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ARTICLE

Democratic Revisability and the Legitimacy of Constitutional Entrenchments: A Content-Specific Approach

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Abstract

As modern constitutions bind democratic legislation to entrenched norms, they are in tension with the democratic idea that laws should be open to revision by new majorities. Against a widespread view, constitutional norms cannot be considered to be "more democratic" than ordinary laws due to specific qualities of the constitution-making process. Rather, the higher-level law of constitutions can fulfil a specific function as it may provide standards that ensure that laws made by the majority can be justified to everyone. On that basis, I evaluate for different types of constitutional norms whether there are good reasons for constraining legislation. In particular, entrenching cultural traditions and economic policy is more problematic than guarantees of the democratic process and rights ensuring respect for individuals. In sum, a two-tiered law-making system has important values, but people engaging in constitution-making and constitutional interpretation should be wary that the constitutional form is not abused.

Keywords: Democracy; entrenchment; legitimacy; constituent power; constitutional functions

A. Introduction

The relationship of constitutionalism and democracy is complex. Democratic law-making institutions owe their authority to the constitution, but modern constitutions also subject their powers to substantive constraints. Constitutions entrench the precise shape of democratic procedures, a catalogue of individual rights, but in many cases also cultural traditions and common good principles. Amendments to those norms are only possible in an especially onerous process, and in some cases not at all. This raises a conflict with a crucial feature of democracy: The *revisability* of legal norms, that is, the opportunity to contest them in democratic processes and replace them with new majorities. In several fields, constitutional entrenchments have received strong criticism. Constitutional property rights, for instance, have often been targeted for entrenching the capitalist economy against far-reaching social reforms, and constitutional abortion bans or balanced budget requirements are also frequently perceived as overly curtailing policy space.[1] For legal realists, constitutional entrenchment is just another form of power politics that allows one part of society to impose its views on others. It does not come as a surprise that some theorists deny any substantive difference between constitutional and ordinary politics. For

[1]On these particular entrenchments, see *infra* Parts D.II.2, D.III.2, and D.IV.2.

them, British-style parliamentary sovereignty is the only model that does justice to the core democratic idea that in the face of pervasive disagreements about values and their prioritization, it is for democratic majorities to decide about the law.[2] And yet, as substantive constitutional norms constraining democratic majorities exist worldwide, it seems hardly plausible that this is just an instrument of power politics.

A prominent way to justify constitutional entrenchments is to point to democratic qualities of constitution-making processes. If opportunities for legal change are essential for democracy, it is certainly not enough to refer to a democratic origin of constitutional norms constraining ordinary legislation. But the argument is a different one: As constitutional norms emerge from processes that involve a broad consensus among political groups or popular participation, they enjoy a higher degree of legitimacy than ordinary laws made by parliaments. On the basis of those theories, it seems legitimate for a democratic constituent power to constitutionalize any issue whatsoever. I argue, however, that purely procedural justifications for constitutional entrenchments fail. They do not take seriously the democratic qualities of ordinary legislation. As important as democratic constitution-making processes are, deciding in those processes is not an end in itself. To attribute norms a higher formal stability rather needs to be based on a substantive conception of legitimacy. The core idea is that the value of majoritarian legislation needs to be complemented by certain conditions that ensure that laws made by the majority are acceptable for everyone.

The article proceeds as follows: Section 2 outlines the challenge constitutional rigidity poses for the idea of democratic law-making, with a particular focus on the value of deciding by simple majority. Section 3 considers the role of constitution-making processes, contrasting voluntaristic approaches with the idea of developing conceptions of political legitimacy. Section 4 discusses for several types of constitutional constraints on legislation, from rules of democratic procedure and rights to cultural traditions and economic and social policy objectives, whether they can be framed as enhancing the legitimacy of laws.

B. Democratic Concerns about Constitutional Rigidity

I. The Counter-Majoritarian Character of Modern Constitutions

In any society, there are rules that can be framed as constitutional in a descriptive sense of organizing political power. In modern times, those rules are mostly included in a comprehensive written document, but there may also be additional social conventions and fundamental statutes that amount to a "constitution outside the Constitution."[3] Nevertheless, this article only focuses on modern written constitutions that are characterized by specific formal features: They attribute their rules the status as supreme law that binds all public powers. Most significantly, constitutional norms in the formal sense claim hierarchical *primacy* over legislation.[4] As a corollary, they are characterized by a certain *rigidity*: It is more difficult to amend them than ordinary legislation. Many constitutions require super-majorities in parliament, others involve the people by referenda or the election of a new parliament which will be competent to adopt the amendment. In federal systems, the subnational units are involved, too. Depending on the mechanism, constitutional rigidity varies in degree.[5] The process may be more or less time-consuming, the necessary consensus among various political actors more or less difficult to achieve. Some constitutions even

[2] *See* Jeremy Waldron, Law and Disagreement 211 (1999); Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (2007).

[3] Mark Tushnet, *Constitution*, *in* The Oxford Handbook of Comparative Constitutional Law 217, 223 (Michel Rosenfeld & András Sajó eds., 2012).

[4] On the hierarchical structure of the legal order, see Hans Kelsen, Pure Theory of Law 221 (1967). Note that social conventions might also be treated as binding for political decision-making. *See* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. Ill. L. Rev. 1847, 1861 (2013).

[5] *See* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter At All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 Int'l J. Const. L. 686, 692 (2015).

provide different amendment procedures for different parts.[6] Nevertheless, there is one common feature inherent in the modern formal idea of the constitution: A simple majority in parliament is never sufficient. Thus, constitutions establish a "hard," "entrenched" form of law that constrains majoritarian politics. In a prominent metaphor, this is compared to Ulysses in Greek mythology who had himself bound to the mast of his ship in order not to be lured to deadly waters by the song of the sirens.[7] This endeavor of hands-tying differs from factual limits to change existing legal norms—they might, for instance, reinforce the power of those who promoted them. While those limits are a side-effect of political decisions, people establishing a constitution deliberately seek to subject future generations to the normative powers of the higher law designed by them.[8]

Constitutional constraints for ordinary law-making are most effective when independent institutions may control whether laws comply with the standards. In most countries, ordinary courts or specialized constitutional courts now have the power to review legislation and declare unconstitutional laws void.[9] Yet, it is still subject to controversies about the "counter-majoritarian difficulty" of unaccountable judges striking down democratic laws.[10] Importantly, though, judges may not strike down laws because they politically dislike them, but have to justify their decisions as deduced from constitutional norms. One of the most prominent critiques of judicial review of legislation, Waldron's, is concerned not only with judicial power, but also with binding legislation to the "verbal rigidity" of written constitutional norms.[11] Judicial review makes compliance with constitutional norms more probable, but it is not conceptually necessary for constraining majoritarian politics by higher law. As constitutional norms, like any law, provide actors with authoritative reasons to disregard certain reasons which would otherwise be relevant,[12] they at least have an impact as discursive constraints. Political actors normally abide by constitutional rules, be it due to a moral pull or because they expect others to do so, too.[13] In systems that exclude a posteriori judicial review of legislation, there are some political compliance mechanisms. For instance, in the Netherlands, no court may invoke the constitution to justify not applying laws, but in the legislative process, the State Council gives an opinion on the constitutionality of projects that politicians will take into account.[14]

The idea that constitutional norms constrain the political process may also have consequences for the way political actors use the amendment process. In many countries, there is a restrictive amendment culture that treats the constitution as a sacred text.[15] Regulating matters on constitutional level may create an impression of moral rightness which makes it more difficult to argue for change in political debates.[16] This effect is more probable for substantive issues than for technical rules, which may also explain that in one and the same constitution, changes to different parts occur with different frequency. In Germany, constitutional rules on the federal division of

[6] *See* Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438 (2018).

[7] *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979). For a critique of this analogy, *see* WALDRON, *supra* note 2, at 255. For Elster's later view, see Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX L. REV. 1751 (2003).

[8] Ludvig Beckman, *Power and Future People's Freedom: Intergenerational Domination, Climate Change, and Constitutionalism*, 9 J. POL. POWER 289, 299 (2016).

[9] Juliane Kokott & Martin Kaspar, *Ensuring Constitutional Efficacy*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 3, at 795.

[10] On the debate in the U.S., see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession*, 112 YALE L.J. 153 (2002).

[11] WALDRON, *supra* note 2, at 220.

[12] On this concept, see JOSEPH RAZ, PRACTICAL REASON AND NORMS 35, 73 (1975).

[13] Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 711 (2011).

[14] Jurgen C. A. de Poorter, *Constitutional Review in the Netherlands: A Joint Responsibility*, 9 UTRECHT L. REV. 89, 92 (2013). A posteriori review is possible by reference to international law including the European Convention on Human Rights, though.

[15] Ginsburg & Melton, *see supra* note 5, at 700.

[16] For examples in Ireland, see *infra* text accompanying note 166.

competences are amended every few years, whereas changes on fundamental rights norms have been rare and highly contested.[17]

A more extreme form of entrenchment are *eternity clauses* that prohibit amending certain fundamental parts. On the assumption common in many legal orders that the prohibition extends to the clause itself,[18] there is no legal way to change these parts under the given constituted order. Of course, no norm can exclude a revolution. But this is an extraordinary step with high risks that political actors normally do not take. Interestingly, some constitutions provide a legal path for their own replacement by constituent assemblies.[19] Thus, even constitutional norms that are not subject to the amendment process can be legally disposed over in the context of a new constitutional project. In a similar way, some constitutions protect basic principles from regular amendments by the political institutions; nevertheless, "total revisions" are possible in a special process involving the people.[20]

II. Democratic Revisions of the Law and the Value of Deciding by Simple Majority

To understand why constitutional entrenchment can raise a democracy problem, it is necessary to reflect the value of deciding on legal norms in ordinary legislation by simple majority. Democratic law-making processes are essential for the legitimacy of legal norms that are binding for everyone. In modern pluralistic societies, legal norms are almost always subject to reasonable disagreement. In consequence, they do not result from objective truth, but from political decisions.[21] The idea of democracy is, then, that the process from which these decisions emerge ensures their legitimacy. Key features are the *deliberation* of various options in an open discussion among representatives and the general public,[22] as well as a *fair decision rule*. But legal norms should not only be adopted in democratic processes. They should also be subject to revision in such processes. This is most evident for citizens of different generations. Jefferson famously argued that every generation must be free to make its own laws.[23] But opportunities to revise the law are equally important among the same citizens. As Habermas puts it, decisions should only function as a "caesura in an ongoing discussion."[24] Unamendable constitutional provisions are therefore in clear tension with democratic principles.[25]

But amendable constitutional norms raise a problem, too. It is not merely for pragmatic reasons, but due to the fundamental idea of citizen equality that in most democracies, the decision rule in legislation is *simple majority*. In representative assemblies, the equal vote of citizens

[17] *See* Dieter Grimm, *The Basic Law at 60: Identity and Change*, 11 GERMAN L.J. 33, 35 (2010).

[18] This is open to debate. *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 139 (2017); SILVIA SUTEU, ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM 242 (2021).

[19] *See, e.g.*, CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA (2009) art. 411; CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 376; CONSTITUCIÓN POLÍTICA DE REPÚBLICA DE ECUADOR art. 444. *See also* JOEL I. COLÓN-RÍOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 160 (2011). In Chile, transitional provisions have been included in the current constitution that regulate its replacement. *See* Raffael N. Fasel, *The Constrained Convention: Emmanuel Joseph Sieyès and the Making of Chile's New Constitution*, 20 INT'L J. CONST. L. 1103 (2022).

[20] *See, e.g.*, CONSTITUCIÓN ESPAÑOLA (1978) art. 169; BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] (1930), art. 44 cl. 3 (Austria). *See also* Manfred Stelzer, *Constitutional Change in Austria*, *in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA, AND THE USA 7, 17 (Xenophōn I. Kontiadēs ed., 2013). For further examples of an increased rigidity of fundamental principles, see Dixon and Landau, *supra* note 6, at 480.

[21] *See* HANS KELSEN, THE ESSENCE AND VALUE OF DEMOCRACY (2013); WALDRON, *supra* note 2; SAMANTHA BESSON, THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW (2005).

[22] *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

[23] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 115 (Julian P. Boyd ed., 1958).

[24] HABERMAS, *supra* note 22, at 179.

[25] Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010); MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 193 (2009); SUTEU, *supra* note 18, at 7. *See also* ROZNAI, *supra* note 18, at 188.

transforms into that of representatives elected by universal equal suffrage. By voting for candidates or parties that advocate their interests, citizens can influence institutional policy-making.[26] A core idea of democracy is that the minority of today can be the majority of tomorrow.[27] Majority rule ensures that a new majority in parliament can change the existing laws. Under super-majority and unanimity rules, by contrast, a minority can block changes to the status quo.

In many countries, there are status quo favoring elements in ordinary legislation, too, when different "veto players" are involved,[28] namely when laws require the consent of a second chamber or the head of state may veto them. Some political systems are even rather based on achieving multi-party consensus than on the distinction of government and opposition.[29] The fact that such institutional rules make political reform more difficult is often seen as a democratic disadvantage.[30] But they are based on their own reasons, like protecting regional interests or coping with severe social fractions. Whether it is worth to adopt an institutional setting that slows down political reform has to be discussed for the particular society, and this evaluation may change over time, as recent attempts in some countries to diminish the number of laws that require approval of a second chamber demonstrate.[31] In any event, it is one thing that the rules of the ordinary political process make it more or less difficult to achieve political reforms, and another that certain parts of the law are not subject to reform in this process at all, as they are fixed in the constitution. The least what can be said is that when a political system is based on majority rule, taking certain issues off the hands of the majority raises questions of consistency. And in systems with additional veto players in ordinary legislation, constitutional amendments are typically even more difficult to achieve.

III. The Role of Interpretation

Constitutional norms are often written in vague terms that leave room for interpretation. In a way, this mitigates the problem. Progressive interpretations may bring about substantial constitutional change even in the absence of amendments. Since social movements may use judicial proceedings to push for new interpretations, some scholars see another form of democratic politics, here.[32] Yet, interpreting the law is not the same as decision-making based on policy preferences. Not only may courts be reluctant to engage in creative interpretations in some countries in line with a more formalistic legal culture.[33] There are also limits on what can be justified as interpretation. As a hermeneutic activity, interpretation is about establishing meaning that connects to a given text.[34] Moreover, even if creative interpretations can bring about important changes to the law, this is not equivalent to changing the law in democratic procedures. The final decision in questions of interpretation is entrusted to judges who lack political accountability. Judicial interpretations may

[26] *See* Nadia Urbinati, *Representation as Advocacy*, 28 POL. THEORY 758, 773 (2000).

[27] KELSEN, *supra* note 21, at 31; Wojciech Sadurski, *Legitimacy, Political Equality, and Majority Rule*, 21 RATIO JURIS 39, 48-49 (2008).

[28] *See* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).

[29] AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY SIX COUNTRIES 30 (2nd ed. 2012); Donald Horowitz, *Conciliatory Institutions and Constitutional Process in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1215 (2008).

[30] For evidence of this in the United States, see Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634 (2000).

[31] On the German 'federalism reform' that reduced the rate of laws to be approved by the Bundesrat, see Simone Buckhart, Phillip Manow & Daniel Ziblatt, *A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany's 2006 Constitutional Reform*, 17 J. GER. POL. 522 (2008).

[32] *See, e.g.*, Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 373, 379 (2007).

[33] Dixon & Landau, *supra* note 6, at 453.

[34] Ralf Poscher, *The Hermeneutics of Law: An analytical Model for a Complex General Account*, *in* THE CAMBRIDGE COMPANION TO HERMENEUTICS 326 (Michael Forster & Kristin Gjesdal eds., 2018). On the problem of re-interpreting numerical rules in constitutions, see Dixon and Landau, *supra* note 6, at 453.

even exacerbate democratic concerns when they extend constraints on legislation. Legislators commit to self-restraint in order to avoid judicial invalidation.[35] The only way to change constraints on legislation established by judicial construction *in a democratic process* is the onerous amendment process. From time to time, political actors have succeeded with amendments that allowed parliament to re-enact legislation which courts had declared unconstitutional before.[36] But since amendments might be seen as damaging the authority of constitutional courts, they are not the regular response to judicial invalidations.[37] When courts adopt a broad reading of eternity clauses or assume unwritten limits to amendments,[38] legislative overrule is not possible at all.

IV. "Political Constitutionalism" as an Alternative Model

Binding legislation to entrenched constitutional norms might not be the only way to implement substantive ideas of constitutionalism like rights protection. Statutory rights guarantees at least guide the executive and judicial application of laws.[39] In several Commonwealth countries, a "political constitutionalism" model has evolved that tries to square the circle of protecting rights even with respect to legislation on the one hand and preserving parliamentary sovereignty on the other. Instruments like the UK Human Rights Act of 1998 express the intent of parliament to bind itself to rights and empower courts to point to incompatibilities in a "weak form review."[40] The crucial feature of those systems is that parliament has the last word. Of course, parliaments *can*, as theorists suggest,[41] use the power of the last word in a "dialogical" way that takes judicial concerns into account and only gives the preference to a different, yet faithful interpretation of rights guarantees and the limitations they permit. But they may also openly set aside rights when they have political reasons to do so. The only function rights guarantees retain here is that deviations must be made transparent, which may involve political costs. In this way, the model avoids the democratic concerns about strong judicial review, but rights protection is arguably weaker, particularly when there is no international system at the background.[42]

An interesting intermediate case is Canada. The Charter of Rights of Freedoms of 1982[43] establishes constraints on federal and provincial legislation, but section 33 empowers legislatures to enact laws "notwithstanding" the liberal rights provisions. While some scholars have interpreted the clause as only allowing legislatures to choose a different interpretation of the Charter provisions following a court decision,[44] the Supreme Court accepts that a formal derogation declaration is sufficient.[45] Section 33 thus entails a power to enact laws in open contradiction to the Charter provisions.[46] Yet, it is not to deny that there is higher law that entails

[35] *See* Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe 73 (2000).

[36] On France, Italy, Germany, and Hungary, see Maartje de Visser, Constitutional Review in Europe: A Comparative Analysis 356 (2014). As for Colombia and India, see Dixon and Landau, *supra* note 6, at 458.

[37] Visser, *supra* note 36, at 372. On the restrictive United States practice, see Vicki C. Jackson, *The (Myth of Un) Amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 Int'l J. Const. L. 575 (2015).

[38] *See* Roznai, *supra* note 18, at 39.

[39] *See* Mark Tushnet, *The Rise of Weak-Form Judicial Review*, *in* Comparative Constitutional Law 321, 323 (Tom Ginsburg & Rosalind Dixon eds., 2011).

[40] Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 Int'l J. Const. L. 904 (2019).

[41] *See* Stephen Gardbaum, *The Case for the New Commonwealth Model of Constitutionalism*, 14 German L.J. 2229 (2013); Tushnet, *supra* note 339, at 326; Dixon, *supra* note 40, at 921.

[42] *See id.* at 926 (contrasting the United Kingdom and its membership in the European Convention of Human Rights with other countries in the British Commonwealth).

[43] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

[44] *See, e.g.*, Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. Mich. J. L. Reform 51, 83 (1984).

[45] Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712 (Can.).

[46] Lorraine E. Weinrib, *Leaning to Live with the Override*, 35 McGill L.J. 541 (1990); Tvsi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. Toronto L.J. 221, 236 (2002).

requirements for legislation. Although legislatures have the power to suspend the typical remedy for a violation of the constitution, judicial invalidation of the law in question, binding standards still exist.[47] In practice, section 33 has been invoked frequently by the Quebec legislature as a power to set aside rights in line with the current political agenda.[48] But it has hardly been used in Anglophone provinces and never on the federal level. Outside Quebec, there is a deep conviction in political culture that legislation should respect the Charter rights.[49]

If the "political constitutionalism" model is, as in the practice of Commonwealth countries, not about the ultimate competence for interpreting constitutional guarantees, but about a right of parliaments to choose whether they abide by them or not, it is actually not a compromise between democracy and constitutionalism. The model is rather based on the view that binding parliaments to constitutional norms is fundamentally incompatible with democracy. Nevertheless, it is precisely the question whether democracy is to be equated with unbound law-making by parliamentary majorities.

C. The Role of the Constitution-Making Process

I. Consensus Among Various Political Forces

If democracy implies options to change the law, it is not sufficient to point to democratic decisions at the origin of constitutions to justify constraints on legislation. A common argument is, though, that constitutions enjoy a superior democratic legitimacy than ordinary laws. For several authors, it is actually a virtue that constitutional norms are typically adopted and amended by super-majorities, since this favors a consensus among various political forces.[50] While in some countries, even the ordinary political process includes elements to achieve a broader consensus beyond majoritarianism,[51] it is said that at least the fundamental norms of the constitution should be agreed upon by all major political forces, as it frequently happens in "round table" constitution-making processes.[52] When controversial issues are settled in political compromises in the constitution-making process and thus removed from the agenda of legislation, this is sometimes also framed as facilitating the latter: Legislators can focus on practical problems rather than wasting their time with endless discussions on fundamental issues.[53] However, a broad consensus might erode over time. It is not evident why constitutional norms that were enacted based on an agreement among different political forces should remain in force when only a minority wants to keep them. In this way, super-majoritarian constitution-making processes create an incentive for political actors to use them strategically for preventing future legal changes by simple majority. This danger has not only been pointed out in theory for a long time—Schmitt and Kelsen saw it quite clearly[54]—but also realized in practice. In Austria, an instrumental view of the constitution has led to an inflation of amendments that serve party interests, particularly during grand coalition governments.[55] As the case of Fidesz in Hungary demonstrates, even a single political

[47]Grégoire Webber, *Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation*, 71 U. Toronto L.J. 510 (2021).

[48]*See* Guillaume Rosseau & François Côté, *A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights*, 47 Revue Générale de Droit 343 (2017).

[49]Richard Albert, *The Desuetude of the Notwithstanding Clause—and How to Revive It*, *in* Policy Change, Courts and the Canadian Constitution 146 (Emmett Macfarlane ed., 2018).

[50]John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo. L.J. 1693, 1706 (2009).

[51]*See supra* B.II.

[52]*See* Andrew Arato, Post-Sovereign Constitutional Making: Learning and Legitimacy 107 (2016).

[53]*See* Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* Constitutionalism and Democracy 19, 19 (Jon Elster & Rune Slagstad eds., 1988); Cass R. Sunstein, Designing Democracy: What Constitutions Do 99 (2002).

[54]Carl Schmitt, Legality and Legitimacy 39 (2004); Hans Kelsen, Algemeine Staatslehre 252 (1925).

[55]Stelzer, *supra* note 20, at 8, 24.

group can sometimes gain a super-majority and use it to entrench its political convictions in the constitution.[56]

Nevertheless, the potential for abuse might be taken if there are good reasons for requiring a broad consensus for adopting and amending constitutional norms. What consensus theories have to explain, then, is why it is valuable to give veto positions to social groups in constitution-making decisions. Kelsen has argued that the value of entrenched constitutional rights may be seen in that they increase the need for political compromise, as measures intervening with certain national, economic, or religious spheres required constitutional amendments to which a qualified minority had to agree. For Kelsen, this could be seen as an even greater approximation to the idea of political freedom than deciding all issues by simple majority.[57] In a similar vein, contemporary accounts present super-majoritarian constitution-making as a solution to the problem that under majority rule, many people holding mild preferences on an issue can outvote few people holding strong preferences.[58] Particularly when societies face severe group conflicts, a constitution-making process that reserves a heavy role for negotiation might be an important contribution—though not a guarantee—to ensure social peace.[59]

Nevertheless, entrenching factual group interests in constitutional norms is vulnerable to the critique of giving a premium on social power without a principled justification. In consensual transition processes from dictatorial regimes to new democracies, members of the old regime sometimes achieve important concessions. For instance, in Chile's 1989 transition process, several "authoritarian enclaves" in the constitution—for example, appointed senators and military autonomy—were kept to which the democratic forces did not agree in formal negotiations, but ultimately acquiesced in order to not lose the timeframe for change.[60] The question whether a constitution is successful in pacifying social conflicts cannot discard the general perspective whether it is legitimate to bind democratic majorities to certain constitutional norms. Even when there are pragmatic reasons for constitutional arrangements that reflect social power, they may still be subject to critique from the perspective of legitimacy, and this may inspire amendments. Chile is a good example of this. The "authoritarian enclaves" conceded to the forces of the previous Pinochet regime certainly helped to ban the risk of another military coup. Nevertheless, they have received strong criticism for legitimacy reasons.[61] Several amendments adopted since the 2000s considerably diminished the historic relics. Recent processes that attempted to replace the 1980 constitution—even if they were not successful so far—aimed at cutting even the symbolic legacy of an illegitimate origin.

II. Popular Constituent Power

For an important strand of theory, a higher legitimacy of constitutional norms does not follow from the involvement of a broad range of political groups in the constitution-making process, but from "the people themselves" exercising constituent power. When "the people" is not presented as an obscure collective, as in Schmitt's version,[62] but as the individuals that will live under the

[56]*See* Marco Dani, *The 'Partisan Constitution' and the Corrosion of European Constitutional*, *in* 68 LONDON SCH. ECON.: "EUROPE IN QUESTION" PAPERS (Joan Costa-i-Font, Vassilis Monastiriotis, Jonathan White, Katjana Gattermann eds., 2013); Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279 (2015); ARATO, *supra* note 52, at 205.

[57]KELSEN, *supra* note 21, at 67. *See* LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY 126 (2017).

[58]McGinnis and Rappaport, *supra* note 50 at 1708.

[59]Horowitz, *supra* note 29, at 1231.

[60]*See* Fredrik Uggla, *"For a Few Senators More"? Negotiating Constitutional Changes During Chile's Transition to Democracy*, 47 LAT. AM. POL. & SOC'Y 51 (2005); Claudia Heiss & Patricio Navia, *You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*, 49 LAT. AM. POL. & SOC'Y 163 (2007).

[61]Claudia Heiss, *Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism*, 24 CONSTELLATIONS 470, 474 (2017).

[62]CARL SCHMITT, CONSTITUTIONAL THEORY 75 (2008). For a critique from the perspective of the question of legitimate authority, see Lars Vinx, *The Incoherence of Strong Popular Sovereignty*, 11 INT'L J. CONST. L. 101, 111 (2013).

constituted political order, popular constituent power means that constitutions are made in highly participatory processes. Whether the concept of constituent power implies such processes[63] or not;[64] the point is that if constraints on law-making by constituted political institutions are to be legitimate, they need to originate from such processes. And if the idea of popular constituent power is to be more than a founding myth, there should be an opportunity for the people to re-constitute beyond amendments by the constituted political institutions.[65] In that way, a constitution works as a social contract: People agree on a constitution that transfers powers to constituted institutions, but at the same time, they establish limitations for those powers, subject only to changes by the people themselves. It is also plausible that courts review amendments by the political institutions referring to those limitations.[66]

Theorists point to different ways of how constitutional structures can remain open to revisions by the people. One prominent account, Ackerman's picture of the United States as a "dualist democracy," refers to "constitutional moments," that is, political processes involving mass participation that result in substantive constitutional change without a formal amendment.[67] Ackerman's theory has rightly been criticized. To assume a constituent power that emerges spontaneously circumvents the formal amendment procedure, and as there is no need to produce an official text, the approach amounts to legal insecurity.[68] Colón-Ríos presents a different way how popular constituent power may function as "the missing link in the debate about constitutionalism and democracy."[69] Relying on Latin American examples, he points out that constitutions can provide a path for their legal replacement by constituent assemblies convocated from below.[70]

The concept of popular constituent power is often presented as incompatible with any limits to that power. What can be said at least, is that the process has a limited task, to constitute a new political order, which does not cover that constituent assemblies engage in ordinary governmental acts.[71] But as long as this is not the case, the concept seems to imply that the constitutional norms made with popular participation may take any content whatsoever. Colón-Ríos points out that his account can explain the legitimacy of a wide variety of constitutional norms beyond democracy-enabling guarantees, like provisions related to "certain forms of economic (de)regulation."[72] For Ackerman, there is nothing to be said against a popular constitution-making decision to prohibit alcohol or establish one religion as mandatory for all citizens.[73] By contrast, Stacey argues that the concept of popular constituent power implies certain minimal standards for the law-making institutions to be established by the constitution. Creating them could only be seen as faithful to popular sovereignty when they will have to respect civil and political rights as well as citizen equality.[74] As important as these substantive aspects are, it is open to doubts whether it is helpful to include them in a concept that has been traditionally associated with a purely procedural

[63]Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223 (2005); COLÓN-RÍOS, *supra* note 19, at 110.

[64]For a critique of Colón-Ríos, see George Duke, *Inherent Constraints on Constituent Power*, 40 OXFORD J. LEG. STUD. 795, 808 (2020).

[65]COLÓN-RÍOS, *supra* note 19, at 109; Ernst-Wolfgang Böckenförde, *The Constituent Power of the People: A Liminal Concept of Constitutional Law*, *in* CONSTITUTIONAL AND POLITICAL THEORY 169, 175 (Mirjam Künkler & Tine Stein eds., 2017).

[66]ROZNAI, *supra* note 18, at 105.

[67]*See* BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[68]Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768 (1992).

[69]COLÓN-RÍOS, *supra* note 19, at 152.

[70]*Id.* at 160.

[71]JOEL I. COLÓN-RÍOS, CONSTITUENT POWER AND THE LAW 226 (2020); Böckenförde, *supra* note 65, at 182.

[72]COLÓN-RÍOS, *supra* note 19, at 2.

[73]Ackerman, *supra* note 67, at 14.

[74]Richard Stacey, *Popular Sovereignty and Revolutionary Constitution-Making*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 161, 170 (David Dyzenhaus & Malcom Thorburn eds., 2016).

legitimation.[75] The question is whether a purely procedural model as defended by Ackerman and Colón-Riós can provide a convincing justification for entrenching norms in a constitution.

A first doubt is empirical. Paradigmatic modern constitutions are the product of elites, not the people.[76] Many constitutions have not been adopted by a referendum,[77] and when there is one, people can only agree to a draft elaborated by some political institution. As it is impossible for millions of human beings to gather in a popular assembly, representation is inevitable even in constitution-making processes.[78] This raises serious conceptual problems: How can an institution speak on behalf of the people when there are no legally established procedures yet? And who is included in the people?[79] These problems might be overcome, be it by pre-existing law for constituent procedures in previous constitutions,[80] or an agreement among political forces,[81] or by *ex post* acceptance,[82] but all these solutions depart from the traditional vision of the constituent power based in popular sovereignty. Representative institutions play an even greater role when it comes to amendments, which are usually entrusted to the legislative power deciding by super-majority, and often do not require approval by referendum. Still, examples of constitution-making that take up propositions from citizens in consultation processes exist[83] and the claim is that constitution-making should be as inclusive as possible. Amendments by representative institutions are compatible with the model as long as they do not touch the fundamental structure.[84]

On the other hand, popular participation does not need to be limited to constituent moments. For theories of deliberative democracy, it is vital that representative institutions receive input from public debates. For popular movements pushing for legal change, it is by far easier to influence representatives in matters that are open to majoritarian decision-making than to achieve an agreement among broad parts of the population to revise fundamental constitutional structures.[85] Many constitutions even establish formalized opportunities for participation in legislation—and in ordinary constitutional amendment—by popular initiatives and referenda.[86]

It is not clear, either, whether the point of constitutionalism can be reduced to taming representative political elites. To assume this would mean that there is no sense in subjecting popular legislation by referendum to constitutional norms and judicial review. The French Conseil Constitutionnel [*Constitutional Council*] once suggested this,[87] but in many countries, legislative referenda do have to respect the constitution. Even constitutional amendment processes that involve a referendum are often subject to legal constraints.[88] Schmitt argued that the people voting

[75]Duke, *supra* note 64, at 804.

[76]*Id.* at 810.

[77]Zachary Elkins, Tom Ginsburg, Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 Temple L. Rev. 361 (2008).

[78]Solongo Wandan, *Nothing Out of the Ordinary: Constitution Making as Representative Politics*, 22 Constellations 44 (2015).

[79]For Kelsen, *supra* note 21, at 36, the people could only be a legally created entity. *See* Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* The Paradox of Constitutionalism: Constituent Power and Constitutional Form 9 (Martin Loughlin & Neil Walker eds., 2007).

[80]*See* text accompanying *supra* note 19. *See also* Colón-Ríos, *supra* note 71, at 15.

[81]*See* Arato, *supra* note 52.

[82]Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 Int'l J. Const. L. 697, 699 (2016).

[83]*See* Justin Blount, *Participation in Constitutional Design*, *in* Comparative Constitutional Law, *supra* note 39, at 38; Hélène Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 J. Polit. Phil. 166 (2015). For more on South Africa, see Simone Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy*, 11 Constellations 153, 161 (2004), and for more on Ireland, see *infra* note 171.

[84]*See* Colón-Ríos, *supra* note 19, at 165. For examples of a two-tiered mechanism, see sources cited *supra* notes 19–20.

[85]Klarman, *supra* note 68, at 766.

[86]Denis J. Galligan, *The Sovereignty Deficit of Modern Constitutions*, 33 Oxford J. Legal Stud. 1, 21 (2013).

[87]Conseil constitutionnel [CC] [Constitutional Court] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

[88]*See* Colón-Ríos, *supra* note 71, at 275 (regarding Colombia); Böckenförde, *supra* note 65, at 180 (regarding the German Länder).

in referenda is a constituted power, which does not affect the opportunity of the people as constituent power to overthrow the constitution in a revolution.[89] But if popular participation in the adoption—and revision—of a constitution is the basis of legitimacy, why should popular law-making be subjected to legal constraints? Those constraints are based on the idea that there is a sense to constitutionalism beyond popular control of political institutions. Referenda have their own problems.[90] They are vulnerable to manipulation by autocrats pursuing a populist strategy,[91] reduce decisions to stark yes-or-no alternatives and may create particular dangers for vulnerable minorities. In Switzerland, a series of rights-restricting constitutional amendments by popular initiative and referendum, inter alia a minaret construction ban, has amounted to calls for implied limits to amendments.[92] While there is certainly room for procedural improvements—the popular vote should be preceded by substantial citizen deliberation[93]—the concerns about referenda illustrate that there is a value in substantive constraints for *any* democratic process.

III. Developing Substantive Conceptions of Legitimacy

If the voluntaristic model of the legitimacy of constitutional entrenchments defended by strong constituent power theories—the idea that a "more democratic" collective will formed in the constitution-making process trumps the collective will of current majorities in parliament—fails, the focus needs to shift to the contents of constitutional norms. Interestingly, even Ackerman develops his approach with a view on a specific constitutional content, individual rights.[94] A different strand of theory acknowledges from the start that what matters about constitutionalism is not so much the origin in popular will but that the principles for the political order contained in the constitution enable citizens to accept the claim to authority as justified. Dyzenhaus highlights that it would miss the point of a constitution to understand it as a mere authorization structure, like delegated powers in administrative law.[95] What distinguishes the constitution from ordinary law is that it establishes a set of principles of political legitimacy. Those principles might be seen as inherent in the idea of law, as it makes a claim to justified authority,[96] but a formal constitution assigns a specific status to them: As higher law, they function as a standard for ordinary law. As Dworkin has pointed out, arguments of policy, which are concerned with furthering collective goals, are the domain of legislation, whereas arguments of principle, which refer to the justification of political decisions, are employed by judges enforcing constitutional norms, namely rights.[97] As Kumm argues, constitutional norms can neither be reduced to the mere will of the constituent power, nor be framed as implementing some kind of natural law derived from reason. They are directed to ensure that constituted institutions that make and apply law do so in a legitimate way

[89] *See* SCHMITT, *supra* note 62. As Böckenförde pointed out, both these uses of people are, in fact, the same people. Böckenförde, *supra* note 65, at 181.

[90] On democratic critiques of referenda, see STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: A THEORY AND PRACTICE OF REPUBLICAN DELIBERATION 22 (2012).

[91] On Hungary, Poland, Turkey, and Venezuela, see Simone Chambers, *Democracy and Constitutional Reform: Deliberative Versus Populist Constitutionalism*, 45 PHIL & SOC. CRITICISM 1116 (2019).

[92] *See* Giovanni Biaggini, *Switzerland*, *in* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 313, 317 (Dawn Oliver & Carlo Fusaro eds., 2011).

[93] *See* TIERNEY, *supra* note 90, at 185. *See* Simone Chambers, *Constitutional Referendums and Democratic Deliberation*, *in* REFERENDUM DEMOCRACY: CITIZENS, ELITES AND DELIBERATION IN REFERENDUM CAMPAIGNS (Matthew Mendelsohn & Andrew Parkin eds., 2001).

[94] Ackerman, *supra* note 67, at 295.

[95] David Dyzenhaus, *The Idea of a Constitution: A Plea for Staatsrechtslehre*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, *supra* note 74, at 9, 16. For Dyzenhaus, administrative law cannot be reduced to delegated powers, either. *Id.*

[96] David Dyzenhaus, *Constitutionalism is an Old Key: Legality and Constituent Power*, 1 GLOB. CONSTITUTIONALISM 229, 244 (2012).

[97] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1977).

rather than arbitrarily exercising power.[98] This point can also be connected to the idea of an "overlapping consensus"[99] on constitutional norms, if that idea does not refer to a mere factual agreement across social groups, but to the acceptability of constitutional norms, that is, that all have reasons to accept those norms as a matter of their contents.[100]

To be sure, there is no ready set of constitutional norms to be found by philosophical enquiry. As there are various ways to specify constitutional principles, democratic decisions on the precise shape of the constitution do matter a lot.[101] But against Waldron,[102] reasonable disagreement on constitutional principles does not imply that they should be specified in ordinary legislation. Principles can only function as a standard for legislation when they pre-exist in a different layer of law. The task of constitution-making and amendment processes is, then, to develop legitimacy conceptions for the society in question, reflecting its history and current problems. Typical features of those processes can be seen in light of their task. Thorough deliberation and popular participation are particularly valuable for developing legitimacy conceptions. And deciding on them by super-majority reflects the idea of a constitutional consensus beyond mere strategic agreements. The higher stability of constitutional norms as compared to ordinary law might be attributed a positive value on independent reasons.[103] In any event, it is a necessary consequence of their function.

In addition to political constitution-making and amendment processes, courts have an important role to play in developing constitutional law. This is not the place for an in-depth discussion of constitutional interpretation. Nevertheless, it is clear that the theory of constitutional legitimacy defended here has, as any theory of constitutional legitimacy, implications for constitutional interpretation. On the one hand, it is not just for conceptual limits of what can be considered an interpretation, but precisely for the value of establishing constitutional constraints for legislation in democratic constitution-making and amendment processes that constitutional judges will in some sense need to adopt a positivist approach rather than freely implementing their normative ideas about a good political order as philosopher kings or queens. On the other hand, positivism can go beyond literal meaning and certainly is not to be equated with a narrow originalism that only acknowledges constraints for legislation in cases envisaged by the framers and their generation.[104] In line with the theory defended here, people participating in constitution-making processes usually do not intend to pre-decide concrete political problems but aim to establish a framework for everyday political decision-making that ensures its legitimacy. Constitutional judges can then specify what the conceptions the constitution is based on mean more precisely. For this task, courts can in particular rely on abstract principles that are explicitly stated in the text[105] or that they find implicit in more specific provisions.[106] The German

[98]Mattias Kumm, *The Rule of Law, Legitimate Authority and Constitutionalism*, *in* Vienna Lectures on Legal Philosophy, 1, 113 (Alexander Somek, Christoph Bezemek & Michael Potacs eds., 2018).

[99]John Rawls, Political Liberalism 133 (1993).

[100]*See* Jürgen Habermas, *"Reasonable" Versus "True," or the Morality of Worldviews*, *in* The Inclusion of the Other: Studies in Political Theory 75 (2005); *see also* Rainer Forst, *The Justification of Justice: Rawls's Political Liberalism and Habermas's Discourse Theory in Dialogue*, *in* The Right To Justification: Elements of a Constructivist Theory of Justice 79 (Jeffrey Flynn trans., 2011).

[101]Arato, *supra* note 52, at 3.

[102]Waldron, *supra* note 2, at 212.

[103]Joseph Raz, *On the Authority and the Interpretation of Constitutions: Some Preliminaries*, *in* Constitutionalism: Philosophical Foundations 152, 174 (Larry Alexander ed., 2001).

[104]On different versions of positivism and originalism in constitutional interpretation, see Jeffrey D. Goldsworthy, *Conclusions*, *in* Interpreting Constitutions: A Comparative Study 321, 322 (Jeffrey D. Goldsworthy ed., 2017). For an originalism that is not confined to original expected applications, see Jack M. Balkin, Living Originalism (2011).

[105]*See, e.g.*, the Grundgesetz [GG] [Basic Law] arts. 1, 20, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.). The same is true of South Africa. *See* S. Afr. Const., 1996, arts. 1, 39.

[106]Regarding Canada, see Peter Hogg, *Canada: From Privy Council to Supreme Court*, *in* Interpreting Constitutions: A Comparative Study, *supra* note 104, at 55, 55.

Constitutional Court's approach to individual rights as an "objective order of values" that requires comprehensive protection in all areas of law[107] is a particularly well-known example.

Eternity clauses and judicial unamendability doctrines are a special case. Critics[108] are right that they should not immunize one shape of constitutional ideas against change. Indeed, an important part of existing unamendable provisions must be qualified as an abusive restriction of democratic openness. For instance, there may be good reasons for a federalist structure, yet, it is problematic to make it unamendable. Nevertheless, recognizing the basic idea of free and equal persons governing themselves through law is necessary for any constitution that aims to establish a legitimate political order.[109] While it is the task of constitution-making processes to develop specific constitutional rules from this basic idea, the idea itself is not subject to reasonable disagreement. It is therefore also plausible to require in constitutional replacement provisions[110] and in international law[111] that the constituent power respects a minimum core of substantive constitutionalism.

D. A Typology of Legitimacy-Enhancing Constitutional Constraints

Constitutional norms constraining democratic majorities can serve a variety of purposes. In the following, I would like to subject those purposes to a critical evaluation. What types of constitutional constraints can be said to enhance the legitimacy of ordinary political decisions? Which ones can be criticized for entrenching political decisions that should rather be open to flexible change by democratic legislation? For each type of constraint, I will give a general overview and take a closer look on more specific phenomena. In principle, the arguments apply to all constitutional democracies. Importantly, though, the focus is only on what constraints can be justified and not whether they should necessarily be implemented. In countries with a long democratic tradition, there may be more trust in the ordinary democratic process and thus less, or even—as in the United Kingdom—no binding constraints for legislation. Many modern constitutions with strong substantive guarantees and judicial review mechanisms in fact react to painful experiences of unconstrained political power in dictatorships. But even in established democracies, there can be many minor or major shortcomings of the democratic process that provide good reasons for constitutional constraints.

I. Safeguards for and Institutionalization of the Democratic Process

1. Democracy-Favoring Constitutional Constraints for Majority Decisions

The most obvious case for legitimate constraints on majoritarian politics are guarantees of the democratic process. Majority decisions can only be legitimate if there are equal opportunities for all political groups to gain the majority.[112] It cannot be at the whim of the majority that there are free and fair elections and electoral campaigns, that members of parliament enjoy certain status rights, and that citizens have political communication rights, namely to free speech and peaceful assembly. In particular, Ely has pointed out that it is all but undemocratic for judges to review laws on whether they undermine the openness of the political process.[113] Ely's approach, originally developed in the context of the United States, has been influential in

[107] *See* Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 104, at 161, 179.

[108] *See* sources cited *supra* note 25.

[109] Kumm, *supra* note 82, at 711.

[110] On Chile, *see* Fasel, *supra* note 19, at 25.

[111] *See* ROZNAI, *supra* note 18, at 82; SUTEU, *supra* note 18, at 169.

[112] Sadurski, *supra* note 27, at 60.

[113] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

constitutional jurisprudence and scholarship around the world.[114] Some courts, namely the German Constitutional Court, have been remarkably active in policing laws for failing to grant equal opportunities to achieve political power for opposition parties,[115] and recent scholarly contributions advocate for comprehensive constitutional standards to ensure the integrity of the democratic process beyond Ely's focus on the political rights of minorities.[116] As far as a democratic minimum core is concerned, it is consequent to not only protect it from change by ordinary legislation but also to include it in eternity clauses and unamendability doctrines.[117]

Important as the argument of protecting a democratic minimum core is, its scope is limited. Many constitutions contain more specific rules on democratic procedures, for example, when they fix the type of the electoral system. Several authors see a value in removing the "rules of the game" from everyday politics. Grimm has argued that it is an "achievement of constitutionalism" to decouple the alteration of the processes for ongoing political decisions from these decisions themselves.[118] For Holmes, constitutional rules of the political process should be seen not only as limiting, but also as enabling democratic politics.[119] However, it is not necessary to constitutionalize all institutional rules to enable democratic politics. The function of constitutions to establish legal validity, that is, to attribute to certain actions the quality of making valid laws,[120] does not extend to all specific rules on elections, the parliamentary process, etc. These rules have to be in place for the work of parliament, but they function as "rules of the game" even when they are amendable by simple majority.[121] From a democratic point of view, there is a value in leaving open different ways of organizing the democratic process to legislation rather than fixing one specific way in the constitution. This would suggest, for example, not to assume that the representative system established in the constitution of a country excludes new approaches to representation like a mandatory quota for women in party lists.[122] If one wants to defend fixing more specific rules for the democratic process at the constitutional level as a means to facilitate ordinary policy-making, the only argument could be that it is easier to arrive at policy decisions when no one can raise the question whether the decision-making rules should be revised. But in most democracies, political actors do not need paternalistic rules of this kind. Even if some actors prefer different institutional rules, they know that it is not wise to argue for institutional reforms whenever they discuss substantive policies. A different argument for entrenching procedural rules is that requiring a multi-party consensus for changes to institutional rules increases the fairness of the system. This is hardly convincing, either, as long as constitutions contain standards of democratic fairness and courts review all legislation on elections, campaigns etc. for its compatibility with those standards.

[114] *See* Rosalind Dixon & Michaela Hailbronner, *Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On*, 19 Int'l J. Const. L. 427 (2021). For more on this subject, see the other contributions to the same April 2019 special issue of the International Journal of Constitutional Law.

[115] *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, Stan. L. Rev. 643, 690 (1998); Michaela Hailbronner, *Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory*, 19 Int'l J. Const. L. 495, 506 (2021).

[116] *See* Stephen Gardbaum, *Comparative Political Process Theory*, 18 Int'l J. Const. L. 1429 (2020); Manuel José Cepeda Espinosa & David Landau, *A Broad Read of Ely: Political Process Theory for Fragile Democracies*, 19 Int'l J. Const. L. 548 (2021).

[117] *See* Arato, *supra* note 52, at 296. For more examples, *see* Roznai, *supra* note 18, at 23.

[118] Dieter Grimm, *The Origins and Transformation of the Concept of the Constitution*, *in* Constitutionalism: Past, Present, and Future 3, 18 (2016).

[119] Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* Constitutionalism and Democracy, *supra* note 53, at 195, 227.

[120] Kelsen, *supra* note 4, at 222.

[121] *See* Besson, *supra* note 21, at 321 (distinguishing "predecision" and "precommitment"). *See also* Axel Gosseries, *The Intergenerational Case for Constitutional Rigidity*, 27 Ratio Juris 528, 535 (2014).

[122] *See* de Visser, *supra* note 36, at 356 (explaining that in France and Italy, quota could only be introduced by constitutional amendment after the constitutional courts had declared changes to electoral legislation unconstitutional).

2. Quasi-Constitutional Entrenchment of the Electoral System in Chile

As an example for the problems raised by entrenching elements of the democratic process in higher-level law, consider the debate in Chile on the electoral system. The constitution, as enacted in 1980 during the Pinochet dictatorship for a future "protected democracy" and amended in the transition process, provides that election rules are to be determined by an "organic constitutional law" that has to be passed by a 4/7 super-majority in both chambers—and is subject to ex ante approval by the Constitutional Court.[123] Part of the concessions to the military junta to which the democratic forces acquiesced in 1989 was—among other things like the "authoritarian enclaves"—to establish a "binomial" voting system that favored tight majorities: The two seats assigned to each constituency were usually split between the first two lists formed by party coalitions; one list could only fill both when it won twice as many votes than any other. Since organic constitutional laws are also required in many other areas, this had the consequence that the left parties had to negotiate many reforms with the right despite winning large majorities in votes.[124] The situation remained unchanged for decades since the constitutional rule requiring a super-majority for electoral law reforms resulted in a veto position of the right. Only in 2015, when the left had achieved a large victory and succeeded in convincing a few senators of the right, mainly of a new small party, the electoral system was changed to proportional representation.[125]

The institutional rules of the Chilean constitution have been criticized for creating a "fundamental impossibility of transforming democratic preferences into policy."[126] The problem may be seen on different levels. First, it might be argued that the binomial voting system is incompatible with essential requirements of democratic fairness. This is not evident, though, given that many democracies have first-past-the-post voting in place. In any event, though, the question arises whether it is justified to entrench the electoral system in higher-level law. Verdugo argued that in this field, a specific justification for super-majority decisions exists since they prevent incumbents of one political coalition from changing the rules of the game to their favor.[127] Other authors countered, however, that super-majority decisions were not the way to ensure electoral fairness; it could only be achieved by constitutional standards and judicial review.[128] Based on what I have said in the previous paragraph, I agree with that view. But even if entrenching electoral rules in higher-level law was not as such illegitimate, a third type of argument applies: Entrenched rules at least need to be created in a democratic process beyond ordinary legislation. The problem with the former Chilean electoral rules is, thus, that they were imposed by the Pinochet dictatorship.

II. Individual Rights

Individual rights are certainly the most important constitutional constraints for legislation. The basic liberal idea is that individuals should not only be able to participate in the political process, but also need protection from its outcomes. In what way can this be compatible with democracy?

[123]Constitución Política de República de Chile arts. 18, 47, 66 cl. 2, 93 cl. 1. For an analysis of those particular quasi-constitutional Chilean laws, see Sergio Verdugo, *How to Identify Quasi-Constitutional Legislation? An Example from Chile*, *in* Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications 45, 52 (Richard Albert & Joel I. Colón-Ríos eds., 2019).

[124]*See* Andrew Arato, *Beyond the Alternative Reform or Revolution: Post-Sovereign Constitution-Making and Latin America*, 50 Wake Forest L. Rev. 891, 907 (2015).

[125]Ricardo Gamboa & Mauricio Morales, *Chile's 2015 Electoral Reform: Changing the Rules of the Game*, 58 Lat. Am. Pol. & Soc'y 126 (2016).

[126]Heiss, *supra* note 61, at 475.

[127]Sergio Verdugo, *Las Justificaciones de la Regala de Quórum Supra-Mayoritaria de las Leyes Orgánicas Constitucionales*, 39 Revista de Derecho de la Pontifica Universidad Católica de Valparaíso 395, 421 (2012).

[128]Guillermo Jiménez, Pablo Marshall & Fernando Muñoz, *La Debilidad de las Súper-Mayorías*, 41 Revista de Derecho de la Pontifica Universidad Católica de Valparaíso 359, 387 (2013).

1. Respect for Individuals

The crucial question is for what reasons individuals should be able to claim that their interests constrain democratic decisions. When rights are conceptualized as merely protecting the individuals' negative liberty[129] to act as it pleases them unhampered by state intervention, it is not clear why they are more important than common good aims. The suspicion is that rights give an unfair advantage to certain interests. In the United States, the Supreme Court's broad interpretation of rights has raised ongoing controversies. The invalidation of social laws as incompatible with freedom of contract in the early 20th century during the Lochner era was a trauma for progressives,[130] while conservatives heavily criticized the recognition of an extended scope of personal rights since the 1960s, calling for narrow originalist approaches as a means to counter judicial activism.[131] Against this background, Ely, who argued for a strong protection of political rights, favored a very restrictive approach for rights in the private interest. Courts should only protect the rights of "discrete and insular minorities" against discriminatory laws when due to hostility and stereotypes, those minorities are not adequately represented in the political process.[132] Like Waldron's and Bellamy's more recent theories,[133] Ely considers any further protection of non-political rights as a question of substantive values that should be left to majoritarian politics.

But is it true that all non-political individual rights are merely a question of contingent values? We can acknowledge a moral priority of individual rights over collective political aims if we can establish that they protect more than mere factual interests. This is what modern theories of liberalism that are based on Kant rather than Locke do. For them, freedom is not about the absence of interferences, but about a positive idea: Everyone is to be recognized as an autonomous person.[134] As Forst argues, rights are based on the fundamental idea that decisions have to be justified to all affected persons.[135] State interventions that restrict private freedom are not in themselves problematic as long as they respect autonomy. And autonomy can not only require the state to refrain from actions, but also to perform positive actions.[136] On that basis, the failure of executive institutions to protect people from dangers or, most importantly in but not restricted to the Global South, to provide them with basic goods like health and education, can be framed as a moral problem to be addressed by rights.[137] The positive idea of private autonomy connects well to the idea of public autonomy that is at the core of democracy. As Habermas has pointed out, both share the same normative origin. Citizens can only make an appropriate use of their public autonomy, as guaranteed by political rights, if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct.[138] Forst highlights that constitutional rights can compensate shortcomings of politics: The task of courts enforcing rights is to insist on

[129] *See* Isiah Berlin, *Two Concepts of Liberty*, in Four Essays on Liberty 118, 121 (1969).

[130] *See* Barry Friedman, *The Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1383 (2001).

[131] *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

[132] Ely, *supra* note 113, at 103, 135. The term "discrete and insular minorities" was coined in the famous "Footnote Four" in the majority opinion of *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1938). *See also* Hailbronner, *supra* note 115, at 499 (contrasting Ely's approach with a robust substantive rights review in Germany).

[133] *See supra* note 2. Waldron shows some sympathy for judicial review protecting "discrete and insular minorities." For evidence of this, see *Jeremy Waldron, The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1403 (2006).

[134] *See, e.g.*, Rawls, *supra* note 99; Dworkin, *supra* note 97; Joseph Raz, The Morality of Freedom 407 (2009).

[135] Rainer Forst, *The Basic Right to Justification: Toward a Constructivist Conception of Human Rights*, in: The Right to Justification, *supra* note 100, 203 at 213.

[136] Kai Möller, The Globel Model of Constitutional Rights 30 (2012).

[137] *See* David E. Pozen & Kim L. Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 Am. J. Int'l L. 608 (2020); Michaela Hailbronner, *Overcoming Obstacles to North-South Dialogue: Transformative Constitutionalism and the Fight Against Poverty and Institutional Failure*, 49 Verfassung und Recht in Übersee 253, 258 (2016).

[138] Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 Polit. Theory 766, 767 (2001).

the level of justification that should also be shown by legislative processes, assuming they were correctly conducted.[139] The concrete shape of rights must of course be specified in democratic constitution-making and amendment processes, taking into account the specific problems of the respective society, and remain open to further discussion. As Habermas puts it, the framers have begun a tradition-building project, but later generations have the task to actualize the still untapped normative substance of the system of rights in constant learning.[140] Constitutional rights should therefore be subject to ongoing interpretation, but also to constitutional amendment. Nevertheless, it is plausible to declare the core idea of recognizing individuals unamendable, as the German guarantee of human dignity does.[141]

In line with this theoretical conception, most modern constitutions establish liberal rights not as absolute prohibitions to legislate, but require that limitations meet certain standards of justification.[142] The institution of constitutional courts allows individuals to ask for such justification.[143] Courts around the world structure their review whether rights limitations are justified by proportionality analysis.[144] This brings standards of political rationality into adjudication.[145] When rights limitations are not necessary to achieve a policy aim or when they are disproportionate with regard to the benefits for that aim, they cannot be justified to individuals. With the balancing stage, proportionality analysis also entails a test beyond general rationality: Political decisions must take into account that the specific rights included in a constitution mark certain goods and activities as being particularly important. Not any common good aim is important enough to justify a limitation. Balancing is not a mathematically exact operation and rights normally do not indicate single right policy choices.[146] But political decisions have to make plausible that they take rights seriously. For instance, the right to freedom of assembly implies that demonstrations may not be prohibited for causing minor traffic disturbances. As to the protection of individual autonomy against failure of states to protect people from dangers and to provide them with basic goods, courts have developed doctrinal approaches that avoid assuming specific ways of performing state functions as constitutionally mandatory while carefully supervising whether the approaches chosen by the legislative and executive powers faithfully implement positive rights.[147]

2. The Right to Property

One typical constitutional right that is subject to strong controversies is the right to property, since it can entail significant constraints on socio-economic policies. Can property rights ensure respect for individuals in a similar way as personal freedom rights do? There are other justifications, too, particularly that they support economic prosperity.[148] But if reasons for entrenchment that are

[139]Rainer Forst, *One Court, Many Cultures: Jurisprudence in Conflict*, *in* NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION 105, 117 (2017).

[140]Habermas, *supra* note 138, at 774.

[141]*See* GG art. 1 cl. 1 (Ger.). *See also* Ralf Poscher, *Human Dignity as a Value and a Right: The German Case*, *in* CONSTITUTIONAL LAW IN GERMANY (Matthias Herdegen, Johannes Masing, Ralf Poscher & Klaus Ferdinand Gärditz eds., 2024).

[142]The United States is often seen as an exception to this trend, but even there, not all rights are understood as protected categorically or without any limitations. *See* Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 416 (2008).

[143]Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 153, 163 (2007); Cristina Lafont, *Philosophical Foundations of Judicial Review*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, *supra* note 74, at 265, 265.

[144]AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 179 (2012).

[145]Kumm, *supra* note 143, at 156. Malcolm Thorburn, *Proportionality*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, *supra* note 74, at 305, 305.

[146]MÖLLER, *supra* note 136, at 199.

[147]As an example, see the German Constitutional Court's approach to the positive right to subsistence minimum, 125 BVerfGE 175 – *Hartz IV*. For an analysis of that approach, see Ingrid Leijten, *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights*, 16 GERMAN L.J. 23 (2015).

[148]Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 911 (1992).

merely concerned with policy outcomes are difficult to reconcile with democracy,[149] the question is whether and in what way property rights can be justified as human rights.

First, there is a crucial difference between expropriation and regulation. When private land is expropriated as a means to realize public projects like constructing roads, the benefits of the property are transferred to the state, and a sacrifice is imposed on some owners. Compensation requirements reflect the equality idea that it would be unfair to make the "unlucky" owners pay more for the project than everyone else by taxation. General regulations, like environmental laws, may have a significant impact on the market value of property, too. But judicial doctrines that treat them as "indirect expropriation" or "regulatory takings" requiring compensation, particularly prominent in the United States,[150] overlook that regulations react to the social effects of property use. Many constitutions therefore highlight the task of the legislative power to establish limits for property use in the interest of the common good,[151] and courts acknowledge that when it comes to the strong social effects of commercial property use, regulation powers are especially wide.[152] The core function of the constitutional protection of property with regard to regulations is that they must comply with rationality standards of the proportionality principle. This may imply a temporal dimension of fairness. Even if changes to existing regulations do not trigger compensation requirements for any negative economic impact, they should take into account the situation of those who operated under the previous rules, for example, by transitional provisions or compensation for frustrating investments that had been incentivized by the old rules.[153]

Even for expropriations, an autonomy-based approach suggests a differentiated picture. Unlike takings for infrastructural projects, those for political projects to transform private enterprises to public administration or to correct a highly uneven distribution of land do not accidentally impose a sacrifice on some owners, but address problems of wealth concentration. Of course, a libertarian conception of property rights[154] excludes such projects, at least when owners are not granted full compensation of market value. However, when property rights function as means to ensure autonomy, all depends on the specific property concerned. Individuals should be secure from takings of their homes and personal belongings, but commercial assets do not enjoy the same level of protection. For good reasons, some constitutions explicitly open up the possibility for a socialization of land, resources and means of production.[155]

III. Protecting Social Institutions in Line with Particular Cultural Traditions

According to a widespread view, constitutions should express collective identities, reflecting the highest values of the nation and its people.[156] This does not need to be in contradiction with universalist ideas of constitutionalism. Although the basic ideas of democracy, the rule of law, human dignity, liberty and equality are universal in nature, the choices for a specific shape of democratic institutions and rights protecting mechanisms in constitution-making processes draw

[149] *See infra* D.IV.2.

[150] *See* Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law: Searching for Light in the Dark*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 107–150 (Stephan W. Schill ed., 2010).

[151] *See, e.g.*, GG arts. 14.1.2, 14.2 (Ger.); 1975 SYNTAGMA [Constitution] art. 17.1.2 (Greece); Art. 42.2 COSTITUZIONE [COST.] (It.); CONSTITUTION OF IRELAND 1937 art. 43.2, https://www.irishstatutebook.ie/eli/cons/en/html.

[152] For an example of this in the German Constitutional Court, see the case on employee participation in corporations, 50 BVerfGE 290. On the court's differentiated protection depending on the function of the property, see Gregory Alexander, *Property as a Fundamental Constitutional Right – the German Example*, 88 CORNELL L. REV. 733, 772 (2003).

[153] For the German Constitutional Court's jurisprudence on legitimate expectations, see the case on nuclear phase-out, 143 BVERFGE 246. For an analysis of that case, see I. M. Rautenbach, *Expropriation: South African Notes on a German Judgment*, 2017 J. S. AFR. L. 585 (2017).

[154] For a critical discussion of this conception, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

[155] *See, e.g.*, GG art. 15 (Ger.); Art. 42.2 COST. (It.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] art. 83, English translation available at https://dre.pt/constitution-of-the-portuguese-republic.

[156] *See* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1135 (2014); Tushnet, *supra* note 3, at 219.

on historical experiences and current problems of the society in question.[157] Nevertheless, for a truly "communitarian" approach, it is not necessary that the rules of a national constitution specify universal ideas. It is to be welcomed, too, when a constitution contains "institutional guarantees" that protect social institutions like marriage, family, the status of churches and Sunday rest in their traditional form from fundamental changes in legislation.[158] From the perspective of constitutional legitimacy developed in this article, however, entrenching traditions at constitutional level is highly problematic.

1. The Place for Particular Collective Identities in Law

Ordinary laws inevitably reflect dominant views on social institutions in a particular society, and this does not raise legitimacy problems. Liberal approaches that reduce law-making to a neutral delimitation of individual spheres of action overlook that it is an essential function of democratic processes to discuss and decide about visions of the common good. This will involve a construction of "who we are," an "ethical self-understanding" of the society.[159] Importantly, though, collective identities are subject to ongoing democratic discussion. Societies may choose to continue the path of tradition, but also to depart from it.[160] The problem with entrenching traditional forms of social institutions in constitutional norms is, then, that they make it harder to change the legal regulation of those institutions.

Beyond the democratic concerns, elevating traditional forms of social institutions to the level of constitutional law also risks to undermine the entrenchment of universal values of constitutionalism. The function of rights to ensure that visions of the common good developed by the majority are acceptable for all is put into question when social institutions based on long-standing traditions have constitutional status, too. When constitutional norms that protect social institutions allow or even require rights restrictions that would otherwise not be permissible, there is an "internal disharmony" between universalistic and particularistic aspirations.[161]

From a pragmatic point of view, things might be different. It can be part of constitutional compromises aiming at social stability in new democracies[162] to entrench certain traditions in the constitution which are particularly cherished by important social groups that would otherwise be in constant opposition to the project. In Germany, for example, guarantees of a special institutional status of churches and religious education in schools are the result of a constitutional compromise that aimed to achieve the support of Christian parties for the constitutional project in 1949.[163] Nevertheless, pragmatic reasons of that kind remain always open to critique from a principled perspective of legitimacy as giving an unjustified prime on social power. In established democracies, social groups can be expected to fight for maintaining laws that reflect cultural traditions in the democratic process. This may have implications for interpretation, too. In Germany, the constitutional guarantee of marriage which was originally understood as shielding this institution in its traditional Christian shape from fundamental changes by the legislator, did not stand in the way of the legislator to introduce a partnership for same-sex couples in 2002 and to open marriage to them in 2017. The court gave the guarantee a reading in line with liberal constitutionalism, entrenching a right that does not prevent the legislator from broadening the scope of the

[157]Gary J. Jacobsohn, *The Formation of Constitutional Identities*, *in* COMPARATIVE CONSTITUTIONAL LAW, *supra* note 39, at 129, 133, 138 (explaining the relationship of universal ideas of justice and local traditions in constitution-making processes with examples from South Africa and India).

[158]The term was coined for the German Weimar Constitution by Schmitt. *See* SCHMITT, *supra* note 62, at 208.

[159]HABERMAS, *supra* note 22, at 162. *See also* RAINER FORST, *The Rule of Reasons: Three Models of Deliberative Democracy*, *in* THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE, *supra* note 100, at 155 (contrasting Habermas' conception with liberal and Hegelian communitarian views).

[160]Jürgen Habermas, *Struggles for Recognition in Constitutional States*, 1 EUR. J. PHIL. 128 (1993).

[161]Jacobsohn, *supra* note 157, at 130.

[162]*See supra* C.I.

[163]*See* Antje von Ungern-Sternberg, *Constitutional Law on Religion*, *in* CONSTITUTIONAL LAW IN GERMANY, *supra* note 140.

institution.[164] After decades of democratic stability, an interpretation that avoided entrenching group interests in maintaining traditions was possible without risking major social conflicts.

2. Catholic Values in the Irish Constitution

Ireland is a good example of a constitution that entrenches social institutions in line with traditional cultural values. The constitution of 1937 established a deeply Catholic state. It not only granted a special status to the Catholic church and parental rights in the Catholic natural law tradition but also called the state to "ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties at home," prohibited divorce and required the criminalization of blasphemy.[165] This reflected the values of a devout population.[166] Few years after independence, the aim of the framers was to replace the constitution of 1922, which had come into force with British consent, by a genuinely Irish document.[167] The postcolonial elite imagined Irish identity as a rural Catholic community, as opposed to the British colonizers. The population largely shared those values for decades. In 1983, the Eighth Amendment even reinforced the conception. While recognizing the right to life of the unborn could also be seen as strengthening individual rights, the goal of the amendment campaign was to secure the existing abortion ban against legislative change and judicial decisions.[168]

In recent decades, however, the cultural provisions were more and more perceived as outdated. The amendment mechanism has provided a realistic path for change. For an amendment to pass, a simple majority in both houses of parliament and in a referendum is sufficient.[169] In 1992, two amendments—no. 13 and 14—responding to controversial court decisions clarified that the Eighth Amendment did not restrict the rights of women to travel for an abortion and to receive information.[170] Another compromise between Catholic morality and the desire to alleviate its worst consequences can be found in the 1995 Fifteenth amendment that allowed divorce under strict conditions like a separation period of four years. In recent years, Ireland has taken steps for profound constitutional changes. In 2012, the government set up a Constitutional Convention, a deliberative mini-public composed of members of parliament and randomly selected citizens, to discuss several constitutional questions.[171] Following a recommendation of the Convention, the 2015 34th Amendment allowed same-sex marriage. The Convention's recommendation to replace the blasphemy clause by a new constitutional regulation on religious hatred was not implemented; instead, the 2018 37th Amendment simply deleted the clause. The prohibition of abortion was discussed in 2016 in a Citizens' Assembly of randomly selected people on the basis of expert statements and voices of affected women. The Assembly, whose work was extensively covered in the media, recommended to authorize legislation on abortion. This result was implemented by the 36th Amendment in 2018.[172] The 2019 38th Amendment left regulation of divorce to legislation, which was not controversial anymore.[173]

[164] 105 BVerfGE 313. For an analysis of that decision, see Anne Sanders, *Marriage, Same-Sex Partnership, and the German Constitution*, 13 GERMAN L.J. 911, 930 (2012).

[165] CONSTITUTION OF IRELAND 1937 arts. 40.6, 41.2, 41.3, 42, 44.2.

[166] Denny Kenny, *The Virtues of Unprincipled Constitutional Compromises: Church and State in the Irish Constitution*, 16 EUR. CONST. L. REV. 417, 431 (2020).

[167] Patrick Hanafin, *Constitutive Fiction: Postcolonial Constitutionalism in Ireland*, 20 PENN. STATE INT'L L. REV. 339 (2001).

[168] Luke Field, *The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date*, 33 IRISH POL. STUD. 608, 609 (2018).

[169] CONSTITUTION OF IRELAND 1937 arts. 46, 47.1.

[170] *See* Field, *supra* note 168, at 610.

[171] Oran Doyle & Rachael Walsh, *Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics*, 16 EUR. CONST. REV. 440, 446 (2020).

[172] *See* Field, *supra* note 168, at 612; Oran Doyle & Rachael Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, 20 INT'L J. CONST. L. 398, 408 (2022).

[173] *See* Lisa Keenan, *The Divorce Referendum 2019*, 35 IRISH POL. STUD. 80 (2020).

The recent constitutional changes in Ireland are impressive, and the processes that preceded them are praised for their deliberative democratic quality.[174] Against this background, Ireland might be seen as an example of a constitution that reflects social values, while a relatively flexible amendment process allows to adapt the document to changes in those values. As the experience with the abortion provision demonstrates, long lasting campaigns of social movements can achieve amendments.[175] And yet, entrenching dominant social values in the constitution has its dark sides. The narrative of a thick cultural identity on which the Irish constitution was based deliberately excluded the perspective of minorities.[176] The procedural legitimacy of the document suffered from the fact that concerns expressed by those who did not share the dominant narrative, namely women, were not heard by the framers.[177] Substantively, the constitution failed to include rights for personal choices that were incompatible with dominant cultural values. Although constitutional rights may not be the only model to protect minorities, entrenching community values in the constitution also means to present them as higher law with a moral standing. When the symbolic dimension of constitutional law extends to norms which are not acceptable to everyone, exclusion is exacerbated. Ireland has learnt from this experience. The procedures used for recent amendments successfully included a wide range of perspectives. But it is also interesting to see that the broad trend of amendments is to leave decisions on issues like divorce and abortion to legislation. Even in Ireland it is felt that certain questions are not apt for entrenchment.

IV. Common Good Objectives

Yet another type of constitutional guarantees can be found in common good objectives. Economic prosperity, social welfare, environmental protection and the like are not only policy goals, but increasingly also the object of constitutional principles that contain specific obligations for legislation. However, if the idea of constitutional constraints for legislation is about conditions for justified policy decisions rather than pre-deciding substantive policy issues, this expansion raises the danger of constitutional overreach.

1. Directives for Social and Environmental Policy

Since the 20th century, many constitutions supplement liberal rights of property and commercial freedom by social policy goals. One of the first examples, the German Weimar Constitution of 1919, contained norms on housing, labor, health insurance and pensions, as well as unemployment benefits.[178] Most constitutions around the world now include directives for social policy.[179] Such directives cover a broader range of issues than social rights that entitle individuals to certain minimal benefits.[180] Recent amendments in many countries require the state to engage in environmental protection.[181]

Many authors have been critical of such provisions. As there is reasonable disagreement about social and environmental policies, they should be determined in democratic legislation. Judicial

[174]For an analysis of these political processes in Ireland, see Doyle & Walsh, *supra* note 172, at 415.

[175]Eoin Carolan, *Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum*, 20 Fed. L. Rev. 1, 9 (2020).

[176]Hanafin, *supra* note 167, at 356.

[177]*See* Patrick Hanafin, *Defying the Female: The Irish Constitutional Text as Phallocentric Manifesto*, 11 Textual Practice 249, 255 (1997).

[178]*See* Weimar Constitution, arts. 155, 157, 160, 163, available in translation at https://germanhistorydocs.ghi-dc.org/pdf/eng/ghi_wr_weimarconstitution_Eng.pdf.

[179]*See* Keith D. Ewing, *Economic Rights*, *in* The Oxford Handbook of Comparative Constitutional Law, *supra* note 3, at 1036, 1036.

[180]*Supra* note 146. On the need of legislation for implementing social rights see Kim L. Scheppele, *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 1921, 1933 (2003).

[181]Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformation?*, 16 Int'l J. Const. L. 836 (2018).

review of these policies seems inappropriate due to the complex factual and normative considerations involved and the resource-sensitivity.[182] The fear is that under a constitution with numerous policy directives, the democratic process transforms into an exercise of merely implementing the constitution under the supervision of a court that turns out to be the center of political power.[183] In order to avoid these problems, many constitutions that include directives for social and environmental policy bar judicial review of legislation by reference to those norms.[184] Here, the concern is that constitutional norms result in empty promises. Notably, the German Basic Law does not take up the Weimar legacy, but contains only liberal rights and an abstract social state principle. While this is in part due to the provisional character intended for the West German constitution, the framers also expressed the view that the Basic Law should consist of justiciable norms, not of programmatic phrases.[185]

Nevertheless, constitutional directives for social and environmental policy can fulfil important functions. First, they clarify that *rights limitations* are permissible.[186] For instance, an obligation to ensure decent housing might serve as a justification for far-reaching limitations of property rights. The more straightforward alternative is, though, to include clauses in rights provisions that avoid an overreaching protection. If any rights limitation were only permissible when it served to fulfil a constitutional obligation, this would come close to the undemocratic endeavor of defining a closed list of state functions—"Staatsaufgabenlehre."[187]

Moreover, constitutional directives for social and environmental policy function as *procedural requirements*. As those directives allocate institutional responsibility to realize certain social values to the legislative power,[188] the latter has a duty to develop a conception to fulfil them. Even non-justiciable obligations to enact social and environmental policies may remind political actors not to forget about these goals. Judicial review of legislation by those constitutional standards could ensure that political actors base their decisions on sufficient information and a thorough discussion.[189] In that way, a political process theory of judicial review[190] is implemented in specific policy fields where institutional failure has been conceived of as particularly pressing in the past.

2. The "Economic Constitution": Balanced Budgets and Central Banks

In economic policy, many constitutions include more significant constraints for legislation. In recent years, constitutional amendments that oblige the state to keep a balanced budget were passed in many countries.[191] Some constitutions and primary EU law—for the European Central Bank[192]—also guarantee the independence of the Central Bank from political influence and bind it to the primary objective of price stability. Central Banks that are independent from elected

[182]Lael K. Weis, *Constitutional Directive Principles*, 37 Oxford J. Leg. Stud. 916, 935 (2017).

[183]For the German discussion see Ernst-Wolfgang Böckenförde, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights*, *in* Constitutional and Political Theory, *supra* note 65, at 235, 264. For a similar discussion regarding India, see Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 Mich. State J. Int'l L. 643, 677 (2007).

[184]*See, e.g.*, Constitution of India art. 37; Constitution of Ireland 1937 art. 45; Constitución Española (1978) art. 53.

[185]*See* Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 Wm. & Mary L. Rev. 1307, 1311 (2007).

[186]On decisions from the United States about 'regulatory takings," see Weis, *supra* note 182, at 942.

[187]*See* Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja Zu Deutschland"*, 10 German L.J. 1241, 1249 (2009).

[188]Weis, *supra* note 182, at 936.

[189]For environmental policy see Kristian S. Ekeli, *Green Constitutionalism: The Constitutional Protection of Future Generations*, 20 Ratio Juris 378, 394 (2007).

[190]*See supra* C.I.1.

[191]For EU states, those amendments are mandatory under Article 3(2) of the Fiscal Compact Treaty, see Stephen McBride, *Constitutionalizing Austerity: Taking the Public Out of Public Policy*, 7 Glob. Policy 5, 8 (2016).

[192]Consolidated Version of the Treaty on the Functioning of the European Union arts. 127, 130, July 6, 2016, 2016 O.J. (C 202) 102 [hereinafter TFEU].

political officials certainly exist in most constitutional democracies. But it is an important difference whether their mandate is based on a revisable parliamentary decision, or whether it is entrenched in the constitution.[193] EU law also entails commitments for an economic order based on free competition and establishes strict rules for subsidies.[194]

Constitutional rules of that kind implement normative theories about good economic policy. The view that the way issues should be regulated by law is a matter of discerning truth, long discredited in democratic theory, is still somewhat present in the economic field. Economic scholars on both sides of the Atlantic have shown deep distrust for the capacity of pluralistic representative democracy to enact sound economic policies, while they were confident that economic science could discern which regulations would be best for economic prosperity.[195] It does not come as a surprise that libertarian theorists call for constitutional norms that prevent "irrational" economic policies.[196] When constitutional entrenchment is used to implement theories of a good policy, this clearly contradicts core ideas of democracy. There are different views even among economists which policies are best for prosperity, and it is yet another question how to balance economic objectives with other common good considerations like social security and protecting the environment. In a democracy, the common good is a matter not of cognition by experts, but of political deliberation and revisable decision-making. There is thus a growing awareness that constitutional rules in the economic field go too far.[197]

Nevertheless, some authors have provided more principled arguments for constitutional rules on economic policy. Price stability has been framed as protecting property rights on savings.[198] Balanced budget rules have been defended as protecting the rights of future taxpayers and ensuring future democratic agency, since politicians in short term election cycles had an inclination for deficit spending which postponed taxation or expenditure cuts to future generations.[199] Those arguments are hardly convincing, either. As to individual rights, understanding them as a means to protect autonomy does not cover excluding policies for mere impacts on personal wealth. Neither a decrease of the value of savings, nor taxation—as long as it does not impose excessive burdens that threaten the exercise of personal freedoms—raises a human rights problem. As to the democratic argument, it is important to see that policy-making at a certain time inevitably affects the options available for later policy-making. Therefore, democracy can hardly require to preserve a certain set of options.[200] The argument of preserving democracy is only consistent in a more limited way: Democratic decisions should not deprive future policy-makers of any opportunity to implement their own ideas. From that perspective, deficits are not as such problematic, but only *extreme* deficits that amount to the risk of a financial collapse. For the similar problem of financial guarantees for foreign states, the German Constitutional Court argued that the constitutional democracy principle only implies a prohibition of taking extreme financial risks that could undermine future budget autonomy.[201]

[193] *See* Jens van't Klooster, *Central Banking in Rawls's Property-Owning Democracy*, 47 Pol. Theory 674, 692 (2019).

[194] TFEU 107–08, 119.

[195] *See* Thomas Biebricher, *Neoliberalism and Democracy*, 22 Constellations 255, 257 (2015).

[196] Friedrich August von Hayek, The Constitution of Liberty 176 (1960); James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan 147 (1977).

[197] See the critique on over-constitutionalization in EU primary law by Dani, *supra* note 56, at 54; Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 Eur. L.J. 460 (2015). For balanced budget requirements see McBride, *supra* note 191, at 11.

[198] *See* Matthias Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 Common Mkt. L. Rev. 9, 13 (1998).

[199] James M. Buchanan, *The Balanced Budget Amendment: Clarifying the Arguments*, 90 Pub. Choice 117, 121 (1997).

[200] *See* Beckman, *supra* note 8.

[201] 132 BVerfGE 195, at 242.

E. Conclusion

The dynamic dimension of democracy has important implications for the legitimacy of entrenched constitutional norms. As there is a democratic value in the competence of simple majorities to revise existing legal norms, it is not enough that constitutional norms are subject to democratic amendment processes, nor that there is a legal path for replacing the constitutional order as a whole. Rather, attributing norms a special "rigid" formal status, which may be more or less strong depending on the amendment mechanism, requires a specific justification. The core idea is that standards of higher-level law can enhance the legitimacy of legislation. How these legitimizing conditions should look precisely is to be discussed in political processes, but it is important not to mix up debates on legitimacy conceptions with policy debates. Democratic constitution-making processes are special not for a higher input legitimacy due to increased levels of consensus and participation, but for engaging with this task. This idea leaves ample room for variations in constitutional design. Nevertheless, it implies some general guidelines. While constitutional guarantees of the democratic law-making process and individual rights protecting personal autonomy fit well with the approach, the constitution is not the right level of law for the expression of particular cultural identities, nor for policy choices, namely in the economic field.

In sum, constitutional law connects ideas of moral rightness and political decision-making in a peculiar way. As almost all law is subject to reasonable disagreement, even constitutional norms have to be decided upon politically. But it is a different level of politics where a political community engages in the construction of substantive standards for its laws. To draw the line between the two levels is not always an easy task, but it seems to me the only viable way to make sense of entrenched constitutional norms as an essential element, rather than an arbitrary curtailment of democracy.

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