucial omissions from the original position is the absence of the recognition that any given society inevitably carries a historical legacy as part of its identity. This legacy, which comprises several relations of power, defines the conditions of those who find themselves engaged with political processes. The solution, according to political constitutionalists, is to frame an authoritative procedure which allows for a politics of the will to solve the

<sup>70</sup> RAWLS, *A THEORY OF JUSTICE*, *supra* note 48, at 198.

<sup>71</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 68, at 240.

<sup>72</sup> *Id.*, at 254.

<sup>73</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 158.

<sup>74</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 68, at 233.

<sup>75</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 185.

<sup>76</sup> To be fair, in the revised version of his conception of public reason, Rawls admits that “political liberalism, then, does not try to fix public reason once and for all in the form of one favored political conception of justice. . . . Even if relatively few conceptions come to dominate over time, and one conception even appears to have a special central place, the forms of permissible public reason are always several. Moreover, new variations may be proposed from time to time and older ones may cease to be represented”: *POLITICAL LIBERALISM*, *supra* note 68, at 451–452.

<sup>77</sup> Sheldon Wolin, *The Liberal/Democratic Divide. On Political Liberalism*, 24 *POL. THEORY* 97, 108 (1996).

question of disagreement. But a description of the formation of such a will as a cycle of elections regulated by majority rule strikes us as largely incomplete. Presented in an abstract way as basic principles, majority rule and equal votes can be easily manipulated, while being formally respected. Take, for example, the case of a state that, after a long period of dictatorship, comes to adopt some form of parliamentary democracy. It will be required to organize electoral districts and to enact electoral laws. At this stage, given the historical context of the country, it is possible to manipulate these elements in such a manner as to favor a specific outcome and to invalidate the principle that the minimum weight of a citizens' vote counts equally. One here may note that political constitutionalists are not making a universal argument because they recognize that their approach is applicable only in contexts where (a) there are democratic institutions already in place, (b) a well-functioning judicial power, (c) a general commitment to rights from the part of the relevant population, and (d) a reasonable disagreement about rights.<sup>78</sup> But it is quite clear that these assumptions secure the input-based approach of political constitutionalism from unwelcome outcomes. This move comes at a high price as well: these constraints look very similar to Rawls's account of political culture in *Political Liberalism* and weaken the strength of the argument by ignoring the issue of how (that is, according to which kind of reasons) to set up the procedures required by input reasons. Moreover, political constitutionalists would probably be committed to other important values which are entailed in the idea of a majoritarian democracy, such as freedom of expression and freedom of association—themes that have not been properly developed until now. An important part of this article's aim is to underline the impoverished nature of the description of representative politics, which, even in its parliamentary style,<sup>79</sup> has not been fully discussed by political constitutionalists.<sup>80</sup>

## 2.1. Voting and judging

In light of previous considerations, the act of voting needs to be placed in a more complex setting which takes into account the formal and informal processes that shape the will as expressed in the very act.<sup>81</sup> This broader setting deals with public opinion and ideas, which are usually shaped, according to Hannah Arendt, by the activity of judging.<sup>82</sup> While the will is the most individualistic and particularistic of the human faculties, judgment is constitutively inter-subjective. This means that its emergence is due to the interaction and communication between citizens. The capacity to judge

<sup>78</sup> These are the four assumptions stressed by Waldron, *The Core of the Case*, *supra* note 3, at 1359–1368.

<sup>79</sup> For a powerful analysis see Kari Palonen, *Parliamentarism: A Politics of Temporal and Rhetorical Distances*, 15 ÖSTERREISCHE ZEITSCHRIFT FÜR GESCHICHTSWISSENSCHAFTEN 111 (2000).

<sup>80</sup> Waldron explicitly recognizes it: see LAW AND DISAGREEMENT, *supra* note 1, at 10.

<sup>81</sup> Quite interestingly, Rawls has urged to rethink the act of voting when he affirms that “the ideal of public reason not only govern the public discourse of elections . . . but also how citizens are to cast their vote”: POLITICAL LIBERALISM, *supra* note 68, at 215.

<sup>82</sup> HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (1982); see also RONALD BEINER & JENNIFER NEDELSKY EDS., JUDGMENT, IMAGINATION AND POLITICS: THEMES FROM KANT AND ARENDT (2001); RONALD BEINER, POLITICAL JUDGMENT (2009); ALESSANDRO FERRARA, JUSTICE AND JUDGMENT (2000).

the actions of representatives is essential for political accountability and it proves that voting does not entail the delegation of every power to elected politicians. Therefore, a more accurate account of how representative politics works ought to consider the role of political judgment. Voting is one of the most important ways of keeping the government under control and holding officials accountable, but this is possible only if it is taken to be the expression of an aptly formed judgment. Recognizing the link between will and judgment entails understanding the act of voting as part of a larger constellation of political activities that are critical to the shaping of public opinion.

Nadia Urbinati and Pierre Rosanvallon,<sup>83</sup> among others, have correctly identified this “negative power” that explains what happens between two elections. From a political perspective, what happens before and after an election ought to be deemed extremely relevant. Elections remain a pivotal moment in political life, because there are no other reasonable alternatives to voting for deciding future plans, but to understand their value one needs to look beyond the pure electoral moment of casting a ballot. Seen from this perspective, electors, more than citizens, seem to be at the forefront of political constitutionalists’ concerns. In that respect, political constitutionalists come closer to supporters of the so-called “minimalist conception of democracy.”<sup>84</sup> This is a view powerfully advocated, for example, by Robert Dahl, according to whom elections prevent civil war because losers know they will have another chance in the next elections.<sup>85</sup> Bellamy, adding further nuances to the argument, states that “the key determinants of political equality so conceived are that rule of the people be by the people according to some mechanism that gives them all an equal say,” which implies that “citizens hav[e] an equal vote in common elections where political parties compete for the people’s vote and electoral and legislative decisions are made by majority rule.”<sup>86</sup> The dynamism of the political process guarantees the participatory conditions of equal concern and respect and therefore secures the non-arbitrary nature of political rule.<sup>87</sup>

## 2.2. The dangers of ordinary politics

The emphasis on a political process based on horizontal separation of powers where parties are the main competing actors may entail some risks.<sup>88</sup> One of these is that such a conception confuses aristocracy and elected representatives by giving the representatives a period of time during which they become isolated and *independent* from the citizenry. In that way, elected officials may become a sort of political clergy. Another risk is underestimating the fact that leaving to a concrete democratic political

<sup>83</sup> NADIA URBINATI, *REPRESENTATIVE DEMOCRACY* (2006); PIERRE ROSANVALLON, *POLITICS IN AN AGE OF DISTRUST* (2008).

<sup>84</sup> Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY’S VALUE* 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

<sup>85</sup> ROBERT DAHL, *DEMOCRACY AND ITS CRITIQUES* (1989).

<sup>86</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 219.

<sup>87</sup> On non-arbitrary rule see PHILIP PETTIT, *REPUBLICANISM 183–186* (1997).

<sup>88</sup> For an analysis of American constitutionalism based on competition between political parties see Daryl Levinson & Richard Pildes, *Separation of Parties, not Powers*, 119 *HARV. L. REV.* 2311 (2006).

process the task of policing itself may indeed entrench established conditions. In that sense, not only counter-majoritarian institutions are biased towards the *status quo*. It is true, for example, that in the case of electoral law, constitutional courts have a tendency to consolidate the *status quo*,<sup>89</sup> but the same often happens to political parties that are usually interested in maintaining and even fostering a determinate political framework. Well established political parties do not have an interest in letting other alternative voices enter the political process. The territorial organization of political representation constitutes a good example of this exclusive logic. The practice of drawing up districts along the lines of race or class or religion in order to control in advance who is going to be elected (known as gerrymandering) is just one of the possible forms of legislative self-entrenchment in clear violation of the principle of political equality.<sup>90</sup> Political constitutionalists seem to underestimate this kind of problem because they adopt a rather “dry” idea of representative democracy. Party competition and majority rule do not provide sufficient criteria for judging if elections respect the principle of political equality.

This problem is aggravated by the fact that in the political constitutionalists’ scheme representatives look like surrogates, rather than dynamic partners of the citizenry, who have the privilege of acting on a vague mandate obtained the day of their election, while bearing in mind that from time to time they have to be accountable to the electorate.<sup>91</sup> But the concept of a free mandate does not imply that representatives are completely detached from their constituencies. On the contrary, one of the reasons behind this freedom is that representatives are able to discuss and deliberate by persuading and being persuaded by others in the assembly. Thus elections do prevent civil war not only because they are cyclical, but also because they put in motion a process that continuously shapes the opinions of the representatives and of the citizens. Those who have lost the last general election can still count on the possibility that they will be able to influence the formation of the will through institutional and informal means of social and political control.<sup>92</sup> The fact that a political system endures despite divisions between the majority and the minorities often means that conflict and the procedure to regulate it are not the only means of integration,<sup>93</sup> but that the formation of public opinion constitutes another important bond.

<sup>89</sup> Classically, this has been the case of the Supreme Court, which has been slowly developing a theory of democracy that emphasizes order and stability over competition: Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 4, 28 (2004).

<sup>90</sup> *Id.*, 59–60. See generally Daniel Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993) (noting the role that the major parties have in structuring access to government).

<sup>91</sup> For an examination of political representation applied to Waldron’s theory see Dimitrios Kyritsis, *Representation and Waldron’s Objection to Judicial Review*, 26 OXFORD J. LEGAL. STUD. 733 (2006).

<sup>92</sup> ROSANVALLON, *supra* note 823, at 84–85.

<sup>93</sup> The idea that conflict works as an integrative force in social and political groups is quite common in political philosophy, at least since Machiavelli. See, e.g., Albert Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 POL. THEORY 208 (1994).

Urbinati aptly summarizes this view in the following way:

focusing on voting as the temporary resolution of political conflict tells us the location of authorized “will” to make laws but does not provide us with the complete picture of the democratic game that puts that will in motion and shapes it.<sup>94</sup>

Once the formation of the will is understood from the perspective of judgment, the neat separation between input and output reasons needs to be revised. It may still make sense to separate input and output reasons for heuristic purposes, but if we want to take both democracy and disagreement seriously we have to become aware that an authoritative majoritarian procedure does not conclude the relevant political process. Quite the contrary: the formation and the activity of public opinion is always at work. There is a *before* and an *after* whose importance, compared to the act of voting, cannot be ranked as secondary. Political constitutionalists should recognize that the principle of political equality makes sense only to the extent that one takes into account the fact that votes are casted in a historically defined context.

In light of these remarks, the ideal of political equality needs to be re-described with a Janus-like profile. Voting (and, accordingly, the principle of majority rule) is surely critical for the democratic justification of the constitutional order, but it by no means exhausts the whole democratic process. Democratic sovereignty, if one can resort to this term, must be conceived in a way that can explain the idea that the citizenry do not delegate everything on the day of the election, but they retain power to investigate, judge, and control their representatives. Such a negative power fits well with a doctrine that puts so much emphasis on disagreement. However, it is surprising to see how little attention political constitutionalists have paid to alternative channels for expressing this kind of negative power.

One might think, for example, of several institutional and non-institutional devices to give voice to these other moments that shape the constitutional life of democracy. Given that political institutions do not exhaust the possible interactions between politics and society,<sup>95</sup> the representative character of institutions should be extended beyond the electoral process in order to facilitate a dialogue between representatives and citizens.<sup>96</sup> Without providing a fully exhaustive account of what these channels of communication might be, it is enough to consider the role of social movements in the exercise of citizens’ negative power, and in particular how valuable civil disobedience can be for a theory based on disagreement.<sup>97</sup> Another interesting example is represented by the use of referendums as a tool which allows segments of civil society to express their concerns about an issue which has already been dealt with by political

<sup>94</sup> URBINATI, *supra* note 83, at 29.

<sup>95</sup> ANDREW ARATO & JEAN COHEN, *CIVIL SOCIETY AND POLITICAL THEORY* (1995).

<sup>96</sup> I do not tackle with another different issue concerning the representative character of unelected institutions. For an introduction to the topic, see MARK VIBERT, *THE RISE OF THE UNELECTED* (2007).

<sup>97</sup> Unexpectedly, political constitutionalists have not dealt with the issue of civil disobedience, a topic which certainly relates to the question of disagreement. See, for an interesting interpretation, Besson, *supra* note 18, at 503–524.

institutions.<sup>98</sup> By challenging a certain legal act, referendums can bring a topic to the fore of public discussion and force political institutions to take it into account or to reconsider the way they decided on it.

### 3. Beyond elitism: The democratic value of constitutional politics

At this point of the analysis, it should not come as a surprise that political constitutionalists reject the idea of constitutional law as higher law. The first reason behind this refusal has to do with the general depiction of law by proponents of political constitutionalism. Law is either an instrument for implementing political decisions or a constraint on political action. This skepticism (not so different from that of legal realism) infuses political constitutionalists' attitude toward constitutional law. In the first case, this conception of the law leads to a decisionist and often irrational portrait of the relationship between law and politics. The second conception shares with liberal constitutionalism the idea that law is always a limit imposed on freedom for the sake of freedom itself. Obviously, this is an understanding of freedom based on purely negative grounds (freedom as non-interference).<sup>99</sup> But the point is that political constitutionalists, by accepting this definition of constitutional law, that is, by denying certain architectural features of constitutional law that make it constitutive of common good,<sup>100</sup> come to propose a minimalist idea of political freedom and to accept the liberal view on the nature of law.

The second reason behind the rejection of a legal conception of the constitution is given by the refusal of the idea of different levels of politics, that is, of a more intense and participate form of political action which might affect the constitutional framework. But since for political constitutionalists all politics is constitutional, and ordinary politics marks the beginning and the end of the spectrum of political action, the anchoring of the superior validity of constitutional norms in the special character of constitutional politics is unacceptable.

From these two assumptions the idea emerges of constitutional law as an attempt to lock-in elites who fear the possibility that in the near future they may be overturned. A clear example of this approach is the thesis of the so-called juristocracy, as notoriously put forward by Ran Hirschl.<sup>101</sup> There is no intention to deny that some instances of recent constitutionalization amounted effectively to a form of "hegemonic preservation" of certain social groups.<sup>102</sup> But the protection of elites is not

<sup>98</sup> For an inquiry on the practice of referendums, see LAWRENCE LEDUC, *THE POLITICS OF DIRECT DEMOCRACY: REFERENDUMS IN GLOBAL PERSPECTIVE* (2003); MATT QVORTRUP, *A COMPARATIVE STUDY OF REFERENDUMS: GOVERNMENT BY THE PEOPLE* (2005).

<sup>99</sup> This was the conception of law advocated, for example, by Thomas Hobbes and Jeremy Bentham. See PETTIT, *supra* note 87, at 41–44; QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY* (2008).

<sup>100</sup> For the classic statement of constitutionalism as *constitutio libertatis*, see ARENDT, *ON REVOLUTION*, *supra* note 17, at 141–178. Cf. Jeremy Waldron, *Arendt's Constitutional Politics*, in *THE CAMBRIDGE COMPANION TO ARENDT* 201 (Dana Villa ed., 2000).

<sup>101</sup> HIRSCHL, *JURISTOCRACY*, *supra* note 60.

<sup>102</sup> On the modern dilemma connected to constituent power and constitutionalization see MARTIN LOUGHLIN & NEIL WALKER EDS., *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (2007).

necessarily undertaken constitutionally. Other strategies of entrenchment are possible. For example, these can be pursued through political and/or economic means. Furthermore, nothing proves that constitutionalization is constitutively linked to a form of entrenchment of the privileged. It mostly depends on where the process of constitutionalization starts from (to simplify, whether from the top or from the bottom) and who the main actors are.

An enticing image illustrates vividly how constitutional law would work as a form of entrenchment of the elite. Legal constitutionalists and social scientists have often relied on the story of Ulysses and the Sirens to provide an analogy for constitutional legitimacy. The problems with the now discredited Ulysses metaphor are twofold. First, the metaphor compares the constitution to the ropes that Ulysses used to bind himself to the mast of his ship in order to hear the music of the Sirens without succumbing to temptation. It is a classic act of self-binding or precommitment,<sup>103</sup> which is based on the superior claim of rationality of a certain group of people at one point in time against the less rational people at another point in time (allegedly a moment where the agent will be less rational and more prone to acting on the basis of desires or passions). The problem with this metaphor is that by tying himself to the mast, Ulysses' action does not provide any reason to act or not to act.<sup>104</sup> The ropes explain why Ulysses resists to the call of the Sirens and stays on board, but they are not his reason for staying. In other words, Ulysses does not give himself a reason for resisting to the Sirens.

Waldron's harsh critique of Jon Elster's idea of constitutions as pre-commitments illustrates the repulsion toward the very idea of higher law as intended in this pre-commitment fashion.<sup>105</sup> On the whole, political constitutionalists believe that a constitution is, first of all, a political process and not a norm. This conception of a constitution as either a norm or a process betrays, however, a misunderstanding of the nature of the higher law and an implausible reading of the workings of political institutions. The latter certainly do not operate in a vacuum, but they have to respect some already established rules if they want to produce outcomes.<sup>106</sup> In fact, there is a risk of giving the impression that political action can stream out of nothing. In this way, constitutional law is reduced, as famously argued by John Griffith, to "what happens."<sup>107</sup> In other words, this approach may end up adopting an almost functionalist stance on constitutionalism and reducing its normativity to a bare minimum. Or to even less than that, since political constitutionalists seem ready to accept the idea

<sup>103</sup> JON ELSTER, *ULYSSES AND THE SIRENS* (1980).

<sup>104</sup> JED RUBENFELD, *FREEDOM AND TIME* 117 (2001).

<sup>105</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 1, at 255–281.

<sup>106</sup> Political institutions can change the rules that they are following, for example in order to enact laws; but to be able to proceed, they have to comply with the rules that regulate their behaviors for at least another time. A parliament willing to change its own internal regulations must follow the same regulations it intends to abolish or transform.

<sup>107</sup> John Griffith, *The Political Constitution*, 42 *MOD. L. REV.* 1, 22 (1978). For a different reading of Griffith's classic article see Thomas Poole, *Truth and Illusion in "The Political Constitution"*, 70 *MOD. L. REV.* 253, 253–254 (2007). Cf. Graham Gee, *The Political Constitutionalism of J. Griffith*, 28 *LEGAL STUD.* 20 (2008).

that representative democracy and majority rule can be followed by a decision taken according to the same democratic process they are supposed to constitute.<sup>108</sup> This perspective may be defined, loosely, as a sort of “absolute democracy,” where in every decision everything, unrealistically, is always up for grabs.

### 3.1. The multiple layers of politics

One of the weak aspects of this theory, however, can be found precisely in its conception of the political that it conveys. Politics is portrayed as arising from nothing in an unconstrained and literally unlimited realm. This account does not take into appropriate consideration the fragility of the political realm where action is supposed to take place.<sup>109</sup> While political constitutionalists recognize the two basic features of the political condition, they fail to dig deeper in order to extrapolate a more accurate description of political action. In this sense, a closer reading of Arendt’s writings on the political may turn out as particularly appropriate in this context.<sup>110</sup> Political action does not occur in a vacuum. Even when, to resort to a typical Arendtian jargon, it brings about a new beginning, political action does not operate in an unbounded way, but it always takes place in a world (in the Arendtian sense of the word).<sup>111</sup> The worldly feature of political action imposes a temporal-extended conception which entails a before and an after.<sup>112</sup> Part of the aim of political action is precisely to maintain and to renovate the common world shared by men. Avoiding this aspect of reality means idealizing the circumstances of politics. The fact that “men inhabit this earth” does not have to be read only in a horizontal manner, that is, as if plurality were generated only by those who are physically present at a particular moment, but it should be understood also as extending over time. This extended dominion of political action is either ignored or, when recognized, downplayed by political constitutionalists. Indeed, the idea that democracy is a constitutive and at the same time constituted process seems to summon a vulgar Rousseavian understanding of collective autonomy.<sup>113</sup> Some passages from the first draft of the *Contrat Social*, written in Geneva, exemplify this attitude: “Now the general will that should direct the State is not that of a past time but of the present moment, and the true characteristic of sovereignty is that there is always agreement on time, place and effect between the direction of the general will and the use of public force.”<sup>114</sup> According to this logic, a

<sup>108</sup> Thomas Christiano has noted that on a normative level it does not make sense to say that a democratic decision can abolish representative democracy: *THE CONSTITUTION OF EQUALITY* 28 (2008).

<sup>109</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 199–206 (1958).

<sup>110</sup> In that respect, see the interesting distinction between extraordinary, semi-extraordinary and ordinary politics put forward by ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY* (2008).

<sup>111</sup> On the concept of world in Arendt see MARGARET CANOVAN, HANNAH ARENDT. A REINTERPRETATION OF HER POLITICAL THOUGHT 105–112 (1992).

<sup>112</sup> On the temporal dimension inherent to parliamentarism, see Palonen, *supra* note 79; Jane Mansbridge, *Rethinking Representation*, 97 *AM. POL. SCI. REV.* 515 (2003).

<sup>113</sup> This does not intend to be a precise description of Rousseau’s philosophy, but only a reference to what is considered normally a Rousseauian argument. For a different interpretation of Rousseau see JUDITH SHKLAR, *MEN AND CITIZENS: A STUDY OF ROUSSEAU’S SOCIAL THEORY* (1969).

<sup>114</sup> JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT OR ESSAY ABOUT THE FORM OF THE REPUBLIC* (GENEVA MANUSCRIPT) 168 (R.D. Masters ed., 1978), quoted by Rubinfeld, *supra* note 104, at 17.

democratic or self-governing polity should not be governed by laws enacted in the past, but should leave political decisions to the present generation.<sup>115</sup> Even when political constitutionalists recognize that a constitutional democracy may be influenced by its past, they minimize this aspect by affirming that “if constitutions are simply artifacts of democracy, though, it seems difficult to accord them any independent weight.”<sup>116</sup>

### 3.2. Constitutionalization as the outcome of constitutional politics

As a final point, one needs to observe that political constitutionalists only see one aspect of the higher-lawmaking process. They tend to emphasize the entrenchment-effect of higher law and, at the same time, they rightly stress the role of normal politics in bringing about social changes. However, this view sometimes appears to be partial and parochial.<sup>117</sup> Multiple analyses of the effects of new constitutionalism on the socio-economic structures of Western countries have defined constitutionalization as tantamount to “hegemonic preservation” or “constitutional protection of capitalism.”<sup>118</sup> These judgements should not be quickly discarded, because most of the times they have been proven to be correct. The problem is that they do not distinguish between different processes of constitutionalization.<sup>119</sup> Not every instance of constitutionalization has been realized through judicial power *alone*.

Historical and theoretical arguments seem to point to a more nuanced evaluation of the link between constitutionalization and entrenchment of privileges. From a historical point of view, processes of constitutionalization have not always been synonymous with conservative outcomes. The contrary is true: one of the main differences between ancient and modern constitutionalism<sup>120</sup> should be seen in the revolutionary potential that is attached to the modern.<sup>121</sup> This aspect should not be overlooked, since even liberal constitutionalism generally concedes that there is a layer of constituent power that cannot be completely tamed by the principle of legality.<sup>122</sup> In that sense, constitutional politics can open new channels for unheard voices. Furthermore, in countries where constitutions have been enacted after the collapse of a despotic or

<sup>115</sup> The sovereignty of the generation is a common theme for thinkers of the Enlightenment such as Adam Smith, Thomas Paine, and Thomas Jefferson. See, on this topic, SHELDON WOLIN, *POLITICS AND VISION* 311 (1960).

<sup>116</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 1, at 123.

<sup>117</sup> Some of the arguments on the debate on judicial review bring with them this parochial mark, as noted, recently, by Mark Tushnet, *How Different Are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49 (2010).

<sup>118</sup> See also Michael Mandel, *A Brief History of the New-Constitutionalism, or “How We Changed Everything so that Everything Would Remain the Same”*, 32 ISR. L. REV. 250 (1998).

<sup>119</sup> For an inquiry into the meaning of the process of constitutionalization see Martin Loughlin, *What Is Constitutionalization?*, in *THE TWILIGHT OF CONSTITUTIONALISM: DEMISE OR TRANSMUTATION?* 47 (Martin Loughlin & Petra Dobner eds., 2010).

<sup>120</sup> See CHARLES McILLWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* (1940).

<sup>121</sup> A paradigmatic work is, of course, ARENDT, *ON REVOLUTION*, *supra* note 17, at 161–164. Cf. JASON FRANK, *CONSTITUENT MOMENTS. ENACTING THE PEOPLE IN POSTREVOLUTIONARY AMERICA* 41–66 (2010).

<sup>122</sup> CLAUDE KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT* [Theory and Practice of the Constituent Power] (1995).

totalitarian government, higher law has sometimes played a completely different role, preventing (or at least hindering) the re-emergence of certain authoritarian institutional models.<sup>123</sup>

From a theoretical perspective, the idea of a major change in the political and civil landscapes through constitutional transformations brings us back to the idea that political decisions have the same value and strength. A transformation of a fundamental aspect of the polity (the repudiation of slavery, for example) does not have the monothematic and therefore narrow scope attributed to it by political constitutionalists. A major change of such relevance affects several areas of social and political life. To stick with the example of slavery, the declaration of its unconstitutionality does not only impact the freedom of citizens, but brings about other major changes in the social and economic realms. In order to achieve such a complex transformation, a deep and *lasting* constitutional process is necessary. Winning one general election may trigger the adoption of some new laws, but it will rarely be enough to transform, in the short term, people's attitudes towards certain fundamental issues.<sup>124</sup> Of course, this does not prevent the engine of constitutional transformation from being legislative politics<sup>125</sup> which are often included in processes of constitutional change. However, a constitutional transformation is not only a change in constitutional law, but a change in the way a polity understands itself. Bruce Ackerman has suggested that constitutional politics should have three characteristics (which may also belong to ordinary politics, but not as an essential feature): depth, breadth, and decisiveness. The latter requirement cuts through the Condorcet paradoxes because the content of a proposal of constitutional change should be in a position to decisively defeat all the plausible alternatives.<sup>126</sup> In order to meet this requirement, that is, to be a Condorcet-winner, for a movement more than one election might be required. It should also win over the resistances of other forces of the modern state (bureaucracy and the judiciary, among others) and, in substance, convince the institutions that it unsettles to accept the transformation as legitimate.<sup>127</sup>

Since it touches upon "constitutional essentials" (and this is what is at stake in this debate, i.e., the formation of public reason), constitutional politics concerns not only lawyers and politicians, but also civic and popular cultures.<sup>128</sup> This is another reason why changing some constitutional essentials of a polity calls for a huge and prolonged political effort.

<sup>123</sup> It is not by chance that the discourse on constitutional patriotism first arose in Germany, and then in Italy and Spain. See JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007).

<sup>124</sup> But for an interesting analysis of the subconstitutional value of some initially ordinary statutes see W. ESKRIDGE & J. FERREJOHN, *A REPUBLIC OF STATUTES* (2010).

<sup>125</sup> A completely different strategy is to try to transform the constitution by changing its interpretation. This move entails the blurring of the difference between enacting and interpreting laws. See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: the Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

<sup>126</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 275–277 (1991).

<sup>127</sup> RICHARDSON, *supra* note 39, at 69.

<sup>128</sup> For the definition of these realms see Bruce Ackerman, *Interpreting the Women's Movement*, 94 CAL. L. REV. 1421 (2006).

One of the great advantages of this process has to be seen in its inclusivity. The problem with what has been called electocracy is that it does not take into account some important avenues of contestability and participation outside institutional channels. Constitutional politics aims at opening up more formal and informal channels for citizens. As such, it represents a philosophical commitment to the lawmaking force of meaningful participatory democracy.<sup>129</sup> Civic, popular, and legal cultures should also have their voices heard, and the combinations between them may yield important insights into the political process.<sup>130</sup> The separation of powers, intertwined with representative politics, may provide multiple forums for “hearing the other side”<sup>131</sup> and as such it can avoid any sweeping transformation which is not followed by a parallel change in the majority of the relevant population. Constitutional transformation through political process presupposes a major change in popular and civic culture.<sup>132</sup> This kind of transformation should not necessarily be reduced to a top-down process, as is the case for other judicial or executive-driven changes. It is often pointed out that this is the risk presented by social movements and political activity which take place outside parliament: the political agenda becomes monothematic. But, once again, the depth and length of constitutional politics require collective groups to reflect not only on the principles or changes they are putting forward, but also on the impact that a constitutional transformation will have on several legal and political domains. Moreover, the claims of collective groups may fruitfully be engaged with by political parties and become the subject of a dialogue between political institutions and civil society. This kind of constitutional politics would not be marked simply as the entrenchment of certain elites, but as a more inclusive political process.

## Conclusion

Of the most relevant issues to be discussed within political constitutionalism, the conception of politics is probably the most urgent. Indeed, for a theory whose most pressing claim is to revive the political aspect of constitutionalism this represents more than a marginal issue. While political constitutionalists might be right in locating the engine of processes of constitutionalization or of constitutional transformation within the political realm, they have not fully exploited the potential of politics. Instead of exploring the political constitution, they shut down politics altogether. This flaw becomes quite evident in their conception of political equality. This principle seems to be guaranteed by majority rule and a political life run by political parties. But once the idea of political equality is expanded in order to account for a temporal-extended

<sup>129</sup> A similar commitment, but limited to the relation between social movements and courts, animates Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4 (2008).

<sup>130</sup> See the work of LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

<sup>131</sup> PETTIT, *supra* note 87, at 189.

<sup>132</sup> Quite interestingly, Tomkins’s historical account of how the Parliament became the locus of sovereignty during the seventeenth century is quite close to the description of a constitutional moment: TOMKINS, *OUR REPUBLICAN CONSTITUTION*, *supra* note 1, at 67–114.

conception of political action, some of the assumptions of political constitutionalists no longer hold. The rejection of constitutional law as higher law is based precisely on this mono-dimensional conception of politics. However, understood as the outcomes of struggles which define the fundamental principles or norms of a polity (its public reason) and, at the same time, as laws open to challenges and contestation, constitutions (and constitutional politics) can still represent the highest and most important of political dimensions.