

Should Progressive Constitutionalism Embrace Popular Constitutionalism?

MELISSA SCHWARTZBERG*

TABLE OF CONTENTS

I. INTRODUCTION	1295
II. SETTING THE AGENDA	1299
III. P-CONSTITUTIONALISM AGAINST SUPERMAJORITY RULE	1305
IV. IMPLEMENTING THE P-CONSTITUTION	1314

I. INTRODUCTION

There are two conceptions of progressive constitutionalism explored in this Symposium. The first is of progressive constitutionalism as, first and foremost, a programmatic agenda, focused on how progressives’ “distinctive constitutional vision may best be transmuted into claims of constitutional law.”¹ To the extent that this constitutional vision entails only a set of policy preferences (e.g., freedom of choice concerning abortion, progressive taxation, economic and social rights), a key ambition of progressive legal scholars will be to produce a progressive theory of constitutional interpretation that will enhance the likelihood that law consonant with these commitments will survive judicial scrutiny. But progressives claim to aim at a constitutional theory that is not merely reducible to a set of left-liberal policies—in Jack Balkin and Reva Siegel’s language, a “redemptive constitutionalism,” the “basic premise” of which is that “our Constitution is always a work in progress,” a “bond with the future, expressing commitments that the American people have yet fully to achieve.”² This takes a strategic cast as well. In Marc Spindelman’s words, crediting Robin West, “progressive politics—and the freedoms towards which they aim—would stand a better chance of success than they presently do if the Supreme Court were to stand back and give the political processes their head.”³ This is the second conception of progressive constitutionalism, one that is tied to popular constitutionalism. It is an account of constitutional emergence and

* Associate Professor of Political Science, Columbia University. Comments from Jack Knight and other panel members and attendees at the Midwest Political Science Association 2011 Annual National Conference, as well as those from Marc Spindelman and participants at the 2011 *Ohio State Law Journal* Symposium on Progressive Constitutionalism, are gratefully acknowledged. Thanks as well to the *Ohio State Law Journal* 2010–2011 and 2011–2012 editorial board members, especially Joseph Wenger.

¹ Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 32 (Jack M. Balkin & Reva B. Siegel eds., 2009).

² Jack M. Balkin & Reva B. Siegel, *Introduction* to *THE CONSTITUTION IN 2020*, *supra* note 1, at 1, 2.

³ Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg’s Constitution*, 70 *OHIO ST. L.J.* 1115, 1115–16 (2009).

change that aims at situating ultimate constitutional authority with the people “themselves” rather than with the courts. The challenge I wish to explore here is whether these two aims ought to be yoked together. There will certainly be moments at which the people or the legislatures may be more receptive than the courts to progressive goals, and so indeed there might be good prudential reasons to develop a constitutional theory that encourages popular appeals. Yet there will also be times when the progressive agenda will be more likely to succeed within the courts than via an appeal to the people or to the legislatures. In such a case, the question for progressive constitutionalists is: which prong of the progressive agenda ought to dominate? Should progressives pursue substantive goals or focus on a set of procedural commitments?

That there *might* be such a tradeoff is obvious; there is no reason to believe that the people or their representatives will consistently promote substantive equality to a greater extent than the courts, or vice versa. That such a compromise might be normatively attractive may seem less plausible. Yet whereas progressives might have good reason to lament the election of leaders who do not share their concerns about social and economic inequalities, a preference for democratic decision making—for a “system in which parties lose elections,”⁴ and in which shifts in electoral politics affect policy outcomes—ought to supersede any set of ideological aims.

Nonetheless, progressive constitutionalists have in recent years tied themselves to popular constitutionalism. The simplest explanation for this move might be one from affinity: many popular constitutionalists would likely self-identify as progressives. It is true that there is no clear causal connection between popular and progressive constitutionalists, and further that the converse is not always the case, because some who believe that the Constitution properly interpreted reveals progressive ideological commitments (such as substantive economic rights) are also committed to a version of judicial supremacy in enacting such interpretations.⁵ But it might explain some degree of convergence in the argumentation.

Yet there are deeper reasons why progressive constitutionalists have been drawn to popular constitutionalist logic. Progressives and popular constitutionalists share a deep commitment to autonomy, a respect for the capacity of individuals, and of democratic communities, to work out fundamental problems for themselves. Robin West describes one strand of progressive constitutionalism, existential progressivism, in which this is foundational: “The freedom to decide one’s life’s course, rather than to have it

⁴ ADAM PRZEWSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 10 (1991) (explaining that “contestation open to participation” is a cornerstone of democracy); see also Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY’S VALUE* 23, 23–55 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

⁵ See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

thrust upon her, is what gives a life moral meaning.”⁶ Jeremy Waldron offers one of the most powerful arguments for majoritarian decision making concerning rights along these lines. Defending democratic participation rather than judicial review as a “*rights-based* solution to the problem of disagreement about rights,” Waldron argues that doing so “calls upon the very capacities that rights *as such* connote, and . . . evinces a form of respect in the resolution of political disagreement which is continuous with the respect that rights as such evoke.”⁷ But again, if we are committed to situating decisions over rights with the people or their legislatures, this may mean that their answers to these difficult questions will not always reflect progressive conceptions of autonomy. Indeed, it might mean that autonomy could be construed in ways antithetical to progressive economic policies, by construing freedom of choice as limiting regulation and redistribution, or enabling restrictions on reproductive freedom.

There is a third possible connection between progressive and popular constitutionalism. Progressives and popular constitutionalists have two central commitments—one to political equality, one to forward-looking change. It is true, as we just saw, that progressive and popular constitutionalists might cash out “political equality” differently. Progressives might focus on the achievement of social and economic equality, popular constitutionalists on formal equality in political decision making. Both, however, are squarely focused away from the Framers’ intent, and towards the future, in their conceptions of constitutional interpretation. The progressive ambition is to interpret the Constitution in such a way that it helps us to ameliorate deprivation and suffering—i.e., to respond to the felt needs of our community today and in the future. A pure theory of popular constitutionalism does not contain concerns for social justice, but it similarly does aim to empower legislatures and the “people themselves” to shape the Constitution in an ongoing fashion. The focus of both progressive and popular constitutionalists, then, is on some form of egalitarianism, and on an adaptive constitutionalism. So if progressive constitutionalism can be reconciled to popular constitutionalism—and it is not certain that it can be—it is likely to be via this third route, which we can term the “inner-logic” argument.

In the rest of this Article, I wish to argue that the inner-logic argument generates a particular institutional agenda for what I shall now term “p-constitutionalism,” synthesizing popular and progressive constitutionalism. If the real underlying commitments of p-constitutionalists are to egalitarian and flexible constitutionalism, the primary target of p-constitutionalists’ agenda ought to change. Popular constitutionalists in particular have long focused on eliminating judicial supremacy, and these arguments have influenced much of recent progressive constitutionalism. Armed with a set of historical claims

⁶ Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 700–01 (1990).

⁷ Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC’Y 307, 334 (1998).

demonstrating that the “people” have at key moments demonstrated both the inclination and capacity to engage in constitutional interpretation outside of the courts, popular and progressive constitutionalists seek to, in the title of a seminal work of popular constitutionalism, “tak[e] the Constitution away from the courts,” and put interpretive authority back where it belongs.⁸ The proper locus of authoritative constitutional interpretation resides either in the metaphorical hands of the “people” themselves, or perhaps in the legislature as the citizens’ elected representatives. What is pivotal is that the Supreme Court should be stripped of this power (where it was never intended to reside in the first place).

Though this claim has substantial normative appeal, popular constitutionalists’ rejection of courts and their relatively spare development of institutional alternatives has made it ripe for criticism and occasionally biting satire. In a devastating critique of Larry Kramer’s book *The People Themselves*,⁹ Larry Alexander and Larry Solum acerbically suggest that his version of “‘popular constitutionalism’ is the cirrus cloud of constitutional theory: floating in a rarefied atmosphere at the very highest level of abstraction, popular constitutionalism is thin and wispy.”¹⁰

My aim here is to provide a cumulus cloud version of the ambitions of popular and progressive constitutionalism capable of meeting at least some of Alexander and Solum’s challenges, without abandoning the core commitments held by Kramer and other popular constitutionalists. In so doing, I suggest that the obsession with courts is an unnecessary distraction from both the important substantive claims developed by popular and progressive constitutionalists, and though a fair target, is a less central one than another: the (extraordinarily strenuous) supermajoritarian limits on amendment through Article V.¹¹ A shift towards a set of complex majoritarian procedures will better reflect the real commitments of p-constitutionalists. Such a focus will enable p-constitutionalists to answer the criticisms leveled at them by “rule of law” or “liberal constitutionalists,” while better realizing their core commitments to substantive egalitarianism and to moral and political progress rather than the elimination of judicial review, judicial supremacy, or both. Nonetheless, as the conclusion affirms, the p-constitutionalists’ commitment to egalitarian and flexible procedures means that there can be no guarantee that they will produce progressive legislation. To the extent that substantive policy change is the real ambition of progressive constitutionalists, it needs to decouple itself from the popular constitutionalists’ agenda.

⁸ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

⁹ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹⁰ Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1618–19 (2005) (book review).

¹¹ U.S. CONST. art. V.

II. SETTING THE AGENDA

A key aim of p-constitutionalism is to ensure that the “public generally should participate in shaping constitutional law more directly and openly”¹²—that “ordinary citizens [should have] a central and pivotal role in implementing their Constitution” and in ensuring the “active sovereignty of the people over the Constitution.”¹³ But though this is, as Alexander and Solum hold, at best merely inspiring and, at worst, an endorsement of mob rule, there is a version of p-constitutionalism—“the kind that involves direct popular action as opposed to legislative or executive supremacy”—that is neither “impractical” nor “dangerous.”¹⁴ Shifting focus away from judicial review skepticism and towards a form of procedurally majoritarian (though not “mob”) amendment enables the true target of p-constitutionalism to emerge—which is not, or should not be, the courts.

It may be immediately and rightly objected that amendment has not escaped the notice of popular constitutionalists; indeed, it has been a key feature of the popular constitutionalists’ agenda. Bruce Ackerman, Akhil Amar, and Sanford Levinson have all emphasized the defects of Article V as a means of enacting constitutional change. Ackerman, for instance, has proposed a Popular Sovereignty Initiative that would entail a referendum (authorized by the President and Congress) for constitutional amendment, as a means of ensuring that the Constitution “register[s] the considered judgments of We the People of the *United States*.”¹⁵ Similarly, Amar has argued that Article V is not the exclusive means by which constitutional change must occur, and has defended a reading of “We the People” that entails an appeal to a majority vote of the electorate for amendment.¹⁶ Levinson has described the “iron cage” of Article V as an impermeable barrier to important constitutional changes, and has advocated a new constitutional convention to remedy the many defects of the American Constitution.¹⁷

Yet in recent years, popular constitutionalists have shifted focus away from Article V and towards judicial supremacy.¹⁸ This move has had unfortunate implications for popular constitutionalism as an agenda. Because of the skepticism regarding not only judicial supremacy but also judicial review, and perhaps because of the important influence of Jeremy Waldron’s rejection of judicial review and his broader skepticism concerning constitutionalism,¹⁹ critics can persuasively argue that the real ambition of popular constitutionalism

¹² TUSHNET, *supra* note 8, at 194.

¹³ KRAMER, *supra* note 9, at 8.

¹⁴ Alexander & Solum, *supra* note 10, at 1636–37.

¹⁵ 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 410 (1998).

¹⁶ See Akhil Reed Amar, *Consent of the Governed*, 94 COLUM. L. REV. 457, 458–59 (1994).

¹⁷ SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 96–97 (2006).

¹⁸ Most notably, see KRAMER, *supra* note 9; TUSHNET, *supra* note 8.

¹⁹ JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

is to do away with constitutionalism altogether. In addition, because scholars such as Ackerman and Amar have emphasized the non-exclusivity of Article V, this may exacerbate the fear that popular constitutionalists do not regard the Constitution as a real constraint on democratic agency. Finally, and perhaps most damning, because of the rhetorical appeal to “We the People,” the “People Themselves,” or merely the People, popular constitutionalists have permitted themselves to be caricatured as Jacobins, bent on sweeping political change, unconcerned with the status of minorities or rights or democratic procedures more generally. Because the “People” is essentially fictive, any political actor can claim to speak in its name.

Alexander and Solum suggest that Kramer’s concept of popular constitutionalism entails the conjunction of some or all of six propositions:

1. The people themselves make the Constitution.
2. The people themselves enforce the Constitution.
3. The people themselves interpret the Constitution.
4. The constitutional interpretations of the people themselves are authoritative.
5. The interpretive constitutional authority of the people themselves is ultimate and final with respect to governmental institutions. Corollary: the interpretive authority of governmental institutions, including the judiciary, is subordinate to and subject to revision by the interpretations of the people themselves.
6. Constitutional decisions by the people themselves trump the written text of the Constitution.²⁰

Alexander and Solum proceed to dismantle these possible views, primarily on the grounds that the “people itself” is not an institution or a body capable of wielding power, so unless it amounts to rebellion against usurpations or mere “tacit endorsement” of the existing popular order, it is incoherent.²¹ The version that they accept as plausible, however, is one in which the “Supreme Court is not an oracle—that its decisions, while authoritative and final in the legal sense, are not infallible and are subject to criticism and ultimately to revision, either by the Court itself or through the process of amendment.”²² (They support a slightly weaker version, in which “regular folks” pay attention to the Court, criticize it when its interpretations are at odds with the “text, structure, and history,” and “vote for Presidents and Senators who will hold the Court accountable.”²³)

Kramer himself at points seems to adopt the modest claim that the Supreme Court would recognize its decisions as subject to the higher authority of the

²⁰ Alexander & Solum, *supra* note 10, at 1616–17.

²¹ *Id.* at 1624–25.

²² *Id.* at 1626.

²³ *Id.*

“people,” just as lower courts recognize that the Supreme Court may overturn its decisions.²⁴

But there is good reason to think that the p-constitutionalist would not, or should not, be satisfied with simply abolishing judicial supremacy. In the first place, some if not most p-constitutionalists reject not merely judicial supremacy but judicial review, even if the decisions of the Court were capable of being overturned either by a simple majority vote (as Judge Bork recommends) or a two-thirds majority of Congress (as Senator Burton Wheeler proposed).²⁵ In Tushnet’s view, such proposals may still generate “judicial over-hang,” i.e., the knowledge that courts will act may induce legislators to enact legislation for strategic reasons despite the fact that courts will strike it down, or to try to second-guess courts’ willingness to uphold the law through creating statutes that they believe will satisfy scrutiny, even at the cost of generating bad policy.²⁶

I take the rejection of judicial review by popular constitutionalists to rest on a set of premises, among them: (1) the basic competence of legislators to interpret the Constitution (i.e., rejecting the claim that judicial expertise justifies judicial review); (2) the quality and stability of constitutional interpretations by Congress is likely to be, at worst, equivalent to that of the courts; (3) responsiveness to citizens’ preferences and to public opinion in constitutional interpretation is a desideratum (i.e., rejecting the claim that the insulation of judges from public pressure makes that institution “safer” for constitutional interpretation). In this set of premises, only the third speaks directly to the core issue of popular involvement; the first and second at best depend upon an indirect method of public engagement through the (re)election of representatives who interpret the Constitution in ways that their constituents find congenial. It is hard to imagine this mechanism satisfying the robust p-constitutionalist. If p-constitutionalism is at a minimum committed to the view that the “public generally should participate in shaping constitutional law more directly and openly,”²⁷ this must entail something more than merely shifting the power to interpret the Constitution towards legislators and away from judges.

But a key challenge rightly put to popular constitutionalists—and thus to p-constitutionalists—is what, exactly, recourse to the people entails. If sanctioning legislators who deviate from their preferred constitutional vision is insufficient, what can it mean that the *people themselves* are the “interpreters,” authoritative or otherwise, of the Constitution? It can’t, of course, mean that as a standard practice nationwide deliberative assemblies habitually meet to discuss and vote on the compatibility of statutes with the Constitution in cases in which constitutionality is challenged (presumably by legislators from the opposing party, who would have an incentive to raise such issues trivially and

²⁴ KRAMER, *supra* note 9, at 252–53.

²⁵ See TUSHNET, *supra* note 8, at 175–76.

²⁶ *Id.* at 54–71, 175.

²⁷ *Id.* at 194.

frequently to delay implementation). Grand historical efforts by popular constitutionalists to uncover moments at which the “people themselves” have spoken shed some light on the capacity to identify a popular movement, at least retrospectively. Ackerman, in the two volumes of *We the People*, has held that “the People should not be confused with their government, but that they can speak in an authoritative accent through sustained and mobilized political debate and decision,” rejecting a formalistic reading of Article V in which only amendments passed through that mechanism possess constitutional standing.²⁸ Identifying a five-stage process by which a constitutional debate between branches of government culminates in a series of major electoral victories affirming one vision against institutional challenges, Ackerman suggests a means by which the people’s voice can be discerned.²⁹ Yet this is dissatisfying in a number of respects from the perspective of p-constitutionalism, most notably that the legitimacy of the non-Article V amendment on such a model depends on the Court’s willingness to deem it cognizable—that is, the Court must acknowledge that the “amendment” generates constraints on the legitimacy of statutes and gives rise to new rights and duties. (Perhaps in part for such a reason, Ackerman defends the Popular Sovereignty Initiative.)

Though Akhil Amar generates an easier and more determinate basis for assessing the popular voice (i.e., that Congress would be obliged to call a convention to propose amendments if a majority of Americans petitioned them to do so, and those amendments would be ratified by a simple majority of the electorate),³⁰ he is liable to a different sort of challenge—that his version of p-constitutionalism relies on a claim that is corrosive to constitutionalism entirely. Akhil Amar’s argument that the people can enact amendments by means other than Article V on the grounds that Article V is nonexclusive—it does not specify that it is the *only* means by which amendment may occur³¹—has disturbing implications. In the first place, should we take “the executive power shall be vested in President of the United States of America” clause³² to suggest that dual kingship is a legitimate alternative?³³ Secondly, on this logic, it is difficult to imagine what types of popular mechanisms would be *prima facie* excluded, and not all are equal. Is the only legitimate extra-constitutional mechanism that of majoritarian popular sovereignty via referendum, as Amar sometimes seems to suggest?³⁴ Or are there alternative mechanisms, requirements for double-voting, as Amar also suggests, that ought to work?³⁵ How would we identify which of these mechanisms generate outcomes capable of binding Congress? Would Congress itself be authorized to determine this, or

²⁸ ACKERMAN, *supra* note 15, at 384.

²⁹ *Id.* at 39–65.

³⁰ Amar, *supra* note 16, at 459.

³¹ *Id.*

³² U.S. CONST. art. II, § 1.

³³ MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 6 (2007).

³⁴ Amar, *supra* note 16, at 459.

³⁵ *Id.* at 503.

would it depend upon the Court's willingness to recognize it as such? (And would the Court have the power to strike down its enactments as procedurally incompatible with Article V?)

Thus, there are two primary weaknesses that p-constitutionalists, indebted as they are to popular constitutionalist arguments, have generated for their own theory. First, it is not always clear what the alternative mechanism designed to replace judicial supremacy ought to be. Is legislative supremacy the implicit alternative, and, if so, is there reason to believe that Congress will consistently be significantly more responsive to public opinion on interpretive issues than the Supreme Court is? That is, the electoral process may not be sufficient to induce the type of responsiveness to popular preferences in terms of constitutional interpretation to satisfy the popular constitutionalists, and the Supreme Court may in fact be more responsive to public opinion than we might otherwise assume.³⁶ If we believe the independence of our representatives from binding mandates to be normatively attractive, there are reasons to think that their function ought not to be to channel public opinion directly. As such, if p-constitutionalists are actively seeking direct citizen involvement in the activity of constitutional interpretation, legislative supremacy may not be the optimal institutional solution.

Second, without specifying clearly and narrowly the means by which we can identify the popular vision of the Constitution or of its proposed amendments, p-constitutionalists render themselves vulnerable to the claim that they are encouraging actions that themselves will depend for their legitimacy on judges accepting the dictates of p-constitutionalism. Worse, by encouraging a view that does not accept the Constitution as authoritative with respect to constitutional change, p-constitutionalists make themselves susceptible to the challenge that they are insufficiently committed to the rule of law—and, potentially, that any group can operate in the guise of “people themselves.” This is especially concerning insofar as Ackerman seeks to locate the authority to initiate constitutional amendments with the President, ascribing to him the power to declare a “constitutional moment.”³⁷

The challenge, then, is to work up a model of p-constitutionalism that solves the problem of seeking to engage citizens in the activity of constitutional interpretation and change, while ensuring that it is sufficiently determinate in terms of who constitutes the “people themselves.” That model, I hold, should be grounded in flexible and egalitarian mechanisms governing constitutional change. As such, the primary institutional change promoted by popular and progressive constitutionalists ought not to be a shift away from judicial supremacy; instead, it ought to be a majoritarian, if complex, procedure for constitutional amendment.

³⁶For an overview, see the discussion in Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 280–81 (2010).

³⁷ACKERMAN, *supra* note 15, at 420.

I will turn to the defense of the particular procedure I wish to advocate in a moment, but let me recapitulate very briefly why amendment ought to supplant judicial supremacy as the key target of reform by p-constitutionalists. A key problem with identifying the core agenda of p-constitutionalism with stripping away judicial supremacy and even judicial review is that it forces p-constitutionalists to hold one of three untenable positions: (1) constitutionalism does not require a mechanism by which the hierarchy of norms can be preserved (i.e., that statutes do not contravene the Constitution); (2) that internal Congressional control (i.e., legislative supremacy) is sufficient to ensure the preservation of the hierarchy of norms and simultaneously satisfies the condition that the “people themselves,” not merely their agents, ought to possess final authority over the Constitution; (3) or that the “people themselves” can serve as the arbiter over debates about the constitutionality of statutes in an ongoing, regular fashion.

Fortunately for p-constitutionalists, this debate over judicial supremacy is merely a sideshow, distracting them from their primary agenda. The success of their project is not hinging upon a *regular* institutional alternative to court-based constitutional interpretation. After all, the real objection to judicial supremacy from the perspective of popular constitutionalism is that it makes the courts, not “us,” the ultimate authority concerning constitutional matters more generally. Naturally, however, it remains the case even under judicial supremacy that ultimately the “people” can alter the Constitution via Article V means if they wish to reject the Court’s interpretation; thus, even Alexander and Solum endorse this reading of popular constitutionalism.³⁸ But the mechanism specified in Article V is so difficult that, in practice, the Court has final authority. Were that mechanism made less difficult, however, the supremacy of the Court vis-à-vis interpretive matters could well be checked, and, importantly, by directly popular means. Were the Supreme Court to offer an interpretation that the citizens deemed fundamentally at odds with their understanding of the Constitution, recourse to constitutional amendment to respecify the norm would be available. Thus, p-constitutionalists such as Ackerman, Amar, and Levinson are right to focus attention on amendment. The project is now to sketch a model that best reflects the underlying commitments of the p-constitutionalist agenda. That the fundamental feature of this model ought to be a commitment to majoritarian, rather than supermajoritarian, decision making is the central claim I wish to advance in the rest of this paper.

³⁸In the United States, we do not have a basis for the Court to strike down unconstitutional constitutional amendments—though we might, as I have suggested, observe a court failing to accept an amendment rendered by means other than those specified in Article V.

III. P-CONSTITUTIONALISM AGAINST SUPERMAJORITY RULE

The inner logic of p-constitutionalism—that which links popular and progressive constitutionalism—is the commitment to equality and to constitutional flexibility. Popular constitutionalists are sensitive to the claim that regular recourse to the amendment procedure may render the Constitution subject to majority whim, and as such may be tempted to retain supermajoritarianism.³⁹ Yet p-constitutionalists should resist such a view, because supermajority rules are in important ways antithetical to the values to which they are committed, in terms of the desire to promote “active sovereignty of the people over the Constitution”⁴⁰ and the emphasis on citizens’ equality (both with respect to voting and beyond). Instead, p-constitutionalists ought to advocate a sort of “complex majoritarianism”: one that preserves the egalitarianism inherent in majority rule, and encourages ongoing change without rendering constitutional matters subject to immediate majoritarian decision making, for instance.

Both the normative appeal and the perceived liabilities of majority rule lie in features closely linked to its egalitarianism. The key starting point for most contemporary work on behalf of majority rule, May’s theorem, famously demonstrates that majority rule is decisive, anonymous, neutral, and positively responsive.⁴¹ (We can set aside the decisiveness requirement, which simply entails that the rule produces a definite result, and can be satisfied by many different thresholds and both democratic and nondemocratic mechanisms.) First, let us take together anonymity and neutrality. Majority rule, in a sense, treats votes and alternatives equally: there is no bias in favor of a particular voter or opinion (anonymity), and no bias in favor of a particular alternative (neutrality). From a formal perspective, systems that enable weighted votes, or identify groups or individuals to assign vetoes, are ruled out under anonymity. Supermajority rules are excluded under neutrality, which is “nonneutral,” or biased, in favor of one alternative, typically the status quo. As Rae and McGann suggest, however, to privilege the status quo may also entail a violation of anonymity.⁴² Though anonymity in the strict sense means only that the decision

³⁹ Ackerman, for instance, suggests that supermajoritarian procedures would remain valuable at various stages. See ACKERMAN, *supra* note 15, at 410–11, 415. Akhil Amar, to his credit, argues that there is to be no compromise on the issue of simple-majority rule; my aim here is to vindicate this claim, while resisting the broader extraconstitutionalist defense he wants to offer. See Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89, 111 (Sanford Levinson ed., 1995).

⁴⁰ KRAMER, *supra* note 9, at 8.

⁴¹ Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 681–82 (1952).

⁴² ANTHONY MCGANN, THE LOGIC OF DEMOCRACY: RECONCILING EQUALITY, DELIBERATION, AND MINORITY PROTECTION 16–17 (2006); Douglas Rae, *The Limits of Consensual Decision*, 69 AM. POL. SCI. REV. 1270, 1270–94 (1975).

rule is insensitive to the identity of the voter, the fact that some voters are systematically benefited by the existing policy may mean that in effect, anonymity may be threatened by supermajority rules. As Charles Beitz writes, these two conditions—neutrality and anonymity—together embody a conception of political fairness that holds that “any fair method for aggregating individual preferences should treat each person’s preference equally” (though, to be sure, this is not Beitz’s own theory).⁴³ The responsiveness of majority rule to preferences suggests other egalitarian dimensions. Positive responsiveness entails, in Anthony McGann’s words, a “knife-edge” result: A shift of one vote from one alternative to another, or the addition of a vote that was previously an abstention, can change the outcome of the decision.⁴⁴ Combined with anonymity, this entails the equal potential capacity of each voter to be decisive. More generally, majority rule gives to each voter *ex ante* an equal probability of being decisive.⁴⁵

In considering the implications of this theorem for normative political theory, however, political theorists such as Beitz have claimed that despite the violation of neutrality, supermajority rules can help to ensure fairness, because they will reduce the frequency with which decisions harmful to some people’s interests and rights emerge.⁴⁶ Yet the key insights of p-constitutionalism should incline us against this argument. Rather, because of the ease with which a minority can veto legislation that would benefit the interests and rights of a majority, we ought to anticipate that such harms would be increased rather than decreased by supermajority rules. That is, of course, unless we believe that the status quo is normatively attractive, and that the failure to enact legislation is less likely to harm such interests than the passage of such laws.⁴⁷ But this view

⁴³ CHARLES BEITZ, *POLITICAL EQUALITY* 58–59 (1989) (citing May, *supra* note 41, 680–84).

⁴⁴ MCGANN, *supra* note 42, at 18.

⁴⁵ See Douglas Rae, *Decision-Rules and Individual Values in Constitutional Choice*, 63 *AM. POL. SCI. REV.* 40, 40–56 (1969).

⁴⁶ See BEITZ, *supra* note 43, at 64–65.

⁴⁷ McGinnis and Rappaport in a series of articles, most notably *Our Supermajoritarian Constitution*, argue in essence that this is the most important function of supermajority rules: blocking that “marginal legislation” that is capable of commanding majority, but not supermajority, support. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 731 (2002). To quote:

The main difference between supermajority and majority voting rules is that a majority rule will allow, but a supermajority rule will prevent, the passage of legislation that can secure only a mere majority. We call such legislation “marginal legislation.” A supermajority rule will improve the quality of legislation only if the legislation prevented by the supermajority rule—the marginal legislation—is undesirable.

Under what circumstances will the marginal legislation in an area be undesirable? The most common situation in which marginal legislation will be undesirable occurs when legislation that can secure a supermajority is desirable, but marginal legislation is not.

is positively antithetical to the commitments of p-constitutionalists: i.e., to robust, substantive egalitarianism, and to a progressive orientation. Thus, whatever mechanism of amendment the p-constitutionalist proposes, its core feature ought to be majoritarian: it ought to weigh each citizen's vote equally, and it ought not to be biased towards the status quo.

It might be held, however, that majoritarianism will necessarily be in tension with constitutionalism, i.e., that we must trade off between promoting majority decision making and securing the constitution. This view holds that supermajoritarian institutions are essential, perhaps even defining, characteristics of constitutions. Supermajority rules ostensibly perform three key functions for constitutionalism in general, beyond whatever other subsidiary political institutions they may govern: generating constitutional inflexibility, securing a broad-based consensus for constitutional change, and protecting vulnerable minorities. Let me briefly discuss these arguments in turn.

First, a supermajoritarian constitutional amendment procedure generates constitutional inflexibility. Supermajorities enable stability in two ways: by distinguishing between ordinary and constitutional legislation—the “hierarchy of norms”—and by securing the constitutional framework as a whole, i.e., its “entrenchment.” It is thought that higher and ordinary law ought to be demarcated by a distinction in the threshold level required for alteration: constitutional law requires a more strenuous threshold than legislation. Without such a distinction, there will be no way to prevent ordinary legislation from encroaching upon constitutional law—on such a model, when a piece of legislation is challenged on grounds of constitutionality, a legislator can just as easily amend the Constitution to accommodate the new law. Thus, the hierarchy of norms is supposedly unstable without a supermajoritarian threshold for the constitutional norms, or when a supermajority is required to enact legislation, a more strenuous rule governing the constitutional norm.

Yet this first problem of maintaining the hierarchy of norms is relatively easy to address with a system of judicial review and especially under judicial supremacy. Nonetheless, it is also true that such an institution might not be necessary. For instance, the logic of constitutional conventions, as Russell Hardin has argued, requires that a constitution describe, rather than generate,

Id. (footnote omitted). This falls into tautology unless McGinnis and Rappaport can offer substantive criteria by which marginal legislation can be discerned. But they do not: the criteria by which desirability is determined is opaque—unless the criterion is “capable of passage” by a supermajority, and thus of course anything weaker than that is undesirable in the sense that it is not desired by a supermajority. *Id.* at 788. McGinnis and Rappaport suggest that there are two “variables,” or “key indicators,” of whether legislation will be improved under supermajority rule: “The worse the legislation passed under majority rule, the more likely that the marginal legislation will be undesirable.” *Id.* at 732. The second variable is “how strong the filtering is—that is, how much better are the laws that can pass with a supermajority than the marginal legislation. The stronger the filtering, the more likely it is that the marginal legislation is undesirable.” *Id.* But these, again, do not give us any capacity to evaluate the desirability of such legislation independently of the fact that it was passed or defeated.

equilibrium.⁴⁸ Because of the absence of an external agent capable of sanctioning violators (as would be necessary to solve a prisoner's dilemma), the Constitution has to be self-enforcing.⁴⁹ On Hardin's account, a constitution is stabilized by the fact that the costs of re-coordination and the attendant risks of instability vastly outweigh whatever benefits could be accrued by a relevant actor by reneging.⁵⁰ In Hardin's words:

Because it is not a contract but a convention, a constitution does not depend for its enforcement on external sanctions or bootstrapping commitments found in nothing but supposed or hypothetical agreement. Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations.⁵¹

Similarly, the mechanisms underlying the creation of "super-statutes," as William Eskridge and John Ferejohn hold, also demonstrate the possibility of superior norms to emerge and endure without supermajority rules.⁵² Between ordinary and constitutional laws, they argue, there is a category of "quasi-constitutional" laws, which (1) "alter substantially the then-existing regulatory baselines with a new principle or policy";⁵³ (2) demonstrate (retrospectively) that they are capable of enduring and become "foundational or axiomatic to our thinking"; and (3) emerge after sustained public deliberation both within and outside of Congress.⁵⁴ Note that these rules do not require supermajority support: instead, as Eskridge and Ferejohn argue, they emerge over a period of conflict and then slowly build consensus around them. Thus, the pivotal dimension of the protection of the hierarchy of norms (and, as we shall now see, constitutional inflexibility more generally) might well be the requirement of sustained deliberation, rather than supermajority decision making as such.

To be sure, supermajority rules are the best-known mechanism by which constitutional Framers have "entrenched," or made less flexible, their higher laws.⁵⁵ We might here accept that a degree of inflexibility is desirable for familiar reasons: it enables ordinary politics to occur without ongoing

⁴⁸ RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 140 (1999).

⁴⁹ *Id.* at 140.

⁵⁰ *Id.* at 113.

⁵¹ *Id.* at 140.

⁵² William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1271–74 (2001).

⁵³ *Id.* at 1217.

⁵⁴ *Id.* at 1230–31.

⁵⁵ Andrei Marmor argues in fact that "[c]onstitutional entrenchment is always a form of supermajority decision procedure." ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 77 n.41 (2007). Although in force Marmor may be correct—even unamendable provisions can be altered through constitutional revolution, which would probably require more than majority support, constitutional provisions could be made more difficult to change, as I have argued, through means other than the use of a vote threshold between 50% plus two and unanimity minus one.

reevaluation of the “rules of the game”; it enhances predictability, thereby enabling citizens to invest and to plan without anxiety that norms (for instance, property rights) will change.⁵⁶ Supermajority rule’s capacity to secure constitutional law against change is of course contingent upon pluralism, or at least a faction large enough to reach the veto threshold. When such a division does not exist, it does not work. This is less problematic in a two-party system such as the United States’, though it is worth noting that the worst-case scenario imagined by rule-of-law constitutionalists (sweeping, passionate majorities) is not remedied through supermajority rules. Regardless, where there is such a split, insofar as the relevant political actors are divided about the merits of the proposed amendment, those advocating for change need to try to persuade the skeptical through deliberation or bargaining. Again, this is the real mechanism underlying constitutional inflexibility: such an effort will typically require protracted work. Further, since the activity of securing the votes would be known to be costly, would-be advocates who know that the probability of success is quite low will often be discouraged from embarking on the effort in the first place, further reducing the rate of amendment. (More attractively, these potential advocates will also be dissuaded from proposing amendments that are likely to appeal only to a narrow partisan majority, an advantage we shall consider in a moment when we consider the promotion of consensus.) Because of the slow nature of the process, the risk of hasty action is reduced: the possibility of passion-fueled bare majorities enacting sweeping constitutional changes is reduced insofar as the process is made more cumbersome through the requirement of garnering the additional votes (and, as we shall discuss, the capacity of the minority to veto the amendments). The time delays generated by supermajority threshold requirements render the Constitution as a whole less flexible.

Yet the functions of deliberation and of time delays could be—and are, in many contemporary constitutions—accomplished by other, more direct means, such as sequential votes, without requiring the derogation from majoritarianism inherent in supermajority rule. The supermajority rule specifically biases the Constitution toward the status quo—and towards the distribution of rights, costs, and benefits secured at the framing. Though there are good reasons why the p-constitutionalist, no less than the “liberal” or “rule-of-law” constitutionalist, ought to wish to secure some set of procedural norms from alteration by ordinary legislative means, the obvious cost of constitutional inflexibility is that it may secure the very inequalities progressives are at pains to eradicate. As such, although the p-constitutionalist ought to still remain committed to a *constitutional* theory insofar as there is a value to preserving the hierarchy of norms governing procedures, a supermajoritarian mechanism may

⁵⁶See, among many other works, JON ELSTER, *ULYSSES UNBOUND* 154–55 (2000); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

not be sufficiently flexible to enable the redistributive commitments at the heart of the p-constitutionalist agenda.

Second, it is thought that in the absence of supermajority decision rules for amendment, a narrow and partisan majority could push through amendments that would not reflect the felt needs of the community taken as a whole. The argument runs as follows: because a bare majority cannot pass amendments, those seeking constitutional change will have to garner support from other constituencies, and this activity is consensus-promoting. In most cases, we may grant that the obligation to “cross the aisle,” as it were, and secure minority party or parties’ support for amendments gives the substance of the amendment a greater chance at reflecting the preferences of the broadest possible constituency. Again, this holds only in cases in which the society is divided in ways that are not mirrored by the supermajority threshold. For instance, if a party commands two-thirds support (as, it would seem, might be the circumstances governing an Ackermanian constitutional moment), sufficient to pass constitutional amendments without requiring the support of the minority party, it is difficult to understand the product of that decision-making process as consensual. Further, in federal structures, the supermajority rule frequently targets a consensus of the states rather than of the citizens as a whole. Of course, however, when population is unevenly distributed, an amendment may pass by a supermajority of the states but a minority of the population as a whole, or receive the vast support of the population as a whole but be blocked by states possessing a small fraction of the country’s population, as Sanford Levinson has rightly objected.⁵⁷

Considered from a more abstract perspective, insofar as the p-constitutionalist seeks to capture the commitments of *the people themselves*, there is also a sense in which any focus on an aggregative threshold may be an inapt strategy. That is, it may be that equating “the people” with the attainment of a 76% threshold may be problematic. Though the aggregative conception is less likely to be susceptible to manipulation by leaders purporting to have a mandate or to speak for the nation as a whole, there is a sense in which popular constitutionalism’s aim is more ambitious than simply ensuring that a specified number of votes have been secured. It is to capture a vision of popular decision making that involves continuity as a nation over time. Either we accept that “the people” is merely a collection of individuals, and hence we give the members of our community equal voting weight via a majority rule, or we hold that there is something transcendent in the concept of the *people* and move beyond strictly aggregative mechanisms to try to discern it, with the attendant risks of misidentification. Though the p-constitutionalist would be sensible to adopt the less mystical route, for reasons suggested by the Alexander/Solum critique,⁵⁸ either mode generates a recommendation for something other than a supermajoritarian system.

⁵⁷ LEVINSON, *supra* note 17, at 7.

⁵⁸ Alexander & Solum, *supra* note 10, at 1618–19.

In a system in which one party holds only a bare majority of support, supermajority rules may indeed provide the incentive to deliberate (although within formal institutions the substance of the deliberations may take the form of log-rolling). But insofar as the aim is to ensure consultation with the minority party, and the optimal mechanism for its achievement is deliberation, one might think: why not simply mandate deliberation directly instead of having it emerge as a byproduct of the threshold requirement? The appropriate means of generating agreement about fundamental constitutional principles is through multiple and sustained opportunities to persuade other citizens, again via deliberative forums and other formal and informal modes of opinion-formation. Supermajority rule is merely an instrument for the achievement of this goal, and a blunt one at that.

Finally, from the perspective of the progressive strand of p-constitutionalism in particular, if supermajoritarian constitutionalism securely protected vulnerable minorities, this would constitute ample grounds on which to defend it. Supermajority rules ostensibly directly protect minorities by enabling them to veto key decisions hostile to their interests. In cases in which such minority groups are sharply disadvantaged in terms of resources, leading them to be at risk of neglect or potentially annihilation, one might think that a supermajority rule will at least force the majority to consider the minority's concerns before acting, and optimally ensure that the minority is capable of blocking harmful legislation. Yet supermajority rule is likely to be an ineffective means of coping with even persistent minorities in the constitutional context. Because of the bluntness of a supermajority threshold rule, as opposed to a targeted veto, it is difficult to ensure *ex ante* in the constitution-making process that the vulnerable minority will be capable of wielding an effective veto (as its ability to do so is contingent upon its vote share).

The veto point may be too high, exceeding the size of the minority and failing to provide any meaningful protection. This is especially the case in the constitutional context, in which it will be impossible over the long term to anticipate the proportion of votes necessary to enable the minority to serve as a veto player. Insofar as the supermajority rule privileges just any minority group or coalition capable of reaching the vote threshold, it may grant a veto to already powerful minority groups rather than to vulnerable ones. In addition, the time horizon will make it difficult to know if the veto will instead benefit once-powerful minority groups, seeking to lock in their interests.

Remarkably, however, some of the most insightful scholars of the problems of persistent minorities have equated supermajority rules with the protection of vulnerable minority interests.⁵⁹ Again, supermajority rules *may* indeed generate

⁵⁹LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 16–17 (1994); *see also* BEITZ, *supra* note 43, at 65; MELISSA S. WILLIAMS, *VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION* 225–26 (1998) (though Williams is more sensitive to the claim that legislative paralysis induced by supermajority rules may benefit the status quo and powerful groups); Steven Macedo, *Against Majoritarianism: Democratic Values and*

a veto over policies potentially harmful to such interests, but they do so at best unreliably. Lani Guinier, most notably, has argued that supermajority rules can serve as a means of granting a minority veto, justified “to overcome the disproportionate power presently enjoyed by white voters in certain jurisdictions. In this sense, supermajority rules provide minorities with an equal opportunity to influence the political process and, consequently, comport with one person/one vote.”⁶⁰ Let us sidestep Guinier’s claim that such a veto protects equality of influence over outcomes, and consider the peculiarity of the identification of supermajority rules and a minority veto. Elsewhere Guinier correctly recognizes that supermajority rules are “race-neutral,” holding in response to her critics that “[s]upermajority remedies give bargaining power to all numerically inferior or less powerful groups, be they black, female, or Republican” and are not merely a mechanism for ensuring the representation of racial minorities.⁶¹ She cites approvingly the Reagan administration’s support for supermajority rules as a means of enforcing the Voting Rights Act in places like Mobile, Alabama, in particular the “five-out-of-seven” rule for municipal decision making.⁶² In Mobile today, however, its reputation is mixed, and precisely for the reason one might expect: instead of necessarily serving as a means of empowering blacks (though it has sometimes done that), it may have also enabled white minorities to block outcomes preferred by blacks.⁶³

Although p-constitutionalists are (rightly) very concerned about the status of minority interests, the solution to the problem cannot lie in supermajority rules. Indeed, a critical reason for advocating the p-constitutionalist agenda must be the capacity and inclination of the people to act in ways that are not harmful to their members’ most fundamental interests and values. If this is the case, then the p-constitutionalist must be committed to the view that with adequate deliberation, minorities will be able to successfully persuade majorities that their interests are harmed by proposed amendments. If this is not the case—if minority populations will be jeopardized by increased citizen involvement in constitutionalism—then the project of p-constitutionalism is doomed, regardless of the institutional constraints it seeks to impose on itself.

As we have seen, supermajority rules secure constitutionalism by imposing deliberative requirements and time delays for enacting amendments. Why, then,

Institutional Design, 90 B.U. L. REV. 1029, 1037–38 (2010). Will Kymlicka suggests that supermajority rules help to render threshold representation (the requirement of enough representatives to ensure the expression of a vulnerable minority’s groups) sufficient to protect minority interests. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 147 (1995). This of course depends upon matching the supermajority threshold to the representation threshold (and bloc voting on the part of the minority representatives).

⁶⁰ GUINIER, *supra* note 59, at 117.

⁶¹ *Id.* at 16–17.

⁶² *Id.* at 17.

⁶³ For a discussion of community members’ perceptions of how this has operated in Mobile, see Chip Drago, *Mobile’s Supermajority: Bridge or Barrier?*, MOBILE BAY TIMES, <http://www.mobilebaytimes.com/supermajoritypa.html> (last visited Oct. 29, 2011).

ought we to believe that majority rule can accomplish these aims? Briefly, as Akhil Amar notes in the context of a similar defense of majoritarian amendment procedures, there is no reason to believe that the commitment to majoritarianism need entail *immediate* decision making—there is no reason not to require both deliberation and time delays.⁶⁴ There are many different ways in which deliberation could occur, including town hall meetings and other types of deliberative forums at various geographic levels. Ackerman too calls for sequential voting at two presidential elections: such a mechanism ensures that the commitment to constitutional change is not fleeting.⁶⁵ Thus, majoritarianism can be rendered compatible through deliberation and delays with slow, careful consideration of the proposed amendment and with consensus-building. In light of the relative ease of amendment, if p-constitutionalists set aside their obsession with judicial review, the courts can ensure the compatibility of flexible, majoritarian constitutionalism with the hierarchy of norms.

Again, the primary challenge of progressive constitutionalists in particular to the argument I have offered here is likely to be the vulnerability of minority populations to abuse at the hands of the majority. Were it the case that supermajority rules effectively protected such minorities, then it might well be worth preserving them. In fact, the key reason to resist supermajority rules from the perspective of progressive constitutionalism is the capacity of such rules to enable not only vulnerable, but powerful, minorities to block change. The failure of the Equal Rights Amendment (ERA) is but one highly salient example of the way in which a minority veto enabled by a supermajority amendment procedure may be deployed by groups hostile to egalitarian, progressive concerns.⁶⁶ Because progressive constitutionalists in particular have as a motivating concern the plight of the disadvantaged in American society, they ought to be extremely suspicious of institutions that may enable wealthy minorities to thwart efforts at redistributive economic and social policies. Thus, the p-constitutionalist agenda in the coming years ought to focus on majoritarian, popular forms of amendment, rather than on judicial supremacy, which will at best serve as an indirect means of realizing their egalitarian and progressive aims.

⁶⁴ Amar, *supra* note 16, at 502–03; Amar, *supra* note 39, at 110–11.

⁶⁵ ACKERMAN, *supra* note 15, at 415.

⁶⁶ In retrospect, of course, we might be glad that the ERA did not pass insofar as it rendered excessively narrow the scope of those warranting equal protection; regardless, optimally a majoritarian amendment procedure would be more responsive to moral progress (towards the recognition of the rights of gays and lesbians) than the supermajoritarian procedure. If this is not the case—if a majoritarian procedure will be turned against vulnerable groups—then, again, we must reconsider the p-constitutionalist agenda more generally.

IV. IMPLEMENTING THE P-CONSTITUTION

I have argued here that the concern about judicial supremacy is a distraction from what ought to be the main focus of p-constitutionalists: egalitarian and ongoing citizen engagement in the activity of constitutional change, consonant with the “inner logic” linking progressive and popular constitutionalism. Eliminating judicial supremacy, even eliminating judicial review, would at best constitute an indirect mechanism for realizing these values, as it would shift the locus of constitutional change away from courts, which are perhaps weakly responsive to public opinion, and towards legislatures, which though more responsive to public opinion are still far from a direct channel for citizen preferences. If p-constitutionalists are sincerely, and not merely rhetorically, concerned to place constitutional matters in the hands of “the people themselves,” the proper locus of such change ought to be with the citizenry. But since the citizens cannot in a regular fashion constitute an arbiter of constitutionality, their power to serve in effect as a court of last resort is best realized through the constitutional amendment process, and through a majoritarian one at that.

As I have suggested, Ackerman and Amar are right to focus on the importance of constitutional amendment, rather than judicial supremacy, for the project of p-constitutionalism, and Amar’s advocacy of majoritarian institutions gives us a sense of the institutional form that such amendment ought to take. Because of the impermeability of Article V, however, they recommend performing an end-run around Article V procedures. Because the essence of their claims is that there is a historical basis to regard constitutional change outside of Article V as legitimate, it is unsurprising that they feel themselves unconstrained by the strictures of Article V once the amendment procedure itself is the object. Although this argument has some appeal given the near-impossibility of using Article V, there are reasons to resist the move, especially because the retrospective legitimacy of the decision would be subject to the Court’s willingness to accept the procedure and its outcome as legitimate, which is far from a foregone conclusion. Given that p-constitutionalists have also been at pains to emphasize their respect for the constitutional project as embodying a shared and evolving set of commitments over time, by ignoring the formal constitutional procedures through which this change was mostly intended to occur, they make themselves the target of those who want to suggest that they are revolutionaries cloaked as reformers. Instead of evading Article V and placing the outcome of the referendum at risk of being deemed illegitimate (and generating true constitutional crisis), the more attractive route is to follow Article V procedures, either through having Congress propose such an amendment to the amendment procedure, or through the constitutional convention procedure generated by the application of two-thirds of the state legislatures. Though Sanford Levinson has called for such a convention (though via national referendum, like Akhil Amar, which also entails the legitimacy

risks associated with extra-Article V efforts),⁶⁷ such an effort has not received overwhelming support even from p-constitutionalists.⁶⁸

The reluctance to call for a convention, remarkably, likely stems from concerns about the scope of changes enacted at such a convention, undoing much of what is rightly esteemed (at least by law professors) in the Constitution. This is an ironic stance for popular and progressive constitutionalists, who are advocating situating constitutional power with “the people themselves,” to adopt. Either the body of the citizens constitutes a trustworthy agent for constitutional decisions, in which case a convention would enable them at last to exercise the authority cruelly denied to them, or it is not sufficiently capable or reliable to render these decisions, in which case the p-constitutionalist project ought to fold its tent. So a key issue may well be one of nerve.

Nonetheless, there is a deeper problem at the heart of p-constitutionalism, the linkage between popular and progressive constitutionalism. As I have suggested, there are certain to be moments at which the people themselves are not inclined toward progressive ideals, just as there are moments at which the courts are retrogressive. Even if liberals prefer that the courts and majorities consistently enact progressive policies, inasmuch as they are democrats, presumably they wish to do so within the context of competitive elections and policy disagreement. The aim of liberals and conservatives alike should be to win in the context of disagreement: victory requires that the majority of the Justices or the people find their arguments compelling in contexts in which the outcome is *ex ante* unpredictable. Whereas the unpredictability of outcomes is something that might nonetheless reasonably disconcert conservatives, who aim at continuity rather than change, p-constitutionalists ought to actively affirm the uncertainty of outcomes produced by genuinely democratic procedures. For p-constitutionalists, such uncertainty is what generates the opportunity to progress towards greater substantive equality, rather than ensuring the stability of existing inequalities.

Does this mean, however, that progressive constitutionalism must abandon its popular commitments? Insofar as progressives’ ambition is a durable alternative vision of constitutionalism, oriented at least in part towards special concern for the most vulnerable populations, progressives’ commitments to robust substantive equality may occasionally run counter to the commitment to formal equality that constitutes, or should constitute, a linchpin of the popular constitutionalist movement. Though in the long term it may be the case that the people themselves are more receptive to progressive appeals than the elite members of the judiciary, there is no reason to yoke the progressive agenda to an account of the proper locus of constitutional interpretation. Enacting progressive policies will likely require a full-frontal attack, requiring the

⁶⁷ LEVINSON, *supra* note 17, at 172–80; Amar, *supra* note 39, at 89.

⁶⁸ See Symposium, *Sanford Levinson’s Our Undemocratic Constitution*, 18 GOOD SOC’Y 27 (2009).

persuasion of judges, legislatures, the executive, and the citizenry alike. But this may well mean ceding popular constitutionalism to the democratic theorists, and situating progressive constitutionalism with the Democratic Party.