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# Social Protests as Constitutional Interpretation

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**THE RIGHT TO SOCIAL PROTEST:  
NEGOTIATING CONSTITUTIONAL MEANINGS**

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A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES  
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## ABSTRACT

This research deals with a parcel of the protests that have been taking place over the last few years, particularly since 2010: those protests in which the protesters, instead of rebelling against the legitimacy of the system, have preferred to accept the regime's remaining in place and consequently have manifested their discontent via playing by the constitutional rules of the game. Although governmental responses have varied in degree, in the end they have all focused on limiting the right of the people to publicly assemble and express their views. As this work contends, when governments restrict protests (sometimes violently doing so) they ignore the fact that protests involve the exercise of rights and arbitrarily restrict the voices that shape constitutional understanding.

By resorting to a mixture of theoretical and comparative approaches, this thesis argues that protests which manifest their acceptance of the regime's remaining in place have, when dealing with matters "a lot of people care a lot," the potential of becoming popular interpretations of constitutions.

The thesis is composed of three main argumentative lines. The first argumentative line rests on the sociology of social movements and from there proposes some conceptual definitions as to what playing by the rules means to social protests. The second argumentative line builds on a comparative analysis to show what constitutional rights are (usually) involved in protecting social protests and what other rights should be considered in enhancing that protection. Finally, the third argumentative line explains that accepting the regime's remaining in place poses politico-constitutional duties on both sides, that of the citizens and that of institutions. Whereas citizens find themselves committed to submitting their popular understandings to institutions, institutions are bound to open their venues and dialogue with (and not merely to be, depending on circumstances, influenced by) these popular contentions.

*To my daughter Amaya*

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Santiago, May 2016

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## INTRODUCTION: THE PENGUIN'S CONSTITUTIONAL INTERPRETATION

*"You say you'll change the constitution*

*Well, you know*

*We all want to change your head".*

John Lennon – Paul McCartney\*

In 2006, thousands of secondary public school students went out to the streets of several cities in Chile. Under banners such as 'enough already,' 'education is not a commodity,' and 'let's put Pinochet's education to an end,' they demanded a comprehensive educational reform. The *Penguin Revolution*—named after the uniforms students wear in Chilean schools, an opaque mixture of grey and white—contested what, until then, was a bedrock constitutional interpretation, namely that education was a commodity and that private schools were businesses to be run under the auspices of free-market commandments.<sup>1</sup>

This understanding, followed by a market-oriented model of legislative and administrative rules, permitted the instauration of a two-tier system for accessing education and other social goods as well. It eventually allowed for-profit

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\* *Revolution*, on HEY JUDE (APPLE Records 1968).

<sup>1</sup> See generally, Sofia Donoso, *Dynamics of change in Chile: explaining the emergence of the 2006 Pingüino movement*, 45 J. LAT. AMER. STUD. 1 (2013) (framing the substantive claims students posed as an opposition to the neoliberal education model); Donna M. Chovanec & Alexandra Benitez, *The Penguin Revolution in Chile: exploring the intergenerational learning in social movements*, 3 J. CONTEMPORARY ISSUES IN EDUCATION 39, 43-4 (2008). It is worth noting what might sound counterintuitive: some of these private schools are part of the public education system as they are financed through public funds.

organizations, whose profits were obtained from public funds, to govern the provision of education.<sup>2</sup> Public education, on the other hand, remained a mainly residual arena to the vast majority of families that could not afford private education<sup>3</sup> This two-tier system had generated segregation, stratification and inequalities that students stood up against,<sup>4</sup> claiming the State needed to be more actively involved. They demanded the State provide free quality public education and a stricter control over the funds the State transferred to privately owned corporations involved in education.<sup>5</sup>

While a first response to protests was an educational reform passed in 2009—the so-called General Educational Law<sup>6</sup>—it did not tackle the main issues students sought to change. As a result, students went to the streets once again in 2011, this time joined by higher education students. The main claim of the 2011 mobilizations was to prevent for-profit corporations having recourse to public funds for education, access which was described as “the core of the education system.”<sup>7</sup> On January 26<sup>th</sup> 2015, Congress passed a bill which, among other things, prohibited these private corporations from running schools profiting from public

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<sup>2</sup> Cristián Bellei & Cristian Cabalin, *Chilean Students Movements: Sustained Struggle to Transform a Market-oriented Educational System*, 15 CURRENT ISSUES IN COMPARATIVE EDUCATION 113 (2013).

<sup>3</sup> See generally, Natalia Angel-Cabo & Domingo Lovera Parmo, *Latin American social constitutionalism: courts and popular participation*, in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 85, 95-6 (Helena Alviar et al. eds. 2015).

<sup>4</sup> See generally, Cristian Cabalin, *Neoliberal education and student movements in Chile: inequalities and malaise*, 10 POLICY FUTURES IN EDUCATION 219 (2012); Donoso, *Dynamics of change in Chile*, *supra* note 1, at 13-8.

<sup>5</sup> Bellei & Cabalin, *supra* note 2, at 112-4.

<sup>6</sup> Law 20370 (D. Of. 02 Jul. 2010).

<sup>7</sup> FRANCISCO FIGUEROA, LLEGAMOS PARA QUEDARNOS. CRÓNICAS DE LA REVUELTA ESTUDIANTIL [WE ARE HERE TO STAY. CHRONICLES OF THE STUDENT REVOLT] 17 (2013) (my translation).

funds.<sup>8</sup> This law, a regulation that decisively weakened Pinochet's educational legacy, was possible because of massive political pressure that led to the transformation of constitutional understanding. This new understanding was precisely what the *penguins* first proposed as a constitutional reading in 2006. Needless to say, the text of the Constitution remained unaltered.

### **I. Liberal constitutionalism: the context**

All this was, of course, not easy to achieve not only because of all the formal (legal) complexities a parliamentary decision of this significance involved, but mostly because of the fact that it was on the streets, and not in a judicial chamber, where constitutional matters were being addressed. It was common people, not lawyers wearing suits or pretended experts, who were claiming what the correct understanding of the Constitution was; it was thousands of students, not an elite group of representatives, who were proposing a change in constitutional understanding; it was through protests, not concept papers, that the constitution was being shaped; and it was passion and emotions, not calm conversations, what were informing constitutional comprehension.<sup>9</sup>

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<sup>8</sup> Law 20.845 (D. Of. 8 June 2015).

<sup>9</sup> I have made these comparisons drawing on Adam Tomkins' description of the "tenets of Legal Constitutionalism." ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 10-25 (2005).

Despite the prominent role that both direct participation of the people and passions have played in politics and institution building,<sup>10</sup> they have been largely ignored,<sup>11</sup> when not actively outlawed, by liberal theory.<sup>12</sup> In fact, liberal theory privileges representative democracy, as opposed to direct participation, and reason, as opposed to passion, as the driving forces behind Western politico-constitutional schemes. Indeed, the main thrust of liberal theory has been that of obscuring the role of politics, sentiments, and that which is sacred in the understanding of democracies, translating them into the constitutional order of law, logical deduction and reason.<sup>13</sup>

Liberalism's constitutional counterpart, liberal constitutionalism, is identified with three core characteristics: (a) a written constitution, (b) provided with a set of basic constitutional rights and other open-ended provisions, (c) whose enforceability and definition depend, in the last instance, on some high court decision. In this equation, the political commitments a community values the most are replaced by legal documents and their reading is reserved to those who claim to hold the professional expertise needed to understand (and explain) those law-like provisions. Thus, the forum of politics—a forum normally deemed to be open to all—gets transferred to judicial chambers where laypersons are seldom

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<sup>10</sup> ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 11-4 (2011) (arguing reason and emotions function, and have functioned, in an intertwined fashion in shaping our constitutional institutions).

<sup>11</sup> MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 4-5 (2013).

<sup>12</sup> REBECCA KINGSTON, PUBLIC PASSION: RETHINKING THE GROUNDS FOR POLITICAL JUSTICE 5-6 (2011).

<sup>13</sup> PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 23-7 (2011). *See* ALLAN C. HUTCHINSON, THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED (2009). *See also*, STEVEN D. SMITH, THE CONSTITUTION & THE PRIDE OF REASON (1998).

admitted. This has resulted in 'juricentric constitutions'<sup>14</sup> whose interpretation has been colonized by judges, lawyers, courts and their allegedly impartial means of decision.<sup>15</sup> In fact this is what liberal constitutionalism has created: a model of constitutional interpretation that under the banners of objectivity, determinacy and progressivity,<sup>16</sup> hides and privileges the hegemonic political understanding of an elite who is driven by fear against popular pressure.<sup>17</sup> Consequently, liberal constitutionalism "limits the modes of political engagement to the *constitutional*".<sup>18</sup> Opposition to current constitutional understandings is to be channeled either through the constitutional amendment process or accountability mechanism already included in the constitutions.<sup>19</sup> What about those means of contention that fall outside? They are "rendered illegal, illegitimate or nonsensical."<sup>20</sup>

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<sup>14</sup> Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power* 78 IND. L.J. 1, 2 (2003) ("The juricentric Constitution imagines the judiciary as the exclusive guardian of the Constitution. It allows the Court's coordinate branches to enforce the Constitution only insofar as they enforce judicial interpretations of constitutional meaning ...").

<sup>15</sup> "Liberal constitutionalism," as professor Nadia Urbinati put it, "thought that the dualistic space of citizens and representatives institutions produced by elections was the sine qua non of impartial and competent lawmaking because it protected the deliberative setting from both the tyrannical passions of the majority and the particular interests of factions." NADIA URBINATI, REPRESENTATIVE DEMOCRACY. PRINCIPLES & GENEALOGY 25 (2006). See also Allan C. Hutchinson & Joel Colón-Ríos, *What's Democracy got to do with it? A Critique of Liberal Constitutionalism* 5-6 (Comparative Research in Law and Political Economy Research Paper 29 Vol. 3 No 05, 2007) (explaining liberal constitutionalism's obsession with permanence and its consequent suspicion of constituent assemblies).

<sup>16</sup> Allan C. Hutchinson, *Waiting for Coraf (or the beatification of the Charter)*, 41 U. TORONTO L.J. 332, 332-52 (1991).

<sup>17</sup> RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 38-49 (2004). See also Hutchinson, *Waiting for Coraf*, *supra* note 16, at 354-5.

<sup>18</sup> Christopher May, *The rule of law as the Grundnorm of the new constitutionalism*, in NEW CONSTITUTIONALISM AND WORLD ORDER 63, 69 (Stephen Gill & A. Claire Cutler eds. 2014).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 70.

Considering this constitutional background, it is no wonder elites in power felt uncomfortable with the constitution being taken away from institutional avenues,<sup>21</sup> and with social protests as the main means to achieve this shift. As Charles Tilly claimed, “[t]o this day, national authorities throughout the world generally resist granting a legal right to demonstrate as such”.<sup>22</sup> In fact, and different from the right to associate and union rights, protests are regularly deemed as a form of exercise of general rights “with police as the main enforcers.”<sup>23</sup> Governmental responses to many recent social protests movements, ranging from severely restricting to criminalizing protests, are testimony of this.<sup>24</sup> Take two similar, though distant, cases: student protests in Chile and Quebec. Inspired, in part, by the massive student protests witnessed in Chile, *Québécois* students went out to the streets en masse to complain about a proposed rise in university tuition fees starting in the fall of 2012.<sup>25</sup> Hundreds of arrests, most of them illegal, were reported in both cases, all against a background of fierce police brutality which included riot police forces entering into McGill campus for the first

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<sup>21</sup> To paraphrase MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>22</sup> CHARLES TILLY, *REGIMES AND REPERTOIRES* 191 (2006).

<sup>23</sup> *Id.*, at 191-2.

<sup>24</sup> Legislation, narrowly directed at specific groups, opens wide spaces to question the fairness of those measures and legitimacy of laws passed. *See*, JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* 12-24, 44-51 (2012) (discussing the alleged virtues of the Rule of Law understood in a morally or substantive detached fashion).

<sup>25</sup> *See*, Fédération étudiante universitaire du Québec, “La communauté universitaire solidaire contre la hausse des frais de scolarité un plan de financement des universités sur le dos des étudiantes et des étudiants”, March 30, 2011, <http://feuq.qc.ca/spip.php?article195&lang=fr>.

time since 1969<sup>26</sup> (a landmark year for student protests) and a 16-year-old student shot dead by the police in Santiago, Chile.<sup>27</sup> Governments have responded with more (legal) violence by filing bills containing restrictive criminal laws—the most brutal State intrusion. The Chilean government, for instance, submitted a bill where it conceptualized public order as “social tranquility.”<sup>28</sup> It also proposed to sanction with up to three years imprisonment those who have “taken part, incited or promoted disorder or any other act of force and violence through which: (iii) free circulation of persons or vehicles were impeded or altered.”<sup>29</sup> Anyone picketing on the streets or, as vague as the terms of the proposed bill are, calling to protest against governmental decisions (resulting in protests that may end in streets or with bridges being blocked) could end up in prison. The National Assembly of Québec did no less and passed Bill 78, an emergency law that—besides suspending academic terms in progress—accorded authorities, particularly the police, ample powers to prevent, regulate, alter, and dissolve demonstrations.<sup>30</sup> The police arrested 518 students taking part in protests only just five days after it was passed.<sup>31</sup>

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<sup>26</sup> Student’s Society of McGill University, “SSMU Statement & Information Regarding November 10th Riot Police on Campus”, November 11, 2011, <http://ssmu.mcgill.ca/blog/2011/11/ssmu-statement-information-regarding-november-10th-riot-police-on-campus/>.

<sup>27</sup> *Chilean police officers dismissed after fatal shooting*, BBC NEWS, August 30, 2011, <http://www.bbc.co.uk/news/world-latin-america-14717934>

<sup>28</sup> Gobierno de Chile, Mensaje No 196-359, September 27, 2011.

<sup>29</sup> *Id.*, at 12.

<sup>30</sup> National Assembly of Québec, Bill 78 (2012, Chapter 12) “An Act to enable students to receive instruction from the postsecondary institutions they attend,” May 18, 2012.

<sup>31</sup> Jacqueline Kennelly, *The Quebec student protests: challenging neoliberalism one pot at a time*, 28 CRITICAL ARTS: SOUTH-NORTH CULTURAL & MEDIA STUDIES 135 (2014).



## II. Social protests and constitutions: the argument

This dissertation is not about the Chilean (or *Québécois*) student protests specifically, but more generally about the role that social protests play in constitutional interpretation. Social protests, this work contends, are direct and popular forms of interpreting constitutions, that is, forms of proposing a certain comprehension of constitutions. Through protests—although certainly not only by their means—the people (or the peoples) directly take over the struggle to define constitutional contours. It is by means of protests that the people directly propose a certain understanding of constitutions. As such, I shall insist, protests work as a means for negotiating constitutional exposition. In this sense, protests as constitutional interpretations are forms of power struggle or contentious politics; they are aimed, as Tarrow put it, at “bring[ing] ordinary people into confrontation with opponents, elites, or authorities,”<sup>32</sup> as to how the constitution should be understood. More specifically, citizens’ public displays through protests are a tool through which expressions of popular will call into question a particular understanding of constitutions that otherwise may have appeared to be obvious or undisputed.<sup>33</sup> Protests, therefore, perform the critical function of making explicit the relations of power upon which current constitutional understanding have been built, proposing a new alignment of the constitutional dimensions of power.<sup>34</sup>

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<sup>32</sup> SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 8 (2011 3<sup>rd</sup> ed.).

<sup>33</sup> JUDITH BUTLER, *NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY* 1-2 (2015).

<sup>34</sup> *Id.*, at 6-11.

However, constitutional understandings proposed through protests alone are not constitutional interpretations until after they take institutional form. It is only once they take institutional form that (what before were) popular understanding of constitutions become (properly speaking) constitutional interpretations. As I argue in this work, it is by dialoguing with democratic institutions that popular readings can be attributed to the people as a whole.

To do this, this work proceeds in a two-step argument. It will first explore the constitutional legitimacy of protests as a means of political participation, and only then it will move to present the way in which these constitutionally protected means of participation can inform the understanding of constitutions. This is the reason why this work envisions two kinds of relations between constitutions and social protests. First, constitutions relate to social protests by (constitutionally) shielding protests. Second, constitutions relate to social protests by becoming objects of influence by popular contestations. This means that constitutions are open to be interpreted not only by way of institutional mechanisms, say a piece of legislation or a judicial opinion, but that they are also open to be construed in a bottom-up fashion by the people resorting to non-institutional means of participation, just what the Chilean students were doing when proposing how to *properly* understand the education provisions of the Constitution.<sup>35</sup> In fact, as I shall insist later, popular constitutional interpretation requires a constant and

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<sup>35</sup> Where *properly* here stands for a politically attributable understanding, rather than a legal fashion where meanings remain hidden and waiting to be correctly discovered. *See also*, Donoso, *Dynamics of change in Chile*, *supra* note 1, at 21-3 (explaining the participatory bottom-up fashion the *Penguin Revolution* had and its probable causes).

balanced interplay between institutional and non-institutional forms of constitutional understanding—protests included. This work contends that social protests that aim at constitutional interpretation interact, although in a tense relation, with institutions. Rather than abandonment of institutional politics (*withdrawal*), constitutional interpretation requires the people to engage with institutions.<sup>36</sup> This is far from a trivial condition and actually a key to differentiate the sort of social protests this work draws upon.

As Chilean students were marching onto the street (again) in 2011, the globe was witnessing large mobilizations in North Africa and massive street occupations in Europe and North America. Almost every large, and global,<sup>37</sup> city experienced some sort of social protest during the years that followed 2010. In no particular order, Cairo, New York, London, Madrid, Athens, Toronto, Moscow, Montreal, Tokyo, and, more recently, Rio de Janeiro, were all cities where large political protests took place. A remarkable indication of this wave was Time's decision to name *The Protester* as the Person of the Year in 2011.<sup>38</sup>

However, despite their phenomenological similitude, these protests were not all of the same constitutional kind. In fact, for protesters taking part in some of these mobilizations, the constitutional schemes in force in their communities were a target they sought to overthrow. These protesters actually embraced the

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<sup>36</sup> See CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 163-89 (2013).

<sup>37</sup> In Sassen's global city framework, one of the facts that explains why protests occurring during 2010 and 2011 got so much attention was precisely because they were taking place in cities that during 'regular' times signal the worldwide networks of economic globalization. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* 3-5 (1991).

<sup>38</sup> TIME, Dec. 14, 2011.

constituent power (and in some cases were successful in doing so). For them, change was not just a matter of interpretation, but of decisively altering the locus of constituent power and political legitimacy. These protesters had already lost faith in the possibilities of bringing about change under the constitutional/legal systems they were living under.<sup>39</sup>

For many other protesters, on the other hand, the constitutional schemes in force at the time they were mobilizing were a different sort of target. They saw constitutions (in some cases unconsciously) as open grounds inviting popular readings of what were common, yet essentially contested, commitments.<sup>40</sup> They still believed these common commitments were open to welcome what so far were (recall the Chilean students) off-the-wall interpretations of the Constitution.<sup>41</sup> Put differently, these were protesters who, paraphrasing Robert Cover, kept faith in their constitutional schemes, for they saw these schemes as not only showing “the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought’ and the ‘what might be’.”<sup>42</sup>

Thus seen, the kind of social protests I am interested in here are those that take place within a constitutional scheme protesters do not seek to replace nor overthrow, but to influence and shape.<sup>43</sup> This work argues constitutional schemes

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<sup>39</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION. POLITICAL FAITH IN AN UNJUST WORLD* (2011).

<sup>40</sup> GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION. ON THE LIMITATION OF RIGHTS 1* (2009).

<sup>41</sup> Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 52 (2005-2006).

<sup>42</sup> I took Robert Cover’s citation from Gerald Torres & Lani Guinier, *The Constitutional Imaginary: just stories about we the people*, 71 *MD. L. REV.* 1052, 1052 (2012).

<sup>43</sup> As professor Nadia Urbinati recently put it, these waves of protests were not aimed at establishing direct democracies around the globe, but actually at controlling what their representatives were doing. Waves of protests, in other words, were not directed at withering institutions away, but at shaping political opinions and “experiment[ing] with new styles of

are open to be interpreted by means of social protests and shows how the people themselves can play an important role in proposing their own readings of constitutions. However, precisely because this is a work on constitutional interpretation it does not, because it cannot, disregard democratic institutions. Rather, as I will argue by the end of this dissertation, institutions prove crucial as they represent a common ground where popular constitutional understandings advanced through protests are expounded, tested and, eventually, endorsed.<sup>44</sup> This is the moment, I shall contend, when a popular reading can be attributed to the people as a whole.

This is also the moment that signals social protests' success. At a procedural level, social protests succeed when they increase the bargaining power of those who resort to the streets.<sup>45</sup> Precisely because constitutional meanings are negotiated among different (both institutional and noninstitutional) actors, the level of bargaining power that protesters enjoy indicates the probability of having their popular views considered on-the-wall readings of the constitution. At a substantive level, social protests succeed when they are able to reshape the meaning of constitutional principles and consequently that of the practices

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representation." Nadia Urbinati, *A Revolt against Intermediary Bodies*, 22 *CONSTELLATIONS* 477, 478 (2015).

<sup>44</sup> MICHAEL WALZER, *POLITICS AND PASSION. TOWARD A MORE EGALITARIAN LIBERALISM* (2004) ("Civil society cannot become a home for either freedom or pluralism without state action.").

<sup>45</sup> Paul Burnstein et al., *The Success of Political Movements: A Bargaining Perspective*, in *THE POLITICS OF SOCIAL PROTEST: COMPARATIVE PERSPECTIVES ON STATES AND SOCIAL MOVEMENTS* 275, 279-80 (J. Craig Jenkins & Bert Klandermans eds. 1995).

governed by those very same principles.<sup>46</sup> This occurs when, as a result of mobilizing, “political and institutional circumstances” combined transform formerly implausible constitutional interpretations into “natural and completely obvious” constitutional claims, therefore commanding legislation that follows.<sup>47</sup>

### III. Dissertation plan

The plan of the dissertation is as follows. Chapter 1 takes and explores insights from the sociology of social movements. The aim of this chapter is twofold. First, it seeks to enrich the all-too-formal understanding of politics in constitutional law (and law, more generally). It points out the different forms social movements—and particularly new social movements—have resorted to in order to expand both the concept of politics and democracy. Whereas politics used to be restricted to the formal avenues of power and democracy meant participation through delegation, new social movements included non-institutional means of participation and forms of direct action. Social movements came to challenge “the boundaries of institutional politics.”<sup>48</sup>

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<sup>46</sup> See Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

<sup>47</sup> Balkin, *How Social Movements Change (or Fail to Change) the Constitution*, *supra* note 41, at 51-2; Balkin & Siegel, *Principles, Practices, and Social Movements*, *supra* note 46, at 929 (at the same time, “[p]rinciples once uncontroversially accepted become counterintuitive and produce uncomfortable results as they are applied to new situations and problems...”).

<sup>48</sup> Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOCIAL MOVEMENTS 817 (1985).

Second, relying on the same literature, this chapter seeks to show that social movements accept the State, its institutions, its formal avenues, and its extremely detailed procedures of will-formation as spaces of conquest, struggle, disagreement, deliberation, and decision. In other words, social movements do not replace formal avenues of politics and institutions with non-institutional forms and pure direct democracy, but rather complement them. Chapter 1 wraps up by identifying social protests as one of the non-institutional means popular movements can resort to, distinguishing social protests from civil disobedience and drawing some main characteristics that social protests exhibit that may inform an adequate constitutional understanding of these phenomena.

Chapter 2 builds upon the distinction between protest events that occur within a constitutional scheme that protesters do not seek to overthrow and those events that aim at enacting new constitutions. As a matter of fact, and actually as a matter of constitutional fact, some of the protests that began in 2010 resulted in putting new constitutions in place. However, other protests, most notably those that took place in the West, did not.

This constitutional distinction, as I call it, is relevant, for it will allow to distinguish the setting where popular constitutional interpretation takes place. Indeed, this distinction permits differentiating among protest events that, although sharing the same causes for discontent and some phenomenological manifestations (people on the streets picketing, blocking, camping, and so on), are of a varied constitutional

nature.<sup>49</sup> While some of these protests, such as those the ‘Arab Spring’ produced, were radical claims seeking to activate the constituent power, others, such as those of the ‘Occupy’ movement and Chilean students, played within the constitutional rules of the game.<sup>50</sup> In other words, the former protesters sought to alter the constitutional landscape by establishing new constitutions. It is of course hard to talk in this context of constitutional interpretation, rather than that of constitution making.<sup>51</sup> The latter sort of protests, on the other hand, sought to alter the constitutional landscape by influencing the understanding of constitutions, along with political regimes, that remained in place. In this last scenario, it was the possibility of advancing a popular interpretation, and therefore interaction with institutions, what drove mobilizations.<sup>52</sup>

The following three chapters explain the two-direction flow between social protests and constitutional law. As I explained above, constitutions relate to social

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<sup>49</sup> See, JOEL COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 175 (2012) (noticing the execution of constituent power may be, and actually need to be, triggered by “informal political practices like ... street assemblies, and mass protests.”).

<sup>50</sup> Playing by the rules of the game entails, as the very nature of challenging movements under scrutiny here, contesting and influencing those very same rules and not only the understanding of those rules, but eventually their institutional manifestations.

<sup>51</sup> See, WEBBER, *THE NEGOTIABLE CONSTITUTION*, *supra* note 40, at 43-52.

<sup>52</sup> Two caveats should be mentioned here. First, it is true that some of these mobilizations, most notably those of the ‘Occupy’ and European *indignados*, refused to pose before authorities any specific claim and to engage in any sort of dialogue. However, from a constitutional viewpoint they did not end up producing new constitutions. I explain this in more detail in Chapters 1, 2 and 5. Second, with the advantage of time we can now see, at least in the European experience, that those movements that refused to engage with institutions were not actually seeking to establish a parallel polity, but have those institutions account for the people’s actual needs. The rise of alternative political organizations such as *Syriza* in Greece or *Podemos* in Spain tells this. Of course, I am not saying that these very same protest movements transformed into political parties, but that these political organizations were able to read the *indignados* political claims and give them a political voice and (a more tangible) impact. Lobera talks of “certain continuities between the 15-M and the emergence of new parties ...”. Josep Lobera, *De movimientos a partidos. La cristalización electoral de la protesta [From movements to political parties. The electoral crystallization of protest]*, 24 *REVISTA ESPAÑOLA DE SOCIOLOGÍA [SPANISH JOURNAL OF SOCIOLOGY]* 97 (2015).



protests by (constitutionally, and up to a point legally) shielding protests, on the one hand, and by becoming objects of influence by popular contestations, on the other. Chapters 3 and 4 explore how constitutions (should) protect protests.

Chapter 3 presents what I call the constitutional foundations of the right to protests. As noted above, this work relates to protests that aim at proposing their own constitutional reading, meanwhile assuming “the regime’s remaining in place.”<sup>53</sup> Therefore, the chapter begins by emphasizing that the right to protest I am talking about here is a constitutional (=positive) right. It is a right composed by different constitutional rights which confer its bearer a variety of subjective rights to something, liberties and powers.<sup>54</sup> The freedoms the right to protest is based on are the freedoms of expression and of assembly. Although they are analyzed in one single chapter, they are two distinct freedoms. While freedom of expression is mainly concerned with the protection of speech, particularly when taking place in public spaces, freedom of assembly emphasizes the protection of public gatherings: the right we have to join others in reunions that might, or might not, have speech (in the sense that freedom of expression understands it) involved. As it will be explained, this chapter contends social protests are not to be exclusively framed as a right to speak in a public forum, for this approach overlooks the fact

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<sup>53</sup> Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 CURRENT LEGAL PROBLEMS 59, 62 (2012).

<sup>54</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 120 (Julian Rivers trans., 2010).

that assemblies need their own 'breathing room.' Put differently, it asks not to collapse freedom of assembly into freedom of expression.<sup>55</sup>

Although an important part of this chapter deals with doctrinal approaches to both freedoms of expression and of assembly, they are also illustrated through different judicial opinions ruled by different courts of different jurisdictions. Rather than intended to expose the up-to-date judicial rulings regarding the right to protest, these decisions—aimed at expanding, rather than shrinking, the protection of avenues for political participation—show what could be called the best practices to protect protests that are both (at the same time) expressions and public gatherings.

However, the fact that there are what might be called best practices, and that along with them there are not-so-good practices, is a very telling consequence of conceiving the right to protest as a positive right: its need for detailing. Charts normally assert rights in general and vague terms that invite their regulation, either to expand their force (not the most frequent scenario) or to limit their extension (the practice that many governments, such as the Quebec legislature and more recently Spain, mainly followed after the wave of protests that started in 2010). As I explain below, the State and its institutions are both a friend and foe of rights.<sup>56</sup>

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<sup>55</sup> See, Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 J. CONST. L. 949, 953-63 (2014).

<sup>56</sup> MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 285-6 (2010).

Chapter 4 invites to build on the traditional doctrinal approach—as presented in Chapter 3—and consider other rights that are relevant in framing the right to protests. This importance can be seen as twofold. First, these rights show foundational freedoms (such as the freedoms of expression and of assembly) are relevant but not conclusive in constitutionally rooting the right to protest. Second, this approach is also relevant because it sheds some light on certain regulations (micromanagement)<sup>57</sup> that, precisely because we usually stop short of considering other rights, may be useful in further shielding the right to protest. By resorting to urban studies, this chapter questions the current utility—in terms of being able to expand popular participation—of the so-called public forum doctrine. Taking into consideration that almost every important political space has now been privatized, the first section of this chapter calls to look at these developments with suspicion and caution. If cities are, as experience shows they are, places where the locus of political power displays, then the kind of city we have (particularly its spatial regulations) “cannot be divorced from the question of what kind of people we want to be ...”.<sup>58</sup>

The second section of this chapter examines the right to privacy. It delineates its understanding in public spaces and explores its utility for protests. Although the right to privacy is usually understood to be limited to private spaces, this chapter presents a more ample conception and prefers to ask what harms this right should

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<sup>57</sup> Abu El-Haj, *All Assemble*, *supra* note 55, at 1029-30.

<sup>58</sup> DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* 4 (2012).

protect us from.<sup>59</sup> This approach to privacy better addresses situations of surveillance and prohibitions of anonymity in public spaces, which eventually may lead to shrinking public participation, thus (sometimes directly, sometimes indirectly) affecting the foundations of the right to protest.

Chapter 5 approaches the relation between constitutions and protests from the other perspective, the side of the people. It inquires whether constitutional theory, despite its emphasis on forms and institutions, courts and robes, and judicial opinions and dissents, is ready to accept a popular involvement in constitutional exposition. The affirmative answer to this question is found in what is called popular constitutionalism. In a nutshell, popular constitutionalism—in its many variants—aims to rescue the crucial role the people should play when it comes time to define the boundaries of constitutional commitments. At the same time, it defies the comprehension of constitutions as a form of law—and nothing more than a law. As one of its main expositors has put it, popular constitutionalism contends the understanding of constitutions as a species of law and thus set aside from the people.<sup>60</sup> Rather than a document reserved to be exclusively read by a certain elite trained, if not domesticated, in law, that is, lawyers and judges, popular constitutionalism claims constitutions to be a layman's document.<sup>61</sup> Constitutions, therefore, are to be taken back to the people themselves.<sup>62</sup>

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<sup>59</sup> DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008).

<sup>60</sup> LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004).

<sup>61</sup> *Id.* at 207.

<sup>62</sup> *Id.* at 247-8.

That fact that popular constitutionalism claims a key role for the people as final arbiters of constitutional understanding does not mean that institutions should be disregarded. Indeed, as I show in this chapter, every variant of popular constitutionalism admits the need of having an institutional avenue where these popular readings can be directed to. One trend of popular constitutionalism, in fact, believes it is possible to reconcile judicial supremacy with the people as final constitutional authorities. Another denies such a central place for courts (the very principle popular constitutionalism reacted against), thus proposing to look at representative branches, either the parliament or the executive. There are of course those who believe none of the representative branches should have a paramount position when it comes to defining constitutional boundaries and thus prefer a sort of horizontality between all branches. At any rate, as I claimed before, constitutional interpretation, even under the auspices of popular constitutionalism, requires institutions. It insists that constitutional interpretation is to consider the “vertical constitutional relationships both among citizens themselves and between citizens and the system of representative democracy within which they live.”<sup>63</sup>

There are mainly two reasons that merit attention in highlighting the relation between institutions and popular readings of constitutions: instrumental and normative reasons. I describe these reasons at the beginning of Chapter 6.

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<sup>63</sup> Stephen Tierney, *Whose political Constitution? Citizens and referendums*, 14 GERMAN L. J. 2185, 2187 (2013).

Instrumental reasons to have popular readings of constitutions institutionalized range from considerations of publicity to conceiving authoritative decisions as a means to shield (provided the immanency of democratic decisions) changes once they have been non-institutionally achieved. However, there is a normative reason as well. As I argue in Chapter 6, constitutional interpretation is, just as representative democracy, a diarchy. It requires the interplay, tense and disputed at times, between non-institutional forms of constitutional interpretation and institutional avenues.<sup>64</sup> These two avenues do not merge, they do not overlap one other, and no avenue gains priority over the other.<sup>65</sup> Rather, they act in concert or in what Guinier and Torres have called dynamic equilibrium.<sup>66</sup>

The value this interplay serves is democratic equality—as understood in the specific context of constitutional interpretation. If constitutions express common commitments, then we need to find a way to subject its readings and interpretations to fora accessible to all. Chapter 6 explains that this can be achieved by asking social protests to direct their popular understandings to institutions that are open to all to consider and deliberate around these interpretations; thereby, protests do not replace institutions and institutions do

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<sup>64</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 1-5 (2014).

<sup>65</sup> When explaining the main features of current constitutional democratic orders, James Tully talked of the 'equiprimordial' balance between the principles of democratic freedom (popular sovereignty) and the Rule of Law. James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 *MOD. L. REV.* 204, 207 (2002).

<sup>66</sup> Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L. J.* 2740, 2749 (2014).

not replace protests.<sup>67</sup> It is only then, that is to say, only after protesters have subjected their readings to the consideration of the rest, we can talk of a genuine constitutional interpretation, an understanding that can be attributed to the people as a whole.<sup>68</sup>

What institution should social protest direct its popular readings to? This is a fairly strategic choice. As the literature on social movements shows, mobilizations usually target (not always successfully) those institutions that are more likely to deliver the kinds of benefits a specific social movement pursues. However, when talking of constitutional interpretations that can be attributed to the people as a whole, I am thinking not in specific benefits, but in democratically contributing to define the proper understanding of constitutions. Social protest movements aimed at interpreting (either consciously or unconsciously) the constitution do not operate as what the literature calls interests groups,<sup>69</sup> but rather as public-oriented political movements whose readings they want all to accept.

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<sup>67</sup> As Schmitt put it, “[i]t is precisely in a democracy that the people cannot become the administrative apparatus and a mere state ‘organ.’” CARL SCHMITT, *CONSTITUTIONAL THEORY* 271 (Jeffrey Seitzer trans. Duke University Press 2008) (1928). And he continues: “Just as a party cannot transform itself into an official organ without losing its party character, so public opinion cannot permit its transformation into an official jurisdiction ...” (at 275).

<sup>68</sup> In other words, I distance myself from the work of others who believe the people as a whole act only at certain specific moments of democratic life—which are singled out as ‘constitutional moments’ and ‘higher lawmaking’ instances. BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 6 (1991). Whereas these readings suggest regular and institutional ‘political’ times cannot revisit decisions reached through constitutional moments (Ackerman talks of overturning the “considered judgments previously reached by the people”), I contend constituted institutions are—in this interaction I am talking about—suitable to permit the development and deepening of our initial (but inevitably left opened) constitutional commitments. Moreover, these developments can also be attributed to the people, and not just to a government or a constituted agency or power. However, what I also argue in Chapter 6 is that the legitimacy of these ‘regular’ decisions can also be evaluated.

<sup>69</sup> See, Guinier & Torres, *Changing the Wind*, *supra* note 66, at 2756-62

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Liberal constitutionalism affirms the constituent power of the people is exhausted once a new constitution is in place.<sup>70</sup> It also teaches that constitutions are to be read and implemented considering their mixture of politics and law. However, this is a compound where law, and more specifically courts, ends up having the last word as to constitutional meaning. Furthermore, this is also a mix where politics is to be mainly defined by representative (formal and institutional) bodies. This is why this work focuses on protests, for social protests—compared to lobbying, legal battles, citizen representatives, and forms of self-authorized representation other than protests—are the most tangible, visible and disruptive responses to the hegemony of liberal constitutionalism. Legal governmental reactions against recent waves of upheavals show this to be so. These reactions against social protests are of course part of a larger picture: liberal constitutionalism’s antipathy toward citizen participation,<sup>71</sup> a form of constitutionalism incapable of dealing with disagreement<sup>72</sup> and appreciating conflict<sup>73</sup> and backlash as legitimate practices of norm contestation.<sup>74</sup> This work proposes a different understanding of constitutions, one that is more political and less legal, and whose contours therefore cannot be hidden under what an elite claims to be professional expertise

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<sup>70</sup> Joel Colón-Ríos & Allan C. Hutchinson, *Democracy and Revolution: An Enduring Relationship?* 89 DENVER U. L. REV. 593, 607 (2012).

<sup>71</sup> Allan C. Hutchinson & Joel Colón-Ríos, *Democracy and Constitutional Change*, 58 THEORIA 43 (2011). *See also*, FÉLIX OVEJERO, ¿IDIOTAS O CIUDADANOS? EL 15-M Y LA TEORÍA DE LA DEMOCRACIA 47-56 [IDIOTS OR CITIZENS? THE 15-M AND DEMOCRATIC THEORY] (2013).

<sup>72</sup> JEREMY WALDRON, THE DIGNITY OF LEGISLATION 154-5 (1999).

<sup>73</sup> Torres & Guinier, *The Constitutional Imaginary*, *supra* note 42, at 1054.

<sup>74</sup> Robert C. Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 382 ff. (2007).



nor limited to institutional avenues. By opening constitutions to popular interpretations and accepting non-institutional means of participation as suitable to propose constitutional meanings, this work argues it is up to the people to constitute themselves as a genuine community of consent.<sup>75</sup> A community that, when not considered, decisively affects the legitimacy of constitutional understandings thus achieved.<sup>76</sup>

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<sup>75</sup> Guinier & Torres, *Changing the Wind*, *supra* note 66, at 2744.

<sup>76</sup> Torres & Guinier, *The Constitutional Imaginary*, *supra* note 42, at 1054-5; Tully, *The Unfreedom of the Moderns*, *supra* note 65, at 208 (“The constitution or the principles justifying it cannot be seen as a permanent foundation or framework which underlies democratic debate and legislation. They must be reciprocally subject to legitimation through practices of the democratic exchange of reasons by those subject to them over time.”).

## CHAPTER 1

### CONSTITUTIONAL NOTES FROM THE SOCIOLOGY OF MOVEMENTS

#### I. Social movements and politics outside the institutions

#### II. Who are the addressees? Presupposing the State

*A. States, institutions and social movements*

*B. Political context*

#### III. Social movements and social protests: some constitutional notes

*A. Outside institutional channels*

*B. Challenging nature*

*C. Joint action*

*D. Continuity*

### Introduction

Social protest movements positing political issues on the streets have marked the second decade of the twenty-first century. From the Spanish *indignados* and Greek *aganaktismenoi* to Wall Street occupiers, from Chilean students to their *Québécois* fellows, from 'Arab spring' protesters to Israeli tent protesters, social movements have become, to quote Time Magazine, "the primer makers of history."<sup>1</sup>

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<sup>1</sup> TIME, Dec. 26, 2011.

Despite this politically transcendent role social protest movements play, governmental authorities tend invariably to label protests as illegitimate and undemocratic interventions.<sup>2</sup> Emphasizing formal and institutional avenues of participation (i.e. elections), authorities approach social protests as threats to the State and blame their (allegedly) poor deliberative capacity. Protests are thus presented as menace to democracy itself.

Unsurprisingly, different liberal governments around the globe have chosen to propose, and in several cases to pass, legislation granting the police ample powers to confront protesters, thus diminishing the people's resort to non-institutional means of participation. Eventually, repression (both symbolic and material) becomes the regular answer—as the U.N. Special Rapporteur has noticed.<sup>3</sup>

This chapter starts from these contentions and seeks answers from the sociology of social movements. Sociologists, in fact, have already discussed the contribution social movements have made to democracy. The first section (I) will briefly discuss social movements. In spite of the fact the concept of social movements has proven to be much contested, there are nonetheless some main traits emerging from scholarly observation that I will sum up in this first part.<sup>4</sup> I will do this in order to

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<sup>2</sup> See, COSTAS DOUZINAS, *PHILOSOPHY AND RESISTANCE IN THE CRISIS 9* (2013) (noting that although Arab, Greek and Spanish, as well as other mobilizations, have differences in scope and intensity, they all provoked similar systemic and political reactions).

<sup>3</sup> See, Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, U.N. Doc. A/HRC/20/27, May 21, 2012, para. 63 (remembering positive obligations for States include to refrain from violence in controlling protests) and 84 a) (calling States not to criminalize those who exercise their right to assembly and association).

<sup>4</sup> By placing the emphasis on the movements' *external face* (protests) I will sidestep, except for a few comments, the debate on the *internal* conditions social movements must meet to succeed—an

underscore that non-institutional instances of participation have become regular forms of political participation—very much stimulated the more States democratize.<sup>5</sup> This, as I will note, has contributed to expand both the concept of politics and that of representative democracy. Ignoring these contributions by exclusively highlighting the abstract violence involved—very much the strategy followed by liberal governments—“combines the defence of the status quo with historical ignorance.”<sup>6</sup>

In the second part (II), I shall underscore an underlying agreement between sociological analyses on social movements, namely that social movements presuppose the State and its institutions—despite the fact they mean to contest and, when possible, shape them.<sup>7</sup> Although I will leave revolutionary (social) movements—which of course exist—aside, I will consider certain qualifications that the new wave of social protest movements should force us to consider. These new movements, although not nihilistic, have decided not to address their demands to the State—and in fact not to pose any demand at all.

I shall finalize (III) by stressing social movements’ most relevant features that need to be considered for a constitutional law assessment of protests. This means, I

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emphasis upon which ‘Resource Mobilization Theory’ has built up its approach. GRAEME CHESTERS & IAN WELSH, *SOCIAL MOVEMENTS: THE KEY CONCEPTS 1-21* (2011).

<sup>5</sup> As will be noted below, social movements (including their large array of non-institutional strategies) tend to increase as democratic conditions improve.

<sup>6</sup> DOUZINAS, *PHILOSOPHY AND RESISTANCE*, *supra* note 2, at 139.

<sup>7</sup> The fact social movements presuppose the State, and not a certain form of polity, as I will add below, should not obscure movements whose main target are hegemonic social relations (i.e. identity claims).

insist, that I won't provide a definition of social protest, but highlight its main characteristics as they prove useful for further constitutional assessment.

## I. Social movements and politics outside the institutions

*"You say you'll change the Constitution,  
Well you know,  
We'd all love to change your head."  
"But when you talk about destruction,  
Don't you know that you can count me out"  
REVOLUTION (Lennon-McCartney, 1968).*

What a social movement is has proved to be an elusive and much contested question.<sup>8</sup> Rather than suggesting narrow and insufficient concepts, observers have focused on its distinctive reasons, notes and characteristics—giving place to different scholarly approaches.<sup>9</sup> In fact, there are several branches of research depending on what observers consider to be social movements' distinctive causes and features.<sup>10</sup> However prolific this literature has been, the main questions that

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<sup>8</sup> CHESTERS & WELSH, *SOCIAL MOVEMENTS*, *supra* note 4, at 1.

<sup>9</sup> *But see*, Mario Diani, *The Concept of Social Movements*, 40 *SOC. REV.* 1 (1992) (arguing there is sufficient common ground among different approaches to suggest a workable conceptualization).

<sup>10</sup> As authors of one of the most complete companions on social movements have noted, "no single volume [] provides in-depth, synthetic examinations of a comprehensive set of movement-related topics and issues in fashion that reflects and embodies the growing internationalization of social movement scholarship." David A. Snow et al., *Mapping the Terrain*, in *THE BLACKWELL COMPANION TO*

have driven these inquiries have been turning around the *why* and the *how* of mobilizations—also denoting different theoretical backgrounds (emphasis on agency or structural conditions) and frames of analysis (theoretical or empirical, both being local, national and international) of intellectual traditions.<sup>11</sup> Though history and experience have shown no sharp distinction exists between these two approaches, mobilizations seem to in fact respond to a mixture of reasons and overlapping factors.<sup>12</sup> Differences remain in both the analytical and scholarly approach that will often emphasize one over the other.

Some studies have paid more attention to the *how* of social movements. This approach has been predominantly dominated by the Resource Mobilization Theory (RMT), which put the focus “mainly on the organizational resources and the rational orientation of political actors.”<sup>13</sup> Charles Tilly, for instance, has argued that a look at history will allow us to appreciate the characteristics social movements have deployed to become relevant political actors.<sup>14</sup> The main characteristics—Tilly contends—that transform a “mere” form collective action into a social movement are precisely those related to their internal organization. In fact, social movements are, and have been, characterized—at least since 1750—by three main features: (a) a “sustained, organized public effort making collective claims on

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SOCIAL MOVEMENTS 3, 5 (David A. Snow et. al. eds. 2007). I certainly do not intend to do so here, but merely to highlight some main features that will allow a better constitutional comprehension of them.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 4

<sup>13</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 7.

<sup>14</sup> CHARLES TILLY, SOCIAL MOVEMENTS, 1768-2004 (2004).

target authorities” transcending one-time petitions;<sup>15</sup> (b) an employment of a large array of methods of political incidence;<sup>16</sup> and (c) a public display that shows the addressees (whoever they may be) the worthiness, unity, numbers, and commitment of those taking part in the mobilizations.<sup>17</sup> The effective transmission of this message, as Tilly argued, is the payoff of those mobilizing but also one of the most difficult obstacles to overcome:

The actual work of organizers consists recurrently of patching together provisional coalitions, negotiating which of the multiple agendas participants bring with them will find public voice in their collective action, suppressing risky tactics, and above all hiding backstage struggle from public view.<sup>18</sup>

Therefore, the fact of being a collectivity does not exhaust the main features of social movements, for their main difference with other forms of collective behavior is precisely their organized character—“the fact that the existence of social movement activity implies some degree of organization.”<sup>19</sup> As Tilly himself elaborated in the early 1990s, “[a] social movement is not a group, a quasi-group, or a group-like composite, but a complex form of social interaction.”<sup>20</sup> On the currency of recent mobilizations it is important to highlight the special role new technologies have played. For as Manuel Castells has noted, social movements have

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<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.*

<sup>18</sup> Charles Tilly, *Social movements and (all sorts of) other political interactions – local, national, and international – including identities*, 27 *THEORY & SOC’Y* 453, 468 (1998).

<sup>19</sup> David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 10.

<sup>20</sup> Charles Tilly, *Social Movements as Historically Specific Clusters of Political Performances*, 38 *BERKELEY J. SOC.* 1, 5 (1993-1994).

found in the Internet new and fascinating tools to overcome the costs of collective action.<sup>21</sup> Although physical presence in the urban space can certainly not be replaced, cyberspace has opened new (radically autonomous, independent and uncoerced) avenues for mobilizing emotions towards a common cause,<sup>22</sup> deliberating,<sup>23</sup> exchanging information, and building common meanings.<sup>24</sup> What recent mobilizations have shown—Castells argues—is that today we witness a hybrid public place, both digital and urban.<sup>25</sup>

To sum up, the approach chosen by RMT led them to ask (a) why people join social movements, (b) how those social movements are organized—and how a given form of organization may either promote or impede their success<sup>26</sup>—, and, finally, (c) what are the conditions that, with all facts considered, present the most favorable scenario to a certain form of collective action.<sup>27</sup> Detailing this last condition, RMT developed the concept of Political Opportunity Structure, the political and institutional environments—the argument goes—that influence the way people mobilizing define their organization, strategies and objectives to be

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<sup>21</sup> MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE (2012).

<sup>22</sup> As the example of Tunisia and Egypt showed, protesters used the Internet to air, and in this way communicate, the brutal repression with which the challenged regime first responded. *Id.* at 22-4.

<sup>23</sup> For its great significance Castells mentions the case of Iceland, where a new Constitution (eventually blocked by traditional political parties) was drafted. As he argues, the Constitutional Assembly Council “received online and offline 16,000 suggestions and comments that were debated on the social networks ... the final constitutional bill was literally produce through crowdsourcing.” *Id.* at 38-42.

<sup>24</sup> *Id.* 1-3, 9-12.

<sup>25</sup> *Id.* at 45.

<sup>26</sup> This is what the literature has called Social Movement Organizations. Andrew G. Walder, *Political Sociology and Social Movements*, 35 ANN. REV. SOC. 393, 404-5 (2009).

<sup>27</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 9. I will return later to this third stance on political context to suggest it is a transversal factor, that is, not that it is an overlap between the both approaches, but that it influences both the how and the why of social movements.



pursued—that is, a rational choice as to when mobilize.<sup>28</sup> RMT centered its attention on the institutional channels modern States open for the people’s involvement; the more open these channels are, the more likely grievances will be manifested—and vice versa.<sup>29</sup>

A second set of studies has put the emphasis on the *why*, allegedly the kind of reasons RMT did not consider in its scheme. In fact, as Chesters and Welsh summarize, RMT had been criticized for being indifferent to the political demands social movements advanced, overemphasizing the individual’s rational and economic calculations, and placing too much attention on the politico-institutional arena, thus reducing the terrain in which social movements act.<sup>30</sup> New Social Movements (NSM) scholars instead contend “modern social movements provide avenues for the development of new values and identities, as well as novel interpretations of social life, revitalizing a decaying public sphere,”<sup>31</sup> thus pluralizing the actors that intervene, the realm where they participate, and the objectives they seek.<sup>32</sup> In this sense they are new movements.<sup>33</sup>

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<sup>28</sup> Sidney Tarrow, *States and Opportunities: The political structuring of social movements*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS. POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 41 (Doug McAdam et al., eds 1996).

<sup>29</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 136. *See also*, Edwin Amenta & Michael Young, *Democratic States and Social movements: Theoretical Arguments and Hypotheses*, 46 SOC. PROBS. 153 (1999) (arguing States influence social movements, and that democratic States tend to open larger avenues to public contestation, thus encouraging social movements as they see the State answering their demands).

<sup>30</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 10.

<sup>31</sup> Kenneth H. Tucker, *How New are the New Social Movements?* 8 THEORY, CULTURE & SOC’Y 75 (1991).

<sup>32</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 12-3.

<sup>33</sup> Craig Calhoun, “*New Social Movements*” of the Early Nineteenth Century, 17 SOC. SCI. HIST. 385 (1993) (contending these movements began in late eighteenth and early nineteenth centuries).

In stark opposition to the all-too-centered-in-the-State approach taken by RMT scholars, NSM advocates focus their attention in non-institutional avenues and in movements aimed at identity-formation,<sup>34</sup> some of them operating under a completely different rationale (non-hierarchical and contesting of existing authorities) compared to the cost-benefit analysis that pervades RMT.<sup>35</sup>

In his seminal piece on NSM, Claus Offe underscored the fact citizens taking part in NSM were eager to have a more direct control on policies, a path they start traveling by resorting to “means that are seen frequently to be incompatible with the maintenance of the institutional order of the polity.”<sup>36</sup> New issues, claims and areas NSM politicize(d) go hand in hand with these new forms of participation, which are “not constrained by the channels of representative-bureaucratic political institutions”<sup>37</sup> and which are defined by a new form of understanding politics. This ‘new paradigm’ of participation, Offe argues, cannot be framed within the liberal tradition that emphasizes a strict distinction between private and public spheres, this latter to be shaped exclusively through representative instances (politics). For as NSM scholars note, the line dividing these spheres begins to blur as politics is

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<sup>34</sup> Nella Van Dyke et al., *The Target of social Movements: Beyond a focus on the State*, in RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE VOL. 25, 27 (Daniel J. Myers and Daniel M. Cress eds. 2004) (“public protest is also used to shape public opinion, identities, and cultural practices and to pressure authorities in institutional arenas not directly linked to the state.”). As I will note below, these contentions may also have an impact in the way the State finally receives demands posed by social groups before not considered legitimate interlocutors, or not noticed at all.

<sup>35</sup> Jean L. Cohen, *Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements*, 52 SOC. RES. 663, 675-89 (1985). *But see*, Diani, *The Concept of Social Movements*, *supra* note 9 (arguing non-institutional politics should not be considered as one of the basic components of social movements).

<sup>36</sup> Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOC. RES. 817, 817-8 (1985).

<sup>37</sup> *Id.* at 820.

extended to new matters previously thought to be private.<sup>38</sup> Thus, Offe contends, NSM create a third sphere—one that is neither private nor public—but

which consists in collectively “relevant” results and side effects of either private or institutional-political actors for which these actors, however, cannot be held responsible or made responsive by available legal [*stricto sensu*] or institutional means.<sup>39</sup>

This new space where social movements intervene is a space of non-institutional politics that appears as a need rather than as an option.<sup>40</sup> Others have concurred in this reading; Kenneth Tucker, for instance, also noted NSM occur in a sphere far from (though, as Offe noted, connected with) traditional political landscapes. Therefore, collective communication occurring in a non-institutional fashion is the key to understanding citizens’ direct engagement with other citizens and authorities.<sup>41</sup> Organizations engaged in this form of political participation privilege “direct action, popular initiative and self-actualization over bureaucratic

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<sup>38</sup> Habermas has also noted how under the NSM paradigm politics reaches new spheres before seen as private (i.e. the family), a process facilitated by recourse to direct means of participation. This, he suggested, generates a dialectical phenomenon of reduction/extension of the State. The State and its institutions, on the one hand, are reduced as NSM resort to forms of political participation other than those formally defined from above; however, at the same time, the State and its institutions begin to have a greater influence by starting to intervene, both legally and bureaucratically, in those very same spheres as they become politicized. Jürgen Habermas, *New Social Movements*, 21 TELOS 33, 35-6 (1981). Rancière, from a more radical perspective, has called this very process the democratic process. The process—he argues—of enlarging the public sphere by politicizing areas before seen as part of the private realm, the very process by which individuals become political. JACQUES RANCIÈRE, *HATRED OF DEMOCRACY* 55-9 (Steve Corcoran trans., Verso 2014).

<sup>39</sup> Offe, *New Social Movements*, *supra* note 36, at 826.

<sup>40</sup> *Id.* Not surprisingly, as Offe noted years ago, the neoconservative strategy has insisted in ‘reprivatizing’ those spheres, both reducing State interference and, at the same time, stretching political participation “down” to institutional channels. (818-20).

<sup>41</sup> Tucker, *How New are the New Social Movements?* *supra* note 31, at 78. See also, Cohen, *Strategy or Identity*, *supra* note 35, at 667.

representation.”<sup>42</sup> It is a “new form of citizen politics,” as Handler put it, “based on direct action, participatory decisionmaking, decentralized structures, and opposition to bureaucracy.”<sup>43</sup> As Jean Cohen sums up, NSM resort to a form of politics that, as these groups themselves claimed, place their efforts beyond traditional party politics:

Instead of forming unions or political parties of the socialist, social democratic, or communist type, they focus on grass-roots politics and create horizontal, directly democratic associations that are loosely federated on national levels.<sup>44</sup>

A quick survey on how recent protesters and observers saw the 2011 wave of mobilizations further confirms scholarly views on the use of direct action—this time merged with high levels of distrust toward formal politics and representative instances. Douzinas, accounting for the Greek case, emphasizes distrust towards representative democracy and the inattention to the interests of those marginalized and excluded as the main thrusts behind protests.<sup>45</sup> This was also the case of the Occupy movements across North America; these movements expressly contended their representatives have agreed to promote multinationals’ interests rather than those of their people, and, as such, the movements called to advance

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<sup>42</sup> Tucker, *How New are the New Social Movements?* *supra* note 31, at 80.

<sup>43</sup> Joel F. Handler, *Postmodernism, Protest, And the New Social Movements*, 26 LAW & SOC’Y REV. 697, 719 (1992); Cohen, *Strategy or Identity*, *supra* note 35, at 692-3 (arguing the new paradigm notes actors taking part in NSM interact in a non-hierarchical fashion); Offe, *New Social Movements*, *supra* note 36, at 829 (noting NSM “do not rely in traditional political forms, neither internally, where they privilege non-hierarchical and collective relations, nor externally, where, as seen, they act in through informal means”).

<sup>44</sup> Cohen, *Strategy or Identity*, *supra* note 35, at 667.

<sup>45</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 2, at 12-3, 147-8, 150-52.

“participatory democracy ... not through elected representatives.”<sup>46</sup> In Iceland, protesters held representatives were simply unable to confront the power of financial elites.<sup>47</sup> Castells, for one, argues that the Spanish *indignados* went beyond in seeking direct action to move beyond formal politics, but also away from other cultural and media intermediaries.<sup>48</sup> Even social protest movements which deliberately sought to engage in formal political dialogue, as was the case of Chilean students, began manifesting their criticisms as to the way representatives were carrying out their duties.<sup>49</sup>

Not only has the concept of politics been transformed by direct action, but also the conceptual extension of representative democracy. By shaking models based exclusively on a juridico-legal representative fashion—despite claims contending the erosion of authority<sup>50</sup>—NSM have contributed to shape democracy’s current understanding. As Urbinati and Warren have shown, the concept of representation has been expanded (in a clear display of its historical contingency) to encompass forms of participation and political decision-making that include non-electoral

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<sup>46</sup> James Miller, *Is Democracy Still in the Streets?*, in *THE OCCUPY HANDBOOK* 173 (Janet Byrne ed., 2012), at 174.

<sup>47</sup> Lilja Mósesdóttir, *Iceland*, 14 *EUR. SOC’Y* 141, 142 (2012).

<sup>48</sup> CASTELLS, *NETWORKS OF OUTRAGE*, *supra* note 21, at 121.

<sup>49</sup> Nora Lustig et al., *¡Basta ya! Chilean Students say ‘enough’*, in *THE OCCUPY HANDBOOK* 223, *supra* note 46, at 227-30.

<sup>50</sup> Offe, *New Social Movements*, *supra* note 36, at 817-8 (underscoring that conservative analysts saw NSM as disruptive of the established legal order, “highly vicious and dangerous ... of political authority and even [of] the capacity to govern.”). *But see*, Tucker, *How New are the New Social Movements?* *supra* note 31, at 79 (arguing NSM do not take authority for granted but, instead, they build and test traditional instances from below); David A. Snow, *Social Movements as Challenges to Authority: Resistance to emerging Conceptual Hegemony*, in *RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE VOL. 25*, *supra* note 34, 3 (contending too much focus on “contentious politics” falls short of appreciating a whole array of NSM who contend authority beyond the government).

venues, including instances of self-authorized representation.<sup>51</sup> While Urbinati and Warren show these new instances of self-authorization appear as a reaction against the failure of institutional politics in representing citizens,<sup>52</sup> they also acknowledge—closer to the literature on NSM—that these forms of direct participation are “not necessarily a precursor to formal, electoral inclusion but rather a representative phenomenon in its own right.”<sup>53</sup>

The same might be said about discursive representation. According to Dryzek and Niemeyer, discursive representation permits more of a comprehensive representation of individuals and groups in contexts where the demos has not been totally defined, admittedly the current situation in modern communities and by necessity situations where NSM contest dominant patterns.<sup>54</sup> In making the case for representing discourses as an integral part of democracy, Dryzek and Niemeyer argue it opens spaces up for bringing new discourses into the democratic agenda. Groups normally marginalized from formal politics would see their chances of influencing public opinion increased—thus enhancing the legitimacy of public decisions.<sup>55</sup> While Dryzek and Niemeyer are more concerned with suggesting formal avenues to implement discursive representation, they also note informal avenues for discursive representation serve the purpose of

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<sup>51</sup> Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 403-05 (2008) (mentioning also citizen representatives—citizens non-elected but who take part in “formally designed venues into which citizens” participate).

<sup>52</sup> *Id.* at 403.

<sup>53</sup> *Id.* at 404.

<sup>54</sup> John S. Dryzek & Simon Niemeyer, *Discursive Representation*, 102 AM. POL. SCI. REV. 481, 481-8 (2008) (arguing individuals feel represented by various levels of discourses, “each of which resonates with a particular aspect of the ‘self’”).

<sup>55</sup> *Id.* at 488-90.

providing a space of critical oversight of discourses recognized at the formal level as well as influencing the terms of political debates and understandings of those discourses.<sup>56</sup> Once again, discursive representation neither replaces nor claims to be better than formal avenues of representation, rather different and complementary.<sup>57</sup>

The emphasis on how the concept of political representation has been expanded to include forms of self-authorization and discursive representation, to name a few, is precisely the outcome NSM have sought and are still seeking: that of contending institutions and a certain form of politics, as well as cultural, social, and other kinds of normative values and principles that we usually take for granted. A large array of scholarly literature has agreed NSM have contributed to *democratize*, rather than to diminish, our comprehensions of democracy<sup>58</sup> at institutional (by bringing in new forms of participation), political (by opening public opinion, shaping new discourses and thus broadening democratic legitimacy), and social (by contending “the structures of domination involved” in societal norms) levels.<sup>59</sup>

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<sup>56</sup> *Id.* at 490-1.

<sup>57</sup> *Id.* at 481, 489.

<sup>58</sup> CHESTERS & WELSH, *SOCIAL MOVEMENTS*, *supra* 4, at 2 (noting social movements have triggered changes—as did the Civil Rights movement—, few would now claim to have diminished democracies); TILLY, *SOCIAL MOVEMENTS*, *supra* note 14, at 1 (“by the turn of the twenty-first century, people all over the world recognized the term ‘social movement’ as a trumpet call, as a counterweight to oppressive power, as a summons to popular action against a wide range of scourges.”); Offe, *New Social Movements*, *supra* note 36, at 828 (arguing social movements’ goal is that of being recognized as legitimate “political actors by the wider community”); Cohen, *Strategy or Identity*, *supra* note 35, at 668-9 (underscoring democratizing trends social movements have *imposed* do also impact beyond the State reaching social institutions).

<sup>59</sup> Cohen, *Strategy or Identity*, *supra* note 35, at 694.

Their biggest success has been that of making it empirically and politically evident that representative democracy is a contingent (essentially contested) concept.<sup>60</sup> As John Markoff once wrote when introducing his sociological history of democracy's changes, "[d]emocracy has been continually defined and redefined by the people challenging government in the streets and fields ...".<sup>61</sup>

For my purposes here it is enough to note, along with Chantal Mouffe, that at the conceptual level democracy opens, rather than closes, spaces for contestation.<sup>62</sup> Mouffe's normative stance also has its empirical face, for as political opportunity structure studies—a variant of RMT—have shown, the more democratic the States, the more likely social movements (together with their non-institutional means of intervention) will sprout.<sup>63</sup> In fact, as Jack Goldstone has suggested, so regular are these non-institutional forms of participation that they are already contained in any shape which representative democracy might take in the future.<sup>64</sup> Eventually, the level of tolerance, acceptance, and responsiveness a State shows toward non-

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<sup>60</sup> Where the degree to which a "continuous active participation of all citizens in political life" stands among democracy's (already an essentially contested concept) most contested features. W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC.* 167, 184-6 (1956).

<sup>61</sup> JOHN MARKOFF, *WAVES OF DEMOCRACY: SOCIAL MOVEMENTS AND POLITICAL CHANGE* xvi (1996).

<sup>62</sup> In fact, as Mouffe argues, democracy opens the possibility of nevertheless sharing a common symbolic sphere, advancing different forms as to how to organize that common ground. In this, she notes—and I will argue below—rights play a key role in permitting that contestation to continuously flow, thus preventing, rather than promoting, radical redefinitions. CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 13-6, 44-5 (2000 repr. 2009). CHANTAL MOUFFE, *ON THE POLITICAL* (2005) (arguing the dangers of denying political antagonism and its manifestation within a shared common ground).

<sup>63</sup> Amenta & Young, *Democratic States and Social movements*, *supra* note 29. *But see*, Jack A. Goldstone, *More social movements of fewer? Beyond political opportunity structures to relational fields*, 33 *THEORY & SOC'Y* 333 (2004) (arguing social movements are part of normal politics and not only a matter "of repressed forces fighting states" and acting according to given opportunities).

<sup>64</sup> Goldstone, *More social movements of fewer? supra* note 63, at 336-7.



institutional forms of participation becomes a democratic touchstone.<sup>65</sup> The downside is for governments reluctant to (politically rather than formally) include non-institutional mechanisms of participation, for they artificially hinder disagreement and conflict likely to erupt at some further time in a more radical and evil face.

## II. Who are the addressees? Presupposing the State

Hitherto I have been considering two of the most relevant approaches to social movements, namely RMT and NSM schools. Despite main disagreements on their approximations, they both coincide in highlighting the non-institutional means social movements resort to, on the one hand, and in admitting them as part of regular politics, on the other. Besides explanatory coincidences there is another common ground both schools admit to at a more conceptual level: that protests, as part of the repertory of actions social movements resort to—and in spite of revolutionary goals bawled—, presuppose the State and its institutions, at least when they are aimed at reading the Constitution.<sup>66</sup> Although the literature on

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<sup>65</sup> Amenta & Young, *Democratic States and Social movements*, *supra* note 29, at 154 (“states whose leaders, forms, and policies are decided with key participation and input from everyday people.”).

<sup>66</sup> When I say that social protest movements (aimed at reading the Constitution) presuppose the State I mean they actually accept the State and its institutions as they have been erected, despite the fact they also aim to shape, transform, influence, etc. that very same State and its institutions. Therefore, they presuppose a certain form of State—most of the times it has been a decision from a governmental agent what has took them to mobilize—and not just a certain form of polity. Revolutionary movements, on the other hand, are aimed precisely at changing “the type of political organization, e.g. from monarchy to oligarchy, from oligarchy to democracy, and so on ... a sharp, sudden change in the social location of political power, expressing itself in the radical

social movements shows this is the case, it is also worth noticing that recent social movements have made explicit their intentions not to present any demands before institutional avenues, totally disregarding the State.

*A. States, institutions and social movements*

Let me begin by pointing out the relevance of the State and its institutions on social movements (and of the movements over the State and its institutions). As I ended up noting in the previous section, social movements have played their part, in fact a very important one, in democratizing States. However, at the same time, empirical analyses show their intervention has been possible due to the fact States have also become more democratic—States, as Amenta and Young put it, “whose leaders, forms, and policies are decided with key participation and input from everyday people.”<sup>67</sup> I do not want to engage in a kind of what came first, the chicken or the egg, debate, rather suggest these facts exhibit an (almost unavoidable) *interdependency* between States and social movements—a relation further encouraged as social movements do not completely dispense with institutional avenues, but quite the contrary.<sup>68</sup>

According to Offe, institutional and non-institutional means run parallel as those engaging in “unconventional forms of political action do so *in addition* to the fact

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transformation of the process of government, of the official foundations of sovereignty ....” Eugene Kamenka, *The Concept of a Political Revolution*, in VIII NOMOS 122, 124 (Carl J. Friedrich ed. 1966).

<sup>67</sup> *Id.*

<sup>68</sup> In fact, and pushing things a little bit forward, even revolutionary social movements presuppose the State, whose institutions they seek drastically to alter and replace—not in vain nationalism has been the main driving force behind revolutionary social movements. JAMES DEFONZO, *REVOLUTIONS & REVOLUTIONARY MOVEMENTS* 8 (1991).

that they also are likely to have engaged in 'orthodox' political behavior."<sup>69</sup> Or as Cohen has put it, NSM are fairly characterized as self-limiting movements whose main focus is that of furthering the democratic project together with its institutions, rather than abolishing the State.<sup>70</sup> In fact, they do not act in an isolated fashion, but in relation with other political actors.<sup>71</sup> Non-institutional instances of participation as well as institutional venues become part of social movements' repertoire, intertwined up to a point where no radical line can be drawn.<sup>72</sup>

Unsurprisingly, Tucker thus noted actors of NSM accept democratic States, the very same condition that legitimizes their demands and means.<sup>73</sup> Offe also underscored (new) social movements do not disregard the State; actually, their demands, which are neither purely private nor exclusively public, pose new issues likely to be affected both by private actors and State policy. What they insist on, however, is the unavailability of legal or institutional means suited, let alone designed, to hold involved actors accountable—which explains their insistence on (new spheres of political action filled up with) non-institutional means.<sup>74</sup>

Moreover, as Habermas more practically put it,

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<sup>69</sup> Offe, *New Social Movements*, *supra* note 36, at 840 (his emphasis).

<sup>70</sup> Cohen, *Strategy or Identity*, *supra* note 35, at 664-70. *See also*, Elim Papadakis, *Social Movements, Self-limiting Radicalism and the Green Party in West Germany*, 22 *SOCIOLOGY* 433 (1988).

<sup>71</sup> Offe, *New Social Movements*, *supra* note 36, at 830 ("Social movements relate to other political actors and opponents not in terms of negotiations, compromise, reform, improvement, or gradual progress to be brought about by organized pressure and tactics, but, rather, in terms of sharp antinomies such as yes/no, them/us ....").

<sup>72</sup> Goldstone, *More social movements of fewer?* *supra* note 63, at 342.

<sup>73</sup> Tucker, *How New are the New Social Movements?* *supra* note 31, at 78.

<sup>74</sup> Offe, *New Social Movements*, *supra* note 36, at 826.

these challenges [NSM pose] are largely abstract and require technical and economic solutions that must, in turn, be planned globally and implemented by administrative means.<sup>75</sup>

Charles Tilly, on the currency of RMT, has also disputed that, from a historical viewpoint, social movements as political actors regularly involve “governments of one sort or another [that] figure somehow in the claim making, whether as claimants, objects of claims, allies of the objects, or monitors of the contention.”<sup>76</sup> Amenta and Young argue in a similar vein when affirming social movements necessarily involve the State—which would also be the case of identity movements.<sup>77</sup> It is true that RMT fell short in their analyses by not considering that social movements act in spheres other than those of the State and its institutions.<sup>78</sup> Even in these situations, however, the State may play an important role. Van Dyke et. al have argued that social movements also target instances other than the State, such as when they look to influence public opinion by directing their actions “toward the realms of culture, identity, and everyday life, as well as direct

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<sup>75</sup> Habermas, *New Social Movements*, *supra* note 38, at 35. He would later insist that civil society functions by “signaling” problems the political system should process and solve. As this is an ongoing dialogue, once a solution has been implemented, civil society “oversee[s] further treatment of problems that takes place inside the political system.” JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 359 (William Rehg trans., MIT Press 1998).

<sup>76</sup> TILLY, *SOCIAL MOVEMENTS*, *supra* note 14, at 3.

<sup>77</sup> Amenta & Young, *Democratic States and Social movements*, *supra* note 29, at 153 (arguing that, though some contend not all movements are State-oriented, even those movements resort to State action “as leverage against their opponents”).

<sup>78</sup> Van Dyke et al., *Beyond a focus on the State*, *supra* note 34, 28 (arguing not all movements focus on the State, but a large array of them “target other entities, such as religious, medical, and educational organizations, professional associations, and private employers”).

engagement with the state.”<sup>79</sup> But if States are catalogued as—allow me to put it this way—more democratic as they become more responsive to their citizenry, these changes and challenges at cultural, everyday life and social norms levels also impact the new realm of institutional politics, and, most importantly, they might also impact the very same conditions that legitimate social movements’ direct action.<sup>80</sup> In line with András Sajó, dominant trends in social organization and norms receive a privileged legal treatment when it comes time to legally regulate certain forms of collective behavior, even when all forms of expression, hegemonic (i.e. religious manifestations) and counter-hegemonic, involve passions and emotions.<sup>81</sup>

Experience shows, therefore, that RMT and NSM approaches are not such incompatible enterprises, but rather that they are complementary.<sup>82</sup> Moreover, this overlapping relation between institutional and non-institutional forms of political participation, far from a pure casual empirical confluence, might be the result of the same driving principle working beneath both forms of intervention in

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<sup>79</sup> *Id.* at 29.

<sup>80</sup> A form of impact that has proven crucial for displaced and marginalized social groups as their struggle also concentrates on shaping both institutional as well as non-institutional patterns of hegemony. As Nancy Fraser explains, social groups resort to a cluster of strategies aimed at “redressing misrecognition ... replacing institutionalized value patterns that impede parity of participation with ones that enable or foster it.” Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 114-5 (2000).

<sup>81</sup> ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 246-7 (2011). This, as I will argue below, also impacts the formation of the *public opinion* according to which the State responds. If certain forms of participation, particularly those regarded as uncommon, unconventional or non-institutional, are enfolded with legal, constitutional, social, and cultural restrictions, then part of the people will be placed in subordination to those whose forms of participation are considered more acceptable. They will be not, as they normally are not—to quote Fraser again—“full partner[s] in social life.” Fraser, *Rethinking Recognition*, *supra* note 80, at 113-4.

<sup>82</sup> Cohen, *Strategy or Identity*, *supra* note 35, at 705-08.

politics. Goldstone put it as follows: “that ordinary people are politically worthy of consultation.”<sup>83</sup>

This relation, however empirically-credited, has also proved to be contingent and tense. Social movements that find States responsive to their demands<sup>84</sup> are more willing to continue engaging in informal collective action.<sup>85</sup> Moreover, even when previously marginalized groups have been progressively integrated into regular and institutional channels of political participation, this *inclusion* did not come “at the expense of other forms of participation.”<sup>86</sup>

Others have called the attention of inclusive States as governmental officers are keen on using inclusion in formal avenues as an argument to call protesters to abandon informal means of participation (you have been invited to have a say—the governmental argument goes) or to weaken non-institutional movements. For one thing, institutional venues have proven ill-suited to encourage actual deliberation between States and challengers.<sup>87</sup> For another, by including challengers into formal avenues governments might succeed in disarticulating social movements or causing friction among them. After all, as Dryzek has argued, when groups leave the “oppositional sphere to enter the state then dominant

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<sup>83</sup> Goldstone, *More social movements of fewer? supra* note 63, at 342.

<sup>84</sup> Moreover, some authors have suggested governmental responsiveness is an index of democracy’s quality. See, G. Bingham Powell, Jr., *The Chain of Responsiveness*, 15 J. DEMOCRACY 91 (2004).

<sup>85</sup> Amenta & Young, *Democratic States and Social movements, supra* note 29, at 155.

<sup>86</sup> Goldstone, *More social movements of fewer? supra* note 63, at 337-8.

<sup>87</sup> Lucio Baccaro and Konstantinos Papadakis, *The downside of participatory-deliberative public administration*, 7 SOC.-ECON. REV. 245 (2009).

classes and public officials have less to fear in the way of public protest.”<sup>88</sup> Therefore, incentives actually point to maintaining the autonomy and independence that an informal civil society provides.<sup>89</sup> One possible way of solving this puzzle is by noticing that challengers, despite joining certain institutional avenues, maintain their rights to resort to direct means of action whenever they decide to do so—constitutionally granted rights, in other words, do not expire.<sup>90</sup> In fact, it has been frustration with available conventional forms of participation what has brought many movements to seek alternatives in the non-conventional realm.<sup>91</sup> A second non-exclusive alternative is not to succumb too quickly before the temptation of getting into formal avenues. It might be sensible to first analyze whether the avenues offered and issues contested provide any actual opportunity for change at the institutional level. Dryzek, for instance, argues social movements might first consider whether their claims fall (or can be redressed) to what he calls State imperatives, “any function that governmental structures must perform if those structures are to secure longevity and stability.”<sup>92</sup> If this is the case, then it might be strategically sensible to join formal conversations. However, when this is not the case (i.e. challengers’ claims touch upon issues irrelevant for the State) inclusion might well be

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<sup>88</sup> JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 89 (2002).

<sup>89</sup> *Id.*, at 81-5 (arguing conditions for meaningful inclusion are quite demanding).

<sup>90</sup> This, however, opens the door for strategic criticism from the State, which will likely resort to mainstream media to highlight the fact that challengers, having been offered the opportunity to seek their demands at governmental level, have preferred to quit and continue rioting.

<sup>91</sup> Offe, *New Social Movements*, *supra* note 36, at 855.

<sup>92</sup> DRYZEK, *DELIBERATIVE DEMOCRACY*, *supra* note 88, at 83-5.

counterproductive.<sup>93</sup> Context is also important; opening institutional avenues might not be enough where social patterns of misrecognition and, as in most countries, structural material inequality are maintained.

There is an important caveat in this analysis that recent mobilizations force us to consider: the case of movements whose aim is addressing neither the State nor its institutions, but to promote the process itself.<sup>94</sup> This is one of the key features the *Occupy* and the *indignados* movements have resorted to: not to present any single demand before the State and to reject representative politics.

The first principle OWA [Occupy Wall Street] shares with anarchists is the refusal to recognize the legitimacy of existing political institutions. A reason for the much-discussed refusal to issue demands is that issuing demands means recognizing the legitimacy—or at least the power—of those of whom the demands are made.<sup>95</sup>

By the same token, Douzinas, addressing the Greek protests in 2008, affirms the people did not pose any demand. These were “people whose interests are never heard, accounted or represented. They did not demand anything special. They

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<sup>93</sup> *Id.* at 110-1. However, it should be pointed out that State imperatives could vary over time—something Dryzek recognizes (at 93)—and actually the large array of rights constitutionally enshrined have helped to open up States’ duties. In any case, what rights entail is often the subject of strong disagreement (there is key disagreement as to what rights we have and what they do command, forbid, and permit), and this is precisely Dryzek’s warning: social movements should only seriously consider joining the State when “the defining interest of the entering group can be connected quite directly to an existing or emerging state imperative” (at 88).

<sup>94</sup> CASTELLS, NETWORKS OF OUTRAGE, *supra* note 21, at 185.

<sup>95</sup> David Graeber, *Occupy Wall Street’s Anarchist Roots*, in THE OCCUPY HANDBOOK 141, *supra* note 46, at 144.



simply said, 'enough is enough', 'here we stand against'."<sup>96</sup> It was a process through which those who were invisible became visible.<sup>97</sup>

Refusal to posit demands has opened some flanks to criticism. Alain Badiou, for example, has argued riots unaccompanied with political truth become a sign (the unrest) with no judgment.<sup>98</sup> While Badiou is not suggesting that political meaning is to be achieved only by addressing the State, he certainly believes movements become political as they also develop an *idea*, "a kind of historical projection of what the historical becoming of a politics is *going to be ...*".<sup>99</sup> This is the moment when

you decide what the state must do and find the means of forcing it to, while always keeping your distance from the state and without ever submitting your convictions to its authority, or responding to its summonses, especially electoral ones.<sup>100</sup>

Žižek has also raised his voice to warn challengers not to fetichize the movement by "fall[ing] in love with themselves, with the fun they are having in the 'occupied' zones."<sup>101</sup> While he admits the movements might be in a latent state where no quick and adjusted-to-liberal-still-not-contested-hegemony is needed (challengers must resist the temptation of translating their energy in "a set of concrete

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<sup>96</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 2, at 151.

<sup>97</sup> *Id.*

<sup>98</sup> ALAIN BADIOU, THE REBIRTH OF HISTORY: TIMES OF RIOTS AND UPRISINGS 21-6 (Gregory Elliott trans., Verso 2012).

<sup>99</sup> *Id.* at 63-4 (his emphasis).

<sup>100</sup> *Id.* at 81-2.

<sup>101</sup> SLAVOJ ŽIŽEK, THE YEAR OF DREAMING DANGEROUSLY 77 (2012).

demands”—he concedes),<sup>102</sup> he also argues “they express an authentic rage that remains unable to transform itself into even a minimal positive program for socio-political change ... the fatal weakness of the current protests.”<sup>103</sup> By relying on the Spanish *indignados* manifesto, he asks: who are those being addressed by the demands?<sup>104</sup>

To be clear, neither Badiou nor Žižek is suggesting challengers should exclusively address the State and its institutions, but to go further in radical change. The question that remains open is whether movements such as *Occupy* and European *indignados* are aimed at achieving *that* radical a change.<sup>105</sup> Some say they do. Douzinas, for instance, claims that these mobilizations carry the germ of political comprehensive changes. They amount to a “political baptism,” as he puts it, which prepares resisting subjectivities despite posing no demands before formal powers.<sup>106</sup> Castells makes a similar claim; to him, instead of assessing the movements by considering actual politico-formal outcomes, they have to be seen under broader political changes they might, and some are sure to, bring about: “its impact on people’s consciousness ...”.<sup>107</sup> In the worst scenario, lack of specific demands is the movements’ strength and weakness.<sup>108</sup>

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<sup>102</sup> *Id.* at 82-3.

<sup>103</sup> *Id.* at 78.

<sup>104</sup> *Id.* at 79.

<sup>105</sup> A latent condition Badiou reserves for ‘Arab Spring’ mobilizations. BADIOU, *THE REBIRTH OF HISTORY*, *supra* note 98, at 26 ff.

<sup>106</sup> DOUZINAS, *PHILOSOPHY AND RESISTANCE*, *supra* note 2, at 141-4 (arguing against Badiou that these movements are not anti-political but collectively insurrectional or political despite their lack of direct demands).

<sup>107</sup> CASTELLS, *NETWORKS OF OUTRAGE*, *supra* note 21, at 185-97.

<sup>108</sup> *Id.* at 188.

This is one possible reading. On the one hand, it suggests the sociological approaches described thus far fall short in not considering the force of movements targeting not the State, but society itself. On the other, it might be seen as a call for reconceptualizing what presupposing the State means. Under this reading one could argue that these movements, even if not directly addressing the State (and its institutions), define themselves precisely in relation/opposition to it. In order to define the new frontiers of the possible, which is no longer in the sole hands of the State, movements take the State into consideration to demarcate boundaries.<sup>109</sup>

A second reading will be to suggest that, no matter how antagonist of formal institutions a movement declares to be, it *needs* the State (and its institutions) to *meet* its goals. I'm here only sketching some possible forms this argument may take. First—I show some examples below—, challengers have claimed the protection of rights embedded in liberal constitutions to shield their actions. This signals, as I see it, respect and resort to the State and its institutions, certainly not to have their demands realized through them,<sup>110</sup> but they confirm the legitimacy of certain key regulations (i.e. constitutional rights) that movements do not contend (call it procedural safeguards to advance a movement's substantive goals).<sup>111</sup>

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<sup>109</sup> BADIOU, *THE REBIRTH OF HISTORY*, *supra* note 98, at 94-5.

<sup>110</sup> *But see*, Pam Martens, *Occupy Movement files lawsuit against every federal regulator of Wall Street*, WALL STREET ON PARADE (February 28, 2013), *available at*: [wallstreetonparade.com](http://wallstreetonparade.com)

<sup>111</sup> In fact, many occupiers have resorted to these very same rights to shield their means of protest. Just to name a few examples: *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 2011 U.S. Dist. LEXIS 135646 (D. Minn. 2011) (where Occupy Minneapolis asked a court to enforce a bundle of constitutional rights—to free speech, assembly and others—against a resolution of the

Second, either willfully or not, these movements have triggered changes (or at least had those possible changes in sight) in the formal field of politics. Some of these changes have actually been seen as a success. In Iceland, the country where one of the most salient cases that actually inspired other European movements took place, demands were institutionally channeled through the Icelandic *Althingi*<sup>112</sup>—where they eventually failed. Douzinas, who described Greek mobilizations as latent historical movements that open prospects for future radical change, talks precisely about politics whose “terrain had changed, through the appearance of new politicized subjects.”<sup>113</sup> In other cases, resorting to formal politics has been seen as an unavoidable path. In Israel, for instance, the movement acknowledged that for “changing the entire order ... [they] will have to await the results of future elections.”<sup>114</sup> In other words, formal politics, the State and its institutions are at least, a reference point not blurred by not posing demands.

### B. Political context

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county restricting meetings at Plazas); Order, *In the Matter of Application of Jennifer Waller et. al. v. City of New York* 112957/2011, November 15, 2011, available at: <http://www.courts.state.ny.us/press/OWS111511.pdf> (where occupiers claimed the city’s order to ban tents in Zuccotti Park); *Garcia v. Bloomberg*, F. Supp. 2d, 2012 WL 2045756 (S.D.N.Y. 2012) (where protesters marching across the Brooklyn Bridge complained they were not given fair warrant by police officers before being arrested); *Occupy Eugene v. United States General Services Administration (GSA)* 2013 U.S. Dist. LEXIS 170700 (D. Or. Dec. 3, 2013) (where occupiers asked a court to grant them permission to protests on public dependencies); *Felarca v. Birgeneau*, 2014 U.S. Dist. LEXIS 6812 (N.D. Cal., Jan. 17, 2014) (where California occupiers complained against police brutality).

<sup>112</sup> See, Á. TH. Árnason, *A Review of the New Icelandic Constitution – popular sovereignty or political confusion*, 2011 TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT 342 (2011).

<sup>113</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 2, at 144.

<sup>114</sup> Neri Zilber, *Occupying the Israeli Street: The tents protest movement and Social justice in the Holy Land*, in THE OCCUPY HANDBOOK 232, *supra* note 46, at 238.

Now I turn briefly to the second point before announced, namely the *political context* where social movements display their (social) power. The political context that I will consider here is different from what is known as the political opportunity structures (POS) approach, despite being developed from this approach.<sup>115</sup> POS paid too much, if not all, of its attention to the impact that the State (formally understood) has on movements, overlooking some crucial features highlighted above.<sup>116</sup> As noted, mobilizations are related to, although not absolutely conditioned by, the State and its institutions. However, the fact that social movements influence the State as well was also underscored. In fact, social movements interact in a dialectic relation with the institutional channels of participation, sometimes accepting their invitation to engage in dialogue, sometimes not, but in any case shaping through action (and omission) formal

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<sup>115</sup> There might be as many definitions of what POS is as texts written on it. However, as Koopmans explains, the core of POS is the idea that “opportunities are the most important determinant of variations in levels and forms of protest behavior ....” Although rarely defined, opportunity, Koopmans argues, refers to “constraints, possibilities, and threats that originate outside the mobilizing group, but affect[s] its chances of mobilizing and/or realizing its collective interests.” Ruud Koopmans, *Political. Opportunity. Structure. Some Splitting to Balance the Lumping*, 14 SOC. FORUM 93, 96 (1999).

<sup>116</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* note 4, at 136. On the political opportunity approach see, Tarrow, *States and Opportunities*, *supra* note 28. However, the political opportunity structure approach has found notable ground to accommodate itself to new empirical data and normative arguments, a process facilitated, in a sense, because of the very fact some of its critics underscore: its conceptual broadness “that soaks virtually every aspect of the social movement environment.” CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* note 4, at 137. See also, Goldstone, *More social movements of fewer?*, *supra* note 63, at 347 (suggesting political opportunity structure does not distinguish between social movement formation and its possible success). David S. Meyer & Debra C. Minkoff, *Conceptualizing Political Opportunity*, 82 Soc. F. 1457 (2003-2004) (noting political opportunity theories have neglected a more robust theoretical conceptualization and suggesting ways to fill that gap by distinguishing approaches to different causal mechanisms that are more sensitive to some groups and less relevant to others).

avenues of participation (the democratization process).<sup>117</sup> Furthermore, it should also be noted—as the NSM school insisted—that social movements interact in spheres before considered private or apolitical, therefore targeting issues different from governmental avenues of decision-making. Changes at the governmental level, therefore, do not necessarily impact these new spheres of politics.

A *political context* approach acknowledges this reciprocal relation between States and social movements, and also takes note of its broader scope of action to suggest a more accurate, but at the same time comprehensive, view when compared to POS.<sup>118</sup> If, as I have been noting thus far, non-institutional forms of participation are regular forms of political intervention in democratic States, social movements—and, among them, social protests movements—are not outside actors carefully and rationally assessing opportunities which the formal political landscape offers to advance their demands (the RMT approach), but one of the players who helps to form those spaces. As Goldstone put it, they are one of the “elements in a complex field of players in politics and society that are seeking advantages by using a variety of tactics.”<sup>119</sup> According to this view, social movements may be affected (either hindered or encouraged) by the spaces governmental institutional spheres offer and also by many other factors with

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<sup>117</sup> The fact that here democratization stands for the deepening of already democratic States should be stressed. This does not mean social movements cannot trigger democratization in its more literal sense: when authoritarian States are overcome to adopt (some sort of) democratic ruling. See, DONATELLA DELLA PORTA, *CAN DEMOCRACY BE SAVED: PARTICIPATION, DELIBERATION AND SOCIAL MOVEMENTS* 124 ff. (2013).

<sup>118</sup> Hanspeter Kriesi, *Political Context and Opportunity*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 67, *supra* note 10, at 68-69.

<sup>119</sup> Goldstone, *More social movements of fewer? supra* note 63, at 358.

which they relate (and vice versa), including several levels of political authorities, elites groups, other movements and counter-movements, various publics, and—most neglected by RMT—“symbolic and value orientations available in society that condition the reception and response to movement claims and actions.”<sup>120</sup>

Bearing these precautions in mind, I can now turn to mark, relying on Kriesi, the aspects of the political context that should be considered. The first aspect is political structure, which, as Kriesi puts it, is the hard core of the political process framework.<sup>121</sup> This core is made up of formal political institutions, which admit a variety of classifications, as well as by cultural-symbolic frames.<sup>122</sup> The second aspect is the configurations of actors, an ongoing process where protagonists, antagonists, and bystanders take shape by mutually interacting. These actors are also influenced by the structures of the political context—which, in turn, they also

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<sup>120</sup> *Id.* at 357. See also, Meyer & Minkoff, *Conceptualizing Political Opportunity*, *supra* note 116 (arguing issue-specific openness is more important than general openness).

<sup>121</sup> Kriesi, *Political Context and Opportunity*, *supra* note 118, at 69.

<sup>122</sup> Open/closed, strong/weak, exclusive/integrative, centralized/decentralized. *Id.* at 70-3. How these structures influence the formation and outcomes of social movements remains a contested matter of both theory and experience. Kriesi, for instance, suggests that “[t]he greater the degree of decentralization, the wider is the formal access and the smaller the capacity of any one part of the system to act.” *Id.* at 70. Amenta and Young take this analysis further, distinguishing between impacts on the form and level of mobilizations. In this light, they suggest the impact of separation of powers varies. While decentralized polities “encourage a wider variety of challengers to form [and] different types of collective action tailored to influence the various parts of the central state,” centralization in the central government “dampens the overall level of social mobilization”. Amenta & Young, *Democratic States and Social movements*, *supra* note 29, at 155-8. Meyer & Minkoff affirm structural openness might be an important factor to consider regarding social movements’ outcomes, yet social movement formation seems to be more decisively influenced by signals: the way activists perceive the political environment for mobilizing. Meyer & Minkoff, *Conceptualizing Political Opportunity*, *supra* note 116, at 1464-84. In a similar sense Kriesi, *Political Context and Opportunity*, *supra* note 118, at 77-8 (recognizing that subjective meanings that the people attach to situations mediate between political opportunity and action).

happen to impact.<sup>123</sup> As political context is conscious that not all social movements target the State, not all social movements “are equally focused on the political process and, therefore, dependent to the same degree on political opportunities for their mobilization.”<sup>124</sup> The third, and last, aspect is the place where structures, both political and social, link actors: the interaction context where “contentious interaction” occurs, that is, where actors influence one another and also shape and modify that very same political context.<sup>125</sup>

This is the space Habermas termed the public sphere. More than a physical place, this sphere is a social phenomenon “best described as a network for communicating information and points of view.”<sup>126</sup> Precisely to single out the dynamics between non-institutional and institutional actors, Habermas notes there are two public spheres: the public sphere and the political public sphere. The former is where civil society (“the real periphery”) strives in public opinion formation; the latter is comprised of those formal institutions (“parliamentary bodies, administrative agencies, and courts”) where will-formation occurs.<sup>127</sup> This depiction of the common place of politics, broadly understood as comprising both institutional and non-institutional politics, will prove critical in addressing the role social protests might play as a legitimate constitutional form of interpretation. In fact, as Habermas pointed out,

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<sup>123</sup> Kriesi, *Political Context and Opportunity*, *supra* note 118, at 73-7, 79.

<sup>124</sup> *Id.* at 77.

<sup>125</sup> *Id.* at 79. On the broad comprehension of this political context as comprehending both political and new political matters, Cohen, *Strategy or Identity*, *supra* note 35, at 694-6.

<sup>126</sup> HABERMAS, *FACTS AND NORMS* *supra* note 75, at 360.

<sup>127</sup> *Id.* at 354-59.



binding [governmental] decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts (and, if necessary, at the exit of the implementing administration as well).<sup>128</sup>

### **III. Social movements and social protests: some constitutional notes**

There is a lot we can learn from the sociology of social movements. I will close this chapter underscoring certain characteristics of social movements that are relevant in pursuing a constitutional analysis of social protests. This will help me in coming up with a set of relevant characteristics, certainly not a static definition, which social protests entail. In order to do so I (i) recall—as I said in the beginning—that social protests are, among the available resources social movements resort to, the most disruptive strategy when contrasted with prevailing liberal constitutionalism, and (ii) assume that social protests, although legally regulated,<sup>129</sup> are constitutionally covered and protected.<sup>130</sup>

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<sup>128</sup> *Id.* at 356.

<sup>129</sup> Offe, *New Social Movements*, *supra* note 36, at 821-23 (arguing the contradiction of the liberal constitutional scheme stems from the fact that rights were recognized but were not expected to be claimed by the people they thought would be absorbed by “privatistic” matters).

<sup>130</sup> *See*, ERIC BARENDT, *FREEDOM OF SPEECH* 268 ff. (2<sup>nd</sup> ed. 2005) (describing how protests find protection in constitutional rights such as freedom of expression and the right to assembly).

Protests are but one of the means social movements resort to.<sup>131</sup> Their sociological comprehension has developed from being considered “irrational responses to [specific] crisis” to “‘normal’ part[s] of the functioning of developed societies.”<sup>132</sup> In fact, protests have also been deemed a rational form of behavior that social groups utilize to advance their political goals.<sup>133</sup> Precisely because social protests are but one of the means, among a myriad of strategies, that social movements resort to, they share some of social movements’ critical features—albeit, as I will note, with some proper characteristics.

Just as I did when approaching social movements literature, I will not provide or attempt any definition, for definitions run the risk of proving too elusive or too broad; they quite obscure our comprehension and may not even be able to build sensible limits as to what they encompass. Consider, for instance, what Taylor and Van Dyke suggest. To them, protest is

[the] collective use of unconventional methods of political participation to try to persuade or coerce authorities to support a challenging group’s aim ... encompass[ing] a wide variety of actions, ranging from conventional strategies of political persuasion to such as lobbying, voting, and petition; confrontational tactics such as marches, strikes, and demonstrations that

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<sup>131</sup> *But see*, KARL-DIETER OPP, THEORIES OF POLITICAL PROTEST AND SOCIAL MOVEMENTS: A MULTIDISCIPLINARY INTRODUCTION, CRITIQUE, AND SYNTHESIS 39-41 (2009) (arguing social movements are but one of the specific forms social protest embody); Verta Taylor & Nella Van Dyke, “*Get up, Stand up*”: *Tactical Repertoires of Social Movements*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 262, *supra* note 10, at 263 (arguing protests are compounded by a variety of actions, including lobbying, voting and petitioning).

<sup>132</sup> CHESTERS & WELSH, SOCIAL MOVEMENTS, *supra* 4, at 143-5.

<sup>133</sup> KARL-DIETER OPP, THE RATIONALITY OF POLITICAL PROTEST: A COMPARATIVE ANALYSIS OF RATIONAL CHOICE THEORY (1989).

disrupt the day-to-day life of a community: violent acts that inflict material and economic damage and loss of life; and cultural forms of political expression such as rituals, spectacles, music, art, poetry, film, literature, and cultural practices of everyday life.<sup>134</sup>

Before, they had stated that protests are precisely the “fundamental feature that distinguishes social movements from routine political actors.”<sup>135</sup> However, the truth is that actions such as lobbying, petitioning and voting are far from being unconventional in nature. Moreover, the range of actions they include in their definition practically includes every kind of opposition to, or prevention of, change. Or take the definition Jenkins and Klandermans attempted when introducing a compendium on social protests, which they define as follows:

The collective action of social movements that are attempting to alter the representation system, public policies, or the general relationships between citizens and the state.<sup>136</sup>

In this definition the reader should imply that because social movements are *mainly* non-institutional then social protests are to have the same character, although its vagueness actually opens more doubts precisely by inviting speculation,<sup>137</sup> for attempting to alter the representation system may be achieved

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<sup>134</sup> Taylor & Van Dyke, “*Get up, Stand up*”, *supra* note 131, at 263.

<sup>135</sup> *Id.*

<sup>136</sup> J. Craig Jenkins and Bert Klandermans, *The Politics of Social Protest*, in *THE POLITICS OF SOCIAL PROTEST: COMPARATIVE PERSPECTIVES ON STATES AND SOCIAL MOVEMENTS* 2, 3 (J. Craig Jenkins and Bert Klandermans eds., 1995).

<sup>137</sup> As I will say below, it is precisely this *mainly* what denotes one of the main differences between social movements and social protests.

through innumerable ways of collective action without leaving institutional channels—an aspect this definition overlooks. Therefore, as I said, I would rather concentrate on some relevant features of social movements a constitutional approach to protests should consider.

*A. Outside institutional channels*

First, social movements are forms of collective action that take place *mainly* outside institutional channels.<sup>138</sup> I highlight that they *mainly* occur at the non-institutional level.<sup>139</sup> For one thing, as I have noted, movements are not totally independent from institutional politics, which movements (most times) address with their utterances. For another, not all of the strategies that movements resort to are non-institutional (i.e. lobbying, bringing cases before courts). This is not the case of social protests, which are non-institutional displays of social power<sup>140</sup>—yet are aimed at being transformed into political power.<sup>141</sup> The fact that protests are *per se* non-institutional forms of participation does not deprive them from constitutional protection. On the other hand, arguing that this constitutional protection confers on protests’ institutional carapace would be pushing things too

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<sup>138</sup> David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 6.

<sup>139</sup> Snow et al. say social movements “are defined *in part* by their use of non-institutionalized means of action ...”. *Id.* at 7.

<sup>140</sup> Michael Lipsky, *Protest as a Political Resource*, 62 AM. POL. SCI. REV. 1144, 1145 (1968) (defining protests as a “political action ... characterized by showmanship or display of an unconventional nature...”) *But see*, OPP, RATIONALITY OF PROTEST *supra* note 133, at 39 (arguing the concept of protests should be understood broadly enough as to encompass also institutional and conventional means of political participation).

<sup>141</sup> HABERMAS, FACTS AND NORMS *supra* note 75, at 362-64.

far.<sup>142</sup> The same might be said about the legal regulations that protests are subjected to; although these regulations order protest activity, they do not specify either the form they might take<sup>143</sup> or its continuity.<sup>144</sup> This is not the case of other means which social movements utilize. Consider lobbying regulations, to take one example, which stipulate, among several other restrictions, that a lobbyist must be included in a public register, restrictions as to who can be a lobbyist, and even a code of conduct.<sup>145</sup> Or take the case of social movements that push their agenda by filing lawsuits; this is a highly regulated arena where the range (kind, opportunity and form) of arguments to be considered is formally limited.<sup>146</sup>

The fact social movements *mainly* occur outside political channels of participation highlights a second, allegedly contingent,<sup>147</sup> aspect worthy of attention:

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<sup>142</sup> Many of our acts, or omissions, as citizens are constitutionally protected. As we act under constitutional protection, we remain citizens acting as members of the civil society.

<sup>143</sup> It is true that these regulations normally punish violence, therefore constraining a certain form which a protest movement must take, but this is also the case of every other means social movements may resort to and also a “burden” erected upon every other civil society activity. In other words, regulated violence is not a “legal burden” posed solely on social protests, but on all actions and omissions taking place within the law’s, however contested, realm—the very realm whose maintenance depends on (institutional) violence. *See*, Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice*, in *Law, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3* (Austin Sarat ed., 2001).

<sup>144</sup> OPP, *THEORIES OF POLITICAL PROTEST* *supra* note 131, at 34 (arguing that an “action may be ‘unconventional’ or ‘irregular’ if there are not institutional rules prescribing that it is repeated over time”).

<sup>145</sup> I took this example from Nancy Holmes & Dara Lithwick, *The Federal Lobbying System: The Lobbying Act and the Lobbyist’ Code of Conduct* (Background Papers - Ottawa, Library of Parliament, Publication No. 2011-73-E, 2011), available at: [http://www.gordonforpendle.com/files/article/403/Lobbying%20\(Canada\).pdf](http://www.gordonforpendle.com/files/article/403/Lobbying%20(Canada).pdf) (last visited Sep. 25, 2012).

<sup>146</sup> *See*, Jeremy Waldron, *Judges as moral reasoners*, 7 INT’L J. CONST. L. 2 (2009) (arguing courts’ chambers may not be the best suited place to address, discuss and define both moral and political issues).

<sup>147</sup> *Allegedly contingent* as the fact protesters are regularly seen as illegitimate actors does not stem from any structural conditions of social protests, but rather from the way in which governments (helped out by mainstream media) see them.

challengers are usually not seen as legitimate political actors. Hegemonic legitimacy is reserved to those acting exclusively through institutional means, legitimacy reinforced through the successive imposition of cultural (societies who conceive only certain forms of communication as viable), discursive (authorities questioning resort to mobilizations), and legal (laws criminalizing protests) patterns. Recent protesters, for instance, have argued that it is this exclusion from the political public sphere, among other reasons such as distrust in representatives, which takes them to non-institutional means.<sup>148</sup> Collective non-institutional action, as Weldon has argued, works for oppressed groups as an effective way to overcome formal ties.<sup>149</sup>

This different political standing is not to be obscured by the fact substantive claims usually overlap with those brought up by *legitimized* actors.<sup>150</sup> Dryzek and Niemeyer have argued, for instance, that current institutional instances feature crucial limits in providing sensitive and sensible representation.<sup>151</sup> Even when members of marginalized groups are included in institutional avenues the problem of how a single member of that group can account for the whole still persists.<sup>152</sup>

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<sup>148</sup> In some readings it is precisely this political and economic marginalization of challengers what defines a protest and leads challengers to protest. See, Susan Eckstein, *Power and Popular Protest in Latin America*, in *POWER AND POPULAR PROTEST: LATIN AMERICAN SOCIAL MOVEMENTS 1, 9* (Susan Eckstein ed., 2001).

<sup>149</sup> S. LAUREL WELDON, *WHEN PROTEST MAKES POLICY: HOW SOCIAL MOVEMENTS REPRESENT DISADVANTAGED GROUPS* (2011) (focusing on how social protest movements, particularly that of women, have resorted to informal means of participation seeking both new forms of representation and overcoming formal democracy's procedural ties).

<sup>150</sup> David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 7-8.

<sup>151</sup> Dryzek & Simon Niemeyer, *Discursive Representation*, *supra* note 54.

<sup>152</sup> As Weldon has pointed out, the idea that individuals can represent a whole group "is based on a problematic understanding of the relationship between individual experience and group

Finally, some of the claims that movements will pose might arguably be exclusive to them—what NSM termed identity claims.

From a constitutional viewpoint we should thus consider the legal limits imposed on social protests with a strengthened scrutiny,<sup>153</sup> for those resorting to social protest aim to take part in shaping collective public decisions from a double condition of marginalization. In this double condition they resort to non-institutional means, and, due to the very fact they are part of those groups, they are either deliberately or consequently displaced from formal politics. It is true that social displays of power have often been met with facially neutral regulations—however difficult it is to draw such a sharp distinction between content-based and content-neutral regulations.<sup>154</sup> But it is also true these very same regulations, however text-neutral, have an uneven impact on different groups. Reva Siegel has shown how this is true in the fields of racial and gender law, fields where the law has shown a non-combustible capacity to accommodate status-enforcement through what appear to be neutral regulations.<sup>155</sup> In such fields—as in probably any other—“the state may enforce ‘facially neutral’ policies and practices with a disparate impact on minorities or women so long as such policies or practices are

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perspective.” She has insisted both institutional structures as well as social movements “can be more or less representative of marginalized groups” by studying the spaces some administrative agencies open for effective expression, even when compared to reserved legislative spots. Laurel S. Weldon. *Beyond Bodies: Institutional Sources of Representation for Women in Democratic Policymaking*, 64 J. POL. 1153, 1153-4 (2002).

<sup>153</sup> I deal with this, and other aspects here briefly mentioned, in Chapters 3 and 4.

<sup>154</sup> Wilson Huhn, *Assessing the constitutionality of laws that are both content-based and content-neutral: the emerging constitutional calculus*, 79 IND. L. J. 801 (2004).

<sup>155</sup> See, Reva Siegel, *Why Equal Protections No Longer Protects: The Evolving Forms of Status-Enforcing State Actions*, 49 STAN. L. REV. 1111 (1996-1997) (arguing how the law has managed to maintain status-enforcement despite its *evolution* into racially and gender-neutral regulations).

not enacted for discriminatory purposes,”<sup>156</sup> a standard too difficult, if even possible, to satisfy.<sup>157</sup>

The same occurs with legal regulations for protests. Legal regulations of expressive conduct must be narrowly tailored in order to suppress as little speech as possible.<sup>158</sup> This is why a total ban on certain forms of speech would not pass constitutional scrutiny:

Prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, [but] the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.<sup>159</sup>

However, even when legal regulations satisfy these standards, that is, even when legal regulations are facially neutral and narrowly tailored, they still might be felt stronger over the shoulders of those who, sometimes forced by circumstances, find in protests the exclusive means to influence public opinion. To them, where no adequate substitute channel exists, the application of these regulations amount to the total elimination of effective channels of communication.<sup>160</sup> The case is even more pressing on those movements that resort to protest to pose identity claims, for they will be struggling against more subtle forms of subordination that might

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<sup>156</sup> *Id.* at 1130.

<sup>157</sup> *Id.* at 1134-42.

<sup>158</sup> *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *Frisby v. Schultz*, 487 U.S. 474 (1988).

<sup>159</sup> *City of Ladue et al. v. Gilleo*, 512 U.S. 43 (1994), at 55.

<sup>160</sup> *Id.* at 56-7 (arguing that for some people—those with “modest means or limited mobility”—certain forms of communication are to be left unrestricted). *See*, Donatella della Porta & Olivier Fillieule, *Policing Social Protest*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 217, *supra* note 10, at 220-7.



be further dissembled by providing formal and neutral open access. In other words, as Nancy Fraser has argued, the total openness of the public sphere cannot be guaranteed with formal exclusions (i.e. a total ban of certain forms of speech) nor secured by relying exclusively on formal inclusiveness.<sup>161</sup> Here, concerns for freedom of expression become entangled with equality worries.<sup>162</sup>

### *B. Challenging nature*

A second feature Snow et al. underscore is that social movements have a challenging nature. Social movements are challengers aimed at either promoting or resisting change. As I noted before, their activity of contention occurs either (or both) in the political arena—“contentious politics”—or (and) at the cultural level. As the authors put it, “movements [can] be considered as challengers to or defenders of existing *institutional authority* ... or patterns of *cultural authority*, such as systems of beliefs or practices reflective of those beliefs.”<sup>163</sup> Social protests are not only non-institutional in character, but also challenging of prevailing (political and cultural) agreements in character,<sup>164</sup> what Taylor and Van Dyke termed their *raison d’être*: contestation.<sup>165</sup>

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<sup>161</sup> Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25-26 SOC. TEXT 56, 63-9 (1990).

<sup>162</sup> William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law on the Twentieth Century*, 100 MICH. L. REV. 2062, 2053 (2002) (arguing “no theory of constitutional law can be adequate or successful which does not centrally involve IBSMs and their jurisprudence”).

<sup>163</sup> David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 9.

<sup>164</sup> OPP, RATIONALITY OF PROTEST, *supra* note 133, at 38 (defining political participation as “behavior that has political relevance in the sense of attempting to influence governmental structure, personnel, or policy”).

<sup>165</sup> Taylor & Van Dyke, *“Get up, Stand up”*, *supra* note 131, at 268-9 (arguing social protest movements are *essentially* aimed at pursuing or preventing change).

In the case of the social protest movements that I am considering, their challenging nature points toward questioning political power relations as grounded in the Constitution. Acts of protests are here directed at contesting common normative grounds by advancing new constitutional readings and interpretations. Seen under this light, protest becomes a means through which the political power capable of implementing and developing the Constitution is shaped.<sup>166</sup> As Habermas put it, it is by mobilizing the public opinion, which protests help to shape, that the political power is taken to formally consider issues brought about by ordinary people in contestation of current assumptions.<sup>167</sup> In other words, social protest serves some groups as a means, and to some groups as *the* means, to take part in collective self-government: defining and shaping the meaning of our common founding principles. It is this engagement in politics that should grant protests special protection.<sup>168</sup> The long-settled freedom of expression doctrine grants dissenting speech heightened protection. As Justice Holmes wrote in his concurring opinion in *Schwimmer* more than eight decades ago,

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment

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<sup>166</sup> In Habermas, this political power *institutionally* capable of will formation includes both democratically elected assemblies as well as courts “that decide political relevant cases.” HABERMAS, *FACTS AND NORMS*, *supra* note 75, at 371-2.

<sup>167</sup> *Id.* at 372-3, 380.

<sup>168</sup> BARENDT, *FREEDOM OF SPEECH*, *supra* note 130, at 154 ff; Edward Heck & Albert C. Ringelstein, *The Burger Court and the Primacy of Political Expression*, 40 W. POL. Q. 413, 415-16, 420 (1987).

than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate.<sup>169</sup>

There are also complementary reasons to strengthen social protests' freedom of expression protection. Social protests possess a twofold nature: they are, as I have argued above, direct means of political participation and thus expressive conduct itself to be protected,<sup>170</sup> but they also are indirect means of political resource building.<sup>171</sup> Following Michael Lipsky, it is to be noticed that many times challengers who resort to social protests do not directly target the State, but develop political bargaining power they lack. They do this by addressing and activating target audiences whom the government considers worthy of paying attention to. Communication becomes essential to protests that, seen under this light, operate in a "highly indirect" fashion.<sup>172</sup> Protection of these informal channels of communication proves critical for politically oppressed groups. For them, recourse to social protest appears not just as one strategy among others, but sometimes the only available communicative resource they have to posit their political claims.<sup>173</sup>

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<sup>169</sup> *United States v. Schwimmer*, 279 U.S. 644 (1929), at 654-5. Freedom of expression also extends its protection to false statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), at 339 ("Under the First Amendment there is no such thing as a false idea.").

<sup>170</sup> See, *Cox v. Louisiana*, 379 U.S. 536 (1965). On the behavioral character of protests, OPP, THEORIES OF POLITICAL PROTEST *supra* note 131, at 33-4 (arguing from a sociological viewpoint, protest is a behavior, although noting there is disagreement as to what kind of behavior contributes to the concept's ambiguity).

<sup>171</sup> HABERMAS, FACTS AND NORMS, *supra* note 75, at 383.

<sup>172</sup> Lipsky, *Protest as a Political Resource*, *supra* note 140, at 1145-46; OPP, THEORIES OF POLITICAL PROTEST *supra* note 131, at 34; HABERMAS, FACTS AND NORMS, *supra* note 75, at 364; Taylor & Van Dyke, "Get up, Stand up", *supra* note 131, at 267, 269.

<sup>173</sup> *Id.*; WELDON, WHEN PROTEST MAKES POLICY, *supra* note 149. *E.g.*, Organization of American States

While social protests are expressive actions aimed at politically contending dominant patterns, they are not to be conceptually merged with civil disobedience.<sup>174</sup> Civil disobedience, Jürgen Habermas explains, is “[t]he last means for obtaining more of a hearing” from political power.<sup>175</sup> It is true that civil disobedience might serve, as it has served, as acts of protest. A disobedient contends acts of authority and power relations—using the breach of law to gain “greater media influence for oppositional arguments.”<sup>176</sup> Moreover, by reviewing the list of characteristics normally attributed to civil disobedience they seem to share all the attributes of social protests—most crucially the fact they are both non-revolutionary means<sup>177</sup>—except for one critical feature: civil disobedience exhibits illegality as one of its key characteristics.<sup>178</sup>

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[OAS], Annual Report of the Inter-American Commission on Human Rights Vol. III: Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L./V/II.124 Doc.7 (Feb. 27, 2006), at 121-22 (“The most impoverished sectors of our hemisphere face discriminatory policies and actions; their access to information on the planning and execution of measures that affect their daily lives is incipient and, in general, traditional channels to make their complaints known are frequently inaccessible. Confronting these prospects, in many of the hemisphere’s countries, social protest and mobilization have become tools to petition the public authorities, as well as channels for public complaints regarding abuses or human rights violations.”).

<sup>174</sup> I am of course considering here cases of civil disobedience taken out to the streets. In fact, disobedience does not need to be done in public or in a concert with others. It can actually be silently and individually practiced (i.e. refusing to enlist).

<sup>175</sup> HABERMAS, *FACTS AND NORMS*, *supra* note 75, at 382-3.

<sup>176</sup> *Id.*

<sup>177</sup> RAFFAELE LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT. A GENEALOGY* 112-5 (Jason Francis McGimsey trans., 2013) (arguing that it is this very acceptance of legal sanctions what signals disobedients’ fidelity to the system); DOUZINAS, *PHILOSOPHY AND RESISTANCE*, *supra* note 2, at 84-5; 91-3 (“Disobedience ... with its emphasis on civility, seeks its justification in the constitution, the law or other institutional sources.”) *See also*, RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985) (distinguishing civil disobedience from mere criminality, as the former “do[es] not challenge authority in so fundamental a way ... [it] accepts the fundamental legitimacy of both government and community.”).

<sup>178</sup> *Id.* at 383; JOHN RAWLS, *A THEORY OF JUSTICE* 320-21 (revised ed. 1999) (arguing that whether courts declare acts of civil disobedience as legally justified or not should not respectively encourage or deter dissenters’ action).

As Quill argues, legal protection of civil disobedience might even be rejected for it “entails the acceptance of punishment and guilt and the personal suffering incurred from a non-linguistic form of persuasion.”<sup>179</sup> This is not the case of social protests, for social protests are *prima facie* lawful acts. Acts of social protests are, in principle, covered by a cluster of constitutional rights (most notably, although not exclusively, as I will tell below, freedom of expression). Furthermore, democracy could be understood as actually promoting forms of protest and dissent. As an author put it some years ago, “genuine democracy demands dissent, thrives on protest.”<sup>180</sup> Whereas there is a general constitutional entitlement to critically engage in political self-government, there is no general principle granting the faculty to disobey laws—but quite the opposite.<sup>181</sup>

It is true that challengers who resort to social protest often breach public order laws, but that is an unintended (in the best case) or a by-product (in most cases) of mass demonstrations.<sup>182</sup> Protesters’ main aim is not to breach the laws they

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<sup>179</sup> LAWRENCE QUILL, CIVIL DISOBEDIENCE: (UN)COMMON SENSE IN MASS DEMOCRACIES 8-9 (2009); PETER E. QUINT, CIVIL DISOBEDIENCE AND THE GERMAN COURTS: THE PERSHING MISSILE PROTESTS IN COMPARATIVE PERSPECTIVE 40-1 (2008) (noticing that, though civil disobedience involves illegal action, it “demonstrates their adherence to the legal system in general by breaking the law in public and by being manifestly willing to accept the corresponding punishment”). *But see*, DWORKIN, A MATTER OF PRINCIPLE, *supra* note 177, at 114-5 (1985) (arguing civil disobedience is not *incomplete* without punishment).

<sup>180</sup> CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 13 (1971).

<sup>181</sup> As Professor Ronald Dworkin put it, “the moral permissibility of disobedience ... is an exception to a more general principle that requires obedience even to laws they disapprove but do not think wicked.” RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 318 (2011).

<sup>182</sup> In the *Brokdorf* decision, cited below, the German Constitutional Court precisely considered public order disturbances as a by-product of mass demonstrations, whereas a year later, in the *Großengstingen and Mutlangen* cases, it upheld criminal convictions precisely because their very purpose was to violate blockades statutes. *See also*, QUINT, CIVIL DISOBEDIENCE, *supra* note 179, at 164-5. *But see*, *Batty et al. v. The City of Toronto*, 2011 ONSC 6862, at para 15, where the court considered the breach of TPM regulations as a form of civil disobedience (“The Charter does not

contend, but to express their disagreement with authority and power relations; in order to shield both the content of their claims and the form to utter them, they invoke freedom of expression and the right to assembly.<sup>183</sup> Civil disobedients also contend authority decisions, but the very means they resort to in order to express their contention is precisely by breaking the very laws they dispute.<sup>184</sup>

In spite of the fact civil disobedience seems to be rather incompatible with liberal democracy (after all it entails defiance of law's authority),<sup>185</sup> it is usually accepted by liberal constitutionalism. In fact, liberal constitutionalism has found ways to

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permit the Protesters to take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space and then contend that they are under no obligation to leave. By taking that position and by occupying the Park, the Protesters are breaking the law. Such civil disobedience attracts consequences. In this case, the civic authority which represents the Toronto community now seeks to enforce the law.”).

<sup>183</sup> This is why I disagree with Cohen when he argues these breaches of municipal regulations or traffic regulations amount to what he calls indirect disobedience. Disobedience is one thing while civil disobedience quite another, the latter being defined precisely by the breach of laws that are disputed and not, as Cohen claims according to what he considers to constitute indirect disobedience, as the breach of laws “other than the object of protest.” In fact, just as acts of protests are constitutionally protected, under some circumstances these indirect breaches are also justified as protests’ side effects. COHEN, CIVIL DISOBEDIENCE, *supra* note 180, at 14-5, 52. A distinction Joseph Raz has suggested is of help here; he distinguishes between what he calls ‘cases of occasional disobedience,’ “breaches of law which the agent thinks, given the character of the law involved and of the particular circumstances in which he acted, were morally permissible,” from civil disobedience, breaches of law that are politically or morally motivated. Whereas for the former kind of breaches “moral considerations merely render [them] permissible,” in the latter the moral and political reasons *are* the motivations for the breach. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 263-4 (2009).

<sup>184</sup> Harrop A. Freeman, *The Right to Protest and Civil Disobedience*, 41 IND. L. J. 228 (1966) (“The protest action is often not civil disobedience but in fact ‘obedience’ (the leader of the second Oakland march called it ‘massive civil obedience’). The total pattern is in the democratic tradition rather than anarchic or totalitarian (it claims to be an expression of free speech). The theory is not anti-law but within the law.”). *See also*, Harry Kalven, Jr., *The Concept of the Public forum: Cox v. Louisiana*, 1965 SUP. CR. REV. 1, 10-1 (1965) (arguing civil disobedience is a deliberate violation of law whereas protests’ “essential feature is appeal to public opinion.”).

<sup>185</sup> David Lyons has argued that there is not a moral/political obligation to obey the law when certain conditions are not met. The political obligation to obey the law, Lyons claims, should itself be based on moral grounds which are normally absent in the concrete historical/paradigmatic situations that have taken us to consider civil disobedience and its justification. In these cases, Lyons insists, there is no need to justify civil disobedience as there is no previous obligation to obey the law. David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHILOSOPHY & PUBLIC AFFAIRS 31 (1998).

admit acts of civil disobedience as a regular part of the political landscape. Their pacifist whiff may have contributed in considering conscientious objection as a legal excuse to prevent sanctions.<sup>186</sup> As Laudani has noted—while criticizing Rawls—, disobedients show self-restraint that presents them as resorting to disobedience only when other means of redress, including legal means, have proved useless.<sup>187</sup> Thus, liberal constitutionalism has found a way of turning what first seemed illegal into an action covered and protected by law.<sup>188</sup>

Besides social acceptance, neoconstitutionalism has also helped to legally protect (meaning not punishing or reducing the sanctions of) civil disobedience. As Ronald Dworkin noted some time ago, constitutions that recognize constitutional political rights as legal rights create a certain ambiguity when it comes time to determine whether the law has actually been breached. The law, therefore, is no longer exclusively the single (breached) statute invoked, but interpreted and checked against the constitutional rights that redefine what the law is.<sup>189</sup>

This alternative merits a little detour. If acts in breach of a law are not sanctioned under this model, it is exclusively because the statute itself is found to be

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<sup>186</sup> RAWLS, *A THEORY OF JUSTICE*, *supra* note 178, at 320 (defining civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about change in the law or policies of the government”).

<sup>187</sup> LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT*, *supra* note 177, at 114-5.

<sup>188</sup> As Quill notes, when reviewing Rawls, while liberal tradition emphasizes a natural duty to obey the law, justifications of civil disobedience call to temper that duty with “the duty to opposed injustice.” QUILL, *CIVIL DISOBEDIENCE*, *supra* note 179, at 14-5. It is worth noticing, as Raz has done, that it is one thing to justify civil disobedience (or even to hold that, under certain conditions, there is also a duty to disobey the law), but quite another to suggest there is a general right to disobey the law. RAZ, *THE AUTHORITY OF LAW*, *supra* note 183, at 266.

<sup>189</sup> DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 177, at 115.

unconstitutional.<sup>190</sup> We are thus dealing with cases where there was actually no disobedience to punish. Disobedience, in this way, becomes obedience.<sup>191</sup> However, it becomes obedience at a high cost: from a political perspective—for instance the one Laudani takes—this form of understanding civil disobedience deprives it of its rebellious significance.<sup>192</sup> As Justice MacPherson put it, “practitioners of civil disobedience *target governments* in their hope to change certain laws. They do not expect the courts to change the laws ...”.<sup>193</sup> Well, this is not quite so.

Social protests and demonstrations have not received the same benevolent treatment. Liberal constitutionalism has for the most part depicted protests as providing ample room for passions to flourish and thus as incompatible to the reason(s) of law. This view on protest obeys hegemonic considerations rather than a fair understanding of rights involved. As Sajó argues, every day we can witness an “ambivalent constitutional treatment of collective public display of emotions and passions,”<sup>194</sup> for certain forms of collective behavior that also imply emotion display get privileged constitutional/legal reception, whereas others are

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<sup>190</sup> James MacPherson, *Civil Disobedience and the Law: The Role of Legal Professionals* 41 OSGOODE HALL LAW JOURNAL 371, 380 (2003) (“Provided the laws are constitutional ... courts are sworn to uphold the rule of law.”).

<sup>191</sup> This was notably, although not exclusively, the case of Martin Luther King Jr.’s civil rights movement. Though involving acts of illegality, the movement was justified mainly on the grounds of “constitutional obedience.” LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT*, *supra* note 177, at 107-12.

<sup>192</sup> *Id.* at 115-6.

<sup>193</sup> MacPherson, *Civil Disobedience and the Law*, *supra* note 190, at 380.

<sup>194</sup> SAJÓ, *CONSTITUTIONAL SENTIMENTS*, *supra* note 81, at 246.



mistreated.<sup>195</sup> It is this ambivalent treatment, and a much-extended idea of civil disobedience as essentially non-violent but still willing to accept punishment, what accords them a deferential treatment.

### *C. Joint action*

Third, social movements involve joint action, which roughly means a collective effort. The very fact social movements are collective enterprises signals some degree of internal organization is needed;<sup>196</sup> in fact, this is the question RMT is concerned with. However, the fact social movements are collectivities might be somewhat obscured by some of their external manifestations. One single actor, say a lobbyist, appears before an administrative agency and the public as a single agent. This is not the case of social protests, which are always joint/collective actions<sup>197</sup> that might or might not be preceded by some sort of internal organization.<sup>198</sup>

Therefore, from a constitutional viewpoint, social protests are essentially collective bodies whose very comprehension has to be, both politically and legally, collective. Politically, on the one hand, social protests show a joint attempt to

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<sup>195</sup> *Id.* at 247.

<sup>196</sup> Although there is some disagreement as to the level, kind and necessity of organization needed. David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 9-10.

<sup>197</sup> OPP, THEORIES OF POLITICAL PROTEST *supra* note 131, at 34.

<sup>198</sup> In other words, a protest might be a tactic deployed by a social movement that decides to act in that way and where internal organization will be required, but social protests might also arise spontaneously, where internal organization may, but also may not, be present. This distinction has proven of relative importance regarding protests' legal regulations. The Constitutional Court of Germany, for one, has held that while organized demonstrations might be subjected to administrative regulations of manner, place, and time, this is not the case of impromptu protests that, if subjected to such regulations, would render the right to assembly meaningless. *Infra* note 201.

collectively take part in shaping the republic's fate. This is a (constitutionally) legitimate way of engaging in politics, particularly for those who see themselves as something other than pure individual numbers whose votes are aggregated<sup>199</sup> and for those groups often marginalized from regular channels—as argued before.

Legally, on the other hand, this means that the rights involved are not just to be assessed on an individual basis, but as collective exercises. Reading an exercise of political citizenry in light of individual entitlements might prove misleading. This emphasis has practical consequences, for if we are talking about a collective action, particularly of social protest, legal decisions about protesters are to consider them as a whole. Admittedly, this is a standard too difficult for the law to meet, which normally focuses on the individual. What is interesting, however, is that it also highlights the limited answer the legal order may offer in face of social protests. Take three quick examples. In the *Brokdorf* case, the Constitutional Court of Germany assessed the constitutionality of a total ban on public demonstrations which was issued by the local police in light of the announcement of massive protests against a soon-to-be-built atomic power plant. Accepting demonstrations could be subject to regulations, the Court analyzed whether the fact that some of the protesters were prone to violence could be a valid constitutional reason to

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<sup>199</sup> RONALD DWORKIN, *LAW'S EMPIRE* 206-15 (1986) (discussing three possible models of understanding what a community is). *See also*, HABERMAS, *FACTS AND NORMS*, *supra* note 75, at 362 ("Public opinion is not representative in the statistical sense. It is not an aggregate of individually gathered, privately expressed opinions held by isolated persons. Hence it must not be confused with survey polls."). While an emphasis on institutional means of participation often entails, although not necessarily, an aggregative version of democracy, emphasis on avenues other than governmental institutions recall a wider understanding of political deliberation. I have taken these two models of democracy from CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY*, Chapter 4 (1996).

impede the others from freely exercising their constitutional rights. Considering the protesters as a whole, it argued the fact that a small number of demonstrators may resort to violence is not enough to “hold down the size of a demonstration or to dampen the desire to demonstrate.”<sup>200</sup> In words of the Court:

If there is no fear of collective strife, it is not necessary to take into account the possibility that a demonstration as a whole will take a violent or rebellious course or that the organiser or his following will strive for such an outcome or at least approve of it. In such circumstances, for peaceful participants the protection guaranteed by the Constitution to every citizen of freedom to meet must remain preserved even if other individual demonstrators or a minority commit riots. If behaviour of individuals which is not peaceful were to lead to discontinuance of the basic right protection for the whole event and not only for the perpetrators, these persons would have it in their hands to ‘turn round’ a demonstration and make it become unlawful, contrary to the intention of other participants [references omitted].<sup>201</sup>

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<sup>200</sup> DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 396 (1997, 2<sup>nd</sup> ed.).

<sup>201</sup> The standard here proposed by the German Constitutional Court does not run counter to my previous assertion that social protest are to be considered as a whole, for what the Court is here implying is that those who engage in riots have put themselves outside the peaceful, nevertheless disruptive, protesters. Should this latter group collectively resort to violence, authorities will be entitled to intervene. I have taken this translation from the Institute for Transnational Law, the University of Texas School of Law, *Translated Decisions*, BVerfGE 69, 315 - Brokdorf Decision of the First Senate, *available at*: [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=656](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=656) (last visited, Oct. 14, 2012).

In Chicago, hundreds of people were detained and accused of having violated a curfew in Grant Park.<sup>202</sup> A group of 92 of those detained (who amounted to 233) asked the Circuit Court of Cook County to dismiss charges as the curfew was facially unconstitutional. The Court found the curfew to be unconstitutional—as “the burden imposed on First Amendment activity is greater than necessary to serve the important government interest.”<sup>203</sup> In order to reach that conclusion, which also benefited the rest of the detained not contending the ban, it considered not only the group appearing before the Court, but also “whether other groups [of protesters] ... would have ample alternative channels for late-night assemblies ...”.<sup>204</sup> Finally, in Chile, and in the midst of student mobilizations, a school board decided to expel a student who took part in the occupation of the school. Chile’s Supreme Court reasoned not on the grounds of freedoms of expression, but held that the student sanctioned was not the only one participating in protests, thus revoking the board’s decision as arbitrary.<sup>205</sup>

The collective character of social protests is also important when drawing differences with civil disobedience. While both are acts of political and collective display of contestation, only the former is constitutionally protected in the same

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<sup>202</sup> The curfew prohibits remaining inside the Park after 11:00 pm. As read in *City of Chicago vs. Tieg Alexander et al.*, Memorandum Opinion and Order, No 11 MC1-237718, et seq. (2012), at 1.

<sup>203</sup> *Id.* at 23.

<sup>204</sup> Admittedly, as the Court itself explains, this is the standard with which a facial challenge must be assessed. However, my emphasis here is on the fact those “other groups not appearing before the court” (*Id.*, at 20) are actual members of the same movement. Moreover, the fact that protests are collective in nature might also clarify the reason why the curfew was also found to be unconstitutional on an as-applied basis, for the curfew, the Court argued, has not been always enforced against all other demonstrators who had remained in Grant Park after 11:00 pm—thus considering people taking part in protests as a block. *Id.*, at 28 ff.

<sup>205</sup> Corte Suprema [Supreme Court], Rol No 10.692-2011, 24 January 2012 (Chile).

fashion: collectively. It is true, as Rawls claimed, “civil disobedience is a political act.”<sup>206</sup> However, while a single subject may perform civil disobedience—something the very collective nature of protests makes impossible—, their constitutional justification (conscientious objection) is always individual and even, as some have claimed, an apolitical act.<sup>207</sup> In fact, it has been precisely civil disobedience’s attachment to individual values and basic individual rights (along with its historical link to the defense of free market principles) what, Douzinas argues, has granted them liberal justification.<sup>208</sup> Moreover, it has been this attachment to individual rights what impedes civil disobedience from having a truly political, in this sense collective, meaning.<sup>209</sup>

In order to overcome individual rights’ intrinsic limitation, as isolating carapaces upon which an apolitical individual dichotomized from the State is configured, plural membership must be embraced.<sup>210</sup> The true meaning of disobedience, one betrayed with too much emphasis on individual rights, rests—Laudani, citing Walzer, argues—“on a ‘shared moral knowledge,’ on a series of obligations toward a handful of principles that are, at the same time, ‘commitments to other men, from whom the principles have been learned and by whom they are enforced’.”<sup>211</sup>

To be effective, it must join the ideal discourse of the principles that govern a political community to the concrete living conditions of those who

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<sup>206</sup> RAWLS, A THEORY OF JUSTICE, *supra* note 178, at 321.

<sup>207</sup> QUILL, CIVIL DISOBEDIENCE, *supra* note 179, at 13-4.

<sup>208</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 2 at 89-92.

<sup>209</sup> LAUDANI, DISOBEDIENCE IN WESTERN POLITICAL THOUGHT, *supra* note 177, at 116.

<sup>210</sup> *Id.* at 117.

<sup>211</sup> *Id.* at 116.

practice it, to the ‘mutual engagements’ of responsibility by the participants and to the sharing of a ‘community of laws and values’ that could be in conflict with those of the state.<sup>212</sup>

Here, challengers are presented in a dialectic relation with the State, without, however, contesting its legitimacy. Claims against the State thus, as Laudani puts it, are partial.<sup>213</sup>

Is social protest suited to better capture this collective (in the sense of politically engaging) face? I think it is. In light of the critique against civil disobedience, let me insist on what I briefly mentioned before: the inescapable collective nature of the rights involved in social protest. As it is well known, Karl Marx was highly critical of the rights of the man. Rights of the man, he contended, are the rights “of egoistic man, of man separated from other men and from the community.”<sup>214</sup> Men and women, under this view, are isolated one from another, ‘withdrawn into themselves.’<sup>215</sup> Liberty, in this sense—and as Marx clearly explains—“is not founded upon the relations between man and man, but rather upon the separation of man from man. It is the right of such separation, the right of the *circumscribed* individual, withdrawn into himself.”<sup>216</sup> In support of his view, Marx cited the individualizing character of the right to property—not totally out of the place

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<sup>212</sup> *Id.* at 117.

<sup>213</sup> *Id.* at 117-8.

<sup>214</sup> Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 42 (Robert C. Tucker ed. Norton 1978 2<sup>nd</sup> ed.) (1844).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 43.

when it comes to civil disobedience<sup>217</sup>—to exemplify how the rights of the man are in private interest.<sup>218</sup> It is not only that the rights of the man further private interests, but also that they are opposed to man’s social ties. Society, ‘mutual engagements’ of responsibility—to take the words used earlier by Laudani—“appears as a system which is external to the individuals and as a limitation of his original independence,”<sup>219</sup> said Marx.

How can a political community be formed where rights facilitate isolation and foster egoism? It cannot, unless we resort to common engagement. Rights of the citizen, the other rights upon which Marx passed judgment, permit this communal existence, for these rights are of a different nature: collective. They presuppose a joint intervention on defining the fate of the political community—which is also presupposed.<sup>220</sup> These rights permit—although Marx put it negatively as he criticized their subjugation to the rights of the man—the establishment of the political State and the composition of civil society into related individuals: a political man and a political woman.<sup>221</sup>

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<sup>217</sup> See, Leo Martinez, *Taxes, Moral, and Legitimacy* 1994 BYU L. REV. 521 (1994) (arguing some citizens may find the duty to pay taxes unjust and therefore disobey on the grounds of private property). Henry David Thoreau’s decisive essay, *Civil Disobedience*, was also about taxes, but founded on totally different grounds: his contention was that citizens should not contribute to finance what he considered to be an unjust war. Henry David Thoreau, *Civil Disobedience* (Nancy L. Rosenblum ed., Cambridge: Cambridge University Press, 2000 repr.) (1849) (“If a thousand men were not to pay their tax bills this year, that would not be a violent and bloody measure, as it would be to pay them, and enable the State to commit violence and shed innocent blood. This is, in fact, the definition of a peaceable revolution, if any such is possible.”).

<sup>218</sup> Marx, *On the Jewish Question*, *supra* note 214, at 42-3.

<sup>219</sup> *Id.* at 43.

<sup>220</sup> See the introductory text of Jeremy Waldron to Marx’s *On the Jewish Question* in his edited volume ‘NONSENSE UPON STILTS’: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 131-32 (Jeremy Waldron ed., 1987).

<sup>221</sup> Marx, *On the Jewish Question*, *supra* note 214, at 46.

Social protest is an exercise of the rights of the citizen.<sup>222</sup> Social protest is collective at its roots and protected by rights that cannot be properly understood but in a collective fashion.<sup>223</sup> Indeed the relevance, and actual manifestation, of these rights cannot be fully grasped if considered as exercised by individuals that are aggregated to one another; however, they can be fully grasped if they are considered a political, and therefore collective, exercise in itself.<sup>224</sup> Consider, for instance, *Garcia v. Bloomberg*, which involved a claim filed by occupiers who were arrested when crossing the Brooklyn Bridge in support of Occupy Wall Street. One of the claims stated that they had not been given a fair warning by the police that they were not permitted to walk onto the bridge's vehicular roadway. While the NYPD submitted video footage showing that they did in fact notify protesters of imminent arrest—before proceeding to arrest some 700 protesters—the Court reasoned on the grounds of the collective body protesting: while some of the protesters—those walking closer to the officers carrying bull horns—may have

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<sup>222</sup> I accept here that, under conditions of modern constitutional States, the difference between the rights of the man and the rights of the citizen is not so much a matter of ontology of the rules (yet the right to assembly cannot be exercised but in communion with others) involved, but on the conditions of their definition, appropriation and exercise. *See*, Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1422-3 (1983-4) (The first is that rights do not come neatly divided into inherently individual and inherently communal rights. Most rights are sufficiently ambiguous that they can be pushed in different directions by political and intellectual struggles). *See also*, RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM. A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 30-1 (2007) (discussing freedom of speech as a public good rather than as an individual right).

<sup>223</sup> Lynd, for instance, mentioned the “right[s] to engage in concerted activity” as a clear manifestation of what he called ‘communal rights.’ Lynd, *Communal Rights*, *supra* note 222, at 1423. Although politically motivated, civil disobedience is precisely justified on exclusion from politics, namely on individual rights where those taking part are individually considered.

<sup>224</sup> *Id.* 1424.



heard the warning, some of them certainly did not hear it.<sup>225</sup> In other words, protesters become, by the very same act of protests, a *we*.<sup>226</sup>

#### *D. Continuity*

Fourth, displays of joint action operating through non-institutional means and aimed at contending political and cultural authority become a social movement as they show some “degree of temporal continuity.”<sup>227</sup> Admittedly, more than an intrinsic feature, continuity becomes a necessity if social movements want to succeed in achieving “the kinds of changes movements pursue.”<sup>228</sup> The same holds for those who want to succeed in advancing new constitutional understandings. In any case, continuity is not required in social protests. In fact, their connection with social movements might be purely contingent. This signals that not only are they but one of the means social movements resort to, but also social protests’ autonomy from them. For one thing, what defines social movements is not their public salience, but their shared identity. Many protests sustained in time do not necessarily signal there is a social movement behind them, and, by the same token, one single sporadic act of protest might be a manifestation of a solid social

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<sup>225</sup> *Garcia v. Bloomberg*, at 488-9 (“While the demonstrators might have inferred otherwise if they had heard the bull-horn message, no reasonable officer could imagine, in these circumstances, that this warning was heard by more than a small fraction of the gathered multitude.”).

<sup>226</sup> Lynd, *Communal Rights*, *supra* note 222, at 1427 (arguing *we* engage in concerted action because a group is experienced as a reality in itself; “I do not scratch your back only because one day I may need you to scratch mine. Labor solidarity is more than an updated version of the social contract through which each individual undertakes to assist others for the advancement of his or her own interest.”).

<sup>227</sup> David A. Snow et al., *Mapping the Terrain*, *supra* note 10, at 10-11.

<sup>228</sup> *Id.* at 11.

organization.<sup>229</sup> For another, we should also notice, as I did above, the phenomenon of spontaneous protests. These acts of unbidden grievances lack continuous machineries upon which they are maintained.

Of course, from a constitutional viewpoint, social protests are granted constitutional protection no matter their continuity. One single (sporadic) act of protest will (or should) be granted constitutional protection, as much as more sustained displays. Constitutions do not provide protection, nor even strengthen protection, depending on how much an individual exhibits sustained exercise of his or her rights. In fact, recent experience suggests that 'prolonged' exercise of rights might actually have counterproductive results, thus diminishing protection.<sup>230</sup>

Of course, the success of the political grievances expressed through protest, as noted above, depend on a large extent to being sustained efforts. Constitutional readings will seduce the public (creating social power) and the avenues of political will-making (turning that social power into political power) as long as they are able to convince them of their rationality, necessity, goodness, and so forth. However, from a constitutional rights viewpoint, even single acts of protests are covered and protected.

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<sup>229</sup> Diani, *The Concept of Social Movements*, *supra* note 9, at 16.

<sup>230</sup> It was, in fact, a prolonged exercise of assembly rights what proved critical to deny constitutional protection to occupiers in Toronto. *Batty*, 2011 ONSC 6862, at paras. 64, 92-6, 104 (where a Toronto court told protesters that the trespass notice the City issued would only restrict their protests to 19 hours a day).

## Conclusions

This chapter has been devoted to the introductory analysis of social movements. As I noted at the beginning, my interest was primarily to enquire about social movements: about their place in, and the role they have played in the comprehension of, our democracies. In answering these questions I turned to sociology. For one, the treatment social movements have received in sociology has been more extensive than the treatment accorded by their legal counterpart. For another, terminology in sociology, mostly drawn from empirical research, is richer and clearer—despite the absence of any canonical definition.

As noted, social movements are mostly defined as non-institutional in character, a feature that has not prevented them from relating to, and being influenced by, the State's institutional avenues. Their place *mainly* outside the institutional channels of participation also explains why it is often said they have played a key role in expanding democracy's understanding, for democracy's meaning has been pushed to transcend the pure institutional arena to also encompass these new forms of representation (self-representation, self-authorization and discursive representation) and participation. Their impact has also been felt at the institutional level. Some of the achievements attained by social movements have been precisely to open governmental channels—to include larger participation—and to help eliminate undemocratic obstacles we now consider evil—as was the case of the civil rights movements. However, I also noted institutional exclusion

might also bring important benefits in keeping a flourishing civil society unconstrained.

In the end, I finalize by narrowing my analysis down from social movements to one of its manifestations, namely social protests. I focused on social protests because, contrary to other means social challengers may resort to, social protests seem to face higher opposition. They are noisy, they cause disruption, they take place on the streets, and, contrary to the legacies of constitutional liberalism regularly endorsed, they seem to give tumults, rather than reason and paused reflection, a say in politics. Unsurprisingly, answers to social protests have usually been accompanied with the State's strongest tool: criminal law. A tool that, as Sajó argues, is used against certain forms of collective display, arguably those which stand against hegemonic relations of power—as noted, the very thrust behind a mobilization.

Despite this current state of affairs, I finalized by suggesting that social protests exhibit some proper characteristics that should take constitutional analysis to pause and reflect before restrictions on protests, for protests have not only contributed to enhance democratic governments (to produce “good laws”), but also to show with their own action that constitutions are unfinished projects whose very understanding, included that of rights involved, is to be defined politically.<sup>231</sup> The notion that constitutions are unfinished projects means to

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<sup>231</sup> HABERMAS, *FACTS AND NORMS*, *supra* note 75, at 369-70, 383-4 (arguing one of the key features of social movements is the *self-referential* capacity to make use of rights and, at the same time, “interpret, defend, and radicalize their normative content”).

conceive constitutions as an *activity*,<sup>232</sup> that is, as open-ended projects where basic commitments are recognized, yet inevitably left open.<sup>233</sup> If politics plays a critical role in defining that unfinished project, politics, as shown above, should include non-institutional interventions to prevent selective (if not discriminatory) readings of what are, allegedly, common commitments.

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<sup>232</sup> GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION. ON THE LIMITATION OF RIGHTS* 13 (2009).

<sup>233</sup> *Id.* at 7.

## CHAPTER 2

### RESIST AND PROTEST

#### I. Common threads

#### II. Constitutional facts

#### III. A constitutional distinction

#### Introduction

*“The liberation of the oppressed class is impossible not only without a violent revolution but also without the destruction of the apparatus of state power ...”*

V. I. Lenin\*

Constitutional law relates to social protests in at least two different, although complementary, ways. First, it provides a right-based framework under which acts of protests are constitutionally protected. Second, it is substantively influenced by the very same acts of protests it protects. This work deals with both relations. In so doing, it considers social protests main traits to be (a) a form of collective action (b) that manifest through street non-institutional means of participation which, (c) regardless of its temporal (dis)continuity, (d) is aimed at challenging both social

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\* THE STATE AND THE REVOLUTION (Penguin Classics 1992) (1918).

and legal/constitutional norms. These traits, instead of a static definition, provide the base upon which a right-based framework is erected and according to which I analyze protests.<sup>1</sup> I will mainly consider the rights that are usually invoked to constitutionally protect social protests.<sup>2</sup> While rights certainly provide constitutional protection, imposing duties on the State, they also regulate and limit—the unavoidable consequence of installing political claims under the umbrella of liberal jurisprudence<sup>3</sup>—the time, place and manner of protests.

Besides case-by-case (legal) limitations, there is another, admittedly more fundamental, political contour the talk of rights configures, for talking about constitutional/legal rights presupposes the State, a constitution, and its norm-creating, norm-applying (most notably, although certainly not limited to, courts) and norm-enforcing institutions.<sup>4</sup> This means that rights need the State to which the rights are directed and therefore a constitutional order upon which a legal, and consequently bureaucratic, system is founded.<sup>5</sup> In other words, its institutional form characterizes law. As an institutional system, law “consist[s] of rules which are subject to adjudication before official bodies,”<sup>6</sup> where both those norms and

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<sup>1</sup> This is particularly relevant in the case of rules related to social protests—and social movements at large. As I will show below, the influence social protest movements exert on law is not confined to substantive understandings (meanings), but it also extends to the rules (rights) protecting/regulating protests.

<sup>2</sup> I will do this in Chapters 3 and 4.

<sup>3</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 6-7 (1995).

<sup>4</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 105 (1979).

<sup>5</sup> NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 49 (2007) (“The institutionalization of legal order in a state or other polity depends on the evolution or adoption of a constitution that establishes the essential agencies of government and assigns powers to them.”); Joseph Raz, *Legal Rights*, 4 *OXFORD J. OF LEGAL STUDIES* 1, 2-5 (1984).

<sup>6</sup> Raz, *Legal Rights*, *supra* note 5, at 3.

those public bodies have been established (*constituted*) by other norms. As Neil MacCormick put it, “nothing comes out of nothing.”<sup>7</sup> Precisely because law is not the general model for all other kinds of rights (or of every other time we claim to be acting pursuant to a right) its scope is limited and cannot account for, let alone protect, all actions claimed to be in exercise of rights (other than legal/constitutional rights).<sup>8</sup>

This formal distinction, formal as law happens to be, is needed to clarify certain constitutional confusion (or what I see as constitutional confusion) that the excitement of the recent waves of protests has provoked. Many demonstrators in Europe, such as the *indignados* in Spain, and in North America, such as those of the ‘Occupy’ movement, to name a few, saw themselves in a continuum with the protests of the ‘Arab Spring.’<sup>9</sup> Thus, to some, Occupy Wall Street was drawing on

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<sup>7</sup> MACCORMICK, INSTITUTIONS OF LAW, *supra* note 5.

<sup>8</sup> I emphasize the notion of law as an institutional system in order to highlight the *need* for a State, not with the intention of arguing moral (or other sorts of) rights or values cannot engender positive (legal/constitutional) rights, although this inference is not *necessarily always* the case. *See*, JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 19-21 (2012) (“The Covenant gives us the *legal ground* of the rights set out in the body of its text, but it is a further question whether this is supposed to be the legal representation of a moral conception. Maybe every legal idea has a moral underpinning of some sort; but it would be a mistake to think that the moral underpinning has to have the same shape or content as the legal ground.”); Jeremy Waldron, *A Right-based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUDIES 18, 23-8 (1993). *See also*, RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 115 (“Law has limits and this is why we can refer to legal systems and to legal rights and duties which are not necessarily moral rights and duties, etc.”). Even authors who hold law is part of a political morality, and therefore assume law is inevitably connected to some kind of moral standard, acknowledge political rights (those that arise only once a State has been established) are not necessarily translated into legal or constitutional rights. *See*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 331-2, 405-6 (2011).

<sup>9</sup> I am not arguing against those protesters who saw themselves as inspired by the ‘Arab Spring.’ That the ‘Arab spring’ served as inspiration to many protests in the rest of the world is something that, although open to criticism, is acknowledged by commentators. *See*, Sarah van Gelder, *How Occupy Wall Street Changes Everything*, in THIS CHANGES EVERYTHING 1 (Sarah van Gelder ed., 2011-2). My concern, however, is directed at those who see all these different movements as belonging to the very same wave of mobilizations.



the “successful model of revolt in Egypt,”<sup>10</sup> whereas others in Madison even chanted, “From Egypt / to Wisconsin / power to the people.”<sup>11</sup> The *Adbusters*—a cultural critique journal that posted one of the first calls to occupy—asked, “Are you ready for a Tahrir moment?”<sup>12</sup> Hardt and Negri contended these protests, although with differences, were part of an “emerging cycle of struggles ... against the lack—or failure—of political representation.”<sup>13</sup> While many of these accounts, and others I shall note below, have traced similarities acknowledging regional differences, it is also true they still hold to the continuum narrative.

Precisely because the first part of this work seeks to show what rights are usually invoked to protect protests—hence why I talk of *the (positive) right to protest*—it is worth distinguishing those who seek to dispute, and finally change, the locus of political power from those who do not contend the current constitutional scheme, although they aim at influencing it.<sup>14</sup> Whereas those uprising against the State claiming to embody the constituent power will normally assert they have a right to do so, they are certainly not thinking in, neither exercising, a sort of right (both

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<sup>10</sup> Daron Acemoglu & James A. Robinson, *Against Political Capture: Occupiers, Muckrakers and James A. Robinson*, in *THE OCCUPY HANDBOOK* 100, 110 (Janet Byrne ed. 2012). See also, Marlies Glasius & Geoffrey Pleyers, *The Global Movement of 2011: Democracy, Social Justice and Dignity*, 44 *DEVELOPMENT AND CHANGE* 547, 551 (2013) (“The Indignados we interviewed in Barcelona, Paris and Brussels reported being inspired by the example of what was happening in Tahrir Square, including the symbolic value of ‘square’ politics. In turn, Occupy Wall Street was inspired by both Tahrir and the Indignados.”).

<sup>11</sup> PAUL MASON, *WHY IT’S STILL KICKING OFF EVERYWHERE: THE NEW GLOBAL REVOLUTIONS* 184 (2013).

<sup>12</sup> MANUEL CASTELLS, *NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE* 159 (2012).

<sup>13</sup> Michael Hardt & Antonio Negri, *The Fight for ‘Real Democracy’ at the Heart of Occupy Wall Street*, *FOREIGN AFFAIRS*, (Oct. 11, 2011), <http://www.foreignaffairs.com/articles/136399/michael-hardt-and-antonio-negri/the-fight-for-real-democracy-at-the-heart-of-occupy-wall-street>.

<sup>14</sup> Constitutional influence, what I term a form of popular constitutional interpretation carried out through protests, is the subject matter of Chapters 5 and 6.

constitutional and legal) to be adjudicated by an official body, but a natural/political right previous or superior to those the civil State guarantees.<sup>15</sup>

The aim of this chapter is to distinguish between protests as a means of revolution aimed at acting as constituent power, on the one hand, and protests as a (positive) right and therefore a constituted entitlement to be adjudicated before official powers likewise constituted.<sup>16</sup> I shall do this by revisiting what I call the *constitutional facts* the ‘Arab Spring’ provide us with: namely the fact that many of the Arab protests and revolts ended with new constitutions in place. I begin by (I) briefly resuming the common threads some commentators of the recent wave of protests have found. I will argue that, although all recent experiences appear to share the main characteristics of social protest movements—most notably their non-institutional character—, these similarities are largely factual or external. In order to hold this claim I will (II) highlight the *constitutional facts* of some ‘Arab Spring’ protests, where revolutions led, either consciously or unconsciously, to new constitution-drafting and (III) introduce the very well-known distinction between constituent power and constituted powers. While this distinction will

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<sup>15</sup> I want to stress the limiting (without axiological charge) character of law. In fact, one of the most salient features of the *Rule of Law* is precisely that it limits the range of actions (and omissions, if you will) that political power can pursue. Aimed at preventing abuses of political power, the Rule of Law “insist[s] on a particular mode of the exercise of political power: governance through law.” Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 11 (2008-2009). See also, MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 225 (2010) (“While government is the product of positive law, the nation owes its existence to natural law alone.”).

<sup>16</sup> This work assumes there is a conceptual distinction between the rights to resist, revolution, and rebellion, on the one hand, and the constituent power, on the other. However, for the sake of space and in order not to deviate the attention, it will treat the first cluster of terms as one and normally in interchangeable terms, and will assume the constituent power as a normal step following a revolution.

help in distinguishing two large groups of protesters: those who acted embodying the constituent power (i.e. Egypt) and those who did not contend the constitutional scheme under which they acted (i.e. 'Occupy'), my main interest is to show that talking about a (positive) right to protest and of protests as popular constitutional interpretation—the two kinds of relations aforementioned—only make sense in the latter case.

## I. Common threads

There has been a tendency to situate all waves of protests as one single group pertaining to a sort of global uprising,<sup>17</sup> a tendency certainly not shared by all commentators.<sup>18</sup> Thus, some see protesters as different as Egyptian revolutionaries and North American occupiers as members of a single global subject, namely the multitude.<sup>19</sup> The multitude would thus bring different agendas to convergence in the struggle against the “dominance of global capital [that] is

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<sup>17</sup> WRITERS FOR THE 99%, *OCCUPYING WALL STREET: THE INSIDE STORY OF AN ACTION THAT CHANGED AMERICA* 11 (2012) (“Occupy Wall Street is part of a global movement that has reached nearly every continent in the last year [2010]. Although the protests in disparate nations have taken place under different forms of government ... all have expressed a similar outrage with the inequities of unfettered global capitalism.”).

<sup>18</sup> See, ALAIN BADIOU, *TIMES OF RIOTS AND UPRISINGS* (arguing the historical conditions to bring revolutionary changes are only present in the Arab mobilizations); SLAVOJ ŽIŽEK, *THE YEAR OF DREAMING DANGEROUSLY* (2012) (suggesting that the lack of real alternatives in the ‘Occupy’ movements may bring protesters to fall in love with the movement itself rather than triggering actual changes). See also, Magid Shihade et al., *The season of revolution: the Arab Spring and European mobilizations*, 4 *INTERFACE* 1 (2012) (although noticing the influence the ‘Arab Spring’ caused in other movements, calling the attention on the eurocentrism with which many approached the Arab revolutions).

<sup>19</sup> Mervat F. Hatem, *The Arab Spring Meets the Occupy Wall Street Movement: Examples of Changing Definitions of Citizenship in a Global World*, 8 *JOURNAL OF CIVIL SOCIETY* 401 (2012).

currently shaping the societies of the North and the South.”<sup>20</sup> Others have argued that the ‘Occupy’ movement, including its tactical and political decisions, was originally envisaged in light of the “emancipatory possibilities of a new political subjectivity [they saw] in Egypt.”<sup>21</sup> Therefore, ‘Occupy,’ here depicted as a global protest, was not only initiated in light of the ‘Arab Spring’—inspired specifically by its Egyptian chapter—but also crucially shaped by it.<sup>22</sup> Still others have claimed that both the ‘Arab Spring’ protests and the occupiers in North America represent examples of pre-figurative politics, “a process in which the objective continuously changes.”<sup>23</sup> Therefore, both groups of movements reject being categorized in terms of success/failure according to some standard abstractly defined and externally imposed; on the contrary, they share a common ground where their “outcomes, initial intentions ... [and] ends ... mutually evolve, interplay, change and cohere during or within the [political] practice.”<sup>24</sup> Finally, there are those who contend the occupiers and ‘Arab Spring’ mobilizations belong to contemporary disobedient movements that “express their opposition to their government’s decisions and policies” by neither institutional means nor “rallies, mass demonstrations, and

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<sup>20</sup> *Id.* at 402.

<sup>21</sup> Sarah Kerton, *Tahrir, here? The influence of the Arab Uprisings on the Emergence of Occupy*, 11 SOCIAL MOVEMENT STUDIES 302 (2012).

<sup>22</sup> Kerton, indeed, talks about how the political subjectivity Tahrir’s occupation gave birth to, *proliferated* to, rather than simply called the attention of, North American occupiers (*Id.*). While she is totally aware of the limited fashion in which this subjectivity was (literally) translated into North America (305), she also insists that the “emancipatory possibilities of the Egyptian revolution ... has already been seen in the making possible of a new, or certainly modified, form of dissent in the Western world” (307). In fact, ‘Occupy Wall Street’ is presented as an emulator of Tahrir Square “in a symbiotic exchange between the two sites of resistance” (*Id.*).

<sup>23</sup> Mathijs van de Sande, *The Prefigurative Politics of Tahrir Square-An Alternative Perspective on the 2011 Revolutions*, 19 RES PUBLICA 223, 231-2 (2013).

<sup>24</sup> *Id.* at 237.

strikes,” but “by consciously refusing to carry out the constituted laws and even the law-constituting authority of those who hold formal political power.”<sup>25</sup> This would clearly be neither coincidence nor simply iteration. There is also a substantive similitude as both movements represent forms of a radical alternative to current societies where there is a “real-time realization in practice” of that very alternative. “[R]adical change,” as van de Sande writes, “is at once envisioned and actualised.”<sup>26</sup> Finally, there are also those who, being aware that there are two identifiable threads in the current wave of protests (those seeking “political reforms,” such as the ‘Arab Spring’ protesters, and those manifesting their political discontent “regarding the political mismanagement of the socioeconomic crisis and the erosion of the welfare state,” such as in North America and Europe respectively), find a common ground in their causes.<sup>27</sup> In fact, this reading suggests that, despite differences in tactics, contexts, and antecedents, this recent wave of protests shares its thrust towards more egalitarian and democratic societies as well as its roots “in the political economy in which globalization, financialization, and neoliberalism had produced vast wealth for the elites, but increasing levels of social and economic inequality.”<sup>28</sup> Movements as different as those revolutionary waves in North Africa and public occupations across the United States and Canada would be “diverse manifestations of an international cycle of contention fighting

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<sup>25</sup> Adam Sitze, *Foreword*, in RAFFAELE LAUDINI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT. A GENEALOGY* vii (Jason Francis McGimsey trans., 2013).

<sup>26</sup> *Id.* at 231.

<sup>27</sup> Benjamín Tejerina et al., *From indignation to occupation: A new wave of global mobilization*, 61 *CURRENT SOCIOLOGY MONOGRAPH* 377, 380 (2013).

<sup>28</sup> *Id.* at 385.

against socioeconomic injustice whose primary goals and visions include a transformation of the economic system to provide greater opportunities, equality, and personal fulfillment.”<sup>29</sup>

Corollary of this understanding was Time magazine’s decision to choose ‘The Protester’ as the person of the year in 2011.<sup>30</sup> According to Time, 2011 was marked by protests that started in Tunisia with the fight against the dictatorship, continued in Egypt with the revolution against Hosni Mubarak, and later spread to Madrid, Athens, London, North America, Mexico, and Chile—to name a few. Although it recognized their “stakes were very different in different places,”<sup>31</sup> the magazine considered all these protests as part of a global step, where the global is no longer solely reduced to “a fluid worldwide economy managed by important people;”<sup>32</sup> rather, there is a common new citizenry worthy of a same label: ‘The Protester’ as the person of the year.

There are undoubtedly some common traits empirical accounts have insisted upon. First of all, and most important, these mobilizations exhibit a phenomenological similarity that shows people on the streets, occupying public spaces (or turning spaces that were privately owned into public ones), and who, depending on the political conditions, exert different degrees of violence. In other words, this is a wave of protests. Second, it is not only that the people occupy

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<sup>29</sup> *Id.* at 386. *But see*, Stavros Stavrides, *Squares in Movement*, 11 SOUTH ATLANTIC QUARTERLY 585-587-8 (2012) (emphasizing the similarity—caused by the public staged of the Arab world—in tactics that spread from Tahrir Square to Europe).

<sup>30</sup> Kurt Andersen, *The Protester*, TIME, Dec. 14, 2011.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

public spaces, but that they do so politically; their intention is to participate in the definition of decisions common to all and they resort to protests as the non-institutional means to present their positions. Third, on average, protesters around the world were young, educated and belonged to the middle class—in fact, many of them claimed, perhaps contradictorily with their so depicted fight against capitalism, that their future was curtailed as power remains unresponsive to their efforts and merits.<sup>33</sup> Fourth, there is also a convergence in the significant use organizers have made of social media—a large use that admits no single characterization that can encompass the “diversity of communicative practices” deployed.<sup>34</sup> Finally, there is no doubt all these waves of protests were, and are, challenging in their nature. *A conditio sine qua non* of the new social movements to some, their challenges have ranged from attempts to bring dictatorial regimes down to question Western democracies’ marriage with large multinationals.<sup>35</sup>

## II. Constitutional facts

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<sup>33</sup> This contradiction was noticed by ŽIŽEK, *THE YEAR OF DREAMING DANGEROUSLY*, *supra* note 18, at 10-2 (2012). *But see*, Tejerina et al., *From indignation to occupation*, *supra* note 27, at 384 (arguing that, although the mobilizations started with the call from “young, often college-educated ... citizens,” it rapidly spread and attracted “many other groups, classes, and age cohorts”) and Zeinab Abul-Magd, *Occupying Tahrir Square: The Myths and Realities of the Egyptian Revolution*, 111 *SOUTH ATLANTIC QUARTERLY* 565 (2012) (“Those who tweeted about Tahrir were not the ones who occupied it, fought bloody battles against state thugs on its frontiers, died in it, and made the revolution happen.”).

<sup>34</sup> PAOLO GERBAUDO, *TWEETS AND THE STREETS: SOCIAL MEDIA AND CONTEMPORARY ACTIVISM* (2012).

<sup>35</sup> Magid Shihade et al., *The Season of revolution*, *supra* note 18, at 11 (arguing waves of protests were directed at different crisis of hegemony).

My intention is not to question the specificities of each of these accounts, many of which I cannot but learn from, but ask whether these diverse movements can be located on a common constitutional ground. I wonder whether these different waves of protests, despite some factual similarities, are expressions of the same political power. Can we, from a constitutional law perspective, throw all these protest movements into the same basket?

While protesters can find themselves with, or trigger with their actions, the task of drafting a new Constitution either consciously or unconsciously—as Hanna Arendt has argued was the case of 1968 student mobilizations<sup>36</sup>—, it is a *constitutional fact* that some of the ‘Arab Springs’ uprisings were able to contend the locus of constitutional sovereignty from previous autocratic rulers.<sup>37</sup> Whereas some accounts have emphasized the democratic turn (or the failure to do so) of these revolts, I limit my analysis to what I shall call the *constitutional fact* of constitution-making.<sup>38</sup> In other words, I limit my analysis only to suggest some of the ‘Arab

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<sup>36</sup> HANNAH ARENDT, ON VIOLENCE 49-50 (1970).

<sup>37</sup> Some authors have argued these revolts are better conceptualized as political, rather than social revolutions: the former characterized by affecting the operation (even if redefining it) of the State and the latter by radically transforming relationships of power in society. Ricardo René Larémont, *Revolution, revolt, and reform in North Africa*, in REVOLUTION, REVOLT AND, REFORM IN NORTH AFRICA. THE ARAB SPRING AND BEYOND 1, 2-3 (Ricardo René Larémont ed., 2013).

<sup>38</sup> It is not my intention to determine whether those processes of constitution-making were, or have been, either democratic in character or pacifically concluded, if concluded at all. Some authors have suggested there are serious doubts as to whether the recent waves of uprisings brought actual democracy to the region or permitted authoritarian adaption, a debate I notice but do not engage with here. See, Garth le Pere, *The Middle East, North Africa, and the ‘Arab Spring.’ Towards revolutionary change or authoritarian adaption?* 43 AFRICA INSIGHT 1 (2013). *But see*, Nouredine Jebnoun, *Introduction: Rethinking the Paradigm of “Durable” and “Stable” Authoritarianism in the Middle East*, in MODERN MIDDLE EAST AUTHORITARIANISM: ROOTS, RAMIFICATIONS, AND CRISIS 1, 5ff. (Nouredine Jebnoun et al., eds. 2013) (arguing the recent Arab uprisings call to reconsider and reexamine the Western approach to the region that tends to emphasize cultural variables, assumed



Spring' protesters were successful in bringing about comprehensive constitutional changes, changes that were not imposed from abroad.<sup>39</sup>

As noted above, many commentators agree on the political (repressive and corrupt regimes responsible for gross violations of individual rights) and socio-economic (large financial crises accompanied with pervasive economic inequality) causes of the Arab revolts.<sup>40</sup> Some scholars also argue that these uprisings were, in part, facilitated by political openness these States strategically implemented.<sup>41</sup> Both Egypt and Tunisia, George Joffé notices, have transited from authoritarian rule to what he and others call 'liberalised autocracies:' a model signaled by "partial political liberalisation" that included the recognition of certain individual rights and toleration for political dissonance.<sup>42</sup> Eventually this liberalization contributed to the formation of autonomous ("not formally controlled by the State") social

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ethnic resilience, and religious exceptionalism, and even incompatibility with democracy, as ever present factors that explain enduring authoritarianism).

<sup>39</sup> Zachary Elkins et al., *Baghdad, Tokyo, Kabul ...: Constitution Making in Occupied States*, 49 Wm. & Mary L. Rev. 1139, 1140 (2007-8) (exploring what they call 'occupation constitutions,' "constitutions drafted or adopted in the extreme condition of one state having explicit sovereign power over another"); Noah Feldman, *Imposed Constitutionalism* 37 CONN. L. REV. 857, 858 (2004-5) (noticing how in countries such as former Yugoslavia or Iraq constitutions are being "drafted and adopted in the shadow of the gun"); *but see*, Hans Agné, *Democratic Founding: We the people and the others*, 10 INT'L J. CONSTIT. L. 836 (2012) (arguing the founding of a State is democratic when agreed to by as many persons as possible within and beyond the boundaries of the State to be founded.).

<sup>40</sup> Kamal Eldin Osman Salih, *The Roots and Causes of the 2011 Arab Uprisings*, 35 ARAB STUDIES QUARTERLY 184 (2013); Ibrahim G. Aoudé, *Egypt: Revolutionary Process and Global Capitalist Crisis*, 35 ARAB STUDIES QUARTERLY 241 (2013); Chibli Mallat, *The Philosophy of the Middle East Revolution, Take One: Nonviolence*, 3 Middle East Law and Governance 136, 139 (2011).

<sup>41</sup> Joffé, for instance, and in line with 'political opportunity' analyses, argues that the cases of Egypt and Tunisia were more successful in part due to the same political openness, limited as it was, that those very same States tolerated. In an attempt to legitimize their own autocracies, authoritarian Tunisian and Egyptian rulers open the constitutional/legal field (thus becoming liberalized autocracies) to the formation of social movements that eventually proved to be relevant in the 'Arab Spring' protests. *See*, George Joffé, *The Arab Spring in North Africa: origins and prospects*, 16 THE JOURNAL OF AFRICAN STUDIES 507 (2011).

<sup>42</sup> *Id.* at 511-14.

movements, which, through their independent agency, were able to challenge regime hegemony.<sup>43</sup> As Joffé puts it,

liberalized autocracies, ironically enough, set up the conditions for their own demise by creating space for the evolution of autonomous precursor movements—ostensibly under regime control—which, in the right conditions, could evolve into movements of political contention.<sup>44</sup>

Despite this partial openness, it is also true that a political regime—together with its Constitution—which offers little, if any, possibilities of redemption for such structural shortcomings has few chances of surviving. Constitutional regimes appeal to obedience in light of political faith and trust, not of false idolatry where empty forms of alleged participation are used to put democratic make-up on autocratic regimes.<sup>45</sup> And faith, Balkin writes, is a matter of constant and ongoing appreciation that runs in a backward-looking and forward-looking fashion necessarily tied to present events.<sup>46</sup>

This has long been held to be true of liberal constitutional regimes.<sup>47</sup> John Locke, for one, argued governmental power is held in fiduciary capacity, which is to say that the people *entrust* their institutions with the power to achieve certain ends.<sup>48</sup>

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<sup>43</sup> *Id.* at 514-7.

<sup>44</sup> *Id.* at 517

<sup>45</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

<sup>46</sup> *Id.* at 73-4.

<sup>47</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 367 (Peter Laslett ed., Cambridge University Press 2005) (1698) (“For all *Power given with trust* for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.”).

<sup>48</sup> *Id.* at 366-7.

Limited as those ends appear under the liberal rubric, what is important is to notice is that *that trust* is always under evaluation. By whom? Let John Locke answer:

To this I reply, *The People shall be Judge*; for who shall be *Judge* whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deposes him, and must, by having deposed him have still a Power to discard him, when he fails in his Trust?<sup>49</sup>

Ronald Dworkin, for another, has made a similar claim. Dworkin wrote that the legitimacy of a State, legitimacy which he saw certainly as a matter of degree, “depends on both how a purported government has acquired power and how it uses that power.”<sup>50</sup> Even when States are not fully just to their citizens legitimacy can be contained only if there are “political processes of correction ... available ...”.<sup>51</sup>

Not only liberals have emphasized the role active vigilant people and political processes open to the people’s decisive intervention.<sup>52</sup> This has also certainly been the case of republicanism, where the government is always under the vigilant eye of the citizens. As Pettit has argued, in a republican perspective governmental

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<sup>49</sup> *Id.* at 426-7. See also, Benjamin Constant, *On the Liberty of the Ancients compared with that of the moderns*, in CONSTANT POLITICAL WRITINGS 307, 326 (Biancamaria Fontana ed., Cambridge University Press 2003, 9<sup>th</sup> print.) (“[T]he people who, in order to enjoy liberty which suits them, resort to the representative system, must exercise an active and constant surveillance over their representatives ....”).

<sup>50</sup> DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 8, at 321.

<sup>51</sup> *Id.* at 323.

<sup>52</sup> See, RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007) (emphasizing the procedural openness democracies should show to permit citizen authorship of collective decisions).

legitimacy is evaluated according to how a (politically deemed acceptable) social order is imposed by a State.<sup>53</sup> Thus, interference is generated and is only acceptable as long as freedom from domination is secured.<sup>54</sup>

Of course, to secure individual liberty citizens must remain vigilant of their government—the very same precondition to secure the commonwealth’s freedom.<sup>55</sup> This is why a variant of republicanism hails processes open to popular intervention; processes open to political contestation, rather than static rights defined in a depoliticized fashion, are the ways to secure and recognize equal status, respect, and concern for citizens.<sup>56</sup> Republican emphasis on “enabl[ing] each individual citizen to exercise an equal right of participation in the making of the laws”<sup>57</sup> also justifies the people’s capacity to exert democratic influence and, in the long haul, imposition of a popular direction on government. As Pettit puts it, democratic and popular control over government “enables us to explain why and how government should be forced ... to operate on the people’s terms.”<sup>58</sup>

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<sup>53</sup> Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 CURRENT LEGAL PROBLEMS 59 (2012) (“The justice question is whether the coercively imposed order is acceptable or justifiable or desirable; the legitimacy question is whether the coercive imposition of the order is acceptable or justifiable or desirable.”).

<sup>54</sup> PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (2002 rep.) 51 (arguing liberty as non-domination to be the distinctive of republican thought, where liberty is understood not as the absence of interference, but “against interference on an arbitrary basis”).

<sup>55</sup> QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 26 (2006 9<sup>th</sup> prin.) (“A free state is a community in which the actions of the body politic are determined by the will of the members as a whole.”); MAURIZIO VIROLI, REPUBLICANISM 49-50 (Anthony Shugar trans., 2002) (arguing that classical republicans considered self-government a condition of liberty).

<sup>56</sup> BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 52, at 156 (arguing republicanism pushes for a form of governmental control “in terms of popular controls rather than a priori restrictions on certain kinds of governmental intervention”).

<sup>57</sup> SKINNER, LIBERTY BEFORE LIBERALISM, *supra* note 55, at 30.

<sup>58</sup> PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 3 (2012).

While some scholars have affirmed the existence of an Arab resilience to live under authoritarian ruling, which is not the same as considering the difficulties to be found when freed from autocratic governments,<sup>59</sup> apparently some Arab revolutions have also endorsed a fuller comprehension of political citizenship assuming a (now we know, crucial) say in their political fate.<sup>60</sup> Seyla Benhabib, for instance, claimed that the ‘Arab Spring’ movements were revolutionaries seeking to establish a “new order of freedom.”<sup>61</sup> By practicing what Benhabib sees as a “modern understanding of politics ... they aim[ed] at constitutional reform.”<sup>62</sup> Joel Colon-Rios and Allan Hutchinson make an even more concrete claim: “with warts and all,” they argue, ‘Arab Spring’ revolutions show “an undeniable embodiment and manifestation of constituent power at its most insistent and immediate.”<sup>63</sup> Constitutional facts accompany their assessment.

First of all, the constitutional facts of Libya support the aforementioned affirmations that some African revolutions were a manifestation of the exercise of constituent power. There is little I want to add to what commentators have already noticed: namely that the Libyan case has proved more difficult as it is the State

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<sup>59</sup> “How difficult it is for a people accustomed to live under a prince to preserve their liberty, should they by some accident acquire it as Rome did after the expulsion of the Tarquins, is shown by numerous examples ...”. NICCOLO MACHIAVELLI, *THE DISCOURSES* 153 (Penguin Classics 2003) (1531).

<sup>60</sup> I am not suggesting that Arab uprisings show their protesters have endorsed neither liberal nor republican ideals. What I am trying to do, however, is to understand how these revolutionaries embody vigilant communities concerned about their political fate and decided to exercise that *right*.

<sup>61</sup> Seyla Benhabib, *The Arab Spring: Religion, revolution and the public sphere*, Eurozine, (May. 5, 2011), <http://www.eurozine.com/articles/2011-05-10-benhabib-en.html>.

<sup>62</sup> *Id.*

<sup>63</sup> Joel Colon-Rios & Allan Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 89 DENVER U. L. REV. 593, 600 (2012).

itself, besides a new Constitution, what is to be built.<sup>64</sup> The extremely personalist and stateless regime al-Qadhafi promoted was both the problem and part of the solution, for once the revolution succeeded in bringing him down the whole *State* (here used in a rhetorical sense) fell with him. Unsurprisingly, drafting a new Constitution is part of the tasks ahead.<sup>65</sup> As I write this work reports show that the constituent process, although still facing a large number of substantial obstacles, is under way.<sup>66</sup>

Although an authoritarian regime, Egypt instead exhibited some political openness that—according to Joffé—allowed autonomous social movements to flourish.<sup>67</sup> This would explain the relative success social mobilization had in Egypt, at least when compared with those monarchical regimes where incipient protests countered, and finally appeased, top-down constitutional reforms.<sup>68</sup> As soon as the uprisings started to calm down, the Armed Forces—a prominent actor in Egypt’s political and economic life<sup>69</sup>—took power and decided to supervise the political future. Moreover, once the uprising started to come to an end, groups that had

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<sup>64</sup> Mieczyslaw P. Boduszynski & Duncan Pickard, *Libya starts from scratch*, 24 JOURNAL OF DEMOCRACY 86 (2013) (arguing al-Qadhafi pursued a policy of “statelessness” which has conspired against the “development of effective governing institutions”).

<sup>65</sup> Alia Brahimi, *Libya’s Revolution*, 16 THE JOURNAL OF AFRICAN STUDIES 605 (2011).

<sup>66</sup> Rhiannon Smith, *Libya’s Constituent Assembly: Light at the end of the tunnel?*, OPENDEMOCRACY.NET, (Nov. 11, 2013), <http://www.opendemocracy.net/arab-awakening/rhiannon-smith/libyas-constituent-assembly-light-at-end-of-tunnel>

<sup>67</sup> Joffé, *The Arab Spring in North Africa*, *supra* note 41, at 511-7.

<sup>68</sup> Imen Gallala-Arndt, *Constitutional Reforms in Tunisia, Egypt, Morocco and Jordan: A Comparative Assessment*, IEMED2012 141, 142 (2012), *available at*: [http://www.iemed.org/observatori-en/arees-danalisi/arxiu-adjunts/anuari/med.2012/gallala\\_en.pdf](http://www.iemed.org/observatori-en/arees-danalisi/arxiu-adjunts/anuari/med.2012/gallala_en.pdf)

<sup>69</sup> *See*, MASON, *WHY IT’S STILL KICKING OFF EVERYWHERE*, *supra* note 11, 5 ff. (insightfully explaining the relevant role the Army played, and plays, in Egypt, as well as its decisive turn in supporting the revolution).

been previously united against Mubarak diverged as to the constitutional agenda. The more conservative groups in the Muslim Brotherhood (a political coalition and movement proscribed under Mubarak and which eventually won the first parliamentary elections post-Tahrir) stood for constitutional reforms whereas the most liberal wing of protesters decidedly supported a plan for a new Constitution.<sup>70</sup> Although at the beginning the Army established an informal alliance with the Muslim Brotherhood, a society that originally rendered little changes to the Constitution,<sup>71</sup> the Egyptian process is still open.<sup>72</sup> In fact, Constitutional facts show that there was an exercise, however dramatically disputed, of constituent power.<sup>73</sup> On January 19, 2014, 98.1% of Egyptians said yes to a new Constitution.<sup>74</sup>

Finally, Tunisia—which many signal as the place where the ‘Arab Spring’ began—also supports the notion of African revolutions exercising constituent power. Tunisia has also been depicted as a liberalized autocracy.<sup>75</sup> That said, the most striking difference when compared with Egypt stems from the minor role the army

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<sup>70</sup> H.A. Hellyer, *Revolution in the Arab World: Egypt and its Challenges*, 3 MIDDLE EAST LAW AND GOVERNANCE 118, 121-2 (2011).

<sup>71</sup> Some authors suggest this pact proved to be a counter-revolution with the Army exercising a kind of “Caesarist role.” Brecht De Smet, *Revolution and Counter-Revolution in Egypt*, 78 SCIENCE & SOCIETY 11 (2014).

<sup>72</sup> Joffé, *The Arab Spring in North Africa*, *supra* note 41, at 521 (arguing this agreement thwarted the objectives more liberal revolutionaries sought).

<sup>73</sup> After the first parliamentary and presidential elections held after the revolution, where the Muslim Brotherhood succeeded and Mohamed Morsi was elected president, a constituent council was appointed. This council was declared unconstitutional, triggering new disputes and uprisings that concluded with Morsi’s ousting—‘enforced’ again by the same Armed Forces—and a newly instituted government. That has recently consulted a new Constitution. *See*, Oliver Housden, *Egypt: Coup d’Etat or a Revolution Protected?*, 158 THE RUSI JOURNAL 72 (2013).

<sup>74</sup> *Egypt referendum: ‘98% back new constitution’*, BBC NEWS MIDDLE EAST, Jan. 19, 2014, <http://www.bbc.co.uk/news/world-middle-east-25796110>.

<sup>75</sup> Joffé, *The Arab Spring in North Africa*, *supra* note 41, at 511-7, 518-9.

played in the pre-revolutionary political life and during the revolts.<sup>76</sup> That marginal role, along with partial political openness—as Joffé argues—, created autonomous spheres that social movements were able to capitalize during the upheavals that started in 2010. It is true that as soon as former ruler Ben Ali fled to Saudi Arabia differences arose among the opposition.<sup>77</sup> Nonetheless, a commission with members from civil society and political parties was established to set the bases for a new constituent assembly.<sup>78</sup> Its work was not easy; difficulties building up political coalitions within the constituent assembly were coupled with new street demonstrations that signaled protesters' impatience for changes. Nevertheless, Tunisia elected its second constituent assembly on October 2011, the very same form of constituent power that defined Tunisia's political form since its independence from France in 1956.<sup>79</sup> The process proved to be as turbulent as the Egyptian chapter—the process took a year longer than supposed and was buffeted by two assassinations and rising terrorism, as well as increasing popular protests.<sup>80</sup> However, Tunisia inaugurated 2014 with a new Constitution that has

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<sup>76</sup> *Id.* at 519; Lisa Anderson, *Demystifying the Arab Spring. Parsing the differences between Tunisia, Egypt, and Libya*, 90 FOREIGN AFFAIRS 2, 3 (2011) ("Tunisia's military also played a less significant role in the country's revolt than the armed forces in other nations experiencing unrest. Unlike militaries elsewhere ... [the Army] does not dominate domestic economy.").

<sup>77</sup> Anderson, *Demystifying the Arab Spring*, *supra* note 76, at 4 (arguing the old opposition tried to take advantage of the political vacuum, a move that proved fiercely contested by the young dissidence).

<sup>78</sup> Gallala-Arndt, *Constitutional Reforms*, *supra* note 68, at 143.

<sup>79</sup> Alaya Allani, *The post-revolution Tunisian Constituent Assembly: controversy over powers and prerogatives*, 18 THE JOURNAL OF AFRICAN STUDIES 131, 131-2 (2013).

<sup>80</sup> Carlotta Gall, *Tunisian Constitution, Praised for Balance, Nears Passage*, NY TIMES, Jan. 14, 2014, available at [http://www.nytimes.com/2014/01/15/world/africa/tunisian-constitution-praised-for-balance-nears-passage.html?\\_r=0](http://www.nytimes.com/2014/01/15/world/africa/tunisian-constitution-praised-for-balance-nears-passage.html?_r=0).



been praised because of its equilibrium between Muslim heritage (most of the time unduly associated to an undemocratic whiff)<sup>81</sup> and individual liberties.<sup>82</sup>

### III. A constitutional distinction

Do revolutions necessarily come with new constitutions? Paul Kahn has suggested something along these lines. According to Kahn, “[a] successful revolution establishes its own value by creating its own truth.”<sup>83</sup> This is why revolutions are both negative and positive: they negate the status quo in order to replace it with a new order.<sup>84</sup> Moreover, constitutions, says Kahn, are not only the product of revolutions, but “the inner truth of revolution[s].”<sup>85</sup> At any rate, drafting a new constitution might be a good sign that a political revolution is beginning to end,<sup>86</sup> a sound “measure of its durable success”<sup>87</sup> and an adequate way to concretize “revolutionary aspirations ... while also providing functional elements and institutions to reinforce these aspirations ...”.<sup>88</sup> As Landau puts it, accounting for

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<sup>81</sup> Consider, for instance, the preamble of the new Tunisian Constitution, which states, “Tunisia is a state of civil character, based on citizenship, the will of the people and the primacy of law.” *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 47 (2012).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Colon-Rios & Hutchinson, *Democracy and Revolution*, *supra* note 63; David Landau, *The Importance of Constitution-Making*, 89 DENVER U. L. REV. 611, 611-2 (2012) (arguing revolutions are sequential events where revolutions occur first and constitution-making later).

<sup>87</sup> Mallat, *The Philosophy of the Middle East Revolution*, *supra* note 40, at 147; Gallala-Arndt, *Constitutional Reforms*, *supra* note 68, at 141 (“The upheavals and revolts for more economic justice and political participation in the Arab world will not bear fruit if they are not consolidated with constitutional reforms.”).

<sup>88</sup> John Liolos, *Erecting New Constitutional Cultures: The problems and promise of constitutionalism post-Arab Spring*, 36 B.C. INT’L & COMP. L. REV. 219 (2013).

revolutions cannot “end at the moment in which the old regime dies. In fact the new regime needs to organize itself in some fashion, by establishing fundamental rules.”<sup>89</sup> Failure to exercise constituent power following a revolution may turn its aspirations elusive.<sup>90</sup> This is further emphasized by authors such as Hans Kelsen, for whom revolutions were identified by the replacement of the entire legal order,<sup>91</sup> or more tellingly by Negri, who asserted “[c]onstituent power as all-embracing power is in fact the revolution itself.”<sup>92</sup>

What I want to stress here is that, when that constituent power acts, it does so unbound by existing rules. Positive rights thus become irrelevant—in the sense they do not, as they cannot, justify neither the uprising nor the attribution of constituent power.<sup>93</sup> Whereas you can speak of a positive right to protest, you cannot talk of a positive right to revolution—in the sense I argued before, that is, of being rights enforceable before an official body. Take Locke once again. According to Locke, it is for the people to decide whether the prince or the legislative power

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<sup>89</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 614.

<sup>90</sup> Liolos, *Erecting New Constitutional Cultures*, *supra* note 88, at 231.

<sup>91</sup> *Id.*

<sup>92</sup> ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 1 (Maurizia Boscagli trans., 1999).

<sup>93</sup> While rights cannot *legally* justify neither revolutions nor the exercise of constituent power, rights (i.e. the right to be prosecuted under a due process of law, the right not to be tortured) might certainly become relevant once a revolutionary movement has been defeated. As Laudani put it when reviewing Fichte, a revolution is a way of escaping what revolutionaries see as inhuman conditions (“an audacious shot for humanity”), but when “unsuccessful, precipitates society into ‘worse and worse misery.’” RAFFAELE LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT* 74-5 (2013). Although talking about a different context—the 9/11 terrorists attacks and the U.S. response—Jeremy Waldron has argued States (where there is one) must respect certain *legal*, as well as moral, limits when responding to challengers. JEREMY WALDRON, *TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* (2010).

has acted against their trust.<sup>94</sup> The language he resorts to here is very telling, for it shows the people pass this judgment not resorting to established rules, but appealing to heaven:

But farther, this Question, (*Who shall be Judge?*) cannot mean, that there is no Judge at all. For where there is no Judicature on Earth, to decide Controversies, amongst Men, *God in Heaven is Judge*: He alone, 'tis true, is Judge of the Right. But *every Man is Judge* for himself, as in all other Cases, so in this, whether another hath put himself into a State of War with him, and whether he should appeal to the Supreme Judge, as *Jephtha* did.<sup>95</sup>

Although Locke is addressing the people's prerogative to resist and not setting forth a theory of constituent power, once the people have resisted the illegitimate government and returned to a state of nature they constitute new forms of government in a legal and institutional vacuum.<sup>96</sup>

The republican tradition holds a similar argument when considering how a corrupted city, a city not oriented to the common good, could get rid of their rulers, for once corruption has become so widespread in a city neither amending laws nor fixing institutions would be enough.<sup>97</sup> Rather, new laws and institutions must be

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<sup>94</sup> LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 47, at 426-7.

<sup>95</sup> *Id.* See also, JEREMY WALDRON, GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 225 ff (2002).

<sup>96</sup> JOEL COLÓN-RÍOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 8 (2012) (arguing a truly democratic interpretation of the constituent power should take us not to confine it solely to resistance moments, but "at any moment in the life of a constitutional regime ...").

<sup>97</sup> MACHIAVELLI, DISCOURSES, *supra* note 59, at 160-2. See also, ISEULT HONOHAN, CIVIC REPUBLICANISM 102-3 (2002) (explaining the North American independence along the lines of revolution as the means "to restore virtue" of Americans in light of what they saw as a corrupted crown).

introduced all at once.<sup>98</sup> To do this, Machiavelli warned, “normal methods will not suffice now that normal methods are bad.”<sup>99</sup>

Hence it is necessary to resort to extraordinary methods, such as the use of force and appeal to arms, and, before doing anything, to become a prince in the state, so that one can dispose it as one thinks fit.<sup>100</sup>

In a similar vein, although in a positive sense, Pettit has argued that accepting the legitimacy of a regime implies “that attempts to change unjust laws should be restricted to measures that are consistent with the regime’s remaining in place.”<sup>101</sup> *Contrario sensu*, illegitimacy of the government triggers recourse to means outside the system.<sup>102</sup> In republican thought, Pettit had previously argued, “the people are entitled to challenge the government about how far and how well it is discharging that [political] trust [that the rules were required to discharge on behalf of the people].”<sup>103</sup> This continuous assessment, where sovereignty actually resides,

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<sup>98</sup> MACHIAVELLI, DISCOURSES, *supra* note 59, at 163.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Pettit, *Legitimacy and Justice*, *supra* note 53, at 62. Ronald Dworkin made a similar argument when discussing the kind of political obligations our living together under, and acting through, a State engenders. He called this a political, not a constitutional (less a legal), right. In fact, he distinguishes between regular means available to correct unjust or unsound policies, on the one hand, and revolution, on the other, when “the stain is dark and very widespread ... and if it is protected from cleansing through politics ...”. DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 8, at 320-3.

<sup>102</sup> This is an argument I intend here to be rhetorical. In fact, Pettit is quite clear about the impossibility of returning to a state of nature as “we are born into a political world.” Pettit, *Legitimacy and Justice*, *supra* note 53, at 75-6. However, by the same token is important to notice the exercise of constituent power is exactly that: recognition of the necessity of shaping our political community. What is crucial, though, is that by exercising constituent power we shape our political and public arrangement in a different fashion than it was established in the previous (illegitimate) regime.

<sup>103</sup> PETTIT, REPUBLICANISM, *supra* note 54, at 202.

includes the people's "right to resist and overthrow" the government "that fails to do its job."<sup>104</sup>

Unusual means, therefore, are precisely those means that take place—to paraphrase Pettit—once the regime does not remain in place. And once a regime does not remain in place, its institutions and regulations wither away with it. As Landau notes quoting Kelsen, in a revolution "the constitution is altered or replaced by some process other than the one contemplated in the text."<sup>105</sup> Antonio Negri makes a similar claim: from a juridical viewpoint the constituent power shows the paradox of being "a power rising from nowhere organiz[ing] law."<sup>106</sup>

It could hardly be in a different fashion. Carl Schmitt explained that the political subject who decides the political and juridical form of the community exercises the constitution-making power.<sup>107</sup> This power is unbound, unlimited and ever present, which signals a political break with the anterior political form (a previous constitution).<sup>108</sup> Hence, this power of political decisiveness and violence (in the sense of the breaking with the past and giving place to a new order) needs not be regulated—although a certain procedure will be necessary to channel its political

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<sup>104</sup> *Id.*

<sup>105</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 616.

<sup>106</sup> NEGRI, *INSURGENCIAS*, *supra* note 92, at 1.

<sup>107</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 125 (Jeffrey Seitzer trans. & ed., 2008).

<sup>108</sup> *Id.* at 125-8.

creativity.<sup>109</sup> It is a power that positively constitutes but is not constituted, let alone constrained, channeled, or limited by previous rules.<sup>110</sup>

Could it be that constitutions contain provisions recognizing the constituent power? Could State constitutions contain and protect the right of those who seek to fund the very same constitutional scheme anew? Experience shows this is hardly the case.<sup>111</sup> Immanuel Kant, for one, rejected such a possibility. Kant thought that would imply a contradiction in its own terms.<sup>112</sup> “There cannot be a law which permits lawlessness”—Beck wrote reviewing Kant’s ideas on the matter.<sup>113</sup> In fact, he noticed such constitutions would confess their own precariousness, namely that constitutions depend on the will of the people and, to a certain extent, on their political and social practices.<sup>114</sup> Antonio Negri, although with a different emphasis, has also noted that the constituent power “resists being constitutionalized.”<sup>115</sup> Schmitt also rejected the idea:

The constitution-making will of the people is an unmediated will. It exists prior to and above every constitutional procedure. No constitutional law,

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<sup>109</sup> *Id.* at 127-8, 130-2.

<sup>110</sup> *Id.* at 136-42, 145-6. *See also*, KAHN, *POLITICAL THEOLOGY*, *supra* note 110, at 52-3 (arguing constituting will contains the rule which it institutes, but it is not subject to any rule).

<sup>111</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 616.

<sup>112</sup> *See*, Lewis W. Beck, *Kant and the Right of Revolution*, 32 *JOURNAL OF THE HISTORY OF IDEAS* 411, 413-5 (1971). Cass Sunstein made a similar argument, although related to the right to secede. Though secession “might be justified as a matter of politics or morality,” he argued, “constitutions ought not to include a right to secede.” Cass R. Sunstein, *Constitutionalism and Secession*, 58 *U. Chi. L. Rev.* 633, 633-4 (1991).

<sup>113</sup> *Id.* at 413-4.

<sup>114</sup> *Id.* at 414 (“Revolution abrogates positive law; therefore positive law and its system condemn revolution. Revolution means return to nature, which the contract establishing positive law renounces.”). *See also* JEREMY WALDRON, *THE LAW* 63-8 (1990) (arguing constitutions, either written or not, depend on social practices, deference and acceptance from those who are bound by them).

<sup>115</sup> NEGRI, *INSURGENCIAS*, *supra* note 92, at 1.

not even a constitution, can confer a constitution-making power and prescribe the form of its initiation.<sup>116</sup>

Others have suggested the opposite. Landau, for instance, discusses the possibility of constraining the exercise of constituent power. Why should we, Landau asks, consider “constitution-making as a kind of legal black hole” open to majoritarian taking?<sup>117</sup> Colon-Rios and Hutchinson argue constitutions themselves could channel the exercise of constituent power, although they have suggested this in order to radicalize democracy by permitting the permanent actualization of the people’s fundamental will.<sup>118</sup> Though they recognize constituent power is hard to handle, they also highlight Schmitt’s Constitutional Theory passages where he argues some form organization or procedure would be needed to implement the people’s will. From here they go on to suggest that “constitutions should approach revolutions and constituent power as offering opportunities for correcting existing injustice through radical and participatory change.”<sup>119</sup>

A recent research by Tom Ginsburg et al. shows constitutions that recognize the ‘right to overthrow your government.’ They conclude that mostly all constitutions

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<sup>116</sup> SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 107, at 132.

<sup>117</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 612. *But see*, Carl J. Friedrich, *The Political Theory of the New Democratic Constitutions*, in *CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II* 13, 23-4 (Arnold J. Zurcher ed., 1955 2<sup>nd</sup> ed.) (showing constitutions might also seek to place “enemies of the constitution beyond its protective frame,” in clear reference to “Hitler’s seizure of power ‘from within’”).

<sup>118</sup> Colon-Rios & Hutchinson, *Democracy and Revolution*, *supra* note 63, at 605-9.

<sup>119</sup> *Id.* at 606. *But see*, Emiliios Christodoulidis, *Against Substitution: The Constitutional Thinking of Disensus*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 189, 204 (Martin Loughlin & Neil Walker eds., 2008) (arguing processes of constitutional actualization of the constituent will are open to ‘involution,’ where “modalities of responsiveness and questionability renewal may remain bound to the pathways of the constituted ...”).

that include a provision of the kind I'm discussing here do it either as a "forward-looking tool that constrains future government abuse, empowers national citizenry, and acts as an insurance policy against undemocratic backsliding," or as a "backward-looking justification for coup-makers who seek retroactive legitimacy for whatever political crimes placed them in a position to be making a new constitution in the first place."<sup>120</sup>

Even if constitutionally included, are these provisions to be adjudicated by an official body? These provisions seem largely unnecessary or at best merely rhetorical, as many of them put their enforcement in the hands of the citizens themselves and, as experience has shown, they cut both ways.<sup>121</sup> It is true that under some circumstances official bodies may be caught up in resistance,<sup>122</sup> but this is far from being a form of adjudication or enforcement. Moreover, official bodies might actually act in an opposite fashion by sending confusing political signals.<sup>123</sup> There is also the risk, as the recent events in Egypt<sup>124</sup> and Turkey<sup>125</sup>

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<sup>120</sup> Tom Ginsburg et al., *When to Overthrow your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184 (2013). At any rate, they also note the right to resist operates as a second-rate right, namely "one by which other substantive rights are made secure." This is why "the constitutional text cannot really be considered the source of the right per se" (at 1193-4).

<sup>121</sup> *Id.* at 1124-5.

<sup>122</sup> Say in the case a branch or agency is unwilling to enforce governmental decisions they regard as illegitimate.

<sup>123</sup> This is what occurs when official bodies continue fulfilling their duties, despite a parallel initiation of constituent power. Amid Quebec's attempts to secede, the Supreme Court held that, although it "would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal," Quebec was bound to "respect[] the rights of others," including those Québécois who reject the idea and the majority of Canada as a whole. It is true that the Court rejected supervising political conversations between Quebec and the rest of the provinces; however, it made clear the legal implications these conversations may have in terms of the rights of those citizens involved ("Where there are legal rights there are remedies"). Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 77-105.

<sup>124</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 615.



have shown, that bringing official bodies to adjudicate the constitutional contours on the constituent power might open ways to subvert popular opinion or prolong the undecisive moment. Although there are some experiences that show courts' willingness to pass decisions concerning the *legality* of constituent power exercise,<sup>126</sup> constituent power politically proceeds in face of, in the sense that *it needs not*, these judicial decisions.<sup>127</sup>

Finally, it is true, as I mentioned before, that some scholars have argued autocratic regimes, by liberalizing their politics, planted the seed of their own future destruction. However, this does not contradict my claims here, for that liberalization, which included the recognition of certain rights and a partially opened public sphere, permitted the spread of a political, rather than judicially enforceable, sense of injustice. In fact, the contradiction here was permitting movements to flourish independently from the State and its official (norm-producing, adjudicative and law-enforcing) institutions.

The aim behind this section has not been to question that different waves of protests in the West and in the North African and Middle East regions are not based on similar (both political and political economic) claims. My only intention here has been that of drawing a constitutional distinction to show that (i) some of

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<sup>125</sup> Asli Bâli, *Courts and constitutional transition: Lessons from the Turkish case*, 11 INT'L J. CONSTIT. L. 666 (2013) (showing how courts can act as bodies helping to shield elitist regimes from democratic change).

<sup>126</sup> Joel Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365 (2011) (showing cases where courts have decided on the exercise of constituent power both "to defend the idea of an unlimited popular will, but also to limit political [constituted] power in profound ways").

<sup>127</sup> Landau, *The Importance of Constitution-Making*, *supra* note 86, at 617 ("the public always has a residual power to call a constituent assembly to replace the existing political order.").

them decided to push the exercise of constituent power as a way to overcome those political difficulties, (ii) whereas others have engaged in actions that leave regimes in place—although turning their backs on them.

As some authors have argued, these waves of protests, despite their global dimensions, exhibit regional expressions.<sup>128</sup> From a constitutional viewpoint—which I have been trying to stress here— these differences show some of these movements “have mainly demanded political reforms to initiate or deepen ongoing processes of democratization”—the cases of Egypt, Tunisia and Libya—while others show a “massive display of discontent regarding the political mismanagement of the socioeconomic crisis and the erosion of the welfare state”<sup>129</sup>—admittedly, as the facts show, the cases of European and other Western mobilizations.<sup>130</sup> Contrary to their Arab counterparts, protests in the West were not revolutionary in character, at least not in the sense of triggering new processes of constitution-making—with the sole exception of Iceland, a process which eventually failed.<sup>131</sup> However, a hasty impulse to put all recent waves of protests in

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<sup>128</sup> Benjamín Tejerina et al., *From indignation to occupation*, *supra* note 27, at 380.

<sup>129</sup> *Id.*

<sup>130</sup> *But see*, Raúl Sánchez, *15M: Something Constituent This Way Comes*, 11 SOUTH ATLANTIC QUARTERLY 573, 575 (2012) (arguing the 15M movement in Spain embodies a “prototype of constituent power ... a work in progress, a radical invention, and an open, intermittent—and in large measure only incipient—process”).

<sup>131</sup> I am totally aware that many of the European protesters and their North American counterparts have actually pushed a different strategy. Instead of targeting the State and its institutions, they have rather decided not to pose any specific demands, let alone interact with political representatives (which protesters claim represent none of them). However, in the best *constitutional* light these movements have only become tolerated and politically marginalized (at least so far).

the same basket has contributed to obscure this constitutional distinction—and, as I proceed to argue now, its constitutional consequences.

## Conclusions

In an interesting interview held in 2012, Noam Chomsky was asked whether he saw the Occupy movement as a precursor to a revolution. As he favored the movement and addressed occupiers many times throughout the duration of the occupations, it is important to highlight his answer:

To have a revolution—a meaningful one—you need a substantial majority of the population who recognize or believe that further reform is not possible within the institutional framework that exists. And there is nothing like that here, not even remotely.<sup>132</sup>

Let's assume, as I explained before in this chapter, it might be the case that all protest movements that started in 2010 have a common grievance: they all manifest their discontent with gross economic inequality. Even if this is true—and I think it is one of the main reasons that explains the connection among recent acts of resistance—, a distinction must be drawn from a constitutional law viewpoint. Simply put, I have aimed at showing that from a constitutional viewpoint challengers have chosen (either consciously or unconsciously) different means to advance their discontent.

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<sup>132</sup> NOAM CHOMSKY, OCCUPY! 48 (2012).

On the one hand, protesters have pursued a more radical path by overthrowing governments and exercising their constituent power in order to fund their States' political shapes anew. This, I argued, has been the case of Libya, Egypt and Tunisia. On the other, protesters have not defied the locus of constitutional legitimacy, although they certainly aimed at influencing its comprehension. Furthermore, these protesters not only have acted assuming the regime would remain in place, but have also sought protection for their actions of dissent from it. This is a sensible path since it only makes sense to talk of a positive right to protest assuming the State remains in place—with all its advantages and disadvantages that I shall explore in the following chapters.

## CHAPTER 3

### THE (POSITIVISTIC) RIGHT TO PROTEST: FOUNDATIONS

#### I. 'A deteriorated right'

A. *Rights*

B. *A (positivistic) right*

#### II. Freedom of expression

A. *Protests as expressions*

B. *Expression as a right*

#### III. Freedom of assembly

A. *Freedom of assembly as an independent right*

B. *TPM regulations and public order*

### Introduction

*"Aturem el Parlament, no deixarem que aprovin retallades."*<sup>\*</sup>

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\* "Stop the Parliament. We won't permit further cuts," stated a banner opened before the provincial *Parlament* in Catalonia, where protesters of the 15M movement intended to impede members of the Congress from entering the building. They did so by throwing objects at the Congressmen, circling and shaking authorities, and blocking the entrance. Protesters were accused of attacking the institutions of the State and assaulting *Parlament* members. *La fiscal pide penas de cinco años y medio de cárcel para los 20 acusados de asediar el Parlament [The prosecutor asks for 5.5 years in prison for 20 accused of besieging the Parliament]*, LAVANGUARDIA.COM, May. 17, 2013, available at <http://www.lavanguardia.com/politica/20130517/54373612927/fiscal-pide-cinco-anos-medio-acusados-asediar-parlament.html>.

To talk of the *positive* right to protest assumes the existence of the State and that the regime remains in place. Seen in this light, the right to protest is a constituted right, a right whose existence and protected exercise largely depends on the State. This is what (legally and constitutionally) distinguishes the protests that occurred in North Africa, on the one hand, from the protests that Western countries witnessed, on the other. Whereas the former were aimed—and up to a certain point successful—in bringing the regimes down to be replaced by new constitutional decisions, the latter have largely operated within a constitutional scheme protesters have not crucially contested.

This chapter deals with this latter form of protests. It deals with the *positive* right to protest. It starts (I) insisting on its constituted character. This means the right to protest is sympathetic to the regime remaining in place, which brings both advantages and limits. In any case, it is a (A) positive right different from the right to resist, which does not need the civil state. (B) Avoiding a static definition of rights and stressing their institutional implications, it then proceeds (II) to describe the (positive) rights normally invoked to constitutionally shield protest. Although largely descriptive, this section also advocates for a certain interpretation (certainly based on experience) of these rights as the most consistent with a constitutional theory sensitive to protests as means of political participation.<sup>1</sup>

### **I. 'A deteriorated right'**

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<sup>1</sup> This might be a largely unavoidable path, which follows from the intrinsically aspirational, as well as descriptive, character many constitutional provisions exhibit.

Professor Costas Douzinas argues that the right to protest is a deteriorated version of the right to resistance. According to him, liberal constitutionalism diluted the right to revolution by excluding its wording from constitutions<sup>2</sup> and providing a surrogate instead: “[a] modest right to protest against laws and policies without challenging the social order ... included in constitutions and human rights documents.”<sup>3</sup> Therefore, the right to protest, rather than being what once was the right to question the founding principles of a resisted order, has become “an example of ‘Speakers’ corner’ mentality: a place for people to ‘let off steam’ and for the political order to claim a variable degree of tolerance and broadmindedness.”<sup>4</sup> While resistance cannot be prevented from (ever) returning when there is a mismatch between the written laws (constitutions, etc.) and the popular sense of (in)justice,<sup>5</sup> the right to protest would at best signal only its beginning.

Professor Douzinas is right in the sense I have been arguing here: that the right to protest is a positive (and therefore constitutionally protected) right, whereas the right to resist (as well as to rebellion and/or to revolution) need not to be adjudicated by an official body. While the former presupposes the State as its condition of efficacy, the latter is natural<sup>6</sup> in the very limited sense that the civil

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<sup>2</sup> COSTAS DOUZINAS, *PHILOSOPHY AND RESISTANCE IN THE CRISIS* 82-3 (2013).

<sup>3</sup> *Id.* at 83.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 77-81, 83-4. I cannot stop noticing certain ambivalence here, for if resistance can never be wished away, that is to say, if constitutional provisions denying (or at least not explicitly recognizing) the right to resist will not stop resistance from returning, then what need is there to recognize it in a constitutional provision? I discuss some alternatives below.

<sup>6</sup> RAFFAELE LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT. A GENEALOGY* 56 (Jason Francis McGimsey trans., 2013).

State is not needed to secure that right.<sup>7</sup> In other words, it is also directed at the State, but to ask its positive intervention. This is, in fact, something Douzinas also acknowledges. The right to resistance—he argues—is both a fact and a right, although a right that “does not derive from positive law, domestic state or international.”<sup>8</sup> It derives from a “‘higher law’ ... both immanent and transcendent.”<sup>9</sup>

As argued above, none of the references to the right to resistance (and to the consequent exercise of constituent power) are understood in the sense of positive rights conferred or ratified by institutions resorting to pre-existing norms that, as it is the case of law, limit the scope of their decisions.<sup>10</sup> Quite the contrary, the people exercising the right to resist and, as one of the manifestations of their sovereign power, their constituent power are neither bound nor limited by pre-existing norms.

In other words—to insist with Pettit—, the right to protest is a right the people can resort to in order to oppose the laws “consistent with the regime’s remaining in place.”<sup>11</sup> As Pettit argues, directed influence over one’s government can be carried out through institutional means (i.e. voting, public audiences, and so on) and also non-institutional avenues (i.e. protests on the

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<sup>7</sup> As Margaret Macdonald wrote, “[t]hough the Roman lawyers conceded that man might be entitled by natural law to that which he was denied by every positive law, they do not seem to have related this to any particular doctrine of legal and political authority.” Margaret Macdonald, *Natural Rights*, in THEORIES OF RIGHTS 21, 26-7 (Jeremy Waldron ed., 1995 6<sup>th</sup> prin.).

<sup>8</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 2, at 95-6.

<sup>9</sup> *Id.*

<sup>10</sup> JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 109-10 (2009).

<sup>11</sup> Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 CURRENT LEGAL PROBLEMS 59, 62 (2012).



streets).<sup>12</sup> In any case, accepting the regime's remaining in place brings both advantages and limits. Just as the discourse of rights emphasizes, rights are to be respected and protected by the regime itself. The regime, however, will also place limits as to how that exercise is to be conducted. Most ironically, those limits will appear as the State regulates in order to protect the rights in question.<sup>13</sup>

Nonetheless, both advantages and limits are rather dynamic than static. This means that rights content is in constant development and, moreover, that it is the very action of protesters what influences them.<sup>14</sup> This is true both in legal theory as well as in the sociology of social movements. Legal systems are successive dynamic legal orders whose content varies without ceasing to be the very same legal orders. Individuals, and groups as well, feel more comfortable with the legal order that best fits their expectations—"which is valid *hic et nunc*."<sup>15</sup> Something similar occurs when one sees the interaction between social movements and the laws protecting/regulating their actions, for, as Habermas has argued, social movements entail a dialectic relation with these rules. While there are legal and administrative rules regulating the actions social

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<sup>12</sup> *Id.* at 62, 80.

<sup>13</sup> I need not insist by now on the crucial political limit that acting with the regime's remaining in place implies, namely not being able to overthrow the government.

<sup>14</sup> To some, this is a crucial demand under conditions of democratic governance. *See*, ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* (2009). I reserve Chapters 5 and 6 to discuss how social protests influence constitutional understandings.

<sup>15</sup> *See*, ANDRZEJ GRABOWSKI, *JURISTIC CONCEPT OF THE VALIDITY OF STATUTORY LAW: A CRITIQUE OF CONTEMPORARY LEGAL NONPOSITIVISM* 258-9 (2009). I would like to thank Raúl Letelier for having brought this argument to my attention.

movements are permitted to perform, at the same time social movements influence that very same framework by pushing and influencing its limits.<sup>16</sup>

### A. *Rights*

Any attempt to comprehensively conceptualize rights is doomed to fail. In light of pervasive theoretical disagreement about the concept of rights, and considering my aim in this work—distinguishing the so-called right to revolution and the consequent appeal to the exercise of constitution-making power from the (positive) right to protest—, it is enough to stress a general institutional implication of rights,<sup>17</sup> namely that rights need (in order to be authoritatively *created, identified, and secured*) the regime to remain in place.<sup>18</sup> As MacCormick explains, the term ‘law’ seems inappropriate to identify those rules that wouldn’t be recognized nor applied by courts and tribunals<sup>19</sup>—and that would not have any significance to institutional arrangements such as parliaments. Here constitutions are relevant for they are assigned the role of

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<sup>16</sup> JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 369-70 (William Rehg trans., 1998) (“Thus, the institutions and legal guarantees of free and open opinion-formation rest on the unsteady ground of the political communication of actors who, in making use of them, at the same time interpret, defend, and radicalize their normative content.”).

<sup>17</sup> See, Jeremy Waldron, *A Right-based Critique of constitutional rights*, 13 OXFORD J. OF LEGAL STUDIES 1, 18 (1993). Habermas, for whom the legal order and morality are rather complementary as they emerged simultaneously, has noticed that the distinctive feature of law is precisely its institutionalized character. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 106-7. See generally, NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 49-58 (2007) (describing the institutions of public law and noticing their necessity in enforcing law).

<sup>18</sup> Not surprisingly, these are the kinds of rules that Hart argued to be characteristic of a modern state and legal system; “the centralized official ‘sanctions’ of the system.” H.L.A. HART, *THE CONCEPT OF LAW* 79, 98 (1997). See also, MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 286 (2010) (“such rights claims—human rights claims—... have effect only when institutionalized within an existing governmental regime ...”).

<sup>19</sup> MACCORMICK, *INSTITUTIONS OF LAW*, *supra* note 17, at 56.

providing coherence as to what is going to be deemed a system of law—a “unitary ultimate law for a state’s legal system as such.”<sup>20</sup>

Therefore, rights as institutionalized law are directed at the State.<sup>21</sup> It only makes sense to talk of a positive right to protest once we acknowledge the State’s twofold agency as an ally (it is there to secure and protect our rights) and as a foe (it limits our rights).<sup>22</sup> One of the legal theorists who has explored this topic is Robert Alexy. Alexy notes that there are a variety of subjective rights that he divides into *rights to something*, *liberties*, and *powers*.<sup>23</sup> In the case of the rights to something, Alexy has shown that they are better explained in a three-point structure (*relational character*), a relation which includes the State as the addressee of rights.<sup>24</sup> While here the State is required to refrain from affecting rights (*defensive rights*), to provide factual acts, or to create legal

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<sup>20</sup> *Id.* at 57.

<sup>21</sup> *Id.* at 202 (arguing institutionalized law “provides means [adjudication and legislative] to make authoritative rulings about practical issues that arouse disagreement”). I’m not here exploring, neither suggesting, whether rights have any more specific institutional implications. What are these more specific institutional implications? For instance, one who assumes constitutional rights place limits as to what legislatures can do will normally allocate reviewing powers on a branch other than the legislature in order to decide when such limits have been violated. However, it is equally possible to argue that constitutional rights are rather political. In such a case constitutions would be inviting, rather than precluding, legislatures to develop rights. Furthermore, we can still draw a distinction, and not necessarily a correlation, between legal rights and constitutional rights. *See generally*, *See* Waldron, *A Right-based Critique*, *supra* note 17, at 18-28.

<sup>22</sup> This is so because this coercive power is put in motion both to constrain as well as to protect individual acts (freedom, entitlements, etc.). Most strikingly, this also holds true for the State, for the State and its institutions act validly (*legally*) where the Rule of Law—“a particular mode of the exercise of political power”—allows them to do so. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 11 (2008-2009). HART, *THE CONCEPT OF LAW*, at 87 and H.L.A. Hart, *Postscript*, in *THE CONCEPT OF LAW* 269 (Penelope Bulloch & Joseph Raz eds., 1997) (“[L]egal rights and duties are the point at which the law with its coercive resources respectively protects individual freedom and restricts it or confers on individuals or denies to them the power to avail themselves of the law’s coercive machinery”).

<sup>23</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 120 (Julian Rivers trans., 2010).

<sup>24</sup> *Id.* at 121-2.

positions to satisfy rights (*positive acts*), the relevant fact is that the State is there to secure the exercise of rights.<sup>25</sup>

Something similar occurs with legal liberties, for they are also better understood as three-point relations with the State becoming relevant every time it is necessary remove obstacles—thus enforcing the liberty constitutionally granted. This is why constitutional permissive provisions are relevant and, according to Alexy, far from futile norms. He explains this by distinguishing *unprotected liberties* from *protected liberties*. Unprotected liberties “exist[] when both an act and its omission are permitted.”<sup>26</sup> This may occur either when there is “an explicitly enacted permissive norm” or “in the absence within the legal system of any commanding or prohibiting norms covering the act, or its omission ...”.<sup>27</sup> In the case of constitutional permissive norms, those of lower hierarchy that contradict the permission (either by ordering the conduct or imposing a prohibition on the permitted conduct) are unconstitutional, so the State must sanction its violation.<sup>28</sup> State action before protected liberties is still more obvious, for such liberties are combined with “a bundle of rights to something and other objective norms which together secure to the constitutional right-holder the possibility of carrying out the act permitted.”<sup>29</sup> Moreover, as Alexy puts it, “[e]very constitutional liberty is a

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<sup>25</sup> *Id.* at 122-7.

<sup>26</sup> *Id.* at 146.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 146-7.

<sup>29</sup> *Id.* at 148.

liberty at least in relation to the state.”<sup>30</sup> The State should at least “not prevent the liberty-holder from doing what he is constitutionally free to do.”<sup>31</sup>

Finally, Alexy describes powers where State action is more straightforward. Powers are characterized for their capacity to alter the legal state of affairs by acts of the power-holder.<sup>32</sup> An institutional act is what confers that legal capacity.<sup>33</sup>

Institutional acts are those which cannot be performed merely on the basis of natural abilities, but which presuppose constitutive rules.<sup>34</sup>

This does not mean that the very same act cannot be performed *alegally*. In fact it could. The people could, as a matter of fact, go out to the streets in order to (say) suggest change in governmental policies, but that action would become an act of legal significance only by means of the constitutive rules (say the constitutionally enshrined freedom of expression and right to assembly).<sup>35</sup> The legal significance here can be seen once one understands, as Alexy suggests, that rights encompass a bundle of constitutional rights positions—rights to something, liberties, and powers.<sup>36</sup> For instance, constitutional provisions would permit protests and, at the very same time, impose obligations on the State which, at the least, should not arbitrarily interfere with protests and/or

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<sup>30</sup> *Id.*, at 149.

<sup>31</sup> *Id.* As Alexy notes, this is not the only case. What is important to stress here, however, is that constitutional rights are normally compounded of a cluster of different rights, liberties and powers. Thus, in the case mentioned above, we can see liberty (to act or refrain from acting) combined with a right to the non-obstruction of the act (the state should refrain), along with the power to claim before the courts the infringement of such a right.

<sup>32</sup> *Id.* at 150.

<sup>33</sup> *Id.* at 152.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 152-3 (explaining that one could move the chess figures any direction around the board, but that those movements would only become chess moves, i.e. a checkmate, in the presence of constitutive rules of the game).

<sup>36</sup> *Id.* at 159.

also remove obstacles to its exercise.<sup>37</sup> Alexy says it explicitly: to appreciate the role of powers of constitutional positions, “they need to be related to rights to something and to liberties.”<sup>38</sup>

I think the need for an institutional framework is still clearer through the international human rights optic. There, rights are obligations undertaken by the States, which consequently assume a cluster of negative and positive duties: to respect, protect and fulfill.<sup>39</sup> Rights enforcement is linked to the State, and, although States are normally taken to enforce these rights by international courts, it is still up to the States to respect, protect and fulfill their duties. In other words, enforcement of rights—which to be properly understood in the international context cannot simply be compared with domestic enforcement—is a multifaceted process which still sees the State and its institutions (state-driven and state-owned) at its core, despite the help and contributions from other actors such as individuals and NGOs.<sup>40</sup>

#### B. A (*positivistic*) right

My intention in this section is to offer a brief review of rights normally invoked to cover and protect protests, but also to show, based on some comparative experience, what is the best understanding of those rights if we are to keep

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<sup>37</sup> Here, once again, Alexy notes the importance of understanding constitutional rights in relation with the State’s capacities. “At this point,” Alexy argues, “constitutional rights norms as negative competences ... limits a positive competence norm.” *Id.* at 158.

<sup>38</sup> *Id.* at 156. There are, in fact, others who have, although relaying on Hohfeld, suggested a similar analysis of the right to protest. See, Simon Bronitt & George Williams, *Political Freedom as an outlaw: republican theory and political protest*, 16 ADELAIDE L. REV. 289, 304-5 (1996) (criticizing the Australian High Court for having conceptualized the freedom of political discussion as an ‘immunity’ and not as a higher level ‘claim-right.’).

<sup>39</sup> Asbjørn Eide, *Economic and Social Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 9, 27-31 (Asbjørn Eide et al., eds. 2001 2<sup>nd</sup> ed.).

<sup>40</sup> Gerd Oberleitner, *Does enforcement matter?*, in THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 249 (Conor Gearty & Costas Douzinas eds., 2012).

open the channels of political contestation.<sup>41</sup> Understanding the right to protest as a participatory (citizen) right is particularly pressing under current governmental practices that, by restricting protests, have privileged political stability—defined as broadly as you can conceive it.<sup>42</sup> This concern with illegitimate limitations of rights,<sup>43</sup> largely due to liberal constitutionalism uneasiness with non-institutional means of participation, has been one of the main preoccupations for the international law of human rights.<sup>44</sup> The Special

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<sup>41</sup> I have taken this phrase from JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980).

<sup>42</sup> In fact, one of the main unwanted consequences of the recent waves of protests has been that many governments passed or proposed to pass legislation and/or administrative by-laws limiting the right to protest, up to the point of turning it impracticable. *Ministro Hinzpeter: "Ley antiencapuchados busca proteger el derecho a manifestarse, pero en paz y sin vandalismo"* [Minister Hinzpeter: "The anti-mask bill seeks to protect the right to demonstrate, but peacefully and without vandalism], *LA TERCERA*, Jul. 20, 2012, available at <http://www.latercera.com/noticia/politica/2012/07/674-473308-9-ministro-hinzpeter-ley-antiencapuchados-busca-protger-el-derecho-a-manifestarse.shtml>; *Anti-protest legislation passes Quebec*, *THE GLOBE AND MAIL*, May 18, 2012, available at <http://www.theglobeandmail.com/news/politics/anti-protest-legislation-passes-in-quebec/article4186770/>; Jeanine Molloff, *HR 347 'Trespass Bill' Criminalizes Protest*, *THE HUFFINGTON POST*, (Mar. 12, 2012), [http://www.huffingtonpost.com/jeanine-molloff/trespass-bill\\_b\\_1328205.html](http://www.huffingtonpost.com/jeanine-molloff/trespass-bill_b_1328205.html); *Spanish Government approves draft law cracking down on demonstrations*, *THE GUARDIAN*, Nov. 1, 2013, available at [www.theguardian.com/world/2013/dec/01/spanish-government-approves-law-demonstrations](http://www.theguardian.com/world/2013/dec/01/spanish-government-approves-law-demonstrations); Gregg Carstrom, *Egypt passes law restricting public protests*, *ALJAZEERA*, Nov. 25, 2013, available at <http://www.aljazeera.com/news/middleeast/2013/11/egypt-passes-law-restricting-public-protests-2013112413847867334.html>; Richard Seymour, *From Quebec to Spain, anti-protest laws are threatening true democracy*, *THE GUARDIAN*, Nov. 25, 2013, available at <http://www.theguardian.com/commentisfree/2013/nov/25/quebec-spain-anti-protest-laws-democracy>; *Oficialismo impulsa proyecto para regular protestas callejeras en Argentina* [Government promotes a bill to regulate street protests], *LA NACIÓN*, Apr. 16, 2014, available at [http://www.nacion.com/mundo/Bloque-oficialista-Argentina-protestas-callejeras\\_0\\_1408859313.html](http://www.nacion.com/mundo/Bloque-oficialista-Argentina-protestas-callejeras_0_1408859313.html). In Brazil, following demonstrations that questioned the large amounts of money spent on the 2014 World Cup, authorities submitted a bill containing vague definitions of 'disorder' and 'terrorism.' Amnesty International UK, *Right to Protest under threat as Brazil pushes 'terrorism' law ahead of World Cup*, (May. 12, 2014): <http://www.amnesty.org.uk/press-releases/right-protest-under-threat-brazil-pushes-terrorism-law-ahead-world-cup#.U3C2TeM4ONA.twitter>

<sup>43</sup> Illegitimate limitations are those that conspire against the (political) right of the people—of every single citizen—to hold 'a suitable civic status,' particularly when it comes to influencing and directing the State. As Pettit explains, this is the kind of control needed to control that the "coercive laws of government are not dominating—not the imposition of an alien will ...". Pettit, *Legitimacy and Justice*, *supra* note 11, at 79.

<sup>44</sup> I will show below that the European Court of Human Rights ('ECtHR') has been the most active court when it comes time to decide cases.

Rapporteurship on Freedom of Expression<sup>45</sup> (‘the Rapporteurship’), for instance, has manifested its concern with the way in which governments in the region have dealt with pacific demonstrations.<sup>46</sup> Thus, reviewing the limitations imposed to the right to protest in Canada, Chile and Ecuador, among others, it reminded States that “any restriction on them must be justified by imperative social interest.”<sup>47</sup> Additionally, the Special Rapporteur on the rights to freedom of peaceful assembly and of association (‘SR’), of the UN Human Rights Council, has expressed a similar concern.<sup>48</sup> By stressing the importance of the right to peaceful assembly as a “cornerstone in any democracy,”<sup>49</sup> it encouraged governments to avoid criminalizing its exercise.<sup>50</sup>

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<sup>45</sup> The Special Rapporteurship is not a member of the Inter-American Commission of Human Rights (IACHR), but reports before it.

<sup>46</sup> There has been no case decided on these grounds by the Inter-American Court of Human Rights (IACtHR). There is, however, one case pending against Chile. Although mainly related to the arbitrary application of the antiterrorist law against indigenous peoples in Chile, applicants have also claimed violation of their right to social protest—based on Article 13 of the American Convention on Human Rights (freedom of expression). It should be noted that social protest is one of the new developments of the Inter-American System of Human Rights, which before was largely devoted to violations committed under authoritarian regimes in the region. Judith Schönsteiner et al., *Reflections on the Human Rights Challenges of Consolidating Democracies: Recent Developments in the Inter-American System of Human Rights*, 11 HUMAN RIGHTS LAW REVIEW 362, 367-8 (2011).

<sup>47</sup> IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2011*, OEA/Ser.L/V/II. Doc.69 Vol II. December 30, 2011, at 52; IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2012*, OEA/Ser.L/V/II.147 Doc.1 Vol II. March 5, 2013. The IACHR also held a thematic hearing on State and police violence against Chilean student demonstrators in 2011. See IACHR, Press Release 87/11, IACHR Expresses Concern for Violence Against Student Protests in Chile, (Aug. 6, 2011), <http://www.cidh.oas.org/Comunicados/English/2011/87-11eng.htm>.

<sup>48</sup> See, Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)*, A/HRC/20/27. May 21, 2012.

<sup>49</sup> *Id.* at para. 82.

<sup>50</sup> *Id.* at para. 84 (c).



The (positive) right to protest is compounded by a cluster of rights (and each of these rights by a bundle of legal positions),<sup>51</sup> most notably freedom of expression and the right to peaceful assembly, but also privacy and some variances of the rights already mentioned. Its multifarious sources and contents should be regarded as a strength rather than a limitation, for each specific right has its own conditions which (at least in theory) should render its limitation more (both politically and legally) costly.<sup>52</sup>

## II. Freedom of expression

Why should we protect freedom of expression? Political philosophical enquiries have provided different justifications for its protection, ranging from considering freedom of expression as a tool for discovering the truth<sup>53</sup> to

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<sup>51</sup> Needless to say, this is already clear from a viewpoint different than the legal perspective. See, JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE. AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 222-35 (Thomas Burger trans. The MIT Press, 1991).

<sup>52</sup> *But see*, Human Rights Council, *Report of the Special Rapporteur 2012*, para. 4 (showing that, in practice, cases are governed by, at least, two different types of legislation therefore rendering difficult to determine which governs the cases' outcomes).

<sup>53</sup> The most famous exposition of this argument is to be found in John Stuart Mill, *On Liberty*, in J.S. MILL: *ON LIBERTY AND OTHER WRITINGS* 1 (Stefan Collini ed., Cambridge University Press 1989) (1859). Mill summarized the "need" of freedom of opinion in order to not silence opinions that can be true, not restrict opinions that may contain a portion of the truth, and not censor opinions that permit contesting commonly assumed truths—whose "doctrine itself will be in danger of lost, or enfeebled and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession ..." (at 53-4). This argument can also be traced back to John Milton, for whom truth—which "hewed her lovely form into a thousand pieces"—is susceptible of being known. Arguing against the Licensing Act, Milton claimed freedom of the press was required so as to always keep truth in motion, for "[t]ruth is compar'd in Scripture to a streaming fountain; if her waters flow not in a perpetual progression, they fick'n into a muddy pool of conformity and tradition." JOHN MILTON, *AREOPAGITICA*, 43 (with a commentary by Sir Richard C. Jebb, Cambridge University Press 1918) (1644). This argument was legally popularized by Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

conceiving it as a manifestation of personal autonomy.<sup>54</sup> Although all these justifications can work in a complementary fashion,<sup>55</sup> none of them is strictly related to the supervisory role (in the liberal tradition) and to the duty to participate (in the republican tradition) that is expected of citizens when dealing with common matters.

While freedom of expression may certainly be important in personal self-realization, it is its crucial contribution to self-government what better explains its democratic relevance.<sup>56</sup> Democracy, as some have argued, is not achieved there where a popular element is merely present, but where that popular element is determining.<sup>57</sup> This is why public opinion becomes the final touchstone of democratic governments. Opinions, Nadia Urbinati observes, “work as a force of legitimacy by connecting and uniting people inside and outside the institutions.”<sup>58</sup> Opinions, she insists, permit establishing links, although contingent and in tension,<sup>59</sup> between citizens and bridging the

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<sup>54</sup> This is a non-consequentialist justification that—as Dworkin put it—is regarded to pay due consideration to each individual’s moral personality in order to decide for ourselves what is good or bad in life and politics, and to express these convictions to others. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (2005 repr.). This distinction between consequentialist and non-consequentialist is also found in Kent Greenawalt, *Free Speech Justifications*, 89 COLUMBIA L. REV. 119, 127-30 (1989).

<sup>55</sup> *Id.* at 201.

<sup>56</sup> ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM. A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 1-25 (2012) (arguing that the political core of the freedom of expression is better explained by its capacity to facilitate “the communicative process necessary for successful democratic self-governance”).

<sup>57</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 235 (1999) (“The demand is not merely that there should be a popular element in government, but that the popular element should be decisive. The demand is for democracy, not just the inclusion of a democratic element in a mixed regime.”).

<sup>58</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED. OPINION, TRUTH, AND THE PEOPLE* 27 (2014).

<sup>59</sup> William A. Gamson, *Bystanders, Public Opinion, and the Media*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 242, 244 (David A. Snow et al., eds. 2007) (noting the term public has a “quasi-collective” condition with different people interested and divided).

institutions of the State with the people.<sup>60</sup> Opinions authorize representation and check that representation. As professor Urbinati explains, citing Hume, public opinion operates as a “force that makes the many easily governed by the few and the few unable to escape the control of the many.”<sup>61</sup> This also explains why freedom of expression occupies such a significant place in current democracies: it safeguards “the communicative process by which public opinion is formed.”<sup>62</sup> In other words, freedom of expression protects the different forms of communication the people resort to, forms of communication which contribute to shaping public opinion. Finally, public opinion controls governmental decisions (and omissions).

#### *A. Protests as expressions*

Why should we protect social protests? First, social protests are forms of expression and therefore (should be) protected under constitutional provisions. In light of the political relevance of the freedom of expression, an important part of the constitutional debate revolves around the forms of expressions “we deem necessary for the free formation of public opinion.”<sup>63</sup> Today few, if any, voices would contend protected expressions are restricted only to language. As Post put it, public opinion formation sometimes occurs “through language, and sometimes, as with picketing and flag burning, it does not.”<sup>64</sup> This does not render the distinction between speech and conduct constitutionally irrelevant, but shows that “courts are prepared to hold forms

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<sup>60</sup> URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 58, at 27.

<sup>61</sup> *Id.*

<sup>62</sup> POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM*, *supra* note 56, at 14.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> *Id.*

of conduct, intended by the actors to communicate opinions and so understood by others,” as protected by freedom of expression provisions.<sup>65</sup> The language of Western constitutional provisions helps in this regard as they recognize ample means for expression.

By the same token, and precisely because we deem public opinion an important component of democratic life, we are to avoid imposing a certain fashion in which public discourse is to be held. András Sajó, for instance, argues that liberal constitutionalism has had a large influence in modeling the kind of interactions we consider appropriate of protection, which ends up being the hegemonic imposition of patterns of dialogue and public engagement ‘which large part of the community does not entertain.’<sup>66</sup> According to Sajó, the liberal ‘rationality paradigm’ has conspired against other forms of political interaction, such as protests, that bring (sometimes heavy) emotions to the public forum.<sup>67</sup> Concealing its own emotions, liberalism has been ready to recognize emotions in the eyes of those who advocate majoritarian politics, but denied those sentiments when it comes time to justify prevailing social, economic, cultural, and legal regimes.<sup>68</sup>

Public discourse, however, presupposes exactly the opposite. If, as Robert Post has argued, public discourse is to “enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society,”<sup>69</sup> then we

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<sup>65</sup> ERIC BARENDT, *FREEDOM OF SPEECH* 78 (2007 2<sup>nd</sup> ed.).

<sup>66</sup> This is of course a paraphrase of Justice Holmes’ famous dissent in *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>67</sup> ANDRÁS SAJÓ, *CONSTITUTIONAL SENTIMENTS* 213 (2011).

<sup>68</sup> *Id.* at 206, 247.

<sup>69</sup> Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *HARVARD LAW REVIEW* 601, 639 (1990).

should expand the means through which the people take part in the political process of public opinion formation. In light of public involvement on matters of common concern—the understanding of the constitution, for one—we should follow Richard Parker and “adjust[] the image of the sort of person who exercises—that is, whom we like to think of as exercising—freedom of speech,”<sup>70</sup> and avoid a privileged status to some forms of collective behavior that receive better treatment.<sup>71</sup>

Second, social protests also merit protection because, as forms of expression, they are part of the public discourse and therefore help shape public opinion. Protests, in other words, are one of the means the people resort to in order to participate. This was what the German Constitutional Court held in 1985 when it reasoned that the right to demonstrate “is derivative of the right to shape public opinion by means of speech and assembly.”<sup>72</sup> This criterion should be given utmost relevance when protests are the sole means of participation some groups may resort to. According to Lipsky, relatively weak challengers who resort to social protests do so not to directly call governmental attention as they lack that power, but to develop political bargaining power they lack by addressing, and activating, target audiences whom the government pays attention to. Communication, seen under this light, operates in a highly indirect fashion and, to these disempowered groups, becomes central in order to have a

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<sup>70</sup> Richard D. Parker, “*Here the People rule*”: *A constitutional populist manifesto*, 27 VALPARAISO UNIVERSITY LAW REVIEW 531, 576 (1993).

<sup>71</sup> SAJÓ, CONSTITUTIONAL SENTIMENTS *supra* note 67, at 247.

<sup>72</sup> DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 396 (Duke University Press: 1997, 2<sup>nd</sup> ed.).

say in public opinion.<sup>73</sup> At any rate, the same reasons for protection hold where protests directly target the State and also where protesters, like those of the ‘Occupy’ movement, target no institutional avenue.<sup>74</sup>

Considerations that stress the role of social protests in forming public opinion are thus strengthened with reference to equality commitments—which are also constitutionally enshrined.<sup>75</sup> This is not so much a matter of impact<sup>76</sup> as one of opportunity and capacity to influence.<sup>77</sup> A constitutional theory of freedom of expression that (from a normative viewpoint) cannot dispense from (but rather has the duty to exalt) commitments to equality cannot rule out forms of expression that are considered disruptive or disturbing of institutional politics.<sup>78</sup> As Barendt has argued, “the state is not free to determine the

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<sup>73</sup> Michael Lipsky, *Protest as a Political Resource*, 62 AM. POL. SCI. REV. 1144, 1146-8 (1968).

<sup>74</sup> However, this might well end up being a circular argument. If they wish to be accommodated under a constitutional scheme they don’t contend, but want to, say, be left alone (“we have no petitions for you”), they probably would try to influence the meaning of constitutional provisions or governmental policies.

<sup>75</sup> The equality references being made here, and subsequent references to them, are procedural rather than substantive; that is, they focus on how equality can enhance and deepen channels of political participation. This does not mean that other equality considerations are irrelevant to protests. Roberto Gargarella, for instance, has argued that in the context of social protests equality assumes different forms. Many of those who protest, in fact, utilize these expressive means to manifest “grave violations of other fundamental rights.” Were procedural equality considerations the only moment when equality becomes relevant, we would certainly run the risk of overlooking the substantive claims related to social justice that protesters are posing. Roberto Gargarella, *Law and Social Protests*, 6 CRIM. LAW & PHILOSOPHY 131, 142-4 (2012).

<sup>76</sup> Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987-1988).

<sup>77</sup> URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 58, at 50-8 (explaining what she calls the democratic-influence maxim, an egalitarian approach to political communication between citizens and institutions). This capacity of influence, Pettit has argued, is exercised with, and among, other citizens. Therefore, republican democratic control—the one he is interested in explaining—is a form of “civic or popular control in which you participate with others ...”. Pettit, *Legitimacy and Justice*, *supra* note 11, at 77-8.

<sup>78</sup> In fact, it could be further argued that freedom of expression is meant precisely to protect the interactions between institutional and non-institutional politics. In representative democracy, Urbinati observes, the meaning of the public is enriched “as both state-based (what pertains to the legal and institutional order) and what is open to all under public scrutiny ...”. URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 58, at 40-3.

boundaries of public discourse.”<sup>79</sup> Imposing such a restriction upon the public sphere will risk silencing certain voices that can only be expressed in this way, thus preventing the public opinion from having their input. In fact, equality preoccupations that permeate freedom of expression are important in noticing—as argued before—that in some instances protests are the only available means social groups resort to in order to influence public opinion. As the Rapporteurship put it not long ago,

The most impoverished sectors of our hemisphere face discriminatory policies and actions; their access to information on the planning and execution of measures that affect their daily lives is incipient and, in general, traditional channels to make their complaints known are frequently inaccessible. Confronting these prospects, in many of the hemisphere’s countries, social protest and mobilization have become tools to petition the public authorities, as well as channels for public complaints regarding abuses or human rights violations.<sup>80</sup>

By depriving them the right to resort to protests, we are limiting the voices that shape politics, thus restricting the voices representatives consider.<sup>81</sup> However,

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<sup>79</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 20. Robert Post has made a similar claim noting what he calls the ‘paradox of public discourse:’ within public discourse freedom of expression “aspires to suspend legal enforcement” of community values of civility and toleration. Post, *The Constitutional Concept of Public Discourse*, *supra* note 69, at 638-46, 681-2.

<sup>80</sup> IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2005*, OEA/Ser.L./V/II.124 Doc. Vol III. February 27, 2006, at 121.

<sup>81</sup> The *Audiencia Nacional* of Spain has recently passed a decision which has served to remind that many social groups resort to public demonstrations because such demonstrations are “the only means they have to express and spread their thoughts and opinions.” However, it also linked this egalitarian emphasis on protests with pluralism, for by opening different means of political participation “the State guarantees the visibility of different opinions present in society, especially those voices silenced before those other voices overrepresented.” Judgment

it is not only that we are limiting the scope of voices that shape public opinion; we are actually excluding a ‘certain kinds of peoples,’ thus “privileg[ing] those modes and styles of expression associated with the ‘better’ sort of people—relatively ‘reasonable,’ ‘orderly,’ ‘articulate’ speech having ‘social importance’.”<sup>82</sup> Those who are excluded are rendered not self-governing, but subjects of external power.<sup>83</sup>

Freedom of expression, therefore, has to be understood as embracing the public and non-institutional displays of grievances not only because its constitutional understanding permeated by equality considerations is essentially non-hegemonic,<sup>84</sup> but also because public opinion is influenced in a myriad of ways.<sup>85</sup> This is why public opinion is not only attached to those kinds of discourses that appear as political *prima facie*.<sup>86</sup> While this restrictive approach would certainly leave unprotected what we now consider core areas of the freedom of expression,<sup>87</sup> it also overlooks the political-moral agency of citizens

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of Jul. 7<sup>th</sup>, 2014, Audiencia Nacional, Sentencia No 31/2014, at 57 (my translations). I would like to thank José Luis Ugarte for having brought this decision to my attention.

<sup>82</sup> Parker, “*Here the People rule*”, *supra* note 70, at 577.

<sup>83</sup> Pettit, *Legitimacy and Justice*, *supra* note 11, at 79 (“If the *demos* or people are to participate in exercising *kratos* or control over government, and if the control they share is to ensure that the coercive laws of government are not dominating—not the imposition of an alien will—then what they exercise must involve both influence and direction.”).

<sup>84</sup> Robert Post, *Law and cultural conflict*, 78 CHICAGO-KENT LAW REVIEW 485, 503 (2003).

<sup>85</sup> POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM, *supra* note 56, at 19.

<sup>86</sup> As it is well known, some have advocated this position. Meiklejohn argued that the First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned with a public power—a governmental responsibility—, and not with a private right. Freedom of expression, he held, should only grant its “unqualified protection” to acts directed at understanding “the issues which ... face the nation” and to pass judgment upon the decisions our representatives make on those matters. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

<sup>87</sup> This inconsistency is noticed in DWORKIN, FREEDOM’S LAW, *supra* note 54, at 203.



to—as I argued before—freely determine how to and according to what means influence public opinion.<sup>88</sup>

It is this political face which better explains freedom of expression's central place in the current configuration of the right to protest. There is no doubt that protests might have a value in truth seeking and that some citizens do not feel that they are expressing their unique individual identities when protesting ("People are citizens but they are much more," Greenawalt wrote).<sup>89</sup> What the political comprehension emphasizes is that the individual character of freedom of expression remains safe but is insufficient.<sup>90</sup>

That protests are better understood in this political light is almost an inescapable fact once we notice the collective exercise of rights. Social protests are, in fact, collective contestations that resort to the streets in order to influence and direct the government.<sup>91</sup> The political meaning of protests lies not so much on the ontology of the rights involved, but on, as Lynd put it, being rights that are collectively exercised and understood.<sup>92</sup> Social protests presuppose the exercise of "rights that are only exercised in community with other men."<sup>93</sup> They are a shared activity, an activity influencing and (eventually) controlling the government, where one is not alone.<sup>94</sup>

### B. *Expression as a right*

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<sup>88</sup> POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM, *supra* note 56, at 23-5.

<sup>89</sup> KENT GREENAWALT, FIGHTING WORDS. INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 131 (1995).

<sup>90</sup> URBINATI, DEMOCRACY DISFIGURED, *supra* note 58, at 65-6.

<sup>91</sup> Pettit, *Legitimacy and Justice*, *supra* note 11, at 80.

<sup>92</sup> Staughton Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417, 1429-30 (1984) (arguing we are talking here of rights that gain their political meaning by being exercised in communion, but that can also be individually exercised and protected).

<sup>93</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 57, at 232.

<sup>94</sup> *Id.* at 235-6; Pettit, *Legitimacy and Justice*, *supra* note 11, at 77.

This political understanding of freedom of expression impacts the duties associated with it. As I argued above, taking on Alexy's argument, constitutional rights of the kind Western constitutions exhibit are better understood as encompassing a bundle of rights: rights to something, liberties, and powers. Nevertheless, I also take some distance from Alexy as I regard the fulfillment of rights—in the broadest meaning of this expression—depends on the (joint) work of all the three branches of government, and not solely on courts. We can still stick to the language of constitutional rights and stress their political significance even if there is no judicial enforcement mechanism.<sup>95</sup> As Tushnet contends, constitutional rights limit governments not simply because they are presented in a text under the name of rights, but because they are publicly fought.<sup>96</sup>

It is of course difficult to tell what this bundle of rights includes without considering specific contexts including social, cultural, political, legal, and constitutional variables. However, examples may shed some light in understanding the positive right to protest. There is no doubt freedom of expression imposes negative duties. States have the duty to neither censor nor impede dissemination of speech. As Barendt explains, this is largely a consequence of the equal political agency each of us is embedded with,<sup>97</sup> an equal agency that results in prohibitions against viewpoint discrimination. “[A]ll persons within public discourse,” Post argues, “should be equally free to

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<sup>95</sup> MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM COURTS 167-8 (1999).

<sup>96</sup> *Id.* at 167.

<sup>97</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 20.

say or not to say what they choose.”<sup>98</sup> If governments were permitted to restrain protests on the basis of the content of their claims, it would amount to having States modeling public discourse at will.<sup>99</sup> Were governments allowed to authorize certain demonstrations while prohibiting others, the moral agency of some groups would be seriously diminished.<sup>100</sup>

Prohibition of censorship and viewpoint discrimination proves crucial for protests. Protests, in fact, are defined by their dissenting nature: they challenge legal and cultural understandings, on the one hand, but also conventional means of participation, on the other. Because we are dealing with a positive, rather than a natural, right, regulations are unavoidable.<sup>101</sup> Here is where governments find spaces to assess what protesters will be (substantively) mobilizing for. Indeed most governments, typically local governments, have issued regulations (i.e. ordinances) for public meetings that demand protesters submit notifications in advance before administrative authorities.

However, States are not free to regulate protests. Freedom of expression regulations are primarily assessed on the basis of whether they leave alternative channels of participation open. This is a reason why a total ban of

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<sup>98</sup> POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM, *supra* note 56, at 22.

<sup>99</sup> The international human rights law is helpful in this regard. The American Convention on Human Rights states in its Article 13.2 that freedom of thought and expression “shall not be subject to prior censorship.” The American Convention on Human Rights, Nov. 22, 1969, *reprinted in* COLUMBIA UNIVERSITY - CENTER FOR THE STUDY OF HUMAN RIGHTS, 25+ HUMAN RIGHTS DOCUMENTS 130, 133 (2005). Although the European Convention does not have a similar prohibition, the European Court of Human Rights case-law has maintained that prior restraints are subject to a more stringent assessment. BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 117.

<sup>100</sup> As Post puts it, those prevented from shaping public discourse “will not experience participation in public discourse as a means of making government responsive to their own personal views.” POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM, *supra* note 56, at 21.

<sup>101</sup> This should not lead us to overlook how these regulations have, or could have, rendered the right to protests symbolic performances, rather than rendering them in a substantive way to secure governments’ responsiveness. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 587-8 (2009).

protests is to be considered unconstitutional.<sup>102</sup> Other regulations, provided they are not total bans, usually receive a strict review as well. Whereas in the United States free speech regulations are constitutionally acceptable as long as they are narrowly tailored,<sup>103</sup> in Canada regulations designed with the purpose of restricting expressions “will be found to violate section 2(b) ‘automatically’.”<sup>104</sup> In the international human rights law the standard—which is also a substantive—asks whether regulations are proportional.<sup>105</sup>

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<sup>102</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 83. *See also*, *City of Ladue et al. v. Gilleo*, 512 U.S. 43, 55 (1994) (“Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.”). It is the people’s decision to express themselves by resorting to the streets. *See*, Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW AND CONTEMPORARY PROBLEMS 5, 30 (1992).

<sup>103</sup> *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *Frisby v. Schultz*, 487 U.S. 474 (1988). According to the Supreme Court of the United States, regulations are constitutional only if they (i) do not target content, (ii) are narrowly tailored, and (iii) are to serve a compelling State interest. In *Clark*, for instance, the Court upheld regulations forbidding camping activities outside the designated areas in Lafayette Park and the Mall, no matter if they were intended to serve as protests. In reaching its conclusion the Court reasoned

The regulation is neutral with regard to the message presented, and leaves open ample alternative methods of communicating the intended message concerning the plight of the homeless (*Clark v. Community for Creative Nonviolence*, 468 U.S. at 288).

In *Frisby*, the Supreme Court of the United States upheld an ordinance making unlawful “for any person to engage in picketing before or about the residence or dwelling of any individual.” The Court reasoned in the following manner:

The ordinance leaves open ample alternative channels of communication ... Viewed in the light of the narrowing construction, the ordinance allows protesters to enter residential neighborhoods, either alone or marching in groups; to go door to door to proselytize their views or distribute literature; and to contact residents through the mails or by telephone, short of harassment. As is evidenced by its text, the ordinance serves the significant government interest of protecting residential privacy (*Frisby*, 487 U.S. 474, 475-6).

<sup>104</sup> RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 34-5 (2000). The Canadian Chart states,

Everyone has the following freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

Can Const (Constitution Act, 1982) §2(b). Section 1 of the Chart allows the imposition of reasonable limits on rights and freedoms only if they are (i) prescribed by law and (ii) can be demonstrably justified in a free and democratic society. No doubt this is also a substantive standard that, under Canadian case-law, has taken courts to assess whether (i) “the restriction advances a substantial purpose,” (ii) that purpose is advanced rationally, (iii) it is proportionate, and (iv) it “impairs the freedom no more than is necessary” (MOON, at 35). The standard of assessment was established in *Oakes* (R. v. Oakes, [1986] 1 S.C.R. 103), a standard that, as I shall show below, has had significance in determining the constitutional luck of some

States may engage in viewpoint discrimination when regulating protests. Although rare, viewpoint discrimination could occur. In 1972, the Supreme Court of the United States decided a case involving a Chicago city ordinance. The ordinance prohibited all picketing activities within 150 feet of a school, unless it was “peaceful picketing of any school involved in a labor dispute.”<sup>106</sup> The Court found the ordinance unconstitutional on the grounds of the Equal Protection clause—“here intertwined with First Amendment interests.”<sup>107</sup>

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.<sup>108</sup>

The same criterion should be applied when administrative authorities are conferred unfettered discretion to restrict public demonstrations, for “wide

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Canadian occupiers. I follow the description available in Leon E. Trakman, *R. v. Oakes 1986-1997: Back to the Drawing Board*, 36 OSGOODE HALL LAW JOURNAL 83, 90-108 (1998). Finally, it should be noted that in cases involving freedom of expression the Canadian Supreme Court has also resorted to assessing regulations in light of their overbreadth, such as in *RJR-Macdonald (RJR-MacDonald Inc. v. Canada (Attorney General))*, [1995] 3 SCR 199). There the Supreme Court reasoned that,

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator (*RJR-Macdonald*, at para. 160).

<sup>105</sup> OLIVER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 313-4 (2011 repr.) (arguing the condition of proportionality includes assessing the appropriateness of the measure as well as its necessity).

<sup>106</sup> *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>107</sup> *Id.* at 95.

<sup>108</sup> *Id.*

discretion would allow officials to engage in viewpoint discrimination.”<sup>109</sup> This could particularly affect demonstrations against governments, whose administrative officials vested with ample powers are incumbents.<sup>110</sup>

What about notification procedures? One way in which prior restraint could be prevented is by understanding—as some standard in the international human rights law suggests—that these notifications are required only to permit governments to organize whatever they need to organize (i.e. traffic) but should not be deemed as preventive authorizations.<sup>111</sup> Notification procedures also are not applicable, for obvious reasons, to spontaneous protests. The German Constitutional Court, for instance, has held this,<sup>112</sup> while the ECtHR has called States to facilitate, rather than place unbearable burdens, on impromptu

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<sup>109</sup> Greenawalt, *Free Speech in the United States and Canada*, *supra* note 102, at 30.

<sup>110</sup> In this sense, and related to the notification procedures below, the Rapporteurship noted that, although notification procedures are not *per se* against the Convention, administrative officials granted that ample discretionary authority could be questioned. IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 142 (“However, the requirement of prior notification should not become a demand that permission be granted beforehand by an officer with unlimited discretionary authority.”).

<sup>111</sup> Human Rights Council, *Report of the Special Rapporteur 2012*, *supra* note 48, at para. 28 (considering these notifications *per se* as not incompatible with human rights obligations, as long as they are not transformed into forms of permission); *see also*, IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 141-2.

<sup>112</sup> Notice the reasonableness with which the Constitutional Court of Germany addressed this issue in 1985:

According to the substantially prevailing view, the duty to notify at the right time does not apply to spontaneous demonstrations which form instantaneously from some cause at that moment.

The fact that a violation of the duty to notify does not automatically lead to a ban or to the dispersal of an event coincides with this. It is true that any person who as organiser or leader “conducts” a meeting which has not been notified commits an offence (§ 26 Meetings Act). But the Meetings Act merely provides in § 15 para. 2 that the competent authority “can” disperse meetings in the open air and processions if they are not notified.

The case in question was *Brokdorf*. I have taken this translation from Institute for Transnational Law, The University of Texas School of Law, *Translated Decisions*, BVerfGE 69, 315 - Brokdorf Decision of the First Senate, *available at* [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=656](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=656).

protests.<sup>113</sup> However, a form of censorship may still occur. Although this will not happen in advance, it will happen if the authority decides to dissolve a manifestation that is against its interest/policies.

At any rate, determining when a government hinders the right to protests on the basis of its content proves certainly difficult. First, it is not always easy to define what the primary purpose of a governmental regulation is.<sup>114</sup> Second, in protests freedom of expression considerations get merged with the right to assembly regulations.<sup>115</sup> Governments normally claim they are not restricting specific contents through these regulations, rather furthering permissible constitutional objectives (i.e. public tranquility). Third, a categorical distinction between content-based and content-neutral regulations is flawed as “most laws contain both content-based and content-neutral-elements.”<sup>116</sup> Whether as content-based or as content-neutral regulations, there will be a degree to which public debate gets distorted.<sup>117</sup>

These cautions demand a more careful approach, for it is also true that by resorting to general and content-neutral regulations governments also conceal

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<sup>113</sup> *Case of Bukta and others v. Hungary*, HUM. RTS. CASE DIG. 1175 (2006-2007) (“In the Court’s view, in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.”).

<sup>114</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 83.

<sup>115</sup> In fact, some have suggested that cases of protests and demonstrations began to be decided in light, and seen as an appendix, of freedom of speech—that is, these were cases “resolved without reference to assembly.” John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 610-11 (2010).

<sup>116</sup> Wilson R. Huhn, *Assessing the constitutionality of laws that are both content-based and content-neutral: the emerging constitutional calculus*, 79 INDIANA L. J. 801, 814 (2004).

<sup>117</sup> *Id.* at 821; Mary M. Cheh, *Demonstrations, security zones, and first amendment protection of special places*, 8 D.C. L. REV. 53, 67-70 (2004) (noting that in protests there is a continuum between forms and substance, which also applies to State regulations).

their actual purposes.<sup>118</sup> The basis of content-neutral regulations is the imposition of restrictions or regulations, regardless of the viewpoints being expressed. However, there are good reasons not to exempt these general regulations from freedom of expression scrutiny; laws that appear as facially content- or speech-neutral may become content- or speech-based as applied.<sup>119</sup> Many protest regulations are of this kind, namely content-neutral statutes that were enacted to further permissible and non-speech-related objectives such as preventing breach of the peace, but that are applied in a content-based fashion.<sup>120</sup> As Volokh notes citing *Cantwell v. Connecticut*, a 1940 case,

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.<sup>121</sup>

Political equality also becomes relevant here. In fact, facially neutral regulations should trouble us more when those being affected by them are always (in a political, but not in a statistical sense) the same.<sup>122</sup> General laws, we know, have

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<sup>118</sup> Chemerinsky, for instance, has argued that the Supreme Court of the United States has maintained a very vague and ambiguous definition of content-neutrality. He also argued that the Court has upheld the validity of various clearly content-based regulations, deemed constitutional only because they have been motivated by content-neutral purposes. Erwin Chemerinsky, *Content neutrality as a central problem of freedom of speech: problems in the Supreme Court's application*, 74 S. CAL. L. REV. 49, 56-61 (2000). See also, Huhn, *Assessing the constitutionality of laws that are both content-based and content-neutral*, supra note 116, at 815-6 (arguing that the standard of assessment for free speech regulations has been relaxed as to permit inquiry into legislative intent to determine a statute's constitutionality).

<sup>119</sup> See, Eugene Volokh, *Speech as Conduct: generally applicable laws, illegal courses of conduct, "situation-altering utterances", and the uncharted zones*, 90 CORNELL L. REV. 1277, 1286-9 (2005).

<sup>120</sup> *Id.* at 1292.

<sup>121</sup> *Id.* n. 69.

<sup>122</sup> Owen Fiss, for instance, has argued that when the Supreme Court protected the protests of the civil rights movement, States also claimed to be simply enforcing public order laws. The



uneven impact depending on one's (political, social, cultural, etc.) side.<sup>123</sup> Context might also be of help here. For instance, as noted before, most current anti-protests bills and regulations have been submitted and passed in very specific contexts of protests and with very specific consequences, which might be very telling of the State's purpose.<sup>124</sup> Whereas governments claim these are content-neutral regulations aimed at protecting (say) public order, political contexts advise taking two steps back to assess those regulations in their proper light: their effects on suppressing certain forms of dissenting speech.<sup>125</sup> According to professor Greenawalt, "[s]treet demonstrations are a unique and important form of communication."<sup>126</sup> As I just noted above, the fact that protests are forms of communication (or of expression) brings important consequences, for States are not free to regulate them at will. Protests, to

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problem, Fiss argues, was that "[o]rder did not just mean order, but order that preserves segregation." OWEN M. FISS, *THE IRONY OF FREE SPEECH* 7 (1996).

<sup>123</sup> Kevin F. O'Neill, *Disentangling the Law of Public Protest*, 45 *LOYOLA L. REV.* 411, 436-7 (1999) (showing that upheld content-neutral regulations limited speech of very specific groups); Helen Fenwick, *The Right to Protest, the Human Rights Act and the Margin of Appreciation*, *THE MODERN LAW REVIEW* 492, 493-4 (1999) (arguing that denial of public forum rights "bears unequally on different groups" as it is actually a denial of free speech rights for certain minorities).

<sup>124</sup> See, Mohamed Abdelaal, *Egypt's Public Protest Law 2013: A Boost to Freedom or a Further Restriction?* 11 *US-CHINA L. REV.* 1114 (2014).

<sup>125</sup> Cheh, *Demonstrations and special places protection*, *supra* note 117, at 69. I don't want to add more, but a caveat is necessary here. The approach I'm here suggesting should take us, and courts, to consider the effects of content-neutral regulations. Are courts reluctant to do so? Moon has argued that courts in Canada have been reluctant to strike down legislation that, although not aimed at suppressing speech, ends up limiting expression, unless—Moon continues—challengers are able to show "that the restricted expression advances the values that underlie freedom of expression ... the realization of truth, participation in social and political decision making, and diversity in the forms of individual self-fulfillment and human flourishing." MOON, *THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION*, *supra* note 104, at 34-5. The same is true in the United States where governments are given ample room to present the intentions of their regulations—which takes precedence over expressive effects. Huhn, *Assessing the constitutionality of laws that are both content-based and content-neutral*, *supra* note 116, at 817-9 (explaining the intent test). Recently the United States Supreme Court ratified the broad scope authorities have in trumping judicial assessment. *McCullen v. Coakley*, 573 U.S. \_\_\_ (2014) ("Second, even if a facially neutral law disproportionately affects speech on certain topics, it remains content neutral so long as it is "justified without reference to the content of the regulated speech.'").

<sup>126</sup> Greenawalt, *Free Speech in the United States and Canada*, *supra* note 102, at 31.

continue with Greenawalt, “cannot be closed off completely, and regulation that sharply limits them should be carefully reviewed.”<sup>127</sup> Freedom of expression, and through it the right to protest, relates to States in the friend-foe relation I mentioned at the beginning, with all the pros and cons this dialectic relation brings with it. As Fiss wrote,

The state, like any other institution, can act either as a friend or enemy of speech and, without falling back to the libertarian presumption, we must learn to recognize when it is acting in one capacity rather than another.<sup>128</sup>

Noticing the political purposes freedom of expression serves, as I have argued in this section, could help us to determine when the State it is acting in which capacity and, consequently, demand tighter scrutiny of its regulations.

### **III. Freedom of assembly**

Owen Fiss noted some time ago that large chains of newspapers and television dominate the current public sphere.<sup>129</sup> The market, he argued, constrains what matters occupy the front page of the public sphere in two main ways: by privileging “certain select groups, by making programs, journals, and newspapers especially responsive to their needs and desires,”<sup>130</sup> on the one hand, and by privately determining what news they will air (or print). These

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<sup>127</sup> *Id.*

<sup>128</sup> Owen M. Fiss, *Why the State?*, 100 HARVARD L. REV. 781, 787 (1987).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 788.

latter decisions, Fiss regretted, “have a great deal to do with profitability or allocative efficiency ... but little to do with the democratic needs of the electorate.”<sup>131</sup>

This is not a matter of market failure, but of market reach—Fiss insisted.<sup>132</sup> This is why the State is asked to create spaces that supplement, rather than replace, the market. Nevertheless, this is also why social groups strive to overcome the limitations they face due to the current configuration of the public sphere. Assembling themselves is a form of *effectively* influencing politics where traditional channels appear to be closed.<sup>133</sup> Engaging in concerted activity is actually both a matter of mutual aid and protection,<sup>134</sup> given the realization that certain objectives are most effectively achieved (or the achievement at least appears feasible) through joint action.<sup>135</sup> The very source of the body politic is, as Rousseau put it: “This sum of forces [that] can only arise only from the cooperation of many.”<sup>136</sup> This sum of forces is also the condition for the exercise of other rights, such a freedom of speech: “If the people could not assemble, many of their rights would be rendered nugatory.”<sup>137</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Lynd, *Communal Rights*, *supra* note 92, at 1424.

<sup>134</sup> *Id.* at 1423.

<sup>135</sup> *Id.* at 1424.

<sup>136</sup> Jean-Jacques Rousseau, *Of the Social Contract*, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39, 49 (Victor Gourevitch ed. & trans., Cambridge: Cambridge University Press, 2003 repr.) (1762).

<sup>137</sup> James M. Jarrett & Vernon A. Mund, *The Right to Assembly*, 9 N.Y.U. L. QUARTERLY REV. 1, 4-5 (1931). At any rate, it is worth emphasizing that the values normally attributed to assemblies and associations are not solely instrumental. Associations, however transitory (assemblies), have value in themselves as they promote “camaraderie, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are only possible in association with others.” Amy Gutman, *Freedom of Association: An Introductory Essay*, in

Certainly, once a body politic has been erected people may come together with different purposes—for example, to overthrow the regime itself. As I have been stressing here, I am concerned with forms of political participation and contestation that presuppose the regime remaining in place. Here, freedom of assembly occupies a central place. Not surprisingly, John Rawls listed this freedom as one of the basic liberties citizens enjoy. Freedom of assembly, among other liberties—Rawls also mentions freedom of expression—, is key to “secure the free and informed application of the principles of justice.”<sup>138</sup> In fact, in *A Theory of Justice* Rawls had also mentioned freedom of assembly as not only required by the first principle of justice (an equal right to the most extensive scheme of basic rights and liberties), but also to secure a public forum free and open to all citizens where they can assess and “add alternative proposals to the agenda for political discussion.”<sup>139</sup>

On the currency of the republican tradition, at least as Pettit has expounded it, assembly also ranks as a prominent place. Numbers (meaning citizens contesting State action in concerted action) are in fact a matter which is necessary to secure liberty. Indeed, the only way in which a government is conducted in republican terms is when that government is controlled by a

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FREEDOM OF ASSOCIATION 3, 3-4 (Amy Gutman ed. 1998); Inazu, *The Forgotten Freedom of Assembly*, *supra* note 115, 567-70 (2010) (arguing the fact of gathering is a form of expression related to, but certainly different from, freedom of speech).

<sup>138</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 334 (1996).

<sup>139</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 197-8 (1999 rev. ed.). In obvious connection with the references to Owen Fiss with which I open this section, Rawls also added,

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate (at 198).

system equally accessible to all.<sup>140</sup> As freedom in republican terms is more demanding than its liberal counterpart, control of government here is not to be based solely on the will of the State, but—as Pettit explains—on unconditioned grounds.<sup>141</sup> How is that correlation between popular influence and government to be maintained beyond simple contingency? One key component to keep that influence binding, and thus not dependent on the discretionary will of the government, is a resistive community:

a community in which, as a matter of fact and/or common belief, people are disposed to resist government, should it ignore popular influence, and government is disposed to avoid triggering resistance.<sup>142</sup>

Numbers are determining to this purpose. “It is only in the presence of concerted, sustained oversight of government activity,” Pettit argues, that governments will be brought, rather than simply expected, to be responsive to popular inputs.<sup>143</sup>

#### *A. Freedom of assembly as an independent right*

Freedom of assembly is the second right that concurs in configuring the right to protest. It is under the understanding sketched above that concerted actions become politically significant and, to some, the only available channel. It is under this political understanding that I read this right. As a right, it is also better understood as encompassing a bundle of legal positions including both negative and positive obligations.

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<sup>140</sup> PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 208-9 (2012).

<sup>141</sup> *Id.* at 218.

<sup>142</sup> *Id.* at 219.

<sup>143</sup> *Id.* at 226.

One way to start understanding the bundle of rights freedom of assembly encompasses is by distinguishing it from freedom of expression.<sup>144</sup> Is freedom of assembly independent of freedom of speech or is it always speech-related?<sup>145</sup> In A. V. Dicey's historical account of the common law of manifestations, he denied there was such a thing as an independent right to assembly. In his words,

The right of assembly is nothing more than the result of the view taken by the Courts as to individual liberty of person and individual liberty of speech.<sup>146</sup>

Schauer, for another, argued demonstrations, parades and picketing activities were important not much because of their communicative value,<sup>147</sup> but because of their effectiveness as means to call others' attention.<sup>148</sup>

Nowadays, a conceptual distinction seems more appropriate—although, as I'm claiming here, both rights concur in configuring the right to protest. Barendt,

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<sup>144</sup> And also by distinguishing freedom of assembly from freedom of association. *See*, Inazu, *The Forgotten Freedom of Assembly*, *supra* note 115, at 567 ("something is lost when assembly is dichotomously construed as either a moment of expression (when it is viewed as speech) or an expressionless group (when it is viewed as association).").

<sup>145</sup> Notice that this is a related, although different, discussion as to whether the concurrence of different liberties strengthens the right to protest (as discussed *supra* note 53).

<sup>146</sup> Cited in Jarrett & Mund, *The Right to Assembly*, *supra* note 137, at 9. *But see*, Helen Fenwick & Gavin Phillipson, *Public Protest. The Human Rights Act and Judicial Responses to Political Expression*, 2000 PUBLIC LAW 627 (2000) (arguing that since the ratification of the Human Rights Act in 1998 the right to protest transformed from being conceived as an unprotected liberty to a positive right).

<sup>147</sup> In fact, he was very dismissive as to the communicative character of protests. Arguing protests are more emotional than intellectual, he contended there would be little, if any, communicative loss if we were to prohibit protests since "statements of the positions involved are available in books, newspapers, magazines and other less obstructive communicative formats." These channels, he insisted, are "more conducive to a rational argument and deliberation ...". FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 201-2 (1982).

<sup>148</sup> *Id.*, at 202. The Constitutional Court of Spain embraced this approach when stating that the freedom of assembly ("derecho de reunión") entails "a collective manifestation of free speech by means of an instrumental and transitory association of persons put in service of the exchange and exposition of ideas." Judgment of May 8, 1995, Constitutional Court, Second Chamber, STC 66/1995, para. II.3 (my translation).

for instance, has persuasively argued the advantages of considering the right to assembly as an independent right. In fact, as he notes, under the protection of the right to assembly there is no need to entertain the discussion whether there is speech involved or not.<sup>149</sup> Accordingly, not every protest has a communicative purpose.<sup>150</sup> What Barendt argues is that freedom of assembly has an “organizational dimension, enabling the convenors of meetings and street processions to choose, subject to limits and conditions, the time and place of their demonstration.”<sup>151</sup> It is this organizational character what has permitted freedom of assembly, different from freedom of expression, to be more easily conciliated with positive duties.<sup>152</sup> Finally, this conceptual distinction is needed to make sense of the fact that many Western constitutions explicitly recognize freedom of assembly as a right different from, although highly related to, freedom of speech.<sup>153</sup> However, this conceptual distinction

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<sup>149</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 271. More recently, Judith Butler has made a similar claim. JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 8 (2015) (“If we consider why freedom of assembly is separate from freedom of expression, it is precisely because the power that people have to gather together is itself an important political prerogative, quite distinct from the right to say whatever they have to say once people have gathered.”).

<sup>150</sup> I cannot but think of the case of football fans in Latin America and Europe who gather some time before matches in public spaces surrounding stadiums, such as squares and parks. There they normally chant to support their teams, and authorities may regulate their activities in order to control the orderly entrance to the stadium. While these activities have an expressive purpose—to show fans’ commitment to their team—, their regulation would hardly be a matter of freedom of speech, but of freedom of assembly. In other words, a fans’ case against these regulations would not be made stronger if they were to show that chanting in favor of their team is a matter of freedom of expression. However, their case would be strengthened by showing they have peacefully gathered in public spaces where reunions are allowed or if chants themselves are politically loaded—a fact we should not dismiss out of hand considering the way in which many political actors have related to football teams.

<sup>151</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 272.

<sup>152</sup> *Id.* at 271-2.

<sup>153</sup> In fact, it should be noted that many State constitutions in the United States subordinate the freedom of assembly to specific communicative purposes: “To consult the common good; to instruct their representatives; (and, or) to apply to the state governments.” Jarrett & Mund, *The Right to Assembly*, *supra* note 137, at 17.

should not obscure the relevant political purposes that freedom of assembly serves alongside, and shares with—as noted above—, freedom of expression.<sup>154</sup>

*B. TPM regulations and public order*

The most obvious negative duty the State is held to is that of not obstructing freedom of assembly. As noted before, notification procedures are likely to be used by States as instances to discriminate or censor because of viewpoints to be aired. This is why notification procedures are not permissions, but instances of communication flow between demonstrators and the State. At any rate, notification procedures are part of what the literature has called regulations of the time, place and manner of protests.<sup>155</sup> I have already said that these TPM regulations should not be subtracted from freedom of expression scrutiny; under what appears to be neutral TPM regulations the purpose of suppressing certain dissident voices might be hidden. I briefly consider here TPM regulations in light of freedom of assembly alone.

TPM regulations are regularly accepted as they permit the State to balance its interests (i.e. preserving public order and traffic flow) with those of the protesters. But is it actually a balance? There has been an interesting debate as to the State's role in *implementing* these regulations. Some commentators, for instance, highlight the spaces of negotiation that TPM regulations open

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<sup>154</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 272 (“the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy. Public meetings and demonstrations enable those ideas to be communicated more effectively.”).

<sup>155</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 80.



between State authorities (mostly the police) and protesters,<sup>156</sup> which some have deemed an actual institutionalization of protests.<sup>157</sup>

Others, however, warn these regulations offer spaces of negotiation that include unequal bargaining power.<sup>158</sup> They contend that these instances make protesters focus on procedural, rather than substantive matters,<sup>159</sup> that this model has proven to offer ample discretion to authorities,<sup>160</sup> and that these negotiations have not changed the face of a State that imposes these limits in a top-down fashion.<sup>161</sup> Moreover, it has been argued that this negotiated management model has been withdrawn altogether and currently replaced by a ‘command-and-control’ model.<sup>162</sup> In the end, protests have been transformed in forced rituals rather than meaningful political instances,<sup>163</sup> free speech rights

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<sup>156</sup> John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, in *THE SOCIAL MOVEMENTS SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY* 83, 83-4 (David S. Meyer & Sidney Tarrow eds., 1998) (arguing that this public order management system, where citizen protests are a normal part of the political process, has improved practices when compared with protest policing in the 1960s).

<sup>157</sup> McCarthy & McPhail, *The Institutionalization of Protest in the United States*, *supra* note 80.

<sup>158</sup> Donatella Della Porta & Oliver Fillieule, *Policing Social Protest*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, *supra* note 59, at 219-20 (arguing this negotiated exchange between protesters and the police is based on unequal bargaining power).

<sup>159</sup> Trevor C. W. Farrow, *Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time*, 28 *QUEEN'S L. J.* 665 (2002-2003) (arguing TPM processes put protesters in the difficult position of compromising their claims by focusing on procedural matters).

<sup>160</sup> Patrick Rafail, *Asymmetry in Protest control? Comparing protest policing patters in Montreal, Toronto, and Vancouver 1998-2004*, 15 *MOBILIZATION* 489 (2010) (contending whether negotiated management models are always the default rule and highlighting differences across cities).

<sup>161</sup> Citizens, Abu El-Haj has argued, are thus “rendered supplicant” of permissions to assemble. Tabatha Abu El-Haj, *The Neglected Right to Assembly*, *supra* note 101 at 546-7 (“we [have] replaced the notion that the state can only interfere with gatherings that actually disturb the peace or create a public nuisance with a legal regime in which the state regulates all public assemblies, including those that are anticipated to be both peaceful and not inconvenient, in advance through permits.”).

<sup>162</sup> PETER DAUVERGNE & GENEVIEVE LEBARON, *PROTEST INC. THE CORPORATIZATION OF ACTIVISM* 55-65 (2014) (arguing this model is characterized by ample and vague powers granted to the police and its militarization, all this against a background and culture of impunity).

<sup>163</sup> Abu El-Haj, *The Neglected Right to Assembly*, *supra* note 101, at 547.

have been turned into ‘permitted speech,’<sup>164</sup> and many protesters have been taken, either consciously or unconsciously, to commune with the power (either public or private) of those they claim to fight against.<sup>165</sup>

In any case, States are not free to restrict public meetings at will. These restrictions will, generally, be upheld as long as they are “no wider than necessary to prevent litter, noise, congestion, or other nuisance.”<sup>166</sup> In the United States, TPM restrictions are subjected to a three-part test where courts control (a) whether regulations are content-neutral, (b) whether regulations are narrowly tailored, and (c) whether these regulations leave “sufficient alternative channels of communication.”<sup>167</sup> This test precludes total, although content-neutral, prohibitions.<sup>168</sup> Similar criteria is followed in Canada—where public protests can be restricted only if (a) regulations are content-neutral and (b) their limits are “narrowly drawn”<sup>169</sup>—and in the international human rights law.<sup>170</sup> Of course, no matter how strict we are in constraining States’ regulatory

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<sup>164</sup> Don Mitchell & Lynn A. Staeheli, *Permitting Protest: Parsing the Fine Geography of Dissent in America*, 29 INTERNATIONAL JOURNAL OF URBAN AND REGIONAL RESEARCH 796, 800-1 (2005) (arguing the system of regulations has become so accepted that the general rule has become limiting).

<sup>165</sup> DAUVERGNE & LEBARON, PROTEST INC., *supra* note 162, at 1-28.

<sup>166</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 80.

<sup>167</sup> O’Neill, *Disentangling the Law of Public Protest*, *supra* note 123, at 435.

<sup>168</sup> See, for instance, *City of Ladue et al. v. Gilleo*, 512 U.S. 43, 55 (1994) (“Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech”).

<sup>169</sup> MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION, *supra* note 104, at 148.

<sup>170</sup> IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 141 (“The Rapporteurship considers that for said limitations to respect the standards for the protection of freedom of expression and freedom of assembly, they must not depend on the content of what is to be expressed in the demonstration, they must serve a public interest, and they must leave open alternative channels of communication.”).

powers, the fact is that today these regulations seem to be the rule rather than the exception.<sup>171</sup>

Let me close references to TPM restrictions by mentioning two related, although open, debates: the resort to public order, on the one hand, and the displacement of dissenting voices, on the other. Public order is one of those vague and open-ended concepts authorities regularly resort to for restricting protests.<sup>172</sup> Historically, the legal scope of protests has been tightly linked to their impact on bystanders. In fact, in the English common law of assemblies, public meetings were illegal if they meant to terrorize the people or had that consequence.<sup>173</sup> As it has been noted, a protest might become unlawful because of its purpose, but also because of its manner.<sup>174</sup>

These limits, however, have proven difficult to determine precisely because of their vagueness and generality. Furthermore, it is not clear at all what interests these restrictions protect, let alone whether there are any rights involved on the side of the government.<sup>175</sup> The absence of rights, in any case, is not conclusive so as to deny the State regulatory powers. States may actually show

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<sup>171</sup> Abu El-Haj, *The Neglected Right to Assembly*, *supra* note 101, at 579 (“we have replaced the notion that the state can only interfere with gatherings when they disturb the peace, with a legal regime in which the state is permitted to regulate in advance ...”).

<sup>172</sup> It is, in fact, one of the criteria upon which freedom of assembly can be restricted under the American Convention of Human Rights (Article 13.2.b). The European Convention on Human Rights uses similar terms. It states “[n]o restrictions shall be placed on the exercise” of freedom of assembly, other than those necessary “for the prevention of disorder or crime ... or the protection of the rights and freedoms of others” (Article 11.2).

<sup>173</sup> Jarrett & Mund, *The Right to Assembly*, *supra* note 137, at 6.

<sup>174</sup> *Id.* at 19-21 (explaining, meanwhile noticing the flexibility of, the “tumultuous manner” standard).

<sup>175</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 290-1.

there are sensible public interests in preserving order,<sup>176</sup> probably the very same social planning interests the law itself is aimed at serving.<sup>177</sup>

The problem is, therefore, with the different conceptions of public order at hand. One canonical approach suggests that public order entails preserving order,<sup>178</sup> “a matter of keeping the peace, avoiding brawls and so on.”<sup>179</sup> That extremely ample approach makes unlawful any assembly concerted with the common intent of “produc[ing] danger to the tranquility and peace of the neighborhood,” as a New Jersey court held in 1928.<sup>180</sup> Moreover, in the recent European context the definition of public order has also been linked to the security and free movement of goods.<sup>181</sup> Nevertheless, public tranquility, to put it broadly (as broadly as the term has been used), shows only one side of the coin, for public order also has an egalitarian component. It might “comprise society’s interest in maintaining among us a proper sense of one another’s social or legal status.”<sup>182</sup> This is to secure the standing of citizens as full

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<sup>176</sup> *Id.* at 291.

<sup>177</sup> SCOTT J. SHAPIRO, LEGALITY 170-73 (2011) (arguing legal systems are “institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning” in the context of highly pluralized communities).

<sup>178</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 291.

<sup>179</sup> JEREMY WALDRON, THE HARM IN HATE SPEECH 46 (2012).

<sup>180</sup> Jarrett & Mund, *The Right to Assembly*, *supra* note 137, at 22.

<sup>181</sup> In *Schmidberger v. Austria*—the case I am thinking about here—the European Court of Justice (“ECJ”) did not hold that protests are to be restricted in light of the fundamental freedom of movement of goods. In fact, the ECJ reasoned that sometimes freedom of assembly outweighs other considerations. Matthew Humphreys, *Free movement and roadblocks: the right to protest in the single market*, 6 ENVTL. L. REV. 190, 191-3 (2004). However, the freedom of movement of goods was certainly a standard with which protests (and other rights) are to be balanced, although in a more relaxed fashion. See, Andrea Biondi, *Free Trade, a Mountain Road and the Right to Protests: European Economic Freedoms and Fundamental Individual Rights*, 1 EUROPEAN HUMAN RIGHTS L. REV. 51, 58-9 (2004) (noticing that, according to the ECJ in *Schmidberger*, the fundamental rights defense is to be scrutinized in light of whether they are tolerable interferences with “obligations imposed by Community Law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.”).

<sup>182</sup> WALDRON, THE HARM IN HATE SPEECH, *supra* note 179, at 46.

members of a given society, that is, the status of citizenship.<sup>183</sup> This egalitarian side of public order, a face seldom emphasized, leads us to consider the attribution and protection of rights, particularly the protection of rights that allow the people to become meaningful citizens (participatory rights), not the security that one's daily life will be uneventful.<sup>184</sup>

A similar reading can be found in the international human rights law where, aware of the open-ended character of public order, a more structural conception has been preferred. This structural conception of public order stresses the institutional conditions needed to secure the enjoyment of rights, being the respect for rights precisely one of these conditions.<sup>185</sup> Thus, the

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<sup>183</sup> *Id.*

<sup>184</sup> In fact, Waldron argues this version of public order aspires to assure "members of a vulnerable group can live their lives gracefully and in a dignified manner, in routine interactions with other" WALDRON, *THE HARM IN HATE SPEECH*, *supra* note 179, at 92. I have already emphasized above the importance of reading freedoms of expression and of assembly in an egalitarian manner, that is, paying attention to how the regulation of rights affects those who are worst-off. Stressing the egalitarian aspect of public order follows such an approach. The Rapporteurship has also highlighted the crucial role protests play in consolidating democracies. IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 140 ("the Rapporteurship emphasizes that societal participation through public demonstrations is important for the consolidation of democratic life of societies. In general, as an exercise of freedom of expression and freedom of assembly, it is of crucial social interest ..."). More recently, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasized restrictions on freedom of assembly are more burdensome to certain marginalized groups. The effect of freedom of assembly regulations, as well as hostility from other individuals, has the consequence of "reinforcing marginalization" and political participation in public matters. Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)*, A/HRC/26/29. April 14, 2014, at paras. 7-15.

<sup>185</sup> The objective of these clauses is to allow States not to resort to legitimate interests recognized in international conventions with the aim of restricting rights and liberties recognized there as well. *See*, Article 29.a of the American Convention on Human Rights;

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.

And Article 17 of the European Convention on Human Rights:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction

Rapporteurship noted in its 2009 Annual Report that public order cannot be invoked to suppress rights recognized in the Convention.<sup>186</sup> In line with the structural notion here emphasized, it defined public order as “the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.”<sup>187</sup> Pointing to the maintenance of democratic institutions,<sup>188</sup> the Rapporteurship emphasized that the widest circulation of ideas was indeed required by public order.<sup>189</sup> Exactly the same emphasis on the structural understanding of public order has been held in the international system of human rights.<sup>190</sup>

There has been some debate as to the meaning of public order in the European context, where public order has been conceptualized in both a broad and a

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of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

<sup>186</sup> IACHR-Office of the Special Rapporteur on Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2009*, OEA/Ser.L/V/II. Doc.51. December 30, 2009, at 251. See also, the *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 140-41 (“the purpose of the regulation of the right to assembly cannot be that of establishing grounds for prohibiting meetings or demonstrations.”).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (“any impairment of public order that is invoked as a justification to limit freedom of expression must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions.”).

<sup>189</sup> *Id.* Some have suggested that this means the IACtHR has understood the terms of the Convention to be sort of “an American democratic public order,” which explains why public order can only be interpreted with reference to the American Convention. ANNA-LENA SVENSSON-McCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION: WITH SPECIAL REFERENCE TO THE TRAVAUX PRÉPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS 170-1* (1998).

<sup>190</sup> De Schutter cites the ‘Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,’ noticing that

The expression ‘public order (ordre public)’ as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 105, at 306.

narrow sense.<sup>191</sup> The broad sense is similar to the structural conception here identified: “the basic structure of a state governed by the rule of law, or in other words, a proper democratic republic’.”<sup>192</sup> In a narrow sense, however, public order amounts to public policy, “that is, normal and undisturbed life in the public sphere.”<sup>193</sup> While de Lange recognizes that it is this narrow sense what provisions of the European Convention on Human Rights accept when permitting limits on rights (the European Convention talks of public safety and the prevention of disorder,),<sup>194</sup> it is also true that fundamental rights normally trump these public policy considerations.<sup>195</sup> This is so because the interests that States regularly resort to in order to restrict rights might be very important, but “they would not include the basic structure of the republic, nor necessarily the fundamental rights of the citizen.”<sup>196</sup> Furthermore, the ECtHR has also developed a more demanding standard whenever political speech is involved, therefore reducing the margin of appreciation granted to States for domestic regulations.<sup>197</sup> Thus, in *Schmidberger*, as already noted, the ECJ

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<sup>191</sup> Here I follow Roel de Lange, *The European Public Order, Constitutional Principles and Fundamental Rights*, 1 ERASMUS L. REV. 3, 7-9 (2007).

<sup>192</sup> *Id.* at 7-8.

<sup>193</sup> *Id.* at 8.

<sup>194</sup> *Id.* at 9.

<sup>195</sup> *Id.* at 8. *See also*, SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS, *supra* note 189, at 188 (“the international law of human rights provides a positive legal framework which strictly conditions the meaning of these notions [national security and public order] so as always to make their interpretation and application conducive to the effective protection of the rights concerned.”).

<sup>196</sup> *Id.*

<sup>197</sup> This is particularly the case of public meetings, whose protection has been routinely merged with that of freedom of speech. Every time this is the case—and as I said before relying on the amplitude of means freedom of expression provides citizens with and public opinion openness, this is regularly the case—the Court sees that the essential foundations of democracy are involved. In any case, as van Dijk et al. recognize, freedom of peaceful assembly has not played such a relevant role in the jurisprudence of the Court. *See*, PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 818-9, 821-3 (2006). I would like to thank Pablo Contreras for the discussion and reference on this issue.

reasoned the right to protest trumped the free movement of goods, for an isolated incident in question did not give rise to a general climate of insecurity.<sup>198</sup>

There is no doubt that the structural understanding of the public order is more congenial with the right to protest, for public meetings will always involve some level of public nuisance that cannot be used as an excuse to sanction dissent.<sup>199</sup> This was what the German Constitutional Court held in *Brokdorf*:

a limitation of this freedom will definitely not be justified by just any interest; inconveniences which inevitably arise from the large scale on which the basic right is exercised, and cannot be avoided without disadvantages for the purpose of the event, will generally have to be born by third parties. It will be just as inappropriate to consider banning of meetings on the basis of mere technical traffic grounds, since juxtaposition of the use of the highway by demonstrators and moving traffic is as a rule attainable by conditions.<sup>200</sup>

It should be noted that in the context of the ECtHR it has also been held that protests will inevitably cause some disruption—inherent in any demonstration—

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<sup>198</sup> *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria (Case C-112/00)*, [2003] ECR I-5659, 5722.

<sup>199</sup> It is a telling fact that in the preparatory works of the Universal Declaration of Human Rights and the International Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights) narrower terms such as ‘public welfare’ and ‘prevention of disorders’ were dropped as limits on rights. This does not mean, as the international case law shows, that considerations of public tranquility cannot be invoked, but it does mean that those considerations alone do not exhaust the meaning of public order. At any rate, this openness calls for a balance of different interests in defining the scope of public order, fundamental rights included—as argued above. See, SVENSSON-McCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS*, *supra* note 189, at 149-61.

<sup>200</sup> *Brokdorf*, *supra* note 112.



, which is protected by freedom of assembly.<sup>201</sup> This protection has also been extended to unlawful gatherings.<sup>202</sup> How much disruption and disorder will authorities permit, however, is difficult to tell in advance. Authorities normally enjoy ample latitude to ‘accommodate’ exercise of (crucial) rights with disorder and risk of violence,<sup>203</sup> but they are not free in determining so.

Or are they? One of the main obstacles to a vigorous freedom of assembly is the vague nature of statutes granting governmental authorities, particularly the police, ample powers for policing protests.<sup>204</sup> No wonder this is one of the reasons why authorities have preferred to stick with the erratic-vague-and-open-to-as-many-interpretations-as-you-will notion of public order.<sup>205</sup>

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<sup>201</sup> *Ezelin v. France*, [1992] EHRR 362.

<sup>202</sup> *Case of Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, ECHR 2011, para. 41 (“the Court reiterates that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility ... it also points out that an unlawful situation does not justify an infringement of freedom of assembly and that regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly as protected by the Convention.”). However, the ECtHR has done so in the context of protests or assemblies limited in time, meaning protests that cause momentary, rather than extended, disruption. In *Barraco*, the Court, despite recognizing that “all demonstrations in a public place are likely to cause some disruption,” also noted that in this specific case protesters went “beyond the level of obstruction inherent in the demonstration itself.” *Barraco v. France* [2009] E.H.R.L.R. 580, 581-2.

<sup>203</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 291-2.

<sup>204</sup> I have noted above (*supra* note 42) that there is a current trend among governments facing different degrees of protests (Canada, Chile, Egypt, Greece, Russia, and Spain, to name a few) to submit bills and pass statutes and different by-laws curtailing the freedom of assembly. They do this by criminalizing ample and vague conducts which exact limits are hard, if impossible, to foresee by regular citizens (public order, of course, ranks among authorities’ preferred terms). Human Rights Council, *Report of the Special Rapporteur 2014*, *supra* note 184, at para. 7 (“In recent years many States have responded to people’s assertions of peaceful dissent by violently clamping down on peaceful protests and other forms of assembly, unduly restricting the ability of associations to form and operate, and physically assaulting civil society actors.”). In this regard, a case decided by the United States Supreme Court in 1965 is exemplary. In *Cox*, the Court held a statute of breach of peace was unconstitutionally vague and broad in scope as it permitted to “sweep[] within its broad scope activities that are constitutionally protected free speech and assembly.” *Cox v. Louisiana* (No. 24), 379 U.S. 536, 551-2 (1965).

<sup>205</sup> Helen Fenwick, for instance, has shown that in the United Kingdom the breach of peace doctrine of the common law is so ample and vague that it even fails to distinguish between riots and protests with freedom of expression significance. Fenwick, *The Right to Protest*, *supra* note 123, at 508. *See also*, Helen Fenwick, *Marginalising Human Rights: Breach of the Peace, “Kettling”, the Human Rights Act and Public Protest*, 2009 PUBLIC LAW 737, 737-8 (2009)

Whereas empirical research has shown the police are keen on reading their own perceptions as to what public order involves within statutes and bylaws,<sup>206</sup> the fact that these statutes contemplate mostly criminal sanctions transforms this into an urgent issue.<sup>207</sup> However, while the police give orders, their orders, as Jarrett and Mund put it back in 1931, are not laws.<sup>208</sup>

Many decisions and standards show that empty and conjectural references to disorders that may (but also may not) follow protests are not enough.<sup>209</sup> As the Rapporteurship explained, every time public order is invoked to limit expressions and assemblies it “must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions.”<sup>210</sup> In this very fashion the ECtHR has reasoned that authorities

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(showing the police have preferred to resort to the common law of breach of peace which offers more discretion to curb and control protests, rather than to the statutes regulating public meetings—however vague as well).

<sup>206</sup> Della Porta & Fillieule, *Policing Social Protest*, *supra* note 158, at 222-27.

<sup>207</sup> *Annual Report of the Inter-American Commission on Human Rights 2009*, *supra* note 186, at 143 (criminalization could have an intimidating effect on this form of participatory expression among those sectors of society that lack access to other channels of complaint or petition.”); Human Rights Council, *Report of the Special Rapporteur 2014*, *supra* note 184, at para. 60 (“Criminal procedure laws and penal sanctions are used in several States to deter the exercise of the right to freedom of association. Authorities who are hostile to critical voices resort to criminal prosecution for defamation or similar offences, thereby discouraging and interfering with legitimate activities by groups.”). *See also*, Gargarella, *Law and Social Protests*, *supra* note 75 (calling attention on the inconvenience, and justificatory problems in the context of pervasive inequality, of answering protests with criminal law).

<sup>208</sup> Jarrett & Mund, *The Right to Assembly*, *supra* note 137, at 26.

<sup>209</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 294-302.

<sup>210</sup> *Annual Report of the Inter-American Commission on Human Rights 2009*, *supra* note 186, at 251. The Rapporteurship has also held that protests “cannot be considered as synonymous with public disorder for the purpose of restricting it per se.” Therefore, “an officer cannot deny a permit because he or she believes it to be likely that a demonstration will endanger peace, security, or public order, without taking into consideration whether the danger to peace, security or public order can be avoided by modifying the original circumstances of the demonstration (place, time, and so on).” *Annual Report of the Inter-American Commission on Human Rights 2005*, *supra* note 80, at 141-3.

need to specify the reasons why an outbreak of violence is likely. Therefore, empty reference to legal norms is not enough. Indeed, in *Ivanov* it held that

even assuming that the legitimate aims pursued were public safety and the prevention of disorder, it can hardly be concluded that the authorities gave relevant and sufficient reasons justifying the prohibitions of the rallies, substantiating their finding that there was a risk to public order, and that the bans were thus necessary in a democratic society. It should also be noted that in their observations the Government did not specify any particular reasons to justify the bans, but merely stated that the authorities had acted in conformity with national law and that their actions had not been arbitrary.<sup>211</sup>

Other local jurisdictions have maintained similar criteria. Thus, in *Edwards v South Carolina* the Supreme Court of the United States held that the threat of breach of peace, there defined in a pretty narrow sense,<sup>212</sup> has to be real and imminent<sup>213</sup>—a standard later to be picked up by the Colombian Constitutional Court under the wording of a “imminent and serious threat.”<sup>214</sup> The Constitutional Court of Spain has also emphasized the burden on authorities to

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<sup>211</sup> *Case of Ivanov and others v. Bulgaria*, no. 46336/99, ECHR 2005, at para. 63. See also, VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION, *supra* note 197, at 821-2.

<sup>212</sup> *Edwards v. South Carolina*, 372 U.S. 229, 234 (1963) (“In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence ..., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence.”).

<sup>213</sup> *Id.*, at 237-8 (“That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. ... There is no room under our Constitution for a more restrictive view.”).

<sup>214</sup> Corte Constitucional [C.C.] [Constitutional Court], julio 14, 1992, Sentencia T-456/92 (slip op. at a), available at <http://www.corteconstitucional.gov.co/relatoria/1992/T-456-92.htm>. See also, Gargarella, *Law and Social Protests*, *supra* note 75, at 140 (noticing the closeness between the Colombian and the North American standards).

show that there are justified reasons to conclude an alteration of the public order is imminent<sup>215</sup>—recalling previous decisions where it has also held public assemblies will inevitably bring restrictions on the free circulation of bystanders, restrictions that are to be expected in a democracy.<sup>216</sup> Something similar has been suggested in the admittedly more restricted context of the United Kingdom. There, the House of Lords has restricted the discretionary powers the police enjoyed before the Human Rights Act was passed.<sup>217</sup> Moreover, in determining whether disorder is likely to occur authorities are restricted from looking to previous disturbances. In other words, previous disorders are no guarantee they will occur again in the future.<sup>218</sup> It should be mentioned that, in light of the freedom of peaceful assembly, direct advocacy of violence by organizers might well be a reason to restrict assemblies.<sup>219</sup>

The second TPM-related issue is the displacement of dissent. TPM restrictions, particularly those of place and time, will normally have the effect of altering the plans of protesters. Protests are intended to call political attention; therefore,

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<sup>215</sup> Judgment of October 27, 2003, Constitutional Court, First Chamber, STC 195/2003, at para. II.4.

<sup>216</sup> *Id.*, at para. II.9. In a similar sense the Constitutional Court of Peru has reasoned restriction of the freedom of assembly can only be deemed constitutional when based on probable causes, “objective and duly justified reasons.” Corte Constitucional [C.C.] [Constitutional Court], diciembre 7, 2005, Sentencia EXP. No 46-77-2004-PA/TC, available at: <http://www.tc.gob.pe/jurisprudencia/2005/04677-2004-AA.html>, at para. 9.2 (18) (my translation).

<sup>217</sup> According to Fenwick, this was the case of *Laporta*. There, the House of Lords reduced the amplitude of the concept of imminence in the common law of the breach of peace. However, as she herself shows, this is far from a consolidated jurisprudential trend. In fact, in *Austin*, the House granted the police ample deference in applying the breach of peace conditions. Fenwick, *Marginalising Human Rights*, *supra* note 205, at 742-54.

<sup>218</sup> So held the Supreme Court of the United States in *Kunz v. New York*, 340 U.S. 290, 294 (1951) (“The court below has mistakenly derived support for its conclusion [criminal conviction of a religious preacher] from the evidence produced at the trial that appellant’s religious meetings had, in the past, caused some disorder.”).

<sup>219</sup> VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION*, *supra* note 197, at 822 (arguing the ECtHR considers relevant the “non-violent intentions of those involved in the assembly, and not those not involved”).

the specific place where, and time when, they are to happen is of utmost importance. I will say something else about this in the following chapter when dealing with the right to the city.

There are also some positive duties different from access rights (which I also discuss in the following chapter), duties which stem from freedom of assembly. First, if States have the duty not to interfere with freedom of assembly, States also have the positive duty of removing legal obstacles to its exercise. Although a positive duty, this is one that is negatively fulfilled most of the time. Thus, whereas a court could find a regulation to be unconstitutional for unreasonably regulating freedom of assembly, courts are unlikely to impose positive duties on political branches to pass legislation/regulations in a certain fashion.<sup>220</sup>

States also have positive duties regarding what could be called factual obstacles. The most obvious example is that of hostile audiences, which are normally seen as a threat to public order. Here the primary duty of the State, no doubt whatsoever a positive one, is that of safeguarding the opportunity of the speakers to speak.<sup>221</sup> As the United States Supreme Court put it in *Fainer*,

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also

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<sup>220</sup> This is not the place to entertain, but simply to notice, the debate regarding the fashion in which constitutional or supreme courts exercising judicial review function. Some have suggested judicial review of legislation is better seen as a dialogue between and among the different branches. I am not denying that, on certain occasions, judicial decisions might lead political branches to fill the vacuum left by a nullified regulation, and to sometimes even follow the guidelines set by a court to do so.

<sup>221</sup> Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1985-1986) (arguing that whereas TPM are often seen as limitations on the right to protests, it is also true that in the cases of hostile audiences we see a 'positive,' in the sense of welcome, governmental intervention).

mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings.<sup>222</sup>

This right to speak includes that of counter-demonstrators:

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents.<sup>223</sup>

The reason seems obvious: violence from counter-demonstrators would “deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.”<sup>224</sup> On the other hand, if the State (normally police authorities) were permitted to prohibit or dissolve demonstrations simply because *they feel* that counter-demonstrators may be present, thus causing a (also alleged) disruption of public order, then that would imply that the exercise of freedom of assembly would be subjected to a sort of de facto veto.<sup>225</sup> Considerations on equality might be of importance here too, for it is one case if a protest is countered by those who oppose the purpose for which demonstrators are advocating, but quite another when the group mobilizing is also unpopular, marginal, and constantly excluded from regular channels of political

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<sup>222</sup> *Feiner v. New York*, 340 U.S. 315, 320 (1951).

<sup>223</sup> *Case of Plattform “Ärzte Für Das Leben” v. Austria*, [1988] EHRR 204, para. 32.

<sup>224</sup> *Id.* But also because violence is not deemed a form of legitimate expression. BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 80-1.

<sup>225</sup> Considerations on public order sketched above are important here too, for everything I have said here about positive duties of the State does not mean that, under certain circumstances, there might not be sensible reasons to further regulate protests. Barendt calls for seeking “imaginative solutions.” BARENDT, FREEDOM OF SPEECH, *supra* note 65, at 302-3

intervention.<sup>226</sup> Whereas the duty of the State is not absolute, in the sense that its resources are limited in safeguarding the rights of the speaker(s),<sup>227</sup> when groups involved are unpopular, marginalized, and constantly excluded from regular channels of political influence it seems reasonable to demand a more stringent scrutiny, for the group might be unpopular for State authorities as well—including the police.<sup>228</sup>

The State can limit freedom of assembly—and the current state of affairs shows shameless governments invoking ample and vague concepts as amply and vaguely as they can be invoked—but also secure its enjoyment. Again, the State is both a foe and friend. Freedom of assembly, as noted above, triggers a bundle of rights (liberties and powers). Sometimes the State is required to step back, such as when we ask it to not obstruct protests, but other times the State is needed. By this I mean that we need the State to not only be a legal entelechy, such as when we demand the derogation—to name a case—of statutes or

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<sup>226</sup> I have taken this distinction from David G. Barnum, *Freedom of Assembly and the Hostile Audience in Anglo-American Law*, 29 AM. J. COMP. L. 59 (1981).

<sup>227</sup> See, Plattform “Ärzte Für Das Leben,” *supra* note 223, at para. 34 (“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used.”).

<sup>228</sup> See, for instance, the claims at issue in *Edwards v. South Carolina (No 86)*. *Edwards* involved the criminal conviction of 187 African Americans who demonstrated against discriminatory laws in South Carolina in 1961. As the records of the case show, no member “of some 200 to 300 onlookers ... [did] any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd” (at 231). The police, however, proceeded to arrest them for breach of the peace. In *Stankov*, the ECtHR held also that

If every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion.

... The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be.

*Case of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, HUM. RTS. CASE DIG. 739 (2001).

regulations too burdensome on citizens' rights. We need it to be an actual State, that is, the State in its physical form, such as when we need the State to protect protesters from hostile audiences or, as I shall explain in the next chapter, when we require the State to own property open to the multifarious voices shaping public opinion.

### **Conclusions**

The *positive* right to protests assumes the regime remains in place. Seen in this light, the State is, as I have tried to show, both a friend and a foe. It is a friend for it is the State's very existence what confers meaningful value—and probably a purpose—to the right to protest. It is a foe as it is its very regulatory powers what, not uncommonly, unduly restrain the scope of the right. I have argued that the right to protest, understood as a positive right, presents both these advantages and limitations. The most obvious advantage stems from the fact, probably an institutional and political fact, that States are not free to restrain the right to protests as they please. The disadvantages, on the other hand, are precisely within the regulatory powers of the State. Governmental regulations following the recent upheavals have led us to consider the disadvantages more. These disadvantages certainly exist. This is why in sections II and III I have suggested that a correct comprehension of the foundational rights involved in protests should lead States to opening avenues of political participation, even if they are non-institutional, such as in the case of protests, for this is the only path to secure that citizens will (i) continually engage in dialogue with the



State, (ii) remain loyal to their constitutional regimes, and (iii) be reluctant to resort to more radical, and evil to their fellow citizens, ways of manifesting dissent.

Of course, all these constitutional democratic goals can be cynically read and, from the State viewpoint, cynically implemented. Because of this, some commentators show little, if any, hope in regular means of participation—among which protests are but one means. Nonetheless, we should have more trust in the people themselves. As the examples from the ‘Arab Spring’ illustrate, the people are quite aware as to when a sensible constitutional faith in current regimes has been replaced by blind obedience to an imposed top-down constitutional idolatry. Put differently, the State acting as a foe of the right to protests might turn out to be its own foe if it unduly and illegitimately pursues restricting dissent.

## CHAPTER 4

### THE RIGHT TO PROTEST: EXPANSIONS

#### I. Public forum / the right to the city

A. *Public forum as a positive right*

B. *A positive right?*

#### II. Participating without a face

A. *From privacy to contextual integrity*

B. *Harms to protests*

C. *Surveillance*

D. *Counter surveillance*

E. *Masks, hoods, and anonymity for protesters*

### Introduction

*"It is clear that terror is not simply an emotional and psychological phenomenon*

*but a physical one as well ..."*

Paul Virilio\*

In the previous chapter I dealt with the rights that concur in giving the (positive) right to protests its basic form. The foundations of the rights to protests, namely freedom of expression and of assembly are so since these are

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\* THE ADMINISTRATION OF FEAR 21 (Ames Hodges trans., Semiotext(e) 2012).

the basic protections protesters claim to be on their side when taking the streets. Put differently, there is no (positive) right to protests without freedom of expression—which protects, among other things, the right to hold and shout dissenting views—and of assembly—the right we have to join others in public spaces.

This chapter focuses on the expansions of the (positive) right to protest. It calls attention on matters that are not foundational to the right to protests, but certainly are of utmost importance for the constitutional protection of protesters. The matters this chapter deals with are expansions in a twofold sense. This is first because—as I argue below—they expand, in the sense that they strengthen, the constitutional protection of protests. Second, they are expansions in that they take us to consider situations that normally would go unnoticed—or at least are not necessarily related to the right to protest. In other words, this chapter argues to expand the view of the constitutional protection of protests and consider restrictions on the right to protest that are usually harder to identify and protect.

The first section (I) goes (in a sense) back to foundations sketched in the previous chapter in order to question what many have called the positive face of the right to protests, that is, the public forum doctrine. While an important development in that it questions a State's behavior as a private proprietor when regulating protests, it still falls short in actually procuring State's positive obligations. I will take insights from what is known as *the right to the city* (mainly contributions from urban geography) to expand our views on matters

that seem irrelevant, but that end up being seriously inimical, to protests (i.e. privatization).

In the following section (II), I analyze a socially vitalized form of privacy to justify the political right to participate without a face. The argument of this section is that protesters, even when in public, still hold a form of privacy. As I argue below, this is not oxymoron, for protests are still public, and therefore political, expressions whose arguments are presented in an open-to-all fashion. What this argument holds, however, is the right that individuals have—when they consider appropriate to do so—to prevent others, including the State, from knowing their actual identities or using the information States gather through different means in a way that affects the right to protest. This is a particularly pressing issue when we consider the general context in which protests take place. This is a context of concentrated violence in the hands of the State and its intelligence services, whose costs (like physical violence and unidirectional imposed restrictive regulations) are directly and indirectly placed on protesters. This is an even more urgent concern in regions, such as in Latin America, where institutions (like the police) have been inherited from recent dictatorships and that are still going under, sometimes stormy, democratic adjustment.<sup>1</sup>

### **I. Public forum / the right to the city**

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<sup>1</sup> I owe Roberto Gargarella this formulation of the general and particular implications of privacy for protests.

“Whatever else a city may be,” Eric Hobsbawm wrote some years ago, “it is at the same time a place inhabited by a concentration of poor people and, in most cases, the locus of political power which affects their lives.”<sup>2</sup> Urban spaces, in fact, cannot divorce the political, material and cultural conditions they have been erected upon, and—as Douzinas has pointed out—they “express[] the inequality of social relations and offer[] a site of conflict.”<sup>3</sup> Urban spaces are the locations where political disagreements take physical existence and actually pervade every corner of urbanity—as I shall show now, they are spaces where different layers of conflict cohabit.

Urban spaces, in fact, are an extension of ourselves, thus merging with the self.<sup>4</sup> What the city is defines, to a certain degree, what we are. As David Harvey put it,

the question of what kind of city we want cannot be divorced from the question of what kind of people we want to be, what kind of social relations we seek, what relations to nature we cherish, what style of life we desire, what aesthetic values we hold.<sup>5</sup>

The right to the city, following these definitions, is more than mere access rights or privileges to enjoy the city’s amenities (although these are certainly included), but a collective political right “to change and reinvent the city more

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<sup>2</sup> Eric J. Hobsbawm, *Cities and Insurrections*, in *REVOLUTIONARIES. CONTEMPORARY ESSAYS* 220 (1973).

<sup>3</sup> Costas Douzinas, *Athens Rising*, 20 *EUROPEAN URBAN & REGIONAL STUDIES* 134 (2012).

<sup>4</sup> This is brilliantly explained by Mustafa Dikeç, who shows public space performs a double, sometimes dialectic, function: it unites by bringing people together and, at the same time, separates as it permits individuals to display their own uniqueness—“as distinct from others,” although built and shaped in interaction with others. Mustafa Dikeç, *Space as a mode of political thinking*, 43 *GEOFORUM* 669, 672 (2012).

<sup>5</sup> DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* 4 (2012).

after our heart's desire."<sup>6</sup> We need not dig much to find conflict and disagreement as to the collective formation of this 'cityness'—to use Saskia Sassen's terminology.<sup>7</sup>

This right, however, has been itself the subject of struggle and conflict as the notions of what public spaces are, who can access them, who is deemed as contributing to its definition, and who is seen as an inappropriate user have always been part of our political struggles and disagreements. As Don Mitchell argues, there are, indeed, many forms through which access to urban spaces is permitted/limited, including "environmental change, behavior modification, and stringent policing," so as to maintain public spaces "'public' rather than hijacked by undesirable users."<sup>8</sup>

Experience shows, therefore, that the right to the city is also, and above all, exercise and practice. In fact, Mitchell contends that no matter how laws guarantee liberties and rights their actual protection is their practice. Constitutional liberties are thus always contested and "always proven in practice, never, that is, guaranteed in the abstract."<sup>9</sup> The very idea of public spaces and constitutional rights, in fact, "has never been guaranteed. It has only been won through concerted struggle, and then, after the fact, guaranteed (to

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<sup>6</sup> HARVEY, *REBEL CITIES*, *supra* note 5, at 4.

<sup>7</sup> Saskia Sassen, *Does the City have a Speech?*, 25 *PUBLIC CULTURE* 209, 214-5 (2013) (arguing 'cityness' corresponds to collective and interdependent dynamics "making the public and making the political in urban space," dynamics that take place beyond specific disagreements and conflicts).

<sup>8</sup> DON MITCHELL, *THE RIGHT TO THE CITY. SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE 2* (2003).

<sup>9</sup> *Id.*, at 4.

some extent) in law.”<sup>10</sup> This is why, according to Sassen, the right to the city is something that is both established and always contested. This ‘cityness’ she talks about is conceived as

a kind of public-making work that can disrupt established narratives and thereby make legible the local and the silenced even in visual orders that seek to cleanse urban space.<sup>11</sup>

Of course, in this vision of the city, one where the people take an active, rather than a passive, role in shaping its understanding and political comprehension, some tolerance to danger, disorder and violence must exist.<sup>12</sup> This city is no longer one where authorities summon their subjects—“an admiring and applauding audience,” as Hobsbawm put it<sup>13</sup>—to display the power of the State with big fanfare and eloquence, but one where citizens take quite an active role in shaping and defining publicity.

This implies a third dimension of conflict and struggle, one that relates to the very definition of public space, for public places where the political is present are no longer those ceremonial sites previously determined by the authority (although these sites are certainly included).<sup>14</sup> Rather, these public places have

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<sup>10</sup> *Id.* at 5. See also, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM COURTS 168-9 (1999) (arguing that there is no need for a court vested with judicial review powers to “have a vibrant language of fundamental rights” that can be defended politically).

<sup>11</sup> Sassen, *Does the City have a Speech?*, *supra* note 7, at 214.

<sup>12</sup> MITCHELL, THE RIGHT TO THE CITY, *supra* note 8, at 5 (“Struggle—which is the only way that the right to public space can be maintained and the only way that social justice can be advanced—is never without danger of violence.”).

<sup>13</sup> HOBBSAWM, *Cities and Insurrections*, *supra* note 2, at 224.

<sup>14</sup> *Id.* at 230 (“No doubt why these sites, deemed by all as the places of power, are one of the preferred sites for rioting, protesting and occupying. Precisely because they express the locus of power they are places worth rioting against; popular protests, in fact, are aimed, at least transitorily, to blur the division rulers/ruled and the occupation of ceremonial sites and buildings shows things are taking that turn.”).

expanded to encompass what Saskia Sassen calls the 'global street.'<sup>15</sup> What characterizes the global street is its difference from more European-style ritualized places. Whereas these latter places operate under the recognition of spaces where politics occurs through ritualized routines (i.e. an official parade where the public assumes, or is imposed, a passive mood), the global street sees urban public spaces as opened to political action. Thus, different from European piazzas and boulevards, the global street is conceived "as [any available open] space where new forms of the social and the political can be made, rather than a space for enacting ritualized routines."<sup>16</sup> Hence, that what signals the global street is neither ceremonies nor rituals, but action.<sup>17</sup>

Finally, this action implies the coming together of people who strive to become political subjects, a struggle which is itself political. In this sense, public spaces—and spatialities in general—work as a catalyst for groups sometimes holding radically different views "to protest against, or wrest control from, those holding the reins of power."<sup>18</sup> By appearing publicly these groups become political subjects, even if they are not formally citizens;<sup>19</sup> they become visible where they were previously ignored;<sup>20</sup> they get a voice and speech where before they were considered pure noise;<sup>21</sup> and they finally get the chance to

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<sup>15</sup> Saskia Sassen, *The Global Street: Making the Political*, 8 GLOBALIZATIONS 573 (2011).

<sup>16</sup> *Id.* at 574.

<sup>17</sup> *Id.*

<sup>18</sup> Walter Nicholls et al., *Introduction: Conceptualizing the Spatialities of Social Movements*, in SPACES OF CONTENTION. SPATIALITIES AND SOCIAL MOVEMENTS 1, 1 (Walter Nicholls et al., eds. 2013).

<sup>19</sup> Think, for instance, of protesting immigrants.

<sup>20</sup> Douzinas, *Athens Rising*, *supra* note 3, at 136-7.

<sup>21</sup> Dikeç, *Space as a mode of political thinking*, *supra* note 4, at 674.



make history.<sup>22</sup> This is so because, as Dikeç has noted reading Arendt, the political space *is* the space of appearing.<sup>23</sup> Or more concretely,

the right to the city is a claim for the recognition of the urban as the (re)producer of social relations of power, and the right to participate in it.<sup>24</sup>

In this fashion, the concept of citizenship is enhanced and pluralized. Citizenship is no longer univocally seen as a legal link (formal) that attaches one to a given territory (territorial), but a substantive and structural set of relations that take place in the city. It is a right that is “not inscribed on paper but cultivated through sharing space.”<sup>25</sup>

#### *A. Public forum as a positive right*

Urban spaces are political sites. They are places where our political disagreements take actual form and appear. As Costas Douzinas has remarked on recent popular uprisings, public appearances have contributed to concretize the public sphere from a sociological concept to a political time and space.<sup>26</sup> The city is political and therefore the locus of conflict.<sup>27</sup> Public spaces are politically relevant since they represent the *where* of politics helping to

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<sup>22</sup> The ‘global street,’ Sassen argues, offers the powerless the space to “make history ... [b]ecoming present, visible to each other [they] can alter the character of powerlessness.” Saskia Sassen, *Does the City have a Speech?*, *supra* note 7, at 213.

<sup>23</sup> Dikeç, *Space as a mode of political thinking*, *supra* note 4, at 671 (“The ‘who’ of the acting subject—her unique distinctness—is revealed to others through speech and action in a space of appearance—when acting, in other words, in the presence of others. This plurality, for Arendt, is ‘the condition sine qua non for that space of appearance which is the public realm.’”).

<sup>24</sup> Liette Gilbert & Mustafa Dikeç, *Right to the City. Politics of citizenship*, in *SPACE DIFFERENCE, EVERYDAY LIFE: READING HENRI LEFEBVRE* 250, 254 (Kanishka Goonewardena et al. eds. 2008).

<sup>25</sup> *Id.* at 258.

<sup>26</sup> COSTAS DOUZINAS, *PHILOSOPHY AND RESISTANCE IN THE CRISIS* 165 (2013).

<sup>27</sup> We should not overlook that these conflicts are mediated by the very same processes that produce ‘civiness.’ The city, therefore, it is a space of conflict but also the place of dynamics that permit triaging that very same conflict in ways different from a militarized response. Sassen, *The Global Street*, *supra* note 15, at 575.

decisively, if not entirely, define which voices are heard and which voices are excluded.<sup>28</sup> This is why it is so important to scrutinize who is accepted and who excluded, for, as the Constitutional Court of Spain notably held, in a “democratic society, urban spaces are not just a field to move, but also a space of participation.”<sup>29</sup>

I noted above that freedom of expression is important in that it compels the State to refrain from encroaching on the people’s right to express themselves in a politically meaningful way. Freedom of assembly, I later suggested, is also relevant in that it strengthens the protection afforded to protests as States have the duty not to block public meetings. I also noted these freedoms involve certain positive duties such as removing legal obstacles and protecting protesters from hostile audiences. Are States also subject to more stringent positive duties implying opening spaces?

To effectively protest, that is to politically appear having a voice on crucial political matters, the right to the city requires State. It actually requires the State to own property common to all and which is, as it has been the aspiration of many protesters, open to all voices and inputs. Because the right to the city mostly implies positive duties I will look at this issue in more detail. I will also now consider freedom of expression and of assembly in unison to see how they strengthen the right to protest.

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<sup>28</sup> Don Mitchell & Lynn Staeheli, *Permitting Protest: Parsing the Fine Geography of Dissent in America*, 29 INTL’ J. URBAN & REGIONAL RESEARCH 796, 798 (2005).

<sup>29</sup> Judgment of October 27, 2003, Constitutional Court, First Chamber, STC 195/2003, at para. II.9.

Positive duties, roughly put, imply that the State must not only refrain from censoring or discriminating speech, but also that it is under the obligation of providing “opportunities or facilities for speech.”<sup>30</sup> In the words of Robert Alexy, the State is under the duty of positive acts when it is asked to provide factual acts or to create legal positions to satisfy rights.<sup>31</sup> It is little wonder that political theories interested in deepening democratic self-government have argued in favor of these enlarged governmental duties.<sup>32</sup> But what happens from a legal viewpoint?

The answer is debatable and depends to a large extent on the specific constitutional context. This does not prevent us from some initial considerations. Frederick Schauer, for instance, thinks freedom of expression only triggers negative duties.<sup>33</sup> It is a ‘negative liberty’ established precisely against interference.<sup>34</sup> Positive obligations, he claims, would cause differences in treatment by favoring the expressive activities of some groups to the prejudice of others—prejudices that include the interference with others’ rights.<sup>35</sup> In “each instance the decision to enhance the actual ability of one individual or entity to communicate,” Schauer argues persuasively, “will at the

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<sup>30</sup> ERIC BARENDT, *FREEDOM OF SPEECH* 101 (2007 2<sup>nd</sup> ed.).

<sup>31</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 126-7 (Julian Rivers trans., 2010).. It is worth noticing that constitutionally protected liberties, such as freedom of expression, can be positively protected by the State when combined with a right to a positive act (149). Once again, the proper understanding of constitutional rights arises once we consider a right as a bundle of constitutional rights positions.

<sup>32</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED. OPINION, TRUTH, AND THE PEOPLE* 65 (2014); PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 201-2 (2012).

<sup>33</sup> FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 129 (1982).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 125-8.

same time create a legal restriction” on others.<sup>36</sup> The decision regarding whom to favor with positive rights involves “the government in the process of selecting and distinguishing.”<sup>37</sup>

Eric Barendt, on the contrary, thinks freedom of speech cannot be considered in solitude, rather in context. Barendt argues that free speech must honor equality, particularly when dealing with the path our polity may take.

In constitutional schemes that also recognize a right to equality, this is a somewhat unavoidable path. Positive obligations are particularly relevant where there is the risk of public discourse being captured by some voices (“the rich and powerful,” Barendt writes,<sup>38</sup> and “television networks and a number of large newspapers and magazines,” Fiss warned some years ago),<sup>39</sup> therefore disgracing the equal right to participate.<sup>40</sup> Freedom of expression and the right to assembly which are understood as political rights, and thus as (part of) our equal share in the making of the laws, cannot be regarded as “merely ‘negative’ rights.”<sup>41</sup> In fact, these political rights require, just as any other right,

the institution and operation of administrative systems ... involve manpower and resources ... presuppose a relatively stable and well-organized society; and ... require governments and government officials

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<sup>36</sup> *Id.* at 128. *But see*, OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996). (arguing that the exercise of freedom of speech itself might imply silencing others).

<sup>37</sup> *Id.*

<sup>38</sup> BARENDT, *FREEDOM OF SPEECH*, *supra* note 30, at 106.

<sup>39</sup> Owen M. Fiss, *Why the State?*, 100 *HARVARD L. REV.* 781, 787 (1987).

<sup>40</sup> BARENDT, *FREEDOM OF SPEECH*, *supra* note 30, at 106.

<sup>41</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 232-3 (1999).

to do certain things under certain conditions, not merely refrain from doing certain things.<sup>42</sup>

This approach is also reconciled with that of the international human rights law, where the positive obligation to protect rights is not an absolute. This means that positive obligations are instead understood as an ‘obligation of means.’<sup>43</sup> Authorities are bound to take reasonable and appropriate steps to ensure rights and are granted ample margin to choose the means they deem necessary in doing so.<sup>44</sup>

The mandate is directed at authorities. This is why positive duties should not necessarily be seen as speaking exclusively to courts—which have been reluctant to uphold wide constitutional positive rights<sup>45</sup>—but to every governmental avenue. In other words, (constitutional) courts might at times interpret the constitution as requiring positive duties, and so may legislatures when passing access rights.<sup>46</sup> “The legal form in which the right is satisfied,” Alexy has claimed, “is quite irrelevant.”<sup>47</sup>

Positive obligations have proven particularly relevant for social protests. As Barendt argues, insisting on the need of taking an egalitarian approach, “the poor and oppressed can only express their opinions through demonstrations

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<sup>42</sup> *Id.* at 233-4. *See also*, STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (arguing the distinction between negative—as noninterference—and positive rights—as welfare rights—is futile as *all rights* are positive).

<sup>43</sup> OLIVER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 414 (2011 repr.)

<sup>44</sup> *Id.*

<sup>45</sup> Eric Barendt, *Freedom of Expression*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 891, 897 (Michael Rosenfeld & András Sajó eds. 2012).

<sup>46</sup> BARENDT, *FREEDOM OF SPEECH*, *supra* note 30, at 103.

<sup>47</sup> ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS*, *supra* note 31, at 126.

on the streets, and in meetings held in premises they do not own.”<sup>48</sup> In considering these positive obligations, just as Barendt does,<sup>49</sup> it is useful to notice how freedom of speech merges with the right to assembly.<sup>50</sup> The result is what has become to be known as the public forum doctrine. However, as the State is always a friend and foe, I want to show that the public forum doctrine is both a legal translation and (at the same time) a disfiguration of the right to the city.

Do the people have a right to use government property, such as streets, as a forum and not as a passageway? Do the people have the right to gather in parks in order to present their political views, instead of doing so just for leisure?<sup>51</sup> The Supreme Court of the United States answered affirmatively. In *Hague*, it held the government cannot treat State-owned property as if it had a private owner; they must accept the burdens of democratic participation.<sup>52</sup>

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of

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<sup>48</sup> BARENDT, FREEDOM OF SPEECH, *supra* note 30, at 106.

<sup>49</sup> *Id.* at 270

<sup>50</sup> Recall that in the previous chapter I noted that the Human Rights Council showed its doubts as to whether different legislations related to different rights strengthen or diminish the protection of protests. I would tentatively say that if we consider that this merging of rights lays positive duties to the State, then there is no doubt the right to protest ends up being reinforced. However, as it is the case with every positive (as opposed to natural) regulation, there are limits as well (what above were described as TPM regulations).

<sup>51</sup> Harry Kalven, Jr., *The concept of the public forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 (1965).

<sup>52</sup> *Hague v. CIO*, 307 U.S. 496 (1939).

the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>53</sup>

The State, in other words, is not like any individual proprietor, rather someone who holds property *in trust* from the people themselves.<sup>54</sup> As the Supreme Court of Canada put it back in 1991, an absolutist approach to State-owned property would “fail[] to take into account that the freedom of expression cannot be exercised in a vacuum and that it necessarily implies the use of physical space in order to meet its underlying objectives.”<sup>55</sup>

That access to public spaces is beneficial as expression should not be hard to understand. For one, protesters would be permitted to obtain access to a large array of people. This allows them to amplify their message by reaching audiences who may not be aware of the topics challengers are presenting. They may also succeed in changing the views of those in the audience who do know the issues at hand.<sup>56</sup> For another, access to public spaces proves particularly crucial for certain specific claims; when protesters want the State to listen—as is the case in most protests—there are certain specific buildings that are worth targeting, either because of their symbolic value or because those are the places where public authorities actually operate (i.e. legislatures).<sup>57</sup>

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<sup>53</sup> *Id.* at 515.

<sup>54</sup> However, it should be noted that not all public property is deemed to be public forum and therefore subject to the very same constitutional standard. Accordingly, the government’s ability to regulate activities depends on the kind of property we are talking about. The government has more latitude to regulate activities taking place in public property not considered to be public forum. *See*, ROBERT C. POST, CONSTITUTIONAL DOMAINS. DEMOCRACY, COMMUNITY, MANAGEMENT 199, 208-11 (1995).

<sup>55</sup> *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at 155.

<sup>56</sup> CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 26 (2007).

<sup>57</sup> *Id.* at 26-7.

The right to use public property as a forum is, of course, not absolute. As soon as the Court in *Hague* held streets and public places could be used for “communicating thought between citizens and discussing public questions,” it qualified this right:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.<sup>58</sup>

As Kalven put it some time ago, public forum requires accommodation of the conflicting interests,<sup>59</sup> for streets are not only meeting places, but they “are also dedicated to other uses, such as travel.”<sup>60</sup> This conflict of interests requires “to work out mutually satisfactory arrangements”<sup>61</sup> that—as seen before—target not the content of speech, but the timing of the activity.<sup>62</sup>

#### B. A positive right?

The public forum doctrine is a pretty widespread concept,<sup>63</sup> despite its limited benefit in some regions.<sup>64</sup> It is also mainly a legal category. Perhaps this is the

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<sup>58</sup> *Hague*, at 515-6.

<sup>59</sup> Kalven, *The concept of the public forum*, *supra* note 51, at 26.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 27.

<sup>62</sup> *Id.* See also, BARENDT, FREEDOM OF SPEECH, *supra* note 30, at 281.

<sup>63</sup> See, Barendt, *Freedom of Expression*, *supra* note 45, at 897-8 (giving a general account of the doctrine related to access to State-owned places); RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 148-51 (2000) (explaining how Canada has given shape to its own version of the public forum doctrine).

<sup>64</sup> ¿ES LEGÍTIMA LA CRIMINALIZACIÓN DE LA PROTESTA SOCIAL? DERECHO PENAL Y LIBERTAD DE EXPRESIÓN EN AMÉRICA LATINA [IS IT LEGITIMATE TO CRIMINALIZE SOCIAL PROTEST? CRIMINAL LAW AND FREEDOM OF EXPRESSION IN LATIN AMERICA] (Eduardo Bertoni comp. 2010) (reviewing the discretionary,



reason why it falls short in answering two crucial critiques. One shows the public forum doctrine itself has built in the concept of limitations by authority. The other shows the public forum doctrine is unable to deal with the effects of legal regulations on dissenting speech, the effects being the unavoidable restriction on dissenting speech, regardless if that restriction was not the purpose the authority sought.

First, there are numerous voices that have warned about the pernicious effect of the public forum doctrine in terms of the doctrine itself.<sup>65</sup> Whereas it accepted new forms of protected expressions such as picketing and protests, it is also true that this has come at the cost of granting the authority enormous powers to regulate dissenting speech. The trick, Mitchell has argued, is not targeting speech (the *what*), but where it is said.<sup>66</sup> The public forum doctrine assumes that political speech is in fact to be subordinated to “the general comfort and convenience.”<sup>67</sup> By tracing the history of the public forum doctrine in the United States, Don Mitchell argues access to public space has indeed always been subjected, if not directly constrained, by a certain understanding

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selective and, at times, unlimited resort to criminal law in Latin American countries to deal with social protests).

<sup>65</sup> Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 585 (2009) (“while cases involving these related doctrines frequently rehearse the words of Justice Roberts in *Hague v. CIO* that streets from ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,’ substantively, they all take as undisputed the correctness of the view that permit requirements are constitutionally permissible within certain parameters.”).

<sup>66</sup> Don Mitchell, *The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced*, in SPACES OF CONTENTION, *supra* note 18, at 47. See also, Mitchell & Staeheli, *Permitting Protest*, *supra* note 28, at 801 (noting public forum doctrine creates broad legal spaces for regulating, and even prohibiting, speech and assembly on public property).

<sup>67</sup> Mitchell, *The Liberalization of Free Speech* *supra* note 66, at 50-1.

of appropriate behavior.<sup>68</sup> This is what he calls the ‘liberalization’ of speech: the assumption that there is only one way in which political speech can be put forward. As he puts it, public forum accepts dissenting ideas, but

these ideas, however, have to stand or fall on their own merits as they enter into competition with other ideas; the better ideas win, but only by being tested against less worthy ideas. [If] ... speech is forced into the public arena, or if violence accompanies that speech, it can and must be regulated.<sup>69</sup>

Although rejection of violence as protected speech is a commonplace in freedom of expression doctrines, Mitchell warns about the very fashion in which violence has been determined over the years. In the early 1900s, for instance, merely picketing or assembling was automatically seen as an act of violence—or an act that would undoubtedly lead to violence.<sup>70</sup> This is so, as András Sajó has argued in the context of constitutional understandings and institutions, because assumptions about what constitutes violence or what actions risk triggering violence are “culturally framed.”<sup>71</sup> In fact, it is not hard to see that there are specific forms of collective behavior that receive privileged treatment by authority. Sajó mentions the behaviors of “[v]oting, organized manifestations of religion or other election-related activities,” which are “nearly unconditionally free, although an equal level of irrationality should

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<sup>68</sup> Don Mitchell, *Political violence, order, and the legal construction of public space: power and the public forum doctrine*, 17 URBAN GEOGRAPHY 152 (1996).

<sup>69</sup> *Id.* at 153.

<sup>70</sup> *Id.* 155-60.

<sup>71</sup> ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 259 (2011).

have made them equally suspect.”<sup>72</sup> The truth is that preoccupations arise not with gatherings and demonstrations themselves, but with a certain kind of gathering or demonstration (normally those seen as problematic in light of prevailing social, cultural, political, and thus legal constructions).<sup>73</sup>

This sheds light on another built-in limitation of the public forum doctrine, for the very canonical formula according to which we are to determine what spaces are public forums shows a history of exclusion and hegemonic determination of what is permitted. Recall that in *Hague* public forums were defined as those places that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>74</sup> Although they are called public spaces, experience shows that many of these sites have been envisioned upon the basis of exclusion. In other words, experience shows that there are few spaces that have ‘always’ been used by citizens to gather and communicate political ideas.<sup>75</sup> There are few public spaces that have not been built upon some form of exclusion,<sup>76</sup> an exclusion of what authorities have deemed undesirable, thus shrinking the concept and content of rights.<sup>77</sup> In other words, we are not talking here of spaces that have been immemorially used as political fora by all citizens, but—just as only certain displays of

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<sup>72</sup> *Id.* at 247.

<sup>73</sup> *Id.*, at 247.

<sup>74</sup> *Supra* note 52.

<sup>75</sup> Don Mitchell, *Introduction: Public Space and the City*, 17 URBAN GEOGRAPHY 127, 127 (1996).

<sup>76</sup> *Id.* (pointing to feminist arguments, Mitchell argues that “idealized public spaces such as the agora ... are not and never have been any truly open public spaces where *all* may freely gather.”).

<sup>77</sup> MITCHELL, *THE RIGHT TO THE CITY*, *supra* note 8, at 8-9

collective action were deemed permitted—of places where only some have been allowed to appear.

The second critique of the public forum doctrine relates to the effects of legal regulations. The public forum doctrine has been praised as it prohibits governments from limiting dissenting speech based on content or viewpoints, and also as it invites dissenters to determine, along with their governmental counterparts, the conditions of protests. However, we should not overlook the limiting effect on speech, particularly on dissenting speech, that the public forum doctrine has not impeded—or, as Mitchell has put it, that it has concealed.<sup>78</sup> Regulations of places, in other words, have a large and quite uneven impact on participatory rights by preventing certain speech from being disseminated.

As noted before, TPM regulations leave ample room for States to justify limitations without having to disclose their actual intentions. As John H. Ely put it some time ago, “the state obviously can move, and often does, ‘simply’ to control the time, place, and manner of communication out of concern for the likely effect of the communication on its audience.”<sup>79</sup> So the first question is as follows: who defines what the public forum is?

Whereas the definition of public forum has been regularly seen as a governmental decision, a sort of a top-down decision protesters have no alternative but to abide, recent approaches stress the fact TPM regulations

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<sup>78</sup> Mitchell, *Political violence*, *supra* note 68, at 169-71 (arguing that, although courts have moved from targeting speech to target the places where it is said, the issue and effects remain the same: “exclusion in the name of social order”).

<sup>79</sup> John H. Ely, *Flag Desecretation: A case study in the roles of categorization and balancing in First Amendment analysis*, 88 HARV. L. REV. 1482, 1498 (1975).

open the space to negotiate places and times of protests.<sup>80</sup> This means that both the State and citizens engage in determining the scope of rights exercise (normally limiting rights). However, as some have argued, it is not at all obvious that these restrictions are in fact defined in a negotiated- or consent-based manner. Moreover, security concerns (there will always be an excuse for this) have swung the pendulum back to top-down impositions of restrictions. In fact, as Tabatha Abu El-Haj has argued, the model of TPM regulations became accepted under the crucial (usually hidden, overlooked or simply ignored) assumption that it is the State who defines public forum at will, just like any other private proprietor.<sup>81</sup> Places and times for dissent are thus exactly determined, perhaps with the intention of silencing dissent, perhaps not, but in any case incorporating dissent into “the liberal democratic state.”<sup>82</sup> Therefore, political dissent, when not chilled,<sup>83</sup> is strictly shaped and controlled.<sup>84</sup>

Places of protests (public fora) are determined in a top-down fashion by a State that imposes the concept of order as the State sees it. There are further reasons that explain why TPM regulations have an uneven impact. First, not everyone resorts to social protests. As Mitchell has argued, there is a striking similarity

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<sup>80</sup> John D. McCarthy & Clarck McPhail, *the Institutionalization of Protest in the United States*, in *THE SOCIAL MOVEMENTS SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY* 83, 83-4 (David S. Meyer & Sidney Tarrow eds., 1998)

<sup>81</sup> “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park,” Holmes wrote back in 1895, “is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.” This famous passage from Oliver Wendell Holmes, although seriously diminished by subsequent decisions, remains relevant, Abu El-Haj contends. Abu El-Haj, *The Neglected Right of Assembly*, *supra* note 65, at 583-4.

<sup>82</sup> Mitchell & Staeheli, *Permitting Protest*, *supra* note 28, at 797.

<sup>83</sup> PETER DAUVERGNE & GENEVIEVE LEBARON, *PROTEST INC. THE CORPORATIZATION OF ACTIVISM* 65-74 (2014)

<sup>84</sup> Mitchell & Staeheli, *Permitting Protest*, *supra* note 28, at 797.

between the economic metaphors utilized by the public forum doctrine (marketplace of ideas, free trade of ideas, and so on) and the very same abstraction that economic theories need to be sound, for, just as liberal formulations on free access to market and equal bargaining power—Mitchell insists—, here too power relations of society have been completely ignored.<sup>85</sup> Recalling Justice Brennan’s words, Mitchell adds,

Those who can communicate through ordinary channels of modern discourse—because they controlled or could afford access to the media—have little need for popular demonstrations in the street.<sup>86</sup>

Despite the uneven impact TPM regulations have, most constitutional systems see consequences on speech and mobilizations as accepted side effects of regulations. Consider the case of occupiers in Calgary against whom the city issued an injunction ordering them to remove all the tents and structures they had kept on the Olympic Plaza.<sup>87</sup> The Court of Queen’s Bench of Alberta reviewed whether there were any extraordinary circumstances (i.e. violation of Charter rights) which could prevent the city from pursuing its order. Interestingly enough, the city of Calgary acknowledged that the Occupy Calgary encampment and its different city occupations are “expressive activities.”<sup>88</sup>

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<sup>85</sup> Mitchell, *Political violence*, *supra* note 68, at 170.

<sup>86</sup> *Id.* A recent research conducted throughout Latin America in 2009-10, and promoted by the UNDP, shows that political social conflicts in the region happen against a background of pervading inequality. One of the main conclusions of the report is that the larger the social gaps are, the more, and more radicalized, protests occur. LA PROTESTA SOCIAL EN AMÉRICA LATINA [SOCIAL PROTEST IN LATIN AMERICA] 15-7; 23-4. (Fernando Calderón coord., 2012). The report also shows that a high percentage of those protesting are those excluded from regular politics—either deliberately or simply because there is a lack of institutional channels of participation, therefore reproducing historical, cultural and social patterns of domination (*Id.* at 131-5).

<sup>87</sup> I am taking the issues from *Calgary (City) v. Bullock (Occupy Calgary)*, 2011 ABQB 764, at para 27.

<sup>88</sup> *Id.* at para 31.

Moreover, it actually “conceded that the effect of injunctive relief requiring the dismantling of the encampment will be to restrict the Respondent’s [occupiers] expression.”<sup>89</sup> While this left little room for the court to maneuver, it did not prove to be conclusive. In fact, the court found restrictions on the uses of parks to be reasonable and proportional, and therefore constitutional.<sup>90</sup>

This debate replicates the discussion concerning the way governments resort to neutral regulations—before reviewed. As long as these regulations are content-neutral, narrowly tailored and so on, restrictions of time, place and manner will be deemed constitutional no matter their unequal impact. The problem, as I am arguing here, is that this carapace of neutral regulations hides the displacement of dissent. Permit systems, covered under mutually-agreed conditions for protesting, in fact unleash outcomes similar to those of neutral-based regulations, silencing dissent voices while at the same time “giving the appearance that public space is politically inclusive.”<sup>91</sup> Put another way, as Mitchell has suggested, the public forum doctrine helps to guarantee “the right to speak” in public spaces but says little, if anything, on “the question of effective access to that forum by those who *need* to speak in the street.”<sup>92</sup> The public forum doctrine, and its acceptance of allegedly neutral regulations, ends up being a law that treats everyone in the same fashion, thus “reinforc[ing] unjust social relations.”<sup>93</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at paras 33-45 (reasoning restrictions were i. prescribed by law; ii. reasonable and demonstrably justified; iii. pursuant of an important governmental objective; and, iv. proportional). In a very similar sense see, *Batty et al. v. City of Toronto*, 2011 ONSC 6862.

<sup>91</sup> Mitchell & Staeheli, *Permitting Protest*, *supra* note 28, at 798.

<sup>92</sup> Mitchell, *Political violence*, *supra* note 68, at 171 (emphasis in the original).

<sup>93</sup> *Id.* Lenin magnificently emphasize this, although with a different purpose:

This is why, as I argued before with neutral regulations of speech, we should also consider contexts more carefully.<sup>94</sup> This would allow us to determine whether those subject to TPM restrictions are always the same unpopular groups whose voices are also despised in institutional avenues. The specific political milieu in which these restrictions are being issued and applied, for instance, may be, despite formal neutrality, very telling of what the specific governmental targets are.

It is public forum neutrality, that is, public forum doctrine's refusal to consider the specific social and political conditions of those who protest, what also explains the doctrine's shortcomings before subtler—although highly documented—forms of limiting dissenting speech such as privatizations. Limitations here work in a double fashion: first, by shrinking public forums and, second, by refusing to grant protest rights in those private spaces.

It is not hard to see how privatization of what was before State-owned property limits political spaces.<sup>95</sup> This privatization includes, among others, the reconstruction and fencing of parks and large urban areas, and the

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If we look more closely to the mechanism of capitalist democracy, we shall see everywhere ... in the real obstacles to the right of assembly (public buildings are not for beggars!) ... we shall see restriction after restriction.

These restrictions, exclusions, exceptions, obstacles for the poor, seem petty, especially in the eyes of anyone who has never known want himself and never been in close contact with the oppressed classes in their mass life ... but the sum total of these restrictions excludes and shoves out the poor from politics, from active participation in democracy.

V. I. LENIN, *THE STATE AND THE REVOLUTION* 79 (Robert Service trans., Penguin Classics 1992) (1918).

<sup>94</sup> See, Timothy Zick, *Property, Place, and Public Discourse*, 21 WASH. U. J. L. & POL'Y 173, 208-9 (2006) ("Given the constitutional recognition of place, courts should far more carefully consider the impact that spatial regulations have on opportunities for public discourse.").

<sup>95</sup> I am talking here of private property *sensu stricto*. Others have suggested that certain regulations upon public spaces create a form of privatization without altering property regimes. This may occur by securing permits which allow users (say those in a political rally) to expel the opposition. Kevin Francis O'Neill, *Privatizing public forums to eliminate dissent*, 5 FIRST AMEND. L. REV. 201 (2006-2007).



privatization of services and security of those services, such as the installation of thousands of surveillance cameras in train stations. “Whole public spaces,” as Mitchell notes, are “closed off for much of the day, locked tight against unwanted users.”<sup>96</sup> Downtowns, where people used to gather, have “increasingly become anomalies in a landscape cluttered with suburban shopping and strip malls,” tells McLeod,<sup>97</sup> while the public spaces that remain “are often designed to facilitate commerce and recreation, rather than expression.”<sup>98</sup> In fact, privatizations and urban planning trends are far from being unconscious of the effects sought on dissent.<sup>99</sup> New property regimes, therefore, dictate where political speech is tolerated and who is welcomed in these new spaces.<sup>100</sup>

If public forum is to operate properly as a positive right, then governments could be legally held accountable for the way they have contributed to reduce, or directly eliminate, public spaces. This requires, as Timothy Zick has claimed, to strongly argue for rights to a place decoupled from property, a truly independent constitutional concept.<sup>101</sup> This means considering a place in regards to its impact and importance on public discourse, rather than to being a (physical) thing (*res*).<sup>102</sup> Place, here, rather than a “background for expressive

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<sup>96</sup> MITCHELL, *THE RIGHT TO THE CITY*, *supra* note 8, at 2.

<sup>97</sup> KEMBREW MCLEOD, *FREEDOM OF EXPRESSION®: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY* 226 (2007).

<sup>98</sup> Zick, *Property, Place, and Public Discourse*, *supra* note 94, at 173 (2006).

<sup>99</sup> John Michael Roberts, *Public Spaces of Dissent*, 2 *SOCIOLOGY COMPASS* 654, 663-6 (2008) (explaining how urban developers ‘integrate’ citizens into new solutions in order to pre-empt dissent, but also how the ‘publicness’ of public spaces is altered “by either opening up or shutting down access to the public space in question.”).

<sup>100</sup> Mitchell, *The Liberalization of Free Speech*, *supra* note 66, at 63-4.

<sup>101</sup> Zick, *Property, Place, and Public Discourse*, *supra* note 94, at 204, 209.

<sup>102</sup> *Id.* at 210.

activity ... is constitutionally bound to expression.”<sup>103</sup> However, courts and the history of Western constitutional thought seem unprepared to displace property to such a ‘secondary’ position.<sup>104</sup>

Another alternative to overcome the reduction of public space could be accepting the ‘sovereignty’ of the State to dispose of its property at will and having courts recognize the right to protest in these *new* public fora. In fact, the focus of the people—forced by circumstances—has also switched from the traditional public forum to these new, although privatized, city centers (such as malls, stadiums, concert halls, etc.) It is in these places that attention can be called. However, courts have not gone as far as to recognize rights to protest in these forums—which illustrates the second limitation aforementioned.

According to McCarthy and McPhail, vague public forum standards have become an open invitation to narrow the protection of the right to protest.<sup>105</sup> These standards have also proven futile before the privatization of traditional places of public gathering which are now in the hands of private corporations or individuals, thus falling within a fourth category where free public transit is discretionarily restricted (it is restricted at the owner’s will).<sup>106</sup> This has been

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<sup>103</sup> *Id.*

<sup>104</sup> Where secondary here stands for a value/right as important as that it has to be balanced against. *See*, JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012) (arguing property rights, although relevant and foundational of liberal autonomy, are but one of the interests a proper constitutional analysis should consider).

<sup>105</sup> John McCarthy & Clark McPhail, *Places of protest: the public forum in principle and practice*, 11 *MOBILIZATION: AN INTERNATIONAL QUARTERLY* 229, 229-30 (2006).

<sup>106</sup> As of today, this is how the scheme of forums looks:

Traditional public fora: where, as noted, content-neutral restrictions might be imposed if they “aim at the noncommunicative impact of speech ... [and are] justified only under the strictest scrutiny;”

Limited public fora: public property that the government has opened for expressive activities. Restrictions here are justified under the same lines as traditional public forum;

reflected in the jurisprudence of “the [United States Supreme] court [that] has tended to place these newer ‘limited public spaces’ further away from the traditional public fora, hence allowing greater restrictions to be placed upon protest in the newer places.”<sup>107</sup> As noted above, property regimes have outbalanced political participation.

When considering its limitations public forum becomes, despite what is usually stated, a doctrine of negative rights. A doctrine that, echoing liberal economic metaphors, is aimed at regulating State intervention but not so much—if at all—a doctrine of positive rights seeking to “assur[e] that marginalized groups can be heard ...”.<sup>108</sup> Although the public forum doctrine has proven relevant in securing the right to protest, it has to be taken cautiously and, in the end, contended from within.

To prevent assemblies and protests from becoming ritualized events under current conditions,<sup>109</sup> where spaces of political participation are determined by authorities, “dissent can only be effective when it is illegal.”<sup>110</sup> On the one hand, it is important to acknowledge that keeping public spaces open up for contestation allows to have and bring different voices *in* in order to shape and

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Nonpublic fora: where restrictions only need to be reasonable;

Private property: excluded from right to protest.

*Id.* at 230-1. Others have shown that the impact of privatization reaches even individual acts of expression, including wearing t-shirts with messages that the owners of these ‘new public places’ consider inappropriate—including the unauthorized distribution of First Amendment fliers. MCLEOD, FREEDOM OF EXPRESSION®, *supra* note 97, at 227-8.

<sup>107</sup> *Id.* at 231.

<sup>108</sup> Mitchell, *Political violence*, *supra* note 68, at 170.

<sup>109</sup> Abu El-Haj, *The Neglected Right to Assembly*, *supra* note 65, at 546-7.

<sup>110</sup> Mitchell, *The Liberalization of Free Speech* *supra* note 66, at 47. *See also*, but labeling it as civil disobedience, McCarthy & McPhail, *Places of protest*, *supra* note 105, at 230 (“The evolution of the public forum doctrine, then, while conceived in theory to protect the rights of dissidents to effectively voice their views, has, in practice begun to nudge them toward more civilly disobedient tactics simply to be heard.”).

define our constitutional commitments.<sup>111</sup> This is what transforms constitutions into actual commitments instead of being pure forceful impositions ready to fall into pieces at the very first actual challenge. On the other hand, it is also important to notice that protests are not only to be understood narrowly in the sense that the only permitted protests are those which police orders allow, but also those that transcend those limits in order to actualize equality in the public space.<sup>112</sup>

Some court has taken a step forward in this light. The *Audiencia Nacional* of Spain has recently passed a decision on protests held before the doors of the *Catalonia Parliament*. While it insisted on the importance of linking protests to the political speech of silenced and displaced voices (something I highlighted in the previous chapter), it also reasoned—in light of Mitchell’s ideas—that in a context of limited expression and access to public space, “mostly controlled by the private media corporations,”

it cannot be concluded but accepting a certain excess in the exercise of freedoms of expression and assembly to grant protests any minimum effectiveness and critique character.<sup>113</sup>

This is the sense of illegality and excess Mitchell is talking about: a sense of illegality, although of constitutionality; a sense in which these very acts of

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<sup>111</sup> As lawyers, Timothy Zick has argued, we should not entertain in urban, environmental or city planning, but we “must ask whether our legal doctrines of place can accommodate public discourse *given* the spatial environment, the *places*, that we actually have. And if they cannot,” which seems to be the case, as shown above, “we must consider what changes might be made to preserve the exercise of fundamental public speech rights.” Zick, *Property, Place and Public Discourse*, *supra* note 94, at 176.

<sup>112</sup> Dikeç, *Space as a mode of political thinking*, *supra* note 4, at 674.

<sup>113</sup> Judgment of Jul. 7<sup>th</sup>, 2014, *Audiencia Nacional*, Sentencia No 31/2014, at 57-8 (my translations). The *Tribunal Supremo* would later revoke this decision (Judgment of Mar. 17<sup>th</sup>, 2015, *Tribunal Supremo*, Sala de lo Penal, Sentencia No 161/2015).

dissidence can take law-making institutions to rethink and reconceptualize the way constitutional rights are to be understood in order to include novel forms of protests.<sup>114</sup> This is, in fact, the history of law itself—the very act of protest once was illegal.<sup>115</sup> Furthermore, this is not an illegality or unruly behavior aimed at destabilizing the State, rather behavior meant to contest and (re)shape the fashion in which political liberties are to be understood. As Mitchell claimed, rights can only be secured through exercise.<sup>116</sup>

## II. Participating without a face<sup>117</sup>

Social protests take place in the public sphere. In its physical sense—and certainly in a wider understanding as well—this is a place States watch 24/7. Surveillance, however, meets with resistance. The image of protesters covering their faces, whether with a hood, a scarf, a balaclava or, more recently, with zombie or Guy Fawkes masks the ‘Occupy’ movement popularized, is common in protests. While this practice might be justified on the grounds that masks themselves are expressive means that help protesters to portray their claims—as I shall show below, an argument which may or may not seduce courts—or

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<sup>114</sup> This is possible, as Zick argues, because public expressive places are not objective immutable governmental allocations, but are contingent, dynamic and depending, in the last instance, on the meaning speakers and listeners—a mixture of layperson, authorities, legal regulations, and contestation of those regulations—impress on them. Zick, *Property, Place, and Public Discourse*, *supra* note 94, at

<sup>115</sup> Mitchell, *Political violence*, *supra* note 68, at 157.

<sup>116</sup> MITCHELL, *THE RIGHT TO THE CITY*, *supra* note 8, at 4-5.

<sup>117</sup> I would like to thank my colleague Rodolfo Figueroa who provided insightful critiques—by posing the right questions—to a previous draft of this section.

simply out of some specific circumstances,<sup>118</sup> I want to insist on a different, yet complementary, path. This path requires considering a socially vitalized form of privacy.

According to the view I will explain, there is a political right to participate in public without a face; citizens have the prerogative to demand the State refrain from interfering—in ways subtler than, say, prohibiting assemblies—with the right to protest. This argument has its basis in privacy protection, but it also requires us to move forward to consider the social and political dimension of informational privacy. Informational privacy alludes to portions of information citizens deem sensible to share in certain contexts (their face when working) but not in others (their face when protesting). In other words, this view requires us to move from considering privacy, along with its implications, an individual right to a societal value.

I explain this argument in more detail in the first section (A) and consider how it bears specific consequences in helping us to expand our understanding of protests in the second (B). I then analyze the impact and possible effects this revitalized conception of privacy has on three practices that usually affect the right to protest: governmental surveillance, counter surveillance, and the prohibition of using masks when in public. I will argue that, considering the social dimensions of informational privacy, States (C) should be restricted in

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<sup>118</sup> For instance, when members of the Russian music band *Pussy Riot* were arrested under charges of hooliganism motivated by religious hatred, protesters who complained about their persecution gathered in front of the Russian Consulate in New York. They wore “colored balaclavas” (as *The New York Times* reported) to resemble those worn by the members of the band. In any case, they were arrested and charged with a law dating from 1845 that prohibits “three or more people to wear masks in public.” Colin Moynihan, *Law Banning Masks at Protests is to be Challenged*, *N.Y. TIMES*, Oct. 22, 2012, at A18.

using information gathered through surveillance; (D) are to accept counter surveillance as a means citizens have to scrutinize their actions and enforce their right to participate; and (E) must refrain from banning challengers from wearing masks during protests.

*A. From privacy to contextual integrity*

In their very much-quoted piece Samuel Warren and Louis Brandeis argued privacy was better understood (and legally protected) as “a more general right of the individual to be left alone ... of an inviolate personality.”<sup>119</sup> This is a right, they argued, “as against the world.”<sup>120</sup> For this reason the right ceased as soon as the individual publicized the facts or consented to their publication.<sup>121</sup> The very acts of the person also speak for the person. Whereas there are those—to insist with Warren and Brandeis—who have “in varying degrees ... renounced the right to live their lives screened from public observation,”<sup>122</sup> there are others who live exactly in the opposite way.

Is it not then an oxymoron to claim privacy in public spaces? Not really. Privacy has long ceased to be a right attached to space; rather, it has become a matter of control of information and expectations.<sup>123</sup> Privacy, therefore, is no longer confined to the intimate and personal spheres, but also encompasses

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<sup>119</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890-1891).

<sup>120</sup> *Id.* at 213.

<sup>121</sup> *Id.* at 218.

<sup>122</sup> *Id.* at 215.

<sup>123</sup> In fact, it has been argued that the opposite is true; public space is no longer attached to the State (in the formal sense) and therefore is not spatialized. Quite the contrary, public space is spatially undifferentiated today. Neil Smith & Setha Low, *Introduction: The Imperative of Public Space*, in *THE POLITICS OF PUBLIC SPACE* 1, 5 (Setha Low & Neil Smith eds., 2006).

information (available about us) in the public realm.<sup>124</sup> This is so because “privacy norms are not necessarily derivable from setting but can come prior.”<sup>125</sup> As Julie Cohen has convincingly argued against what she calls the liberal approach to privacy, the self is culturally and socially situated, and therefore communally and communicatively shaped.<sup>126</sup> While places are elements that help frame these contexts, they are not the only, nor even the most important, elements, as has been correctly suggested. This is so because our lives occur in and we do things in places, and our lives also take place within certain “politics, convention[s], and cultural expectation[s].”<sup>127</sup>

Privacy, thus, cuts across a universe of overlapping realms where the (simple) private/public distinction cannot automatically account for what is private/public. According to Nissenbaum,

We do not have a dichotomy of two realms but a panoply of realms; something considered public in relation to one realm may be private in relation to another ...<sup>128</sup>

In fact, the texture of people’s lives shows we “cross[] dichotomies ... move[] about, into, and out of a plurality of distinct realms.”<sup>129</sup> What best accounts for privacy therefore is this multiplicity of realms, relations, and norms governing roles, expectations, behaviors, and limits within.<sup>130</sup> Precisely because privacy “enabl[es] individuals to maintain contextual integrity,” that is, distinct

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<sup>124</sup> Helen Nissenbaum, *Toward an Approach to Privacy in Public: Challenges of Information Technology*, ETHICS & BEHAVIOR 207, 212 (1997).

<sup>125</sup> *Id.* at 214.

<sup>126</sup> Julie E. Cohen, *What privacy is for*, 126 HARV. L. REV. 1904, 1905-08 (2013).

<sup>127</sup> Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASHINGTON L. REV. 119, 137 (2004).

<sup>128</sup> Nissenbaum, *Toward an Approach to Privacy in Public*, *supra* note 124, at 215.

<sup>129</sup> Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 127, at 137.

<sup>130</sup> *Id.* at 138.



relationships with different people, information we deem “appropriate in the context of one relationship may not be appropriate in another.”<sup>131</sup>

Contextual integrity (and not the spatial focus) better explains how privacy contributes to our identity and individuality<sup>132</sup>—and it also helps us understand why privacy is rooted in public relations rather than in solitude and against the world. Actually, privacy is the “relief from a range of kinds of social friction.”<sup>133</sup> In fact, privacy permits the interplay between selfhood and social shaping—rendering these two concepts mutually reinforcing.<sup>134</sup> This is possible thanks to privacy’s dynamism, for privacy is not a fixed concept that takes place in just one realm, but “an interest in breathing room to engage in socially situated processes of boundary management.”<sup>135</sup> When we lack privacy, we lack this valve that allows the autonomous, although not totally isolated, definition of the self. Privacy, thus seen, ensures that “the development of subjectivity and the development of communal values do not proceed in lockstep.”<sup>136</sup>

This approach allows to understand privacy beyond its individual right carapace and to highlight its other benefits. In other words, this permits comprehending the value of privacy as a right of the citizen. We care about protecting privacy not solely, if at all, because it is an individual right, but because harms on privacy “affect the nature of society and impede individual

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<sup>131</sup> Nissenbaum, *Toward an Approach to Privacy in Public*, *supra* note 124, at 216.

<sup>132</sup> ALAN F. WESTIN, *PRIVACY AND FREEDOM* 34 (1967).

<sup>133</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 *UNIVERSITY OF PENNSYLVANIA L. REV.* 477, 484 (2006).

<sup>134</sup> Cohen, *What privacy is for*, *supra* note 126, at 1909.

<sup>135</sup> *Id.* at 1911.

<sup>136</sup> *Id.*

activities that contribute to the greater social good.”<sup>137</sup> Seen in this way, privacy constitutes both, rather than tears apart, individuals and community.<sup>138</sup>

This also holds true in a comparative constitutional perspective. In fact, the core of privacy has been conceptualized as going “beyond the idea of privacy as seclusion and as a shield from intrusion and unwanted gaze.”<sup>139</sup> Whereas privacy still has a value for those wanting to be left alone, undisturbed both in their existence as well as in their personal details, it has also come to be understood as “a right to define and construct one’s own identity, not only in isolation but in social relations.”<sup>140</sup> Privacy “protects people, not places.”<sup>141</sup>

How could this socially infused version of privacy benefit protesters? Is privacy a concern for protesters at all? Amid massive student demonstrations in Chile between 2011 and 2013, where isolated misdemeanors had been committed against property and members of the police, then-President Sebastián Piñera claimed the need to grant police the power to conduct preemptive identity verifications against those taking part in protests.<sup>142</sup> This, he argued, would prevent crimes and vandalism.<sup>143</sup> What was his reasoning?

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<sup>137</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 488.

<sup>138</sup> *Id.* at 488-9.

<sup>139</sup> Manuel Cepeda, *Privacy*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 966, *supra* note 45, at 969.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 971. As the Supreme Court of the United States stated in *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>142</sup> *Presidente Piñera firma proyecto de ley que permite control preventivo de identidad [President Piñera files a bill that will permit preventive identity verifications]*, EMOL.COM, Jul. 10, 2013, available at <http://www.emol.com/noticias/nacional/2013/07/10/608364/presidente-pinera-firma-proyecto-de-ley-que-permite-control-preventivo-de-identidad.html>

<sup>143</sup> *Id.*

If you have nothing to hide, you have nothing to fear. Only those aimed at committing crimes will feel offended by this legislation.<sup>144</sup>

As professor Solove has observed, there is a false tradeoff involved when people—protesters included—are asked not to fear if they have done nothing wrong, for, as he points out, this argument attaches little value to privacy.<sup>145</sup> First, it is uncommon that no one has anything to hide.<sup>146</sup> Second, it is absolutely wrong to suggest privacy is about hiding bad things.<sup>147</sup> Most of the time privacy works to protect totally legal actions. Moreover, encroachment of privacy actually may prevent legal actions—such as joining a demonstration.<sup>148</sup> Third, it is also misleading to exclusively see privacy as secrecy. As noted above, privacy protects a myriad of situations, which include some forms of secrecy.<sup>149</sup> Governmental public observation, for instance, is problematic even when the information it collects is not something the people may have wanted to hide. The pernicious effect of these forms of privacy invasion, which include governmental public observation and citizen identity control, is the “suffocating powerlessness and vulnerability” the use of personal data creates.<sup>150</sup>

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<sup>144</sup> *Id.* Piñera’s Minister of Interior had previously justified a prohibition to attend protests with masks on the same grounds. His reasons? “In our ... country you cannot mask yourself to commit vandalism, protests are to be attended with clean hands and to attend with clean hands is to attend with your face uncovered.” *Gobierno anuncia reforma legal para prohibir encapuchados en manifestaciones [Government announces legal reform to prohibit masked protesters]*, NACION.CL, Aug. 13, 2011, available at <http://www.lanacion.cl/gobierno-anuncia-reforma-legal-para-prohibir-encapuchados-en-manifestaciones/noticias/2011-08-13/132238.html> (my translation).

<sup>145</sup> DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 21 (2011).

<sup>146</sup> *Id.* at 23-4.

<sup>147</sup> *Id.* at 26-7.

<sup>148</sup> *Id.* at 27.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

In other words, as it has been aptly observed, privacy protects forms of harm “involved beyond exposing one’s secrets to the government.”<sup>151</sup> We value privacy not because it permits us to hide things, but because—as observed before—it enables us to move in a series of realms feeling empowered to do so. Therefore, for protesters the force of privacy stems precisely from the fact they have done nothing wrong, unless you consider it wrong (either constitutionally or legally) to publicly shout your grievances.

*B. Harms to protests*

From here it is possible to see further, more specific, implications for the right to protest. The harms a socially infused understanding of privacy should protect us against, as explained before, can only be aptly grasped when considering privacy to be a citizen right. Here the right is completely reconfigured. As Honneth has argued, these are rights whose structure invites and enables civil engagement. They allow the people to become authors (*democratic citizens*) of their political fate through the cooperative task of democratic will-formation.<sup>152</sup> These rights, in other words, “enable subjects to do what they could not do alone and in a stance of individual retreat.”<sup>153</sup> This is the case, for instance, of the right to vote. A “seemingly individualistic right to

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<sup>151</sup> *Id.* at 29.

<sup>152</sup> AXEL HONNETH, FREEDOM’S RIGHT. THE SOCIAL FOUNDATION OF DEMOCRATIC LIFE 79 (Joseph Ganahl trans. Columbia University Press 2014). Of course, it can also be a subjective right that enables individuals to retreat and conduct inner examination “in order to explore the meaning and aims of their individual lives” (*Id.* at 72). At any rate, Honneth insists that that very subjective space where individuals examine their own lives has been ethically shaped. In other words, the legal freedom individual rights permit depends on the content of these rights being defined from outside the rights. The same applies to privacy: “individuals can only exercise their legally guaranteed right to privacy if they can rely on the communicative background of a lifeworld that itself has not come as a result of legal processes” (*Id.* at 85-6).

<sup>153</sup> *Id.* at 259.

vote” cannot be properly understood unless we consider it a citizen’s prerogative, the citizen being a member of the democratic community.<sup>154</sup>

Solove concurs. Instead of protecting individuals at the expense of society, privacy “should be justified by its social benefits.”<sup>155</sup> It is the contribution to the greater social good, and certainly its contribution to citizenship, what should guide our understanding of privacy. “It is hard to imagine,” Solove writes, “how people could freely participate in public life without some degree of control over their reputation and private life.”<sup>156</sup>

In the specific case of protests, therefore, what should trouble us are the harms that could affect the people’s willingness to join others and thus take an active part in political life. In fact, these are forms of harm that lead people to withdraw their intervention in public opinion shaping activities—such as protests. As a general matter, many privacy problems indeed involve the “risk that a person might be harmed in the future.”<sup>157</sup> This risk includes direct attacks such as dignitary, monetary and physical harms.<sup>158</sup> It also affects a person’s life by preventing him or her from engaging in activities that he or she would otherwise join.

Solove, for instance, writes, “[p]eople’s behavior might be chilled, making them less likely to attend political rallies or criticize popular views.”<sup>159</sup> Nissenbaum holds a similar notion. For her, privacy in public becomes relevant to secure both political autonomy and freedom. Where there is absolutely no restriction

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<sup>154</sup> *Id.* at 260.

<sup>155</sup> DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 91 (2008).

<sup>156</sup> *Id.* at 93.

<sup>157</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 487-8.

<sup>158</sup> *Id.* at 488.

<sup>159</sup> *Id.*

in access to personal information critical reflection may shrink. Certain spaces, in fact, are crucial to provide the people with freedom to “experiment, act, and decide without giving account to others of being fearful of retribution.”<sup>160</sup> When the people are freed from what others will judge, say or react, they obtain the necessary inhibition to think about, propose, discuss, hold, and revise “the reasons behind significant life choices, preferences, and commitments.”<sup>161</sup> This is what Simmel called the phenomenon of the stranger, a sociological liberation that permits specific forms of interaction in liberty:

the objective individual is bound by no commitments which could prejudice his perception, understanding, and evaluation of the given. (...) he is freer, practically and theoretically; he surveys conditions with less prejudice; his criteria for them are more general and more objective ideals; he is not tied down in his action by habit, piety, and precedent.<sup>162</sup>

Still, Cohen argues that unconstrained and unchecked surveillance affects both an essential condition to define *ourselves* and our capacity of self-government.<sup>163</sup> Surveillance permits the burgeon of what Cohen terms ‘modulated democracy,’ a form of democracy, if at all, where our decisions are molded from the outside.<sup>164</sup> Citizenship, therefore, is crucially affected, for the scope of these practices, which include voting, public debates and other forms

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<sup>160</sup> Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 127, at 148-9.

<sup>161</sup> *Id.* at 149.

<sup>162</sup> Georg Simmel, *The Stranger*, in *THE SOCIOLOGY OF GEORG SIMMEL* 402, 402-5 (Kurt H. Wolff trans. & ed. The Free Press, 1950) (1908). I have taken links between Simmel’s *The Stranger* and privacy from WESTIN, *PRIVACY AND FREEDOM*, *supra* note 132, at 31-2.

<sup>163</sup> Cohen, *What privacy is for*, *supra* note 126, at 1912.

<sup>164</sup> *Id.* at 1915 (defining modulated democracy as “a set of processes in which the quality and content of surveillant attention is continually modified according to the subject’s own behavior, sometimes in response to inputs from the subject but according to logics that ultimately are outside the subject’s control”).

of political participation, “will be defined in part by the practices that existing institutions encourage, permit, or foreclose.”<sup>165</sup> Technology, particularly networked information technologies, helps to shape those practices by allowing some interventions and rejecting others, thus crucially determining our capacity for democratic self-government.<sup>166</sup>

As Solove highlights, this more comprehensive approach to privacy is not only concerned with the harms the person may directly feel, but also with a larger harm—that sometimes occurs unnoticed—affecting society:

Constitutive privacy understands privacy harms as extending beyond the “mental pain and distress” caused to particular individuals; privacy harms affect the nature of society and impede individual activities that contribute to the greater social good.<sup>167</sup>

When someone is prevented, because of disturbances on his or her privacy, from sharing his or her voice so as to shape public opinion, it is not only he or she who is affected. All of us are affected—and along with us, our constitutive commitments whose contours are determined for an exclusive set of voices.

Of course, as in the cases of other aforementioned rights, the State is both an ally and a foe to privacy.<sup>168</sup> In fact, privacy’s constitutive aspects requires the State to refrain from impinging privacy (where privacy turns out to be largely a negative right) and to also take positive measures allowing the “autonomous

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<sup>165</sup> *Id.* at 1912.

<sup>166</sup> *Id.* at 1913.

<sup>167</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 488.

<sup>168</sup> Thus, regulation of both private and public realms responds to specific power relations in society which also happen to shape the State, just as “many of the state’s actions do indeed mold and frame what specific societies take to be the public” and, we should add, private. Smith & Low, *The Imperative of Public Space*, *supra* note 123, at 5.

shaping of individual identity.”<sup>169</sup> Indeed, privacy “enables people to engage in worthwhile activities in ways that they would otherwise find difficult or impossible”<sup>170</sup>—activities which certainly include our right to participate in political matters without the fear of losing our job, being presented as violent, being criminally persecuted, “community shunning, and other social reprisals.”<sup>171</sup>

I now turn the focus to three specific issues related to social protests: governmental surveillance; the natural counterpart of this surveillance, that is, citizens’ data collection of governmental, particularly police, behavior; and different means by which protesters seek to conceal their identity when protesting.<sup>172</sup>

### C. Surveillance

“Power, whether in the form of elites, government policies, or innovations in built environments, can override the speech of the city,”<sup>173</sup> Saskia Sassen has argued. She has also identified one such government policy: large-scale surveillance systems which have had the effect of turning everyone into

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<sup>169</sup> *Id.* at 970.

<sup>170</sup> Solove, *Taxonomy of Privacy*, *supra* note 133, at 484.

<sup>171</sup> Daniel J. Solove, *The virtues of knowing less: justifying privacy protections against disclosure*, 53 DUKE L. J. 967, 995 (2003).

<sup>172</sup> I am interested here in explaining the right to protest. This is why I will not stop at analyzing how the right to privacy can, at times, work as a limit on protests, as it has occurred for access to abortion clinics. Richard Albert, *Protest, Proportionality, and the Politics of Privacy: Mediating the Tension between the Right of Access to Abortion Clinics and Free Religious Expression in Canada and the United States*, 27 LOY. L.A. INT’L & COMP. L. REV. 1 (2005) (explaining both jurisdictions have privileged the right of access to abortion clinics). Privacy has also been suggested as a limit on funeral picketing. Njeri Mathis Rutledge, *A time to Mourn: balancing the right to free speech against the right of privacy in funeral picketing*, 67 Maryland L. Rev. 295 (2008) (arguing privacy should be considered an important interest that the State should protect before unwanted protests in funerals).

<sup>173</sup> Sassen, *Does the City have a Speech?*, *supra* note 7, at 219.



possible suspects,<sup>174</sup> transforming a vibrant civil society into an uncivilized one.<sup>175</sup> As I show here, this constant monitoring (due to a government's suspicion of all people) should be observed as a serious disturbance on the right to protest.

Why does surveillance affect protesters and their right to demonstrate? After all, as some have suggested, protests occur in the public realm; therefore, participants should assume they are to be observed. I have already argued that privacy extends to public areas such as streets and squares, and also that privacy covers legal, as well as regular, daily actions taking place in these areas. With these considerations in mind I now turn to show specifically how surveillance undermines the right to protest.

Governmental surveillance of protests takes many forms, two of which I will name. For one, governments gather information by means of massive surveillance carried out by cameras located throughout cities. After all, we live in a 'Cam era.'<sup>176</sup> Governments also watch through policing. This latter form of surveillance is directly done by police agents who carry portable cameras as well as other devices.

There are several reasons why surveillance is detrimental to protests. These reasons stem mainly from the enriched conception of privacy (in public) that was depicted above. First, surveillance can take citizens to self-censorship by

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<sup>174</sup> *Id.* at 220.

<sup>175</sup> DAUVERGNE & LEBARON, *PROTEST INC.*, *supra* note 83, at 75-7 ("Suppressing social movements by isolating and delegitimizing groups as extremists and terrorist is a more insidious process of control than mere repression—one that, as many states know well, can be a highly effective way to divide and conquer opposition.").

<sup>176</sup> Hille Koskela, 'Cam Era' – *the contemporary urban Panopticon*, 1 *SURVEILLANCE & SOCIETY* 292 (2003).

avoiding (public) places and practices where, for whatever reason, they don't want to be seen.<sup>177</sup> Second, surveillance limits freedom and autonomy by permitting the State to have a record of our past actions and omissions, which compromises our anonymity.<sup>178</sup> This constraint on freedom, as Solove shows, is particularly potent for people engaging in political protests or dissent of accepted norms,<sup>179</sup> for people captured on film in such activities might "face persecution, public sanction, and blacklisting for their unpopular political beliefs."<sup>180</sup> Moreover, these retributions regularly target disfavored groups and causes.<sup>181</sup> Sadly, this is far from pure academic speculation. As recently reported, the Russian Federation makes "'propaganda of non-traditional sexual relations' ... punishable by administrative fines,"<sup>182</sup> propaganda which includes parades and other public gatherings. From a more historical perspective, some research has shown governmental surveillance has been directed precisely at exposing, disrupting, misdirecting, discrediting, and neutralizing social mobilizations seen as undesired.<sup>183</sup> Finally, massive surveillance technologies allow the State to gather an amount of information absolutely disproportionate

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<sup>177</sup> SOLOVE, *NOTHING TO HIDE*, *supra* note 145, at 178.

<sup>178</sup> *Id.* 178-9.

<sup>179</sup> *Id.* at 179.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* This might be explained by that fact that, in the end, as some have put it, technology hardly presents a new start, but "are extensions of existing practices ... the old wine of existing processes and practices is normally presented via the new bottles of technological delivery." Pete Fussey & Jon Coaffee, *Urban spaces of surveillance*, in *ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES* 201, 207 (Kirstie Ball et al. eds. 2012).

<sup>182</sup> Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)*, A/HRC/26/29. April 14, 2014, at para. 31.

<sup>183</sup> Amory Starr et al., *The impacts of State Surveillance on political assembly and association: a socio-legal analysis*, 31 *QUAL SOCIOLOG* 251, 253 (2008). *See also*, Solove, *Taxonomy of Privacy*, *supra* note 133, at 496 (showing that surveillance the FBI directed against Martin Luther King, Jr. was aimed at showing his communist ties; whereas surveillance failed to 'discover' those ties, it ended up revealing King's extramarital affairs).

with the objective originally sought (i.e. prevent crime).<sup>184</sup> This permits the State to develop large repositories of information then used to target disfavored groups or dissident voices with whatever minor infraction they could pull from that gathered data.<sup>185</sup>

In the end, these forms of protest surveillance have the effect of seriously constraining, if not directly eliminating, political dissent.<sup>186</sup> By promoting anxiety and discomfort,<sup>187</sup> massive surveillance takes, or may take, people to conform their behavior and views—including those views about how to better understand our constitutional commitments—to mainstream ideas.<sup>188</sup> In fact, modulation, which surveillance facilitates, is a form of privacy that produces particular kinds of subjects whose consent is manufactured and directed both in markets and politics.<sup>189</sup> Whereas democracy needs discomfort to have citizens constantly engaged in pursuing “political and social ideals,” surveillance and modulated democracy deprives citizens of the means, and

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<sup>184</sup> SOLOVE, *NOTHING TO HIDE*, *supra* note 145, at 179-81.

<sup>185</sup> *Id.* at 181.

<sup>186</sup> This does not mean that all encroachments on privacy seek the same result. Large corporations, combined with the easiness with which Internet search engines trade personal information, actually want the opposite: “to know our every desire, confident that we can be pleased into submission.” GARRET KEIZER, *PRIVACY* 6-7 (2012). The way in which Internet search engines set individualized profiles for each and every one of us, together with corporations buying these profiles and news media companies offering the same ‘service’—so you can read exactly what you want to read by snipping away every other opinion that counters yours—likewise affects the fashion in which our public and communal agreements are constructed, as well as the basis of our society. CASS R. SUNSTEIN, *REPUBLIC.COM* 7-10, 14-5 (2001). Julie Cohen has also called attention against the sort of sovereignty private corporations enjoy at the time of freely modeling individuals’ lives. This mistreatment of privacy affects “democratic citizenship, innovation, and human flourishing ...”. Cohen, *What privacy is for*, *supra* note 126, at 1927-32 (criticizing what she terms ‘informational capitalism’ and calling for new regulations that uphold privacy concerns of individuals).

<sup>187</sup> Solove, *Taxonomy of Privacy*, *supra* note 133, at 493 (“Because of its inhibitory effects, surveillance is a tool of social control, enhancing the power of social norms, which work more effectively when people are being observed by others in the community.”).

<sup>188</sup> *Id.* at 494.

<sup>189</sup> Cohen, *What privacy is for*, *supra* note 126, at 1917.

probably the desire, to practice this sort of contestation—“this sort of citizenship.”<sup>190</sup>

Moreover, we have to consider that, although today it is a common knowledge that cameras are constantly watching us, one of the few unexplored components of surveillance is ‘unverifiability.’<sup>191</sup> This means that citizens, despite having a general sense of being watched, do not know whether they are actually being observed. It is precisely that general sense of being under surveillance where governmental power resides, for whereas actual watching might be sporadic, “the threat of being watched never ceases’.”<sup>192</sup>

A likely result of this internalization of control<sup>193</sup> is that people are prevented from suggesting new visions. This is because experimentation requires a certain level of privacy, that is, the assurance there will be no retribution.<sup>194</sup> This chilling effect on dissent affects not only ideas, but also one of the most effective means, and to some the only available means, of political participation: popular reunions and assemblies. Constant surveillance may take people to avoid joining others, a burden particularly felt by disadvantaged or minority groups.<sup>195</sup> As some empirical data shows, surveillance may take people to

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<sup>190</sup> *Id.* at 1918.

<sup>191</sup> Koskela, ‘*Cam Era*’, *supra* note 176, at 298.

<sup>192</sup> *Id.* (citing Matt Hannah).

<sup>193</sup> *Id.* at 299 (“People internalise the rules, regulate their own behaviour even when it is not necessary and, thus, exercise power over themselves. Power operates by creating ‘bad conscience’.”). *See also*, Cohen, *What privacy is for*, *supra* note 126, at 1916 (“In the modulated society, surveillance is not heavy-handed; it is ordinary, and its ordinariness lends it extraordinary power.”).

<sup>194</sup> Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 127, at 148-9.

<sup>195</sup> Solove, *Taxonomy of Privacy*, *supra* note 133, at 499 (“Espousing radical beliefs and doing unconventional things takes tremendous courage; the attentive gaze, especially the government’s, can make these acts seem all the more daring and their potential risks all the more inhibitory.”).

withdraw from groups and seek more individualistic forms of participation;<sup>196</sup> it also impacts the organizational basis of movements<sup>197</sup> and, in the end, the culture of protest itself.<sup>198</sup>

This, however, remains a disputed territory in courts. Some of them, like the courts in the United States, have held citizens do not have a reasonable expectation of privacy in public. Although in *Katz* the Court declared that privacy protects people rather than places,<sup>199</sup> it has never really left the secrecy paradigm—as Solove has termed it.<sup>200</sup> This paradigm consists of understanding privacy in very a narrow fashion: something is private, and is therefore granted constitutional protection, “only if it is completely secret.”<sup>201</sup> In *California v. Ciraolo*, for instance, the Court held a person had no reasonable expectation of privacy, even when in his backyard, against a governmental “observation from a public vantage point where he has a right to be and which renders the activities clearly visible.”<sup>202</sup> This vantage point was possible thanks to a police helicopter flying over the claimant’s home. Therefore, to claim the protection of one’s privacy, people must act as reasonable paranoids, that is, take every imaginable step to prevent exposition to the public eye.<sup>203</sup>

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<sup>196</sup> Starr et al., *The impacts of State Surveillance*, *supra* note 183, at 255.

<sup>197</sup> *Id.* at 258-60 (showing surveillance generates reluctance to participate and thus “impacts donations to organizations, numbers of participants in events, willingness to sign petitions and public statements, volunteering, and receipt of newsletters and other educational materials normally sent to members.”).

<sup>198</sup> *Id.* at 261-3.

<sup>199</sup> *Supra* note 141.

<sup>200</sup> SOLOVE, *NOTHING TO HIDE*, *supra* note 145, at 93-101.

<sup>201</sup> *Id.* at 94.

<sup>202</sup> 476 U.S. 207 (1986).

<sup>203</sup> See a description of how a reasonable paranoid would behave in Elizabeth Paton-Simpson, *Privacy and the reasonable paranoid: the protection of privacy in public places*, 50 U. TORONTO L.J. 305, 305-6 (2000).

In Canada, the Supreme Court previously held a property approach which it later abandoned to adopt its own version of reasonable expectations of privacy.<sup>204</sup> In *Hunter et al. v Southam Inc.*, it held, just as the United States Supreme Court did in *Katz*, that privacy protected persons, not places.<sup>205</sup> However, the standard has also proven futile in protecting privacy rights in what are normally seen as public spaces. Whereas some commentators have noted Canadian courts seem more willing—at least when compared with courts in the United States—to protect some forms of privacy in public,<sup>206</sup> overall matters are more or less the same. In *United Food and Commercial Workers, Local 401 v. Alberta*, the Supreme Court of Canada decided whether a picketing union had the right to record individuals crossing the picket line. Individuals recorded by the union claimed their privacy rights were infringed. The Supreme Court dismissed these privacy concerns. It found the union to be exercising ‘journalistic’ powers as granted in the relevant legislation (Personal Information Protection Act, PIPA) and therefore considered the union had engaged in expressive activities. The Court also held the following:

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<sup>204</sup> Kate Murray, *The ‘reasonable expectation of privacy test’ and the scope of protection against unreasonable search and seizure under Section 8 of the Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 25 (1986) (arguing the Canadian version of the test has several differences with the one adopted in the United States).

<sup>205</sup> [1984] 2 S.C.R. 145, at 159. However, the Court was not so quick to admit the people lose their privacy rights once in public. See, Derek Lai, *Public video surveillance by the State: Policy, Privacy legislation, and the Charter*, 45 ALTA. L. REV. 43, 66 (2007) (distinguishing *Katz*, depicted as “an American rather than a Canadian viewpoint,” from *Hunter*).

<sup>206</sup> Paton-Simpson, *Privacy and the reasonable paranoid*, *supra* note 203, at 318 (analyzing the trend in the early 2000s and suggesting “there are signs that Canadian courts may be more open to the notion of public privacy.”); Lai, *Public video surveillance by the State*, *supra* note 205, at 67 (“current *Charter* jurisprudence does suggest that Canadians retain a reasonable expectation of privacy in what they expose in public”), although the decisions Lai analyzes, as he acknowledges, deal with “surreptitious video surveillance in a private place” (*Id.*).

I agree that the complainants had no reasonable expectation of privacy. They were at not just a public place, but a public demonstration with important political and social implications. There is no rational connection between protecting privacy when the individuals in question are in public view. There is no right to “practical anonymity.”<sup>207</sup>

It is true that the Court was dealing with private individuals and not with governmental officers, but it is important to highlight that it understood there is no such thing as a reasonable expectation of privacy when in public places.<sup>208</sup>

In fact, as it has more recently been suggested, the series of cases regarding privacy matters which the Supreme Court has heard—besides being related to admissibility of evidence obtained without judicial warrants—have missed important differences between being seen, watched, recorded, and monitored.<sup>209</sup>

In Australia, the Victoria Civil and Administrative Tribunal found the police had sensible reasons to film and take photographs of protesters, even when they

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<sup>207</sup> *United Food and Commercial Workers, Local 401 v. Alberta*, [2011] 509 AR 150, at 187.

<sup>208</sup> In *Ward*, the Ontario Court of Appeals read the Supreme Court case law as securing a right to privacy even when in public. It held the following:

I take the [Supreme] court to have held that in Canadian society people can reasonably expect that they can move about on public highways without being identified and continually monitored by the state. If the state chooses to engage in that kind of invasive conduct, it must be able to meet the constitutional requirements of s.8. *Wise* holds that while the public nature of the forum in which an activity occurs will affect the degree of privacy reasonably expected, the public nature of the forum does not eliminate all privacy claims. *R. v Ward*, [2012] 296 O.A.C. 298, at 313-4.

However, it is worth noticing this standard has been built in the context of criminal investigations and evidence gathered without judicial warrants. *See, Lai, Public video surveillance by the State, supra* note 205, at 70 (arguing that, according to *Wise*, “any breach [of privacy] must flow from the subsequent monitoring and/or recording by those cameras,” but not from the mere fact of cameras being installed in public).

<sup>209</sup> Krista Boa, *Privacy outside the castle: surveillance technologies and reasonable expectations of privacy in Canadian judicial reasoning*, 4 SURVEILLANCE & SOC’Y 329 (2007) (arguing that the Court has dismissed reasonable concerns of privacy by overlooking these distinctions).

were peacefully demonstrating.<sup>210</sup> The court held the police can gather and retain information about protesters for intelligence purposes, no matter how broadly defined (“it may be useful in future”),<sup>211</sup> and that there was no privacy violation. In order to do so, it held privacy remained unaltered as “no names were noted down.”<sup>212</sup> Following the trend depicted above, it also noted that “very public activities did not engage (or infringe)” a right to privacy.<sup>213</sup>

Not all courts have followed the same path. Spain’s Constitutional Court ruled on the action of police officers who took pictures and recorded images of a picket of workers who, while holding a strike, were also informing bystanders about the main causes of a general labor strike. The Court, although resting on the constitutional right to collective bargaining and strike, held the policed affected the workers’ labor rights.<sup>214</sup> The Court reasoned that, while the police did not impede the strike,<sup>215</sup> their actions were certainly aimed at intimidating and threatening workers taking part in the strike.<sup>216</sup>

What should be done then? I argue this socially vitalized version of privacy should have States acting within more demanding limits as to the information they are allowed to gather and keep, and certainly controlling the uses the State can make of that information. The practical answer to State surveillance, therefore, is not that States should drop every form of public vigilance, but

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<sup>210</sup> *Caripis v. Victoria Police (Health and Privacy)*, [2012] VCAT 1472.

<sup>211</sup> *Id.* at para 30.

<sup>212</sup> *Id.* at para 50.

<sup>213</sup> *Id.* at para. 65. Reasoning that this present case cannot be distinguished from *Catt*—an English case the tribunal relied on—, it asserted that “the public nature of Mr Catt’s activities was also important in leading to the conclusion that his right to privacy was not affected by the gathering and retention of information about him” (para 66).

<sup>214</sup> Judgment of Feb. 17, 1998, Constitutional Court, Second Chamber, STC 37/1998.

<sup>215</sup> *Id.* at para. II.5.

<sup>216</sup> *Id.* at para. II.6.



maintain it within margins that do not unnecessarily threaten the right to protest.<sup>217</sup> Roughly put, this means that for all purposes (even punishing crimes) the State should consider protesters joining a protest as first-time attendees, as if they had no protesting past. In fact, it is a common practice of the police to record and aggregate information of demonstrators, thus creating protester profiles later used to obstruct their right to protest—for instance, to conduct preemptive detentions. The means to achieve this objective, again, is not to drop public surveillance, but to subject a State’s means of gathering information to stringent standards, such as imposing penalties for abuses (leaks), the obligation to delete old data, the prevention of ‘mission creep,’ and judicial oversight.<sup>218</sup> In other words, governmental surveillance needs to undergo more effective accountability measures. Indeed, one of the problems of surveillance is that citizens do not know what information on them is available at governmental records. In addition, they do not know what pieces of information have been put together or who is doing that job.<sup>219</sup>

#### D. Counter surveillance

Technology cuts both ways. What happens when surveillance is turned against the watcher? This practice, favored by technology developments in devices (mostly mobiles) citizens carry, could be seen as a sort of accountability of

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<sup>217</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 155, at 187 (arguing activities—such as surveillance—that affect privacy “are not socially undesirable or worthy of sanction or prohibition.”).

<sup>218</sup> SOLOVE, NOTHING TO HIDE, *supra* note 145, at 181.

<sup>219</sup> Kimberly N. Brown, *Anonymity, faceprints, and the Constitution*, 21 GEO. MASON L. REV. 409, 435-6 (2014).

those in charge of watching us,<sup>220</sup> but also as mechanisms of power contestation that disrupt State surveillance and contribute to identity building of political actors in the streets.<sup>221</sup>

Slobogin, for one, has argued that ‘watching the watchers’ is a form—a popular form, for the situation I am concerned with here—of implementing privacy rights in public.<sup>222</sup> It is, therefore, a form of accountability of what governments and their agents collect, catalogue and index that is rooted in privacy concerns. Notice that these citizen practices not only enhance governmental transparency, but also place the burden of surveillance on the government itself.<sup>223</sup> By doing so, the State, and particularly the police, loses its ability to “patrol the facts” before public opinion.<sup>224</sup> On the other hand, it is also possible to see these acts of counter-surveillance as forms of political contestation—‘protests as news,’<sup>225</sup> for publicly exposing the policing of protests also signals how the State reacts before specific demands. The legitimacy of the State is in this way doubly challenged.<sup>226</sup> Technologies, whose uses are not predetermined, are thus given a social meaning of resistance.<sup>227</sup>

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<sup>220</sup> See generally, Andrew John Goldsmith, *Policing's New Visibility*, 50 BRITISH JOURNAL OF CRIMINOLOGY 914 (2010).

<sup>221</sup> Elise Danielle Thorburn, *Social Media, subjectivity, and surveillance: moving on from Occupy, the rise of live streaming video*, 11 COMMUNICATION & CRITICAL/CULTURAL STUDIES 52 (2014).

<sup>222</sup> Christopher Slobogin, *Public privacy: camera surveillance of public places and the right to anonymity*, 72 MISS. L.J. 213, 256, 306-7 (2002-2003).

<sup>223</sup> *Id.* at 307. See also, Stephen Clarke, *The Panopticon of the Public Protest: technology and surveillance*, 4 RES COGITANS 4 (2013) (arguing these forms of public control of police behavior enhance the autonomy of protesters).

<sup>224</sup> Goldsmith, *Policing's New Visibility*, *supra* note 220, at 915-6.

<sup>225</sup> Chris Geer & Eugene McLaughlin, *We predict a riot? Public order policing, new media environment and the rise of citizen journalism*, 50 BR. J. CRIMINOLOGY 1041 (2010).

<sup>226</sup> Thorburn, *Social Media, subjectivity, and surveillance*, *supra* note 221, at 57.

<sup>227</sup> *Id.* at 59. See also, Peter Ullrich & Gina Rosa Wollinger, *A surveillance studies perspective on protest policing: the case of video surveillance of demonstrations in Germany*, 3 INTERFACE 12, 23

This ‘forced’ openness pretty much explains why States feel uneasy about these forms of popular accountability. The police rarely tremble before proceeding to arrest journalists covering protests<sup>228</sup> and, of course, protesters photographing or recording them.<sup>229</sup> This is not just a matter of police practice, but of legal entitlement as well. For instance, in the United Kingdom counter-terrorist legislation has been resorted to in order to legally justify detention of those taking images of the police,<sup>230</sup> while in Spain, as well as in other latitudes, a recent bill is aimed to sanction those who capture images of the police force without their consent.<sup>231</sup>

Nevertheless, it is easier here to find courts standing on the side of citizens (and journalists). Arguably this is because courts have focused on the vigilant role

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(2011) (noting socio-technological practices have their own inner dynamics which cannot prevent ‘unintended effects’ such as counter-surveillance).

<sup>228</sup> Arbitrary detentions of journalists have been reported in Chile (Jason Suder, *How to be arrested in Chile without breaking the law*, THE HUFFINGTON POST, Jun. 3, 2012, [http://www.huffingtonpost.com/jason-suder/chile-freedom-of-press\\_b\\_1324547.html](http://www.huffingtonpost.com/jason-suder/chile-freedom-of-press_b_1324547.html)), the United States (*In Ferguson, Washington Post reporter Wesley Lowery gives account of his arrest*, THE WASHINGTON POST, Aug. 14, 2014, [http://www.washingtonpost.com/politics/in-ferguson-washington-post-reporter-wesley-lowery-gives-account-of-his-arrest/2014/08/13/0fe25c0e-2359-11e4-86ca-6f03cbd15c1a\\_story.html](http://www.washingtonpost.com/politics/in-ferguson-washington-post-reporter-wesley-lowery-gives-account-of-his-arrest/2014/08/13/0fe25c0e-2359-11e4-86ca-6f03cbd15c1a_story.html)), Greece (*Athens riot police beats Photo-reporters*, KEEPTALKINGGREECE.COM (Oct. 5, 2011), <http://www.keeptalkinggreece.com/2011/10/05/athens-riot-police-beats-photo-reporters-pcts-video/>), Spain (*Los periodistas, detenidos y golpeados al cubrir las manifestaciones del 15-M [Journalists, arrested and beaten while covering 15-M demonstrations]*, ELMUNDO.ES, Aug. 05, 2011, <http://www.elmundo.es/elmundo/2011/08/05/comunicacion/1312558334.html>), and Canada (*Under arrest? Tweet it, fast*, NATIONALPOST, May. 23, 2012, <http://fullcomment.nationalpost.com/2012/05/23/under-arrest-tweet-it-fast/>), to name some examples randomly selected from the web.

<sup>229</sup> Not in vain the United Nations passed a resolution calling States to pay particular attention to the safety of journalists and media workers covering protests, as well as the safety of protesters. Human Rights Council, *Promotion and protection of all human rights in the context of peaceful protests*, A/HRC/25/L.20. March 24, 2014, paras 8 and 18.

<sup>230</sup> Counter-Terrorism Act 2008, § 76.

<sup>231</sup> *Proyecto de Ley de Seguridad Ciudadana (Texto íntegro) [Public Safety Bill (full text)]*, EL HUFFINGTON POST, Jul. 11, 2014, [http://www.huffingtonpost.es/2014/07/11/ley-seguridad-ciudadana\\_n\\_5578288.html](http://www.huffingtonpost.es/2014/07/11/ley-seguridad-ciudadana_n_5578288.html) See also, DAUVERGNE & LEBARON, PROTEST INC., *supra* note 83, at 65-6 (arguing that, besides the UK, anti terrorist legislation in the US, Canada, Russia, Germany, “and many other countries” has been resorted to in order to “further criminalizing dissent as states extend surveillance and detention powers to a wider range of groups.”).

citizens play vis-à-vis the State, on citizens' freedom of expression rights allowing them to scrutinize public officials, or on the public office of those being photographed or recorded by citizens. Thus, the Constitutional Court of Spain held in 2007 that privacy encompasses the protection of an individual's image from being captured by others without consent.<sup>232</sup> However, it also held that it was not an absolute right.<sup>233</sup> In fact—the Court went on—the right to control whether an individual's image is captured and divulged cannot rest solely on the individual's will, but also on the circumstances where the individual is placed.<sup>234</sup> In certain cases those circumstances may require the individual's will be yielded before other considerations, such as when other rights concur (i.e. freedom of expression) or when there is a public interest involved in capturing and publishing images.<sup>235</sup>

Was there any public interest involved in this case? The court held there was. The case dealt with a newspaper article which, in covering an eviction process in Madrid, had published photos of police officers involved under the headline 'violent eviction.'<sup>236</sup> To support its argument, the Court cited domestic legislation which protects image rights and prevents public officials from recovering damages if pictures are taken when they are performing official duties in public places.<sup>237</sup> These exceptions were taken to constitutional status when the Court held there was no encroachment on privacy rights when the

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<sup>232</sup> Judgment of Apr. 16, 2007, Constitutional Court, First Chamber, STC 72/2007, at II.3.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at I.2.a.

<sup>237</sup> *Id.* at II.3.

photo captures images of (a) a public official (b) exercising his or her duties (c) in the context of public actions (d) taking place in a public place.<sup>238</sup>

In Canada, a court in Ontario decided a case involving a police assault of a photographer who was shooting pictures of a fight between patrons and the police at a restaurant. The personal assault resulted from the excessive force the police used in detaining the photographer after having been ordered to stop shooting pictures. It held that, although police officers were in the middle of a “volatile situation, faced with a loud, hostile and aggressive crowd,”<sup>239</sup> police have limits as to the use of force they can resort to.<sup>240</sup> More crucially, the court enquired whether the order to stop taking pictures was within police powers. The court concluded that

unless Mr. Farkas’s [the photographer] presence or actions were creating a danger to him or others, ordering him to stop photographing was not a lawful command ...<sup>241</sup>

The court noted the relation between the police, on the one hand, and citizens, on the other—whether they have or have not committed any offence—, is imbalanced. Sometimes some light is needed to expose the sensible concern as to how the police exercise their legal powers. “An officer who conducts himself reasonably has nothing to fear from an audio, video or photographic record of his interaction with the public.”<sup>242</sup> Furthermore, the court saw the recording of an interaction with the police as a right to oversee the way in which public

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<sup>238</sup> *Id.* at II.5.

<sup>239</sup> *R. v. Zarafonitis* 2013 ONCJ 570 (CanLII), at para 18.

<sup>240</sup> *Id.* at para 20.

<sup>241</sup> *Id.* at para 24.

<sup>242</sup> *Id.* at para 26.

powers are being put into practice, a citizen practice that, in the end, plays a significant role in the maintenance of the Rule of Law.<sup>243</sup> “Interference by a police officer in the public’s exercise of that right,” the court concluded, “is a significant abuse of authority.”<sup>244</sup>

In the United States, the 7<sup>th</sup> Circuit Court of Appeals prevented the enforcement of Illinois’ eavesdropping statute.<sup>245</sup> The statute considered it a felony to audio record conversations unless all parties involved in the conversation give their consent. While the government claimed to be protecting the privacy of conversations, the Court held “that interest is not implicated when police officers are performing their duties in public places ....”<sup>246</sup> It is worth noting that the case was presented by the American Civil Liberties Union (ACLU), which sought declaratory and injunctive relief so that the statute could not be enforced against their ‘police accountability program.’<sup>247</sup> The ACLU argued the statute violated their free speech rights. The court agreed. First, it held public

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<sup>243</sup> *Id.* (“The public has a right to use means at their disposal to record their interactions with the police, something that many police services themselves do through in-car cameras and similar technology ... The maintenance of that public record plays a significant role in the maintenance of the rule of law. The existence of this form of objective ‘oversight’ has great potential to minimize abuses of authority and to maintain peaceable interaction between police and the citizenry, all of which is very much in the public interest.”).

<sup>244</sup> *Id.*

<sup>245</sup> *ACLU of Illinois v. Alvarez*, 679 F.3d 583, (7th Cir. 2012).

<sup>246</sup> *Id.* at 586.

<sup>247</sup> *Id.* at 588 (“a program of promoting police accountability by openly audio recording police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful. The program will include, among other things, audiovisual recording of policing at ‘expressive activity’ events—protests and demonstrations—in public fora in and around the Chicago area.”).

recordings used as a means of expression to disseminate information were included within freedom of speech protection.<sup>248</sup>

Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast—whether to the general public or to a single family member or friend—and thus burdens First Amendment rights.<sup>249</sup>

It was the fact that the statute prevented citizens from freely discussing governmental affairs, namely the work of public officials in public places, what seriously compromised free speech rights.<sup>250</sup> This fashion in which the court framed free speech rights can have no other outcome than to highlight the accountability role the citizenry plays in a democratic society.<sup>251</sup> Accordingly, the statute was seen as restricting a medium of expression “and thus an integral step in the speech process ... it interferes with the gathering and dissemination of information about government officials performing their duties in public.”<sup>252</sup>

Although some of the Court’s paragraphs aforementioned make some references to public space, it would be completely wrong to suggest free speech

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<sup>248</sup> *Id.* at 595. It rested on the Supreme Court doctrine that regulations, and control and suppression, of speech may operate “at different points in the speech process” (*Id.* at 596). This is not, the Court explained, to hold that audio recordings are speech acts themselves, but—drawing a parallel with other mechanical mediums—that they are integral to the forms of speech they facilitate (*Id.* at 596-7).

<sup>249</sup> *Id.* at 597.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 599 (“To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government.”).

<sup>252</sup> *Id.* at 600.

rights—as framed here—are to be upheld only in such a space,<sup>253</sup> for the vigilant role the people play also reaches spaces that, while public, are not part of what the traditional doctrine regards as public fora. Thus, the same stringent scrutiny—as the one applied in *Alvarez*—would be applied if a statute criminalizes the use of mediums of expression in (say) the congress, a court, or the buildings of the administration.<sup>254</sup> The Supreme Court has recently denied certiorari, leaving the 7<sup>th</sup> Circuit decision to stand.<sup>255</sup>

More recently in Spain, a court in Madrid decided a case along the same matters. A citizen (who claimed to be a free press journalist) was recording two municipal police agents that were conducting an eviction when they requested he stop capturing their images. The agents ordered the man to pixel their faces if he published the material, hit his camera,<sup>256</sup> and eventually charged him with a public order offense. The court dismissed the charge.<sup>257</sup> In doing so the court noted there is no legal prohibition to record public officials in public spaces and recalled the Constitutional Court decision aforementioned (*supra* note 232): privacy and image rights of public officials, when exercising their legal duties in public places, are yielded in favor of other constitutionally protected rights, such as the public interest associated with scrutinizing public officials.<sup>258</sup>

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<sup>253</sup> What the court did do, however, was dismiss the claim that privacy rights of the police were involved in the regulations (*Id.* at 605-6, noticing the police cannot reasonably expect privacy for conversations in the open).

<sup>254</sup> Each of these instances has exceptions. Nevertheless, the police also have exceptions when conducting undercover operations, operations that are, for the most part, legally regulated or authorized by a court.

<sup>255</sup> 133 S. Ct. 651 (2012).

<sup>256</sup> *Policía golpea la cámara grabando un desahucio*, YOUTUBE, (Oct. 9, 2013), <https://www.youtube.com/watch?v=OI6ed7OhQdc>

<sup>257</sup> Juzgado de Instrucción Madrid, marzo 6, 2014, Recurso 982/2013 (slip op.).

<sup>258</sup> *Id.*



The bottom line here is that these counter surveillance activities are to be permitted, if not promoted. Counter surveillance allows citizens to uphold their own privacy rights. As it has been argued, by unveiling questionable practices counter surveillance may help to moderate or even trigger a cessation of undue publications or uses of information. Information gathered through counter surveillance, in fact, could also be used to persecute governmental responsibilities of those involved, also causing the revision of surveillance practices.<sup>259</sup>

#### *E. Masks, hoods and anonymity for protesters*

Does informational privacy also play a role in protecting protesters from being identified? And if so, why would protesters want to remain anonymous? Many protesters use masks to cover their faces—thus hindering, if not directly impeding, their identification. This practice has found stringent reaction from governments. In fact, many governments have reacted by submitting bills or passing regulations—mostly criminal regulations—prohibiting protesters from hiding their faces at public demonstrations.<sup>260</sup>

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<sup>259</sup> Gary T. Marx, *A Tack in the Shoe: neutralizing and resisting the new surveillance*, 59 J. OF SOCIAL ISSUES 369, 384 (2003).

<sup>260</sup> *Wearing a mask at riot is now a crime*, CBS.CA, Jun. 19, 2013, available at <http://www.cbc.ca/news/politics/wearing-a-mask-at-a-riot-is-now-a-crime-1.1306458>; *Montreal police use controversial new laws to quell protest*, THE GLOBE AND MAIL, May. 23, 2012, available at <http://www.theglobeandmail.com/news/national/montreal-police-use-controversial-new-laws-to-quell-protest/article4204035/>; *Piñera pone urgencia a ley anti encapuchados y critica a quienes le "hacen el juego a los terroristas" [Piñera places urgency on anti-mask legislation and criticizes those playing "the games of terrorists"]*, NACION.CL, Jan. 13, 2013, available at <http://www.lanacion.cl/pinera-pone-urgencia-a-ley-anti-encapuchados-y-critica-a-quienes-le-hacen-el-juego-a-los-terroristas/noticias/2013-01-13/123556.html>; *Mayores penas para los violentos en protestas abren el debate en Colombia [Heightened sanctions on violent protesters open a debate in Colombia]*, ELPAIS.COM.CO, Sep. 13, 2013, available at <http://www.elpais.com.co/elpais/colombia/noticias/mayores-penas-para-violentos-protestas-colombia-abre-debate>; *Spanish government tones down its controversial Citizen Safety Law*, ELPAIS.COM, May 28, 2014, available at

Whereas preventing crime may be a sound reason for these regulations— anonymity makes it hard to punish crimes by helping to conceal the identity of perpetrators<sup>261</sup>—, my concern is with protesters who are not committing crimes.<sup>262</sup> In other words, I wonder whether this is not an overreaching response that affects the privacy of the rest of protesters who pacifically concur to protest (normally the vast majority of them) and still wish to remain

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[http://elpais.com/elpais/2014/05/28/inenglish/1401272039\\_980140.html](http://elpais.com/elpais/2014/05/28/inenglish/1401272039_980140.html); *Outrage as France become first nation in world to ban pro-Palestine demos*, DAILY MAIL, Jul. 18, 2014, available at <http://www.dailymail.co.uk/news/article-2697194/Outrage-France-country-world-ban-pro-Palestine-demos.html>.

<sup>261</sup> However, it should be noted that governments do not seek, although some have tried, to specifically criminalize the use of masks or hoods, but to facilitate crime persecution. In other words, as some commentators have suggested for the Canadian case, crime prevention is satisfied with criminal provisions already available. This further explains the actual objective of these regulations: to obstruct the exercise of the right to protest. *Ban on masks at riots not needed, MPs hear*, CBC.CA, May. 08, 2012, <http://www.cbc.ca/news/politics/ban-on-masks-at-riots-not-needed-mps-hear-1.1201624>

<sup>262</sup> We should place a large caveat here. In many cases, as I noted when reviewing the powers policies are regularly granted with, the decision about *when* a protester is committing an offence or a crime is up to the discretion of authorities. Consider legal regulations proposed in Spain which sanction as a serious offense (with fines of up to €30,000) those who take part in altering public safety using hoods, helmets or any other objects or clothes aimed at preventing identification. *Las claves del anteproyecto de ley de Seguridad Ciudadana [The key of the Public Safety draft]*, EL MUNDO, Nov. 29 2011, available at <http://www.elmundo.es/espana/2013/11/29/52985b7468434195418b4592.html>. Protesters may be wearing, say, hoods, to prevent identification, not with the aim to conceal their identities in order to commit crimes. However, policing powers are so vague and discretionary that, as I have noted before, the mere reunion of people or the obstruction of traffic flow may be considered an alteration of public safety. Whereas the actions remain the same (a public gathering or the obstruction of traffic), it is literally up to the authorities (the police) to determine whether there is an alteration of public safety. Therefore, whereas my concern here is with protesters who concur pacifically to demonstrate, we should not overlook the fact that the determination of when a protester becomes an offender depends largely on police discretion and selective enforcement of its public order regulations—and hoods themselves may play a significant role in causing the police to enforce those regulations. I would also add that, even where there is judicial control over the acts of the police, it is the very act of the police that infringes both the right to protest and privacy of protesters. Finally, there might still be good reason to criticize the criminalization of masks, even when protesters, or anyone else, wearing masks do so in order to commit crimes. This depends largely on the distinction between ‘criminal laws’ and ‘general laws’ (which I address below). In the former case—where the government intervenes upon evidence that those masked have committed a crime or are intending to commit one—it could be possible to suggest that by preventing individuals from concealing their identity the State is forcing the perpetrator to self-incrimination. This, of course, would depend to a large extent on how the right to not self-incriminate is understood. In the United States, for instance, this right has been understood to protect only compelled testimony leading to (self) incrimination (Susan W. Brenner, *The privacy privilege: law enforcement, technology, and the Constitution*, 7 J. TECH. L. & POL’Y 123, 182-90 (2002)). I would like to thank Ignacio Castillo and Juan Pablo Mañalich for a valuable exchange of opinions here.

anonymous. Despite obvious similitude with surveillance, a restriction on mask wearing at protests, I want to suggest here, is a complementary assault on privacy—which happens to have an undesirable impact on freedom of expression, in addition to causing other harms to individuals.

Is anonymity alien to democracy? Not at all. We cast votes in privacy. This means that one of the most important rituals in current democracies, a crucial feature under the liberal view, takes place under anonymity. This also means that there might be good reasons available to demand anonymity when politically participating. Secret voting, for instance, was aimed not only at preventing bribery,<sup>263</sup> but also at securing the liberty of voters (citizens) before political and economic power.<sup>264</sup> By securing the secret of the ballot, citizens, particularly those worst-off who largely depend on governmental economic assistance, would not be the subject of threats and intimidation by political power.<sup>265</sup> Their social and material inequality, to put it in other words, would not translate into political disparities.<sup>266</sup> The anonymity citizens enjoy in the voting booth, seen in this light, amounts to “political privacy,”<sup>267</sup> a constitutional guarantee that they would be able to participate by “vot[ing]

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<sup>263</sup> *But see*, Simeon Nichter, *Vote buying or turnout buying? Machines politics and the secret ballot*, 102 AM. POL. SCI. REV. 19 (2008) (arguing bribery can still take, and actually takes, place in face of secret voting).

<sup>264</sup> This, however, has not always been an undisputed reason. In 1840s England, for instance, some saw secret voting—in an impressive resemblance with today’s critique of protesting with covered faces—as “a mask on an honest face.” NADIA URBINATI, *MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT* 105 (2002).

<sup>265</sup> ANDREW REEVE & ALAN WARE, *ELECTORAL SYSTEMS: A THEORETICAL AND COMPARATIVE INTRODUCTION* 111 (1992).

<sup>266</sup> Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1329-30 (2000).

<sup>267</sup> EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 152 (1978).

according to their best judgment, rather than to avoid political ostracism or penalty, or to seek approval of favors ...".<sup>268</sup>

This is where the socially infused understanding of privacy calls us to look at the social goods which the protection of privacy seeks to further. Daniel Solove, who argues that privacy, rather than being defined in a single concept, is to be understood as a cluster of problems that create harms to individuals and society,<sup>269</sup> notes there are many situations where privacy-as-anonymity is to be protected. This is particularly the case before relationship harms, vulnerability harms, power imbalances, and chilling effects.<sup>270</sup> Continuous monitoring, for instance, can contribute to create, if not directly to provoke, anxiety and discomfort, causing individuals to alter their behavior and self-censorship.<sup>271</sup> The same may occur with identification—the very objective that mask bans are aimed at obstructing—which links actual individuals to a baggage of information.<sup>272</sup>

As Solove argues, all these harms are better understood when we see them not as forms of injuries to particular individuals, but as forms of harm that contribute to generate what he terms 'architectures of vulnerability.'<sup>273</sup> These are "designs or structures for the processing of personal information that make people vulnerable to a host of dangers."<sup>274</sup>

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<sup>268</sup> *Id.*

<sup>269</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 155.

<sup>270</sup> *Id.* at 176-8.

<sup>271</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 493.

<sup>272</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 155, at 122-4.

<sup>273</sup> *Id.* at 178.

<sup>274</sup> *Id.*

Anonymity brings important benefits against these structures of vulnerability; anonymity allows individuals to be protected from bias, feeling free and safe to speak and associate without harm of (a large array of possible) reprisals.<sup>275</sup> This is quite a relevant concern once we realize these harms are particularly burdensome on unpopular and vulnerable groups. By prohibiting anonymity minorities feel their liberty is taken away and that they are forced to conform to mainstream ideas.<sup>276</sup> A couple of years ago a Chilean media corporation warned its employers not to take part in labor protests that are held yearly to commemorate International Worker's Day on May 1<sup>st</sup>. They were told that if they did, they would be fired. Many of them disregarded what they saw to be an arbitrary command and proceeded to demonstrate. As they were marching in front of the newspaper's offices, they glanced at the human resources officer taking pictures of them. They filed an *amparo laboral*<sup>277</sup> claiming their freedom of expression and assembly had been threatened.<sup>278</sup> For them, covering their faces would not have been a matter of breaking the law, but a security measure to keep their jobs. The same is the case of various minorities in different jurisdictions that have been prevented from wearing masks and hoods when peacefully demonstrating. The U.N. Human Rights Council expressed its preoccupation with this situation, calling States to consider the condition of

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<sup>275</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 515.

<sup>276</sup> Slobogin, *Public privacy*, *supra* note 222, at 240-42.

<sup>277</sup> A judicial writ filed before Labor Tribunals to secure the exercise of constitutional rights.

<sup>278</sup> A labor court found workers had a right to demonstrate and to receive legal protection, particularly considering the protest in which they were taking part involved political speech. A Court of Appeals overturned the decision; it held it cannot appreciate how the mere fact of taking pictures could pose an actual and effective violation of the constitutional freedom of expression. *Protesta social y derechos humanos [Social protest and human rights]*, in INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2010 [ANNUAL REPORT ON HUMAN RIGHTS IN CHILE 2010] 74-6 (2010).

minorities for whom covering their faces is the means to prevent violence and escape retaliation.<sup>279</sup>

Is it a contradiction to demonstrate and conceal one's identity? After all, protests take place on the streets, before many eyes—including those of the very bystanders protesters seek to convince. Alan Westin argued that there is a specific shape the right to privacy takes when exercised among a larger group, that of becoming a condition of anonymity or reserve.<sup>280</sup> Anonymity therefore takes place even when the individual "is in public places or performing public acts," for there he or she may still want to seek, and multitudes normally permit, "freedom from identification and surveillance."<sup>281</sup> Of course this is not an absolute right; you cannot claim anonymity to prevent being prosecuted for a crime committed either in public places or at home. On the other hand, individuals are also (almost naturally) inclined to participate in society.<sup>282</sup> At any rate, the decision to participate in society in an (un)anonymous fashion is an individual and autonomous one. It is the individual who is "continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others ...".<sup>283</sup>

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<sup>279</sup> The Council convincingly noted that these prohibitions seem to target particular vulnerable groups. Human Rights Council, *Report of the Special Rapporteur 2014*, *supra* note 182, at paras. 32-3.

<sup>280</sup> WESTIN, *PRIVACY AND FREEDOM*, *supra* note 132, at 7 (1967).

<sup>281</sup> *Id.* at 31.

<sup>282</sup> *Id.* at 7, 31 ("In this state the individual is able to merge into the 'situational landscape.' Knowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas.").

<sup>283</sup> WESTIN, *PRIVACY AND FREEDOM*, *supra* note 132, at 7.

The autonomous character of this decision, however, is not only seriously affected by constant monitoring, as argued before, but also by prohibiting wearing masks or hoods or prohibiting whatever means someone may find suitable to keep her identity on reserve. As Slobogin put it, “[p]eople who engage in expressive conduct in public know they will be observed. But they may choose, like the pamphleteer or the petitioner, not to reveal their identity for all sorts of reasons.”<sup>284</sup>

It would be wrong, in other words, to suggest that one withdraws privacy when entering the public arena. As I have been arguing here, privacy in fact often becomes a precondition for public engagement. Thus, even when in public we expect to remain “nameless-unremarked,”<sup>285</sup> being in the middle of a crowd gives people the advantage of remaining “part of the undifferentiated crowd—as far as the government is concerned.”<sup>286</sup> It is precisely because protesters have done nothing wrong—let alone illegal<sup>287</sup>—that they want to remain free from identification, even when in public.<sup>288</sup>

Could democracy require citizens to appear with uncovered faces? After all, publicity has been held to be—since Kant stated so in his essay on *Perpetual Peace*—a precondition for justice.<sup>289</sup> This is, no doubt, a sensible claim that

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<sup>284</sup> Slobogin, *Public privacy*, *supra* note 222, at 256.

<sup>285</sup> *Id.*, at 238.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 244-5 (arguing that we should not have trouble in understanding why we sometimes want actions, although totally legal and taking place in public locations, to be kept secret, such as attending an alcoholics anonymous meeting, going to a gay bar, a visit to the doctor, or a love affair, to name a few).

<sup>288</sup> *Id.* at 239.

<sup>289</sup> IMMANUEL KANT, *PERPETUAL PEACE A PHILOSOPHICAL ESSAY* 196 (M. Campbell Smith trans., G. Allen & Unwin Ltd. Macmillan Co. 1917) (1795) (“The possibility of this publicity, every legal title implies. For without it there could be no justice, which can only be thought as before the

demands clarification. The clarification is this: whereas it would be wrong to read *privacy as anonymity* as opposed to public participation, not every anonymous political intervention will be deemed democratically acceptable.

First, it should be noted that publicity primarily applies to States and not to their citizens.<sup>290</sup> This is so because citizens and governments perform different duties and functions, and this is the way we see each other.<sup>291</sup> Differences in power and responsibility, for example the extremely limited power electors have over their representatives as compared with the considerable power the latter have on citizens, bring very different standards of publicity and accountability.<sup>292</sup> Furthermore, imposing standards of publicity—or of informational flow—suited for the State on citizens would be an injustice, the injustice of allocating duties (publicity) according to the standards meant for other spheres (governmental).<sup>293</sup>

Of course, functional differentiation, that is, the fact that States and citizens perform different functions each with its own norms of information flow, cannot be the exclusive criterion to judge when publicity is required, for this would leave without explanation many situations where citizen transparency is

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eyes of men: and, without justice, there would be no right, for, from justice only, right can come”).

<sup>290</sup> Evan Darwin Winet, *Face-veil bans and anti-masks laws: State interest and the right to cover the face*, 35 HASTINGS INT’L & COMP. L. REV. 217 (2012) (arguing there is no such right “to see the bare face of another person.”).

<sup>291</sup> As Nissenbaum has convincingly argued, different contexts and functions require different flows of information. Unidirectional flows of information are not strange. In the context of healthcare, for instance, the flow of information is far from bidirectional—indeed it is a context where information flows from patient to physician. Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 127, at 142.

<sup>292</sup> Annabelle Lever, *Mill and the secret ballot: beyond coercion and corruption*, 19 UTILITAS 354, 359-61 (2007).

<sup>293</sup> Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 127, at 143-5.



also expected.<sup>294</sup> In order to explain why this is so we must unveil the democratic principle behind governmental publicity. The reason why we want governments to be transparent is to promote what has been called independency through dependency to assure, to the extent possible, that governments remain responsive to the people and the rules framing their public duties and not to undue influences.<sup>295</sup> The standard of independency through dependency, and not an unqualified duty of publicity applicable to all citizens, allows us to highlight differences between social protests—where *privacy as anonymity* could be constitutionally protected—and other means of political intervention—where transparency is sensibly required, such as lobbying or campaign financing.

In fact, while protesters present their arguments in a public fashion—regardless if they have concealed their faces—, lobbying and campaign financing do so secretly—regardless of having an uncovered face. This is the reason why it is sound to require lobbyists to (at the least) appear in public light. Because they have sought to conceal not so much their identity, but their arguments, interests, and motivations—precisely the aspects social protests publicly present—, they thus compromise the public good in order for private interests to benefit.<sup>296</sup> Put differently, whereas in public protests we know, even when we do not see faces, what ideas might have affected a governmental

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<sup>294</sup> Recall that I have said that whereas it would be wrong to read *privacy as anonymity* as being opposed to public participation, not every anonymous political intervention will be deemed democratically acceptable.

<sup>295</sup> LAWRENCE LESSIG, *REPUBLIC, LOST. HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 130-1 (2011).

<sup>296</sup> I took these ideas from Zephyr Teachout, *The unenforceable corrupt contract: corruption and Nineteenth-Century law*, in *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED* 135, 138-46 (Monica Youn ed. 2011).

decision, secret lobbying and anonymous electoral financing prevent us from seeing what agenda and interests (decisively) influence the State's march.<sup>297</sup>

After all, when individuals protest anonymously they still remain in public, yet undifferentiated.<sup>298</sup>

Finally, some have argued—as presented in a previous example—that open voting might encourage someone “to vote in a discursively defensible manner.”<sup>299</sup> While this is an important argument, it does not affect my claim here. For one, in a social protest the message (say, the popular interpretation of the constitution) remains public, and the same happens with the reasons and arguments that protesters put forward. For another, I am not suggesting, as is the case with secret voting, that protesters *must* cover their faces when participating in protests, but that they may if they feel the need to do so (such as when they want to avoid reprisals). In the end, a protester who conceals his or her face neither ceases to be a public-minded citizen nor corrupts the government by bringing it down to answer private interests.<sup>300</sup> In fact, it could be argued that actually the opposite is the case: a protester who conceals his or

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<sup>297</sup> See, DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* 260 (2014) (“The argument for disclosure here is a structural democratic claim in favor of building up a wall that shields the polity from being influenced by money and economic market factors.”).

<sup>298</sup> Brown, *Anonymity, faceprints, and the Constitution*, *supra* note 219, at 413-4 (“Anonymity enables one to remain undifferentiated in public.”).

<sup>299</sup> Geoffrey Brennan & Philip Pettit, *Unveiling the vote*, 20 *BRIT. J. POL. SCI.* 311, 311 (2009).

<sup>300</sup> Zephy Teachout, *The Anti-Corruption Principle*, 94 *CORNELL L. REV.* 241, 377-9 (2009) (arguing citizenship is a form of public office also malleable by corruption when oriented toward private interests). This is, in a similar sense, what Schmitt argued against secret voting. The fact that such secrecy transforms citizens, otherwise part of the people and bearers of public opinion, into private individuals who manifest their ‘private opinions.’ CARL SCHMITT, *CONSTITUTIONAL THEORY* 273-4 (Jeffrey Seitzer trans. Duke University Press 2008) (1928).

her face wants to bring attention exclusively to arguments, rather than to the faces that pronounce them.<sup>301</sup>

Besides those practices that dishonor the independency through dependency principle, it is reasonable to consider a second set of practices that are not constitutionally covered by privacy: crimes. The problem here is how to strike the right balance between governmental interest in preventing crime, on the one hand, and those of the protesters in exercising constitutional rights, on the other. While this is a question that is hard to answer in the abstract, it is useful to consider some general ideas in the context of social protests.<sup>302</sup> I want to argue that in order to strike the right balance we should *start* by paying attention to the harms that overreaching criminal legislation (may) pose on the exercise of rights.<sup>303</sup>

Although freedom of expression can be invoked as an independent justification for anonymity, I think it has a stronger (constitutional) force when linked to privacy, for it is the harm on privacy what prevents people, particularly unpopular groups, from concurring to shape public opinion. After all, as the Supreme Court of the United States held in *NAACP v. Alabama*, political participation may require some form of anonymity.<sup>304</sup>

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<sup>301</sup> Solove, *A Taxonomy of Privacy*, *supra* note 133, at 515 (“Anonymity can enhance the persuasiveness of one’s ideas, for identification can shade reception of ideas with readers’ biases and prejudices. This is why, in many universities and schools, exams are graded anonymously.”).

<sup>302</sup> SOLOVE, *UNDERSTANDING PRIVACY*, *supra* note 155, at 187-8 (arguing that, although the “balance might come out differently across various societies,” the taxonomy of harms he proposes have been recognized as problems “in nearly every industrialized information-age society”).

<sup>303</sup> This is, as you can see, a very modest claim.

<sup>304</sup> *N.A.A.C.P v. Alabama*, 357 U.S. 449 (1958).

It is useful to begin distinguishing between ‘general anti-mask’ laws, where the mere fact of wearing a mask results in criminalization, from ‘criminal anti-mask’ laws, where wearing a mask results in criminalization as long as authorities prove criminal intent from those wearing masks.<sup>305</sup> From the constitutional viewpoint of the right to protest, the former laws end up being tremendously problematic, for they ban the use of any masks, including those being used for legitimate reasons. It does not matter what circumstances individuals argue. It also does not matter if protesters fear retribution or experience anxiety—such as a serious loss of autonomy—due to having their faces associated to specific groups. The use of masks, under this approach, is always illegal. The latter laws might also be problematic if, as I have noted above, the mere fact of wearing a mask is considered to be an indicator of criminal intent. As long as masks themselves are not seen in this light, there might be a way of conciliating these laws with the exercise of rights.<sup>306</sup> I will assume this understanding for the second kind of laws, although the practice and governmental intent often proves the opposite, and will focus my attention on ‘general laws.’

Some have argued that when the State claims to be preventing crime it is not shielded from constitutional objections. I agree. Simoni, for one, argued constitutional objections could be drawn from constitutional freedom of expression. These objections, he suggests, are of two kinds: direct, when

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<sup>305</sup> Stephen J. Simoni, *“Who goes there?”—Proposing a model anti-mask act*, 61 *FORDHAM L. REV.* 241, 241-3 (1992). Simoni also mentions ‘narrow anti-mask laws,’ “which prohibit mask-wearing only when the wearer actually seeks the resulting anonymity” (*Id.* at 243).

<sup>306</sup> This is, in fact, the claim Simoni made when proposing a model anti-mask act. In doing so, Simoni called to consider the legitimate exercise of rights as an exception to the prohibition. *Id.* at 268-9.

statutes prohibit the use of masks (which are themselves considered to be expressive conduct),<sup>307</sup> or indirect, when the prohibition of masks prevents people from taking part in what would otherwise be lawful activities.<sup>308</sup> Others have made a similar claim when noting that in *Ghafari v. Municipal Court* the Court held that a general law intended to be applied to masked student demonstrators outside the Iranian Consulate in San Francisco was “overbroad, vague, and denied equal protection.”<sup>309</sup>

However, putting forth a defense exclusively based on freedom of expression is limited in that it requires protesters to show that masks themselves serve an expressive purpose—which could be, but is certainly not always, the case of masked protesters. In *Aryan v. Mackey*, Winet notes that a court prevented the enforcement of an anti-mask general law against Iranian students who wore masks while protesting.<sup>310</sup> The court, Winet shows, reasoned the masks themselves constituted a form of symbolic speech that deserved constitutional protection. The problem with this argument is that the Iranian students succeeded in showing the masks themselves were a means of expression, but

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<sup>307</sup> That laws may end up directly affecting the exercise of freedom of expression can be easily seen, Simoni convincingly argued, when considering the kinds of exceptions regulations contain. For instance, the use of masks for purposes other than political matters (i.e. entertainment) are usually allowed as accepted exceptions. This shows these regulations are far from being totally neutral—the argument the State would make to *justify* regulations are not content-based but neutral general laws—and that these regulations therefore do depend on “the actor’s message.” Simoni, “*Who goes there?*”, *supra* note 305, at 250-1. Richard Parker made an argument in favor of anonymity when discussing *Abrams v. United States* (250 U.S. 616, 1919). There, the elitist approach he criticized suggested all individuals should express themselves unmasked. This approach, Parker contended, contributed to discriminate “against expressions of ordinary energy, [that may contribute to further constitutional values such as an] ‘uninhibited, robust ... wide-open’” debate. Richard D. Parker, “*Here the People rule*”: *A constitutional populist manifesto*, 27 VAL. U. L. REV. 531, 577 (1993).

<sup>308</sup> *Id.* at 245.

<sup>309</sup> Winet, *Face-veil bans and anti-masks laws*, *supra* note 290, at 233-4.

<sup>310</sup> *Id.*

many others have failed in trying to prove the same.<sup>311</sup> This was the case of the Klu Klux Klan in *Kerik*,<sup>312</sup> where the court considered the masks worn by the Klan's members were not symbolic speech, but instead "redundant with the Klan robes and other regalia;" the masks added "no expressive force to the message portrayed by the rest of the outfit."<sup>313</sup> Of course, the same criticism may be directed against protesters who, by going to the streets and demonstrating, are already expressing their viewpoints. Moreover, in *Miller*,<sup>314</sup> the Georgia Supreme Court found that members of the Ku Klux Klan had not provided evidence that reprisals are likely to follow.<sup>315</sup>

Does privacy protection need to satisfy this high standard? Not necessarily. For one, there are many forms of privacy protection that do not require uncontrovertibly showing some kind of reprisal will follow.<sup>316</sup> Peeping Toms, for instance, are legally sanctioned for intruding on spheres of informational privacy—as Moore has put it—, and not because the information surreptitiously captured pose any specific, let alone uncontrovertibly proved, risk such as future threats, harassments, etc.<sup>317</sup> In fact, as Moore argues, an

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<sup>311</sup> *Id.* at 235.

<sup>312</sup> *Church of the American Knight of the Klu Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).

<sup>313</sup> 356 F.3d at 206.

<sup>314</sup> 260 Ga. 669 (1990).

<sup>315</sup> *Miller*, 260 Ga. at 675.

<sup>316</sup> As the Supreme Court of the United States held in *McIntyre*,

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.

*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-2 (1995). It is true that Simoni argues that the standard the Court relied on deciding *NAACP v. Alabama* does not require protection to be afforded only before uncontroverted evidence, but only where a reasonable probability of threats, harassments and other harms exist. However, *NAACP v. Alabama* is precisely a case where anonymity (in that case of members of a political association) has no expressive purpose itself but to enable political participation. Simoni, *Model Anti-Mask Act, supra* 305, at 265 n.160.

<sup>317</sup> ADAM D. MOORE, PRIVACY RIGHTS. MORAL AND LEGAL FOUNDATIONS 82-7 (2010).

individual might not know that his or her privacy has been invaded or the specific and ‘uncontroverted’ risks associated with this. The person’s privacy would still be affected.<sup>318</sup> For another, we are to consider that privacy concerns do not rule dignity out of the picture as a sound foundation for privacy protection. Many times dignity is actually the underlying value that justifies privacy protection. This is the case of continental privacy law which, as Whitman has argued,<sup>319</sup> rests on personal dignity:

rights to control your public image—rights to guarantee that people see you the way you want to be seen ... rights to be shielded against unwanted public exposure—to be spared embarrassment or humiliation.<sup>320</sup>

Could it be that excessively permissible legislation on mask wearing can incentivize crime? As Winet notes, ‘criminal anti-mask’ laws are perceived to be less effective from the law enforcement viewpoint, for in these situations the police should wait for those who are masked to “manifest[] clear intent to commit a crime ...”.<sup>321</sup> I think this depends to a large extent on *how much anonymity* is actually achievable. The fact that, even when we can

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<sup>318</sup> *Id.* at 96-7.

<sup>319</sup> James Q. Whitman, *The two Western cultures of privacy: Dignity versus Liberty*, 113 YALE L. J. 1151 (2004). See also, BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY, *supra* note 267, at 39-46. This does not mean that all privacy violations should be treated in exactly the same way nor that they all cause the same harms as if they were based on a same essential core. As Solove has persuasively argued, privacy is better understood as an umbrella concept encompassing several and disparate groups of things and situations. Privacy, in other words, is a “pluralistic concept ... [that] does not have a uniform value. Its value varies across different contexts depending upon which form of privacy is involved and what range of activities are imperiled by a particular problem.” SOLOVE, UNDERSTANDING PRIVACY, *supra* note 155, at 173, 185-7 (arguing different countries recognize the same privacy problems).

<sup>320</sup> This distinction, Whitman notes, is certainly a matter of degree. Whitman, *The two Western cultures of privacy*, *supra* at 319, at 1161-4.

<sup>321</sup> Winet, *Face-veil bans and anti-masks laws*, *supra* note 290, at 232.

(constitutionally) hold a reasonable expectation of privacy in public, total anonymity is impossible to achieve—largely because of the means the State has at its disposition—should balance governmental anxiety regarding mask wearing at protests. Even when protesters mask their faces, they do so in public. They are thus able to keep their identities hidden, but not the fact that (when this is the case) they are (publicly) committing a crime.<sup>322</sup>

Admittedly, calling authorities' attention to the importance of these collective harms has proven difficult. Courts and legislators do not seem to consider harms other than specific injuries, very narrowly understood, to particular individuals.<sup>323</sup> This narrow approach has prevented them from noticing the impact these overreaching regulations on the use of masks and other devices have had, and may have, on protesters. Whereas some have suggested tackling these harms by paying exclusive attention to individuals' freedom of expression, I think—as I hopefully have showed—that it is better to see freedom of expression as another victim (*harm*) of the scant attention protesters' privacy has received. Put differently, it is not privacy or freedom of expression, but two constitutional rights that are to be considered together in expanding the scope of the (positive) right to protest.

Once again, a neglected approach might consider this form of privacy opposed to the public role of protests. After all, protesters appear in the public sphere to become, by that very act of self-assured visibility, political and recognized. However, as I have explained, this form of privacy is not considered as such. As

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<sup>322</sup> Brenner, *The privacy privilege*, *supra* note 262, at 141-2.

<sup>323</sup> SOLOVE, *UNDERSTANDING PRIVACY*, *supra* note 155, at 179-83.



I have been arguing, privacy may actually work as a condition to appear publicly. Privacy, here, is the right we have to determine our public image.<sup>324</sup> This is, as you may recall, what Nissenbaum called privacy as ‘contextual integrity,’<sup>325</sup> that is, the right we have to hold distinct relationships with different people and to share different information depending on contexts.<sup>326</sup> Privacy is not a device to seclude us from the outer world, although it may operate as such. Rather, it is the power we have to determine “how we present ourselves before the world.”<sup>327</sup> This right includes our decision to appear and pose political arguments (for instance, about how to better understand our constitutions) far from the government’s eyes or anonymously.

### **Conclusions**

We know that rights are not simple entities but they embody a cluster of legal positions. This, I have claimed, is also the case of the right to protest. Traditional accounts of the right to protest mention both freedom of expression and the right to assembly as its foundations. This is what I explained in Chapter 3. This present chapter, relying on those foundations, has advanced in expanding the legal basis of the right to protest. I have sought to show that there are other constitutional rights that may also concur in framing the right to protest.

These rights, namely a reconceptualization of the public forum doctrine and the right to privacy, as I have argued, expand the force of the right to protest. The

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<sup>324</sup> *Id.* at 1168.

<sup>325</sup> Nissenbaum, *Toward an Approach to Privacy in Public*, *supra* note 124, at 216.

<sup>326</sup> *Id.*

<sup>327</sup> Whitman, *The two Western cultures of privacy*, *supra* at 319, at 1168 (quoting Rossinio).

expansion, as I have been trying to show, can be seen not only in the fact that these other rights come to play, thus extending the array of legal positions at hand, but also in the fact that it is only by considering these new rights that we can notice many situations that otherwise may appear as unrelated to the right to protest. This is the case, as I have contended, of privatizations—that one could see as simple policies related to the administration of resources—and the use of public vigilance—that one could see as simply related to public security policies. Instead, I have shown that a new conception of the public forum doctrine along with privacy rights can take us to dispute these decisions (such as privatizations and public vigilance) in light of how many restrictions they place on available spaces to shape public opinion.

## CHAPTER 5

### POPULAR CONSTITUTIONALISM AND SOCIAL PROTEST

#### I. Popular constitutionalism

A. *Just multitudes?*

B. *Foundations*

C. *Avenues (to speak)*

#### II. Popular institutionalism

A. *The need for institutions (avenues to be heard)*

B. *Disregarding the State*

### Introduction

*“Here lies the dilemma of the revolutionary within a society unripe for revolution.*

*If he stands aside from the main currents of social change, he becomes purist, sectarian, without influence. If he swims with the current, he is swept downward by the flow of reformism and compromise.”*

E. P. Thompson\*

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\* *William Morris*, in *PERSONS AND POLEMICS, HISTORICAL ESSAYS* (1994). I'd like to thank Pedro Lovera Parmo for having brought this reading to my attention.

Many current social protest movements deal with constitutional matters. This is not to say that protesters are themselves conscious about the fact they are reading the country's constitution nor that they are citing specific constitutional provisions to the forum—although some of them have done so. However, it means that protesters are dealing with the issues they/we most care about.<sup>1</sup> In some cases, in fact, they are dealing with the bases upon which politics is built.

Here are some examples:

In Iceland, massive social protest movements contended their political class was unable to cope with financial institutions. Rather than keep a vigilant eye on banks, politicians have allowed them to operate as sovereign institutions whose directors, different from ordinary citizens, have a direct line with the country's most important political authorities.<sup>2</sup> Consequently, and taking note of an old aspiration,<sup>3</sup> they claimed (although eventually failed) a new constitutional order was to be discussed. In Greece, one of the nations where the economic crisis has become most tangible, protesters joined their Icelandic counterparts in their allegations against the political class—which they already considered *gone*.<sup>4</sup> They also made more powerful demands. In struggling with the austerity measures imposed by the European Union (EU), protesters claimed Greece's commitment to

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<sup>1</sup> MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010).

<sup>2</sup> MANUEL CASTELLS, *NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE* 38-9 (2012).

<sup>3</sup> Á. TH. Árnason, *A Review of the Icelandic Constitution – popular sovereignty or political confusion*, 2011 *TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT* 342, 343-6 (2011) (arguing Iceland's Constitution is mainly a set of old rules adapted from the old Danish monarchy in 1941).

<sup>4</sup> PAUL W. MASON, *WHY IT'S STILL KICKING OFF EVERYWHERE: THE NEW GLOBAL REVOLUTIONS* 88-93 (2013).

the EU is to be reviewed on the basis of popular decision-making.<sup>5</sup> The *indignados* in Spain followed a similar path; they contended their political class was doomed to fail before the power of financial institutions.<sup>6</sup> The ‘Occupy’ movements across North America were also involved in key political-constitutional matters; those camping in New York parks defied their authorities to confront massive financial frauds, and their mobilizations and sit-ins also included claims related to job cuts in the public sector<sup>7</sup> and healthcare reform<sup>8</sup>. Chilean students and their fellows in Quebec also posed crucial matters in the spotlight; while the former argued the State should ensure free access to secondary and university education, the latter demonstrated against the raising of university fees. In both cases crucial public policies, including the definition of key sections of national budgets, were involved. Should we be troubled by a multitude of people marching onto the streets to influence the way in which the constitution is to be understood? The first part of this chapter (I) will discuss this question from a normative viewpoint. By presenting the mainstream assumptions liberal constitutionalism has been based upon, namely that constitutions are legal codes whose interpretation belongs exclusively to courts (and, eventually, lawyers), I shall contend there are new constitutional approaches that highlight the decisive role of the people in constitutional understanding. Here the role of the people is not only to influence

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<sup>5</sup> COSTAS DOUZINAS, *PHILOSOPHY AND RESISTANCE IN THE CRISIS* 10-5 (2013).

<sup>6</sup> MASON, *WHY IT’S STILL KICKING OFF EVERYWHERE*, *supra* note 4, at 216-20.

<sup>7</sup> *Id.* at 184-7.

<sup>8</sup> *Occupy Wall Street Protesters Rally for Health Care Reform*, NY1, June 23, 2011, available at [http://manhattan.ny1.com/content/top\\_stories/149489/occupy-wall-street-protesters-rally-for-health-care-reform](http://manhattan.ny1.com/content/top_stories/149489/occupy-wall-street-protesters-rally-for-health-care-reform).

constitutional interpretation, but also to contribute—as long as their claims are heard—to its legitimacy.

The second part (II) will clear up some misunderstanding about popular constitutionalism. In fact, popular constitutionalism, although promising to give the people a say in constitutional understanding, proposes a mediated process where governmental institutions play a key role. The State and its institutions are actually the tools the people have to make their popular interpretations of constitutions effective. This will take me to consider recent waves of protest, such as the *indignados* or ‘Occupy,’ that have rejected engaging with the State.

### **I. Popular constitutionalism**

This part aims at normatively building the legitimate relation that exists between social protest and constitutional law. To do this, I (A) explain the mainstream assumptions liberal constitutionalism has been based upon, namely that constitutions are legal codes whose interpretation belongs exclusively to courts (and, eventually, lawyers). In this landscape, the people themselves are pictured (at best) as incompetent to deal with constitutional matters. As I will show, (B) popular constitutionalism has rightly contended these assumptions by proposing an understanding of constitutions which is open to popular interpretations. While all popular constitutionalists share this principled understanding of constitutions, they place different emphasis on this openness depending on the governmental

branch they highlight as the proper forum for constitutional interpretation. I shall close the first section (C) arguing that popular constitutionalism is sympathetic to non-institutional means of constitutional exposition, social protests included. Thus, under the banner of popular constitutionalism, social protests—as one of the means the people resort to in order to advance their own (lay) readings of constitutions—are not disruptive of constitutional understanding, but a democratic input to its shaping.

*A. Just multitudes?*

Questions about the role of the people in constitutional interpretation are particularly pertinent in times of widespread demonstrations and pervasive liberal constitutionalism (or at least the most extended version of it).<sup>9</sup> For liberalism has tended to despise all forms of passion outpouring in politics and claims itself to be the throne of reason,<sup>10</sup> a view that has certainly impacted the way we see constitutions (and their interpretation). By way of equating regular politics to passion, conflict and disagreement, constitutions—our most important and constitutive commitments—have unsurprisingly been shielded from legislative intervention.<sup>11</sup>

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<sup>9</sup> I identify three core characteristics of liberal constitutionalism: (a) a written constitution, (b) provided with a set of basic constitutional rights and other open-ended provisions, (c) whose enforceability and definition depend, in the last judicial instance, on some high court.

<sup>10</sup> See, MICHAEL WALZER, *PASSION AND POLITICS: TOWARD A MORE EGALITARIAN LIBERALISM* 110 ff. (2006) (arguing liberalism itself is an expression of, and has roots in, passions); ANDRÁS SAJÓ, *CONSTITUTIONAL SENTIMENTS* (2011) (arguing emotions and sentiments have played a large role in shaping our current constitutional institutions).

<sup>11</sup> Of course, this argument normally begs the question regarding foundational moments, where politics (and thus passions and sentiments) also have their own way. See, LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 20-1 (2012) (discussing that respect for the Constitution steams from

This politico-constitutional scenario offers little hope for those advocating a role, let alone a paramount one, for the people to directly intervene in constitutional politics. As Michael Walzer has argued, the rejection of passions in politics—or, as he puts it, of some passions that hegemonic views have catalogued as bad/wrong passions—has come at the cost of presenting dangerous sentiments as necessarily associated to the people (the plebe) while linking enlightened and considered judgment to elites.<sup>12</sup> These dangerous sentiments (i.e. a rampant desire to oppress those who hold different views) can manifest either when the people are acting through their representatives as well as (and most notably) when acting by themselves. The key assumption here is, as Jeremy Waldron has argued, the rejection of assemblies (of people getting together to decide matters of common concern). Legislative assemblies are seen as instances particularly propitious to elicit passions and tumultuous disagreements, on the one hand, as well as raising—precisely because of the assemblies’ numbers—clear obstacles to rational lawmaking, on the other.<sup>13</sup> James Madison addressed these alleged obstacles when he was dealing with the appropriate number for legislatures; “the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.”<sup>14</sup>

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a reasoned decision “to be preferred to decisions made in the heat of a particular political moment”).

<sup>12</sup> WALZER, *PASSION AND POLITICS*, *supra* note 10, at 121 ff.

<sup>13</sup> JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 28-35 (1999).

<sup>14</sup> *THE FEDERALIST* No. 55, at 275 (James Madison) (Oxford University Press 2008).



If this is how legislatures are seen, the people themselves come up worst, for non-institutional mechanisms of participation are not considered forms of dialogue at all. Crowds, gatherings and demonstrations—the argument goes—are *per se* the spaces where passions will flourish.<sup>15</sup>

In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter of reason. Had every Athenian citizen been a Socrates every Athenian assembly would still have been a mob.<sup>16</sup>

Indeed, men and women acting by themselves in constant dispute and disagreement are precisely the reasons that call for a civil organization to overcome the state of *irrationality*.<sup>17</sup>

Courts, more than any other institutional arrangement, have been vindicated from this view. For as Jeremy Waldron has argued, the perverse imagery used to describe legislatures (“as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling—as anything, indeed, except principled political decision-making”) has been accompanied by an “idealized picture of judging”<sup>18</sup> (as being “not directly political” and isolated “from the conditions of ordinary life”).<sup>19</sup>

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<sup>15</sup> See, SAJÓ, CONSTITUTIONAL SENTIMENTS, *supra* note 10, at 246-7.

<sup>16</sup> THE FEDERALIST No. 55, at 275 (James Madison) (Oxford University Press 2008).

<sup>17</sup> See, STEPHEN HOLMES, PASSION AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 75-8 (1995).

<sup>18</sup> WALDRON, DIGNITY OF LEGISLATION, *supra* note 13, at 1-2. That judges are idealized is more than a simple exaggeration. See, J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 21 (2012) (“The imperfections of democracy [intolerant, biased, venal ...] are the imperfections of the human condition, which, by the way, have not passed the judicial branch by.”).

<sup>19</sup> *Id.* at 24-5, 31; Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1016 (2004) (claiming that assuming popular constitutionalism postulates would mean that “[c]onstitutional interpretation would be transferred from an institution largely insulated from political pressure to one that is highly majoritarian”).

Their institutional settings—as some have argued<sup>20</sup>—would allegedly grant them the capacity to be shielded against politics (passions, conflicts and factious interests).<sup>21</sup> In fact, many of liberalism’s most prominent expositors have accorded courts—the forum of principles<sup>22</sup>—the capacity to better articulate “the political ideal of a people to govern itself in a certain way” as expressed in the constitution.<sup>23</sup>

Hence, constitutional law has began to be seen as a lawyers’ bastion and consequently (being a kind of law)<sup>24</sup> as courts’ exclusive terrain, for courts have faced little opposition to setting themselves up as the final readers and expositors

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<sup>20</sup> See, RONALD DWORKIN, A MATTER OF PRINCIPLE 69-71 (1986) (arguing courts are institutionally designed to ensure rights issues will be properly and morally dealt with); Horacio Spector, *Judicial Review, rights, and democracy*, 22 L. & PHIL. 285, 292-3 (2003) (affirming “law ought to secure an institutional setting for people to exercise the discursive moral powers associated with moral rights,” which he suggests would be courts—“institutional arrangements enabling holders of such rights to express their claims and grievances in their own voice and ensuring them a deliberative and impartial response”).

<sup>21</sup> BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 9-10 (1991) (arguing the Supreme Court “serve[s] democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for innovations”).

<sup>22</sup> DWORKIN, A MATTER OF PRINCIPLE, *supra* note 20, at 2-3, 10-1, 32 (“[S]ociety ... promises a forum in which his claims about what he is entitled to have will be steadily and seriously considered at his demand.”).

<sup>23</sup> JOHN RAWLS, POLITICAL LIBERALISM 215-6 (1996) (arguing the Supreme Court has “to explain and justify” its decisions on the Constitution, something “the legislative and the executive need not”). He would later insist this presents the Supreme Court as an exemplar of public reason, “the only branch of government that is visibly on its face the creature of that reason and of that reason alone.” *Id.*, at 231 ff. It should be stressed that, even if the argument of judicial settings is not convincing enough, there still might be reasons of outcome—as some have argued—to grant courts the power to veto legislative decisions. As professor Fallon, Jr. has argued, judicial review might “promote[] better outcomes than would exclusive legislative definitions of disputed rights ...”. Richard H. Fallon, Jr., *The core of an uneasy case for judicial review*, 121 HARV. L. REV. 1693 (2008). *But see*, JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 56-60 (1980) (arguing we should question the “alleged incompatibility between popular input on moral questions and ‘correct’ moral judgment”).

<sup>24</sup> See generally, STEVEN D. SMITH, THE CONSTITUTION & THE PRIDE OR REASON 36-9 (1998) (arguing American framers decided to lay down a law-shaped document to institutionalize what they saw as ‘self-evident’ truths); Larry Alexander, *The Constitution as Law*, 6 CONST. COMMENT. 103 (1989) (arguing stability, predictability, a theory of authority, the interpretation and settlement of conflicts all advise that the constitution should be considered the law).

of the constitution,<sup>25</sup> triggering a shift in public attention from representative chambers to judicial halls.<sup>26</sup> Constitutions have thus become ‘juricentric.’ This means, as Post and Siegel have put it, that judges consider constitutions “as a document” that speak only to them.<sup>27</sup> It is no wonder judges have been declared the constitutions’ exclusive guardians and expositors of its moral, open-ended, and vague principles.<sup>28</sup> Accordingly, judges—and with them society at large—assume that constitutions are legal codes rather than a layman’s document.

If courts end up being vindicated vis-à-vis parliaments in general depictions of the work of politics, the same occurs under ‘juricentric constitutions,’ for here parliamentary interpretations of constitutions are seen—when contended—as merely transitory before courts. Courts’ decisions are actually expected to either

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<sup>25</sup> ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 1 (2000) (“‘new constitutionalism’ has it that legislation must conform to the dictates of the constitution—as interpreted by constitutional courts—or be invalid.”). *See also*, AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 134 (2006) (affirming judges “must give expression to the constitution’s fundamental values ... [that] act as a basis for judicial review of the constitutionality of statutes.”).

<sup>26</sup> On the relevance of the matters addressed through judicial decisions, *see*, RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169-99 (2004).

<sup>27</sup> Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L. J.* 1, 2 (2003) (criticizing the role courts played as exclusive guardians of the Constitution in spite of popular forms of political engagement).

<sup>28</sup> We find Dworkin to be a fine expositor of this form of constitutional interpretation. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 72-81 (1996) (arguing the Constitution guarantees the rights required by the best conception of the political ideals laid down in the Constitution—even if those rights are unenumerated). The role of courts in finding rights not expressly enshrined in constitutions has been a major issue in the scholarly discussion in civil law countries—under the label of ‘neo-constitutionalism.’ Promoted by the introduction of constitutional courts, constitutional judges have had no reluctance in interpreting constitutions, guiding their decisions and even striking laws down based on the constitution’s broadest and most ample provisions. *See generally*, TEORÍA DEL NEOCONSTITUCIONALISMO [Neo-constitutional Theory] (Miguel Carbonell ed., 2007); Paolo Comanducci, *Formas de (neo)constitucionalismo: un análisis metateórico* [*Forms of (neo)constitutionalism: a metatheoretical analysis*], 16 *ISONOMÍA* 89, 100-1 (2002) (emphasizing authors like Dworkin endorse an ideology of neo-constitutionalism characterized by (i) considering the constitution as a law (ii) whose interpretation is specifically legal—as technical).

endorse or reject those parliamentary readings, only then conferring these decisions a seal of constitutionality. Moreover, a 'juricentric constitution' sees parliamentary constitutional interpretations as threats to the "Court's role as the 'ultimate expositor of the constitutional text',"<sup>29</sup> and also downgrading politics as unable to grasp constitutions' actual meaning. If the constitution is the superior law—the very fact that would *grant* courts the power to review other branches' acts—, its interpretation becomes "emphatically the province and duty of the judicial department."<sup>30</sup> Courts, judges, lawyers, and precedents have become part

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<sup>29</sup> Post & Siegel, *Protecting the Constitution*, *supra* note 27, at 3. Also consider the following passages taken from 'juricentric' decisions:

This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. *Aaron v. Cooper*, 358 U.S. 1, at 18 (1958).

The framers envision a new strategy for the effectiveness of rights, which consist in giving preference to the judge—and not to the executive or the legislator—the responsibility of the efficacy of rights. Corte Constitucional [C.C.] [Constitutional Court], junio 5, 1992, Sentencia T-406/92 (slip op. at 12), available at <http://www.corteconstitucional.gov.co/relatoria/1992/t-406-92.htm> (my translation). The Court has been entrusted to finally and definitively interpret the Constitution ... the court substitutes the will of those involved in the [constitutional] conflict, making its opinion prevail over those branches involved. Tribunal Constitucional de Chile, STC Rol No 591, 11<sup>th</sup> Jan. 2011, par. 3, 9 (Chile) (my translation).

This constitutional outlook has now changed. The Knesset is no longer all-powerful in exercising its legislative authority. In the area of human rights, the Knesset [parliament] has limited its legislative powers by exercising its constituent authority.

It is the people that determines—according to the social philosophy developed over the course of its history—who exercises the highest authority of the State, and its rule of recognition. The Court gives expression to this social determination. The Court is the faithful interpreter of the people's will as expressed in the constitution. The Court attempts to give the best possible interpretation of the totality of the national experience. *Bank Mizrahi v. Migdal Cooperative Village*, [1995] ISRLR 1, at 142, 188 (Israel).

The Constitutional Court as the authorized interpreter of the Political Constitution and guardian of the integrity of its text, has already well settled the binding character of the *ratio decidendi* of its decisions. Corte Constitucional [C.C.] [Constitutional Court], febrero 22, 2011, Sentencia T-110/11 (slip op. at 8), available at <http://www.corteconstitucional.gov.co/relatoria/2011/t-110-11.htm> (my translation).

<sup>30</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

of our common language, which has resulted in the exaltation of legalistic prose when we argue and debate on matters as diverse as life<sup>31</sup> and death,<sup>32</sup> and war.<sup>33</sup> Arguably, the critique that sees courts as final constitutional expositors may be somewhat exaggerated. No matter whether courts see their decisions as final constitutional expositions, politics will continue around divisive issues (i.e. abortion and same-sex marriage, to name but two), and the constitutional amendment alternative—however difficult to meet—will always remain open as a valid challenge of judicial (although finally concessive of its supreme) authority.<sup>34</sup> Whereas some scholars have emphasized the fact that courts are but one of the participants in a broader and ongoing political dialogue related to constitutional meaning,<sup>35</sup> others have pointed precisely to the force and circumstances of politics that prevent courts from monopolizing constitutional understanding,<sup>36</sup> including

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<sup>31</sup> Kelly J. Hollowell, *Defining a person under the Fourteenth Amendment: a constitutionally and scientifically based analysis*, 14 REGENT U. L. REV. 67 (2001-2) (referring to the “fourteenth amendment person”).

<sup>32</sup> Dworkin asked in Chapter 5 of his *Freedom’s Law*: “do now we have a right to die?” DWORKIN, FREEDOM’S LAW, *supra* note 28, at 130; *Vacco et al. v. Quill et al.*, 521 U.S. 793, 793-4 (1997) (“The distinction between letting a patient die and making that patient die is important, logical, rational, and well established: It comports with fundamental legal principles of causation.”).

<sup>33</sup> William J. Ronan, *English and American courts and the definition of war*, 31 AM. J. INTL’ L. 642 (1937) (noticing courts have had a say in the definition of ‘war’ and/or ‘state of war’ when dealing with domestic statutes).

<sup>34</sup> John N. Hostettler & Thomas W. Washburne, *The Constitution’s Final Interpreter: We the People*, 8 REGENT U. L. REV. 13, 19-20 (1997) (arguing that if constitutional amendments are a check against judicial supremacy, it means that we have already affirmed the court’s supremacy).

<sup>35</sup> KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001).

<sup>36</sup> Carol Nackenoff, *Is there a political tilt to “juristocracy”?*, 65 MD. L. REV. 139, 147-8 (2006) (arguing that even if judicial decisions were final constitutional expositions, political deliberations teach that a single issue has several other related aspects at stake); *see also*, ROACH, THE SUPREME COURT ON TRIAL, *supra* note 35, at 31-2 (arguing that, despite certain exceptions—most notably in the American case—, legislatures almost always can respond to a court’s decisions with legislation).

strategies legislators display to walk (that is, legislate) around judicial constitutional interpretations.<sup>37</sup>

Possible exaggerations aside, some constitutional theories have correctly reacted against too much emphasis on ‘juricentric’ interpretations of constitutions. These approaches have highlighted the role of the people, as I will specify, either directly or indirectly in reading the constitution. Under the rubric of popular constitutionalism, scholars have questioned the role of courts as exclusive constitutional expositors and, by suggesting different institutional arrangements, have vindicated the people’s involvement in having a (crucial) say in key constitutional issues.

Highlighting popular involvement in constitutional understanding, popular constitutionalism seems promising before politico-constitutional demands posed by current social protest movements.<sup>38</sup> The following sections explore the foundations of popular constitutionalism. They argue popular constitutionalism reacts against juricentric and jurispathic courts in order to stress the role of the people in constitutional interpretation. It ends noting social protests—the people

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<sup>37</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 17-21 (1999).

<sup>38</sup> Although it may be claimed that this is not entirely so, for, as I shall suggest, popular constitutionalism assumes social movements always present their claims before institutional authorities. Hence, it is unprepared to answer those constitutional visions running parallel to formal avenues of political decision. In fact, what recent demonstrations have shown, as in the case of Greek *aganaktismenoi*, Spanish *indignados*, and worldwide occupiers, is that large sections of protesters are not interested in delivering any claims before their political authorities. As I said at the beginning, they see their authorities as co-opted by large financial institutions and unable to protect the people—let alone to channel democratic self-government. Bringing politico-constitutional demands to the formal forum would amount, they claim, to (re) recognizing their political capacity and legitimacy, exactly what they are contesting. I will argue the (constitutional) advantage of engaging in institutional dialogue below, thus contending the withdrawal strategy *indignados* and occupiers resorted to.

on the streets—are one among many avenues to pose popular and cultural readings of constitutions.

### *B. Foundations*

The whole constitution is not judicially enforced,<sup>39</sup> nor the constitutional text exhausts what we understand as constitutional matters—the issues we care about the most.<sup>40</sup> However, as experience shows, many of those sections of the constitution that reach court chambers are the ones that provoke large and heated disagreements.<sup>41</sup> In fact, it is the political salience of these issues what brings both courts and the constitution into the spotlight. As noted above, courts—whether acting as supreme courts or constitutional tribunals—have found the way to erect themselves as the constitution’s final expositors. Therefore, the issues we most care about are, although primarily sketched by political branches, eventually judicially determined.

It is not only that courts (non-elected bodies) have the final say, but also that they diminish society’s jurisgenerative capacity. Some thirty years ago Robert Cover called our attention to the jurisgenerative powers of society expressed through different cultural medium.<sup>42</sup> Laywomen and laymen exercise jurisgenerative power—the capacity to create legal meaning—, through which they develop

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<sup>39</sup> LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 84-92 (2004).

<sup>40</sup> TUSHNET, *WHY THE CONSTITUTION MATTERS*, *supra* note 1; ADAM TOMKINS, *PUBLIC LAW* 9 (2003) (“written constitutions are not complete codes capable of answering all constitutional questions. Indeed no written constitution could ever be.”).

<sup>41</sup> TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 37, at 10-1

<sup>42</sup> Robert M. Cover, *The Supreme Court, 1982 Term. Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 11 (1983-4).

“alternative stories [that] provide normative bases for the growth of distinct constitutional worlds.”<sup>43</sup> They all look to the same authoritative constitutional text, where there is one, but suggest different narratives as to its meaning. This multifarious array of societal-constitutional meanings show—Cover believed—that there is no “authoritative narrative regarding its significance.”<sup>44</sup>

What is the role supreme or constitutional courts play here? According to Cover’s view, courts act in a ‘jurispathic’ fashion. Judges are people of violence whose job is not to “create law, but to kill it”—he wrote.<sup>45</sup> This should not come as a surprise. Cover wrote this landmark piece when there was growing distrust toward the State and disenchantment with the possibilities of conceiving it in a fashion other than as the exercise of pure brute force.<sup>46</sup> Therefore, the State, and courts accordingly, exercises force that destroys legal meaning(s) by imposing the official view. Indeed, they are here to solve the problem of the “fecundity of the jurisgenerative principle.”<sup>47</sup> When they do so, claiming such hermeneutic superiority backed up by force, they shut down the “creative hermeneutic of principle that is spread throughout our communities.”<sup>48</sup>

This is the scenario popular constitutionalism reacts against. It reacts against courts that are both juricentric—those that hold an interpretation that sees the

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<sup>43</sup> *Id.* at 19.

<sup>44</sup> *Id.* at 17.

<sup>45</sup> *Id.* at 53.

<sup>46</sup> Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 *YALE J. L. & HUMAN.* 9 (2005).

<sup>47</sup> Cover, *Nomos and Narrative*, *supra* note 42, at 40.

<sup>48</sup> *Id.* at 44.



constitution as speaking exclusively to them—and jurispathic—those that aim at killing non-judicial, but above all non-official, interpretations of the constitution. Popular constitutionalism disputes the role of judges as the exclusive readers of the constitution. It believes that our constitutional normative coordinates are generated from avenues other than the formal corridors of judicial chambers. In other words, they contend it is up to the people to have (at the least) a say (although some argue the final say) on the meaning and extension of the crucial matters principled constitutional provisions address. Popular constitutionalists also argue there are many ways through which the people can channel the legal meanings they envision; social protests are one among them.<sup>49</sup>

The core of popular constitutionalism can be stated in the following way: the people should have a say on constitutional matters<sup>50</sup>—the final say, in fact. Accordingly, any institutional arrangement seeking to take constitutional decisions

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<sup>49</sup> Despite the argument he later develops, the example Larry Kramer cites in one of the many quotes he uses in opening one of the most important books published on the matter is remarkable: “Saturday, July 18, 1795. At least 5,000 people gathered in front of Federal Hall in New York to protest the Jay Treaty ... Hamilton mounted the steps of a nearby building surrounded by supporters and began to speak ... someone in the crowd allegedly threw a rock that hit Hamilton in the head. Similar scenes were repeated around the country.” LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 4 (2004).

<sup>50</sup> Many popular constitutionalists claim to be accounting for U.S. history rather than posing a normative claim. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 49, at 7; Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25-6 (Jack M. Balkin & Reva B. Siegel eds., 2009); *see also*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 *MICHIGAN LAW REVIEW* 2596, 2598-9 (2002-2003) (arguing that the Supreme Court has always been responsive to public opinion, “albeit not in the precise form in which [popular constitutionalists] ask for it.”). Here I am extracting popular constitutionalism’s main traits in a rather normative fashion.

away from the people suffers from a key democratic deficit.<sup>51</sup> Certainly the idea that popular opinion should set bounds on every democratic government (as the final touchstone of political and constitutional decisions) has taken many shapes in the minds of those who advocate public opinion's crucial role.

In his seminal piece on the matter Richard Parker advocated a majoritarian reading of constitutional law.<sup>52</sup> He attacked elitist constitutionalism which—in his view—saw (as it currently sees) the political energy of ordinary people as a problem and normally attached to values that run against (what they consider to be) a good government: emotions, ignorance, short-sightedness, impulsiveness, and so on.<sup>53</sup> By claiming to rescue a populist sensibility, Parker vindicated the participation of the people in constitutional matters, an approach also accompanied by a reconsideration of the role emotions play.<sup>54</sup>

Parker did not claim the people's voice to be infallible, but sovereign, or that the government should be responsive to it.<sup>55</sup> This required, as he noted, to reconceptualize constitutional law as open, rather than essentially contrary, to majority rule. He brightly dismissed claims about the alleged tyranny of the

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<sup>51</sup> As will be clear below, the democratic deficit stems from depriving the people from having the final say and not—as it could not be in the context of representative democracies—from erecting institutions in charge of being responsive to public opinion.

<sup>52</sup> Richard D. Parker, *Here the People rule: A constitutional populist manifesto*, 27 VALPARAISO UNIVERSITY LAW REVIEW 531, 532 (1993).

<sup>53</sup> *Id.* at 553-4. To him our attitudes toward the people were crucial when determining the role they are to play in politics. *Id.*, at 532 (arguing precisely that our attitudes to the energy of ordinary people define what we think “should be the mission of constitutional law ... and the proper form of reasoning about their derivation, definition, and application.”).

<sup>54</sup> *Id.* at 557.

<sup>55</sup> *Id.* at 556.

majorities by arguing experience shows majorities seldom rule.<sup>56</sup> In regards to apathy he argued this was a consequence of elitist constitutionalism that can be counteracted; it is the appropriation, and privatization, of constitutional law by lawyers and judges what has taken ordinary people not to participate, rather than a presumed lack of interest.<sup>57</sup>

Accordingly, Parker reframed the role of constitutional law with a new mission: “to promote majority rule ... the goal inspiring argument about ‘interpretation’ of the Constitution ought to be government of, for, and—to the extent it is feasible—by the majority of the people.”<sup>58</sup> People can certainly not be forced to participate, but their intervention is to be encouraged by criticizing action or inaction “that tends to frustrate opportunity for the effective exertion of ordinary political energy”<sup>59</sup> and by reframing under this sensibility the exercise of much-praised political rights.<sup>60</sup>

Parker certainly believed constitutional matters were of utmost importance, but he contended they were to be (exclusively) read in a legal fashion. This is why he called to deflate constitutional discourse, admitting at its heart lays “political controversy about democracy, and about what it can be and what it should be.”<sup>61</sup>

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<sup>56</sup> *Id.* at 558-61, 569-71.

<sup>57</sup> *Id.* at 561.

<sup>58</sup> *Id.* at 573.

<sup>59</sup> *Id.* at 574.

<sup>60</sup> *Id.* at 577-9. I will say something about this below. For the time being, it is enough to notice that current answers to popular challenges take the following form: political participation rights are open to all. However, as Parker argues, that is not enough to overcome the elitist approach, for rights are not exercised by the majority, on the one hand, and not every form of exercise is protected, on the other, as only certain (most of the time, judicially-) accepted fashions are covered.

<sup>61</sup> *Id.* at 580.

In fact, the terms of constitutional debate are “not so different from the terms of ordinary political argument.”<sup>62</sup> Notwithstanding the fact judges wear robes, lawyers wear suits, and they talk in inflated terminology, “no fancy ‘theory,’ no obsessive ‘methodology,’ can hide the fact that, like any argument, constitutional argument appeals—at the bottom—to ordinary, competing sensibilities, competing emotions.”<sup>63</sup>

As noted above, arguments favoring the role of courts in constitutional interpretation came at the expense of the role of the representative branches and ultimately of the people. Popular constitutionalism assault, as can be seen in Parker’s work, turned the equation around. Accordingly, this resulted in a vindicated role for legislatures in constitutional matters and a direct contention of judicial review—seen as the very artifact to impose final constitutional readings.

Mark Tushnet, for example, called to take the constitution away from courts.<sup>64</sup> First, he rejects that courts can fix political rules through their rulings. Judicial decisions settle the particular dispute they are passed on, but cannot stand as general political rules binding representative branches.<sup>65</sup> Vital questions affecting the whole people—Tushnet argues referring to Lincoln—are to be decided by the people themselves and their representatives.<sup>66</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37.

<sup>65</sup> *Id.* at 6-9.

<sup>66</sup> *Id.*

To determine what are the vital questions affecting the whole people, Tushnet has us consider what he labels the “thin Constitution:”<sup>67</sup> ample and vague principles taken by the people to be a political, rather than judicial, rule. These principles are (also) to be found beyond the constitutional text.<sup>68</sup> The (thin) constitution can be read in several ways as disagreement looms large on politico-constitutional matters. Judicial decisions seldom bring these disagreements to an end. This is true partly because political branches often find ways to circumvent the core of a judicial decision—a practical way out that does not challenge, and can actually exist together with, judicial supremacy.<sup>69</sup> But above all it is true because of the normative stance populist constitutionalism takes: that the political constitution belongs to the people. These disagreements—Tushnet argues accordingly—are “best conducted *by the people*, in the ordinary venues for political discussion.”<sup>70</sup> Political disagreements, therefore, are best conducted *by the people*, but not in a vacuum. These discussions, where people should have a vital say, take place in the regular venues of political debate. This, Tushnet implies, shows the relevance of politics, politicians and institutional avenues, as long as these avenues are popularly informed. In Tushnet’s words:

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<sup>67</sup> *Id.* at 11.

<sup>68</sup> *Id.* at 12-3.

<sup>69</sup> *Id.* at 17-21, 23.

<sup>70</sup> *Id.* at 14.

Discussions *among* the people are not discussions by the people *alone*, however. Politics does not occur without politicians, and political leaders play an important role in the account of populist constitutional law ....<sup>71</sup>

Giving the people a say in key constitutional matters not only makes them participants in the common government,<sup>72</sup> it also makes them own the constitution<sup>73</sup> and embrace it politically, thus shielding its content (though always open to contestation).<sup>74</sup> In Tushnet's words, what limits governments are not rights contained in texts, but those publicly and politically fought.<sup>75</sup> As he puts it citing Madison,

"The political truths declared in that solemn manner [in a constitutional text] acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."<sup>76</sup>

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<sup>71</sup> *Id.* An important part of Tushnet's argument is devoted to showing the role of politicians and, among them, leaders who are able to conduct and canalize the views of the people (this is actually a two-sided dialogue) to identify when vital constitutional issues are at stake (*id.*, at 23-5). Tushnet has recently insisted on this point; if rights and (vital) constitutional arrangements are better defended when politically embedded in the national sentiment, then the reason why the constitution matters is because it sets the frame for politics to happen and function.

The Constitution matters because it provides a structure for our politics. It's politics, not 'the Constitution,' that is the ultimate—and sometimes the proximate—source of whatever protection we have for our fundamental rights.

TUSHNET, WHY THE CONSTITUTION MATTERS, *supra* note 1, at 1.

<sup>72</sup> TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37, at 182-5 (arguing the constitution set the terms of political discourse thus uniting us as *a* people).

<sup>73</sup> *Id.* at 180-2

<sup>74</sup> *Id.* at 185 ("populist constitutionalism does not dictate the position we must take on affirmative action. Instead, it sets the terms of discourse.").

<sup>75</sup> *Id.* at 167.

<sup>76</sup> *Id.* at 167.

Jeremy Waldron has examined in greater depth constitutional disagreement and the adequate institutional avenue to democratically address, rather than to resolve, this disagreement. He offers a vindicated role for legislatures, along with arguments against judicial review of legislation.<sup>77</sup>

Members of a political community need to make (as we make) decisions on matters of common concern.<sup>78</sup> This is what he calls the ‘circumstances of politics,’ “the felt need among the members of a certain group for a common framework or decision or course of action on some matter ...”.<sup>79</sup> Of course, what decisions should be made will be subject to the burdens of pluralism and disagreement. People in modern communities disagree on crucial matters—we “disagree with one another every bit as much as strenuously about rights as [we] do about social justice and public policy.”<sup>80</sup> The harder the issues we have to address (i.e. the treatment we should accord one another to respect a common, although unspecified, commitment to equality), the more difficult the decisions will be.<sup>81</sup>

With this background of disagreement in mind Waldron argues that legislatures are avenues of collective decision that account for, rather than just hide or wish

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<sup>77</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). Waldron has concentrated what he called “the core” (meaning a process-based analysis independent of historical considerations and specific manifestations) of the arguments against judicial review in his *The Core of the Case against Judicial Review*, 116 *YALE L. J.* 1346 (2006).

<sup>78</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 77, at 15-6.

<sup>79</sup> *Id.* at 101-2.

<sup>80</sup> *Id.* at 11-2.

<sup>81</sup> *Id.* at 12. Waldron persuasively argues that “it is a mistake to think that the more important the question, the more straightforward or obvious the answer.”

away, those disaccords.<sup>82</sup> Legislation, in fact, shows the possibilities of “achievement of concerted, co-operative, co-ordinated, or collective action,” even in the face of pluralism.<sup>83</sup> More importantly, legislation permits the kind of achievements Waldron talks about in a *democratic* fashion. This is so as legislatures open spaces respectful of each individual’s moral (and democratic) agency. By recognizing politico-constitutional disagreement and pluralism (“differences of opinion about justice”), legislatures respect each individual’s moral responsibility to address matters of common concern by “embod[ying] a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement.”<sup>84</sup>

Proponents of judicial review of legislation, the faculty granted to courts to review legislative outcomes, normally point out the need to protect minorities from the predatory self-interests of those voting. However, Waldron argues this overlooks the moral autonomy accorded to individuals to have their own say about common matters.<sup>85</sup> Likewise, it denies that voting can be public-spirited and based on good faith disagreement about common concerns.<sup>86</sup> In fact, matters we care most about are routinely what Waldron terms partial conflicts; we need/want to address

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<sup>82</sup> *Id.* at 16, 99 (“Legislation is the product of a complex deliberative process that takes disagreement seriously and that claims its authority without attempting to conceal the contention and division that surrounds its enactment.”).

<sup>83</sup> This is already, Waldron notes, a reason to respect legislative outcomes: the fact that, even in the face of looming disagreements, we can still coordinate actions and reach decisions—however always open to contestation. *Id.* at 101-5.

<sup>84</sup> *Id.* at 109.

<sup>85</sup> *Id.* at 14 (arguing proponents of judicial review claim respect for the rights that will protect our autonomy as equal moral agents while at the same time majorities are described as “irresponsible Hobbesian predators”).

<sup>86</sup> *Id.* at 14-5.



matters of (say) social justice, but we (reasonably) differ as to the specific outcome.<sup>87</sup> Finally, and most importantly, this alternative merely transfers disagreement from one chamber, popular and representative, to another, elitist and isolated.<sup>88</sup> As he puts it,

Judges disagree among themselves along exactly the same lines as the citizens and representatives do, and ... make their decisions, too, in the courtroom by majority voting.<sup>89</sup>

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<sup>87</sup> *Id.* at 103-5. This reference to issues of common concern we *all* address opens room in Waldron (although in a fashion different from which he would hold) to accept judicial review—or any other form of review—when decisions involved exclusively affect (or address) the interests of a single (however difficult to define) group, even if the group is not *formally* excluded from participating in the legislative debates. Consider, for instance, *Roemer*, where the U.S. Supreme Court considered a California constitutional amendment passed against a political minority. As it is well known, the amendment stated that “homosexual, lesbian, or bisexual orientation” would be barred from being considered legal “basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.” *Romer v. Evans*, 517 U.S. 620 (1996). The Court held that this was a measure specially passed against a minority group. It stated, we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint” (*Romer*, 517 U.S. at 631).

Some authors have developed a theory of judicial review limited to these kinds of cases, situations in which courts, instead of focusing on discovering the fundamental values hidden in the constitution, should—as Ely put it—keep political processes open to all viewpoints “on something approaching an equal basis.” ELY, DEMOCRACY AND DISTRUST, *supra* note 23, at 79.

This is a case different from the situation where groups whose interests are addressed (most of the case minority groups) are *excluded* from the discussion (something Waldron concedes, WALDRON, LAW AND DISAGREEMENT, *supra* note 77, at 297). This exclusion does not necessarily need to be formal; as we can imagine—as Ely did—it can be in subtler forms of non-recognition as well. Cécil Fabre has argued in a similar vein, but with the purpose of opposing Waldron, that not every debate about rights is always about “rights all members have.” She also mentions the case where “the legislature decides whether homosexuals should be granted all the rights heterosexuals have,” a case where they are clearly addressing “rights for *one* group of the population, to wit homosexuals.” Cécile Fabre, *The Dignity of Rights*, 20 OXFORD J. L. STUD. 271, 277-8 (2000) (her emphasis).

<sup>88</sup> This is not just a transferring of a decision method from one chamber to another; “is a difference of constituency.” WALDRON, DIGNITY OF LEGISLATION, *supra* note 13, at 128-9.

<sup>89</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 77, at 15.

In a context where disagreement cannot be eliminated, granting judges judicial review faculties amounts to an elitist approach to constitutional matters where disagreements among citizens are seen not as politically relevant as disaccords among judges.<sup>90</sup> In fact, Waldron correctly points out that “citizens may well feel that if disagreements on these matters are to be settled by counting heads, then it is their heads or those of their accountable representatives that should be counted.”<sup>91</sup> In the end, a constitutional scheme where judges monitor (let alone make final) constitutional interpretations becomes politically arbitrary;<sup>92</sup> meanwhile, it also denigrates the people’s moral agency as equals to define the issues of principle affecting them.<sup>93</sup> This, Waldron argues, ignores the central role the right to participation (‘the right of rights’) plays and represents as the means through which we, in concert, govern common affairs.<sup>94</sup> It is up to “[t]he people whose rights are in question [to] have the right to participate on equal terms on that decision.”<sup>95</sup>

A similar stance can be identified in Adam Tomkins’ work.<sup>96</sup> According to Tomkins, granting judges the enormous power to overrule political decisions, as if this

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<sup>90</sup> Disagreement among citizens, as the argument favoring judicial review goes, is equated to passion, obscured reason and self-interest, whereas disaccord among judges is seen as debates regarding the terms of law, as a genuine disagreement about reason and justice. Fernando Atria, *¿Qué desacuerdos valen? La respuesta legalista [What disagreements matter? The legalist answer]*, 8 IUS ET PRAXIS 419 (2002).

<sup>91</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 77, at 15.

<sup>92</sup> *Id.* at 168 (“In this democratic sense, ‘arbitrary’ means something like ‘without authority or legitimacy’.”).

<sup>93</sup> *Id.* at 249.

<sup>94</sup> *Id.* at 233.

<sup>95</sup> *Id.* at 244.

<sup>96</sup> TOMKINS, PUBLIC LAW, *supra* note 40; ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

would prevent discretionary decisions from being made, is pure wishful thinking. In the face of political disagreement, the kind of disagreement we face when determining the details of constitutions, the only thing that the legal constitutionalist model does is replace one avenue to make political decisions (legislatures) “with untrammelled judicial discretion.”<sup>97</sup>

Worse still, by placing political decisions in the hands of judges, Tomkins argues we risk being dominated by decisions made in an undemocratic and unaccountable fashion.<sup>98</sup> In fact, legal constitutionalism trusts crucial policy questions in the hands of judges whose decisions will impact citizens, while citizens will lack any power to affect these decisions. Indeed, “unlike those who in a democracy hold political office, judges are neither democratically elected, accountable, nor representative.”<sup>99</sup> Besides the fact that access to courts is limited to those who can afford lawyers’ fees,<sup>100</sup> it is the very nature of the judicial forum what critically alters the profile of decisions there made. Instead of producing public (common) oriented decisions,<sup>101</sup> courts offer an environment where decisions are adjudicated between two parties, a setting which happens to ‘privatize’ what was (but now ceases to be) a common matter open “to any reason ... at any time” before the political branches.<sup>102</sup>

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<sup>97</sup> TOMKINS, OUR REPUBLICAN CONSTITUTION, *supra* note 96, at 22. On the role Tomkins sees for courts, see Adam Tomkins, *The Role of Courts in the Political Constitution*, 60 U. TORONTO L. J. 1 (2010).

<sup>98</sup> TOMKINS, OUR REPUBLICAN CONSTITUTION, *supra* note 96, at 25.

<sup>99</sup> TOMKINS, PUBLIC LAW, *supra* note 40, at 21.

<sup>100</sup> *Id.* at 19-20.

<sup>101</sup> Of course Tomkins is not suggesting judicial decisions lack any public impact.

<sup>102</sup> TOMKINS, OUR REPUBLICAN CONSTITUTION, *supra* note 96, at 27-30.

How should the democratic shortfalls of legal constitutionalism be addressed? It should do so by turning our attention to the political constitution. A political constitution—Tomkins contends while explaining public law in England—is one whose implementation depends on the actions and policy decisions of a “responsible government,”<sup>103</sup> one that is responsible to the people. A political constitution creates a dynamic between citizens and public officials that courts do not. In this scenario, “governments will not do things which they cannot politically get away with,”<sup>104</sup> for they will feel the people’s pressure; in other words, “they will lose power.”<sup>105</sup>

How is it that a political constitution secures this control? By trusting decisions over political matters to fora which are open and accessible to all.<sup>106</sup> Different from courts, which legally shield their decisions passed in chambers isolated from political pressure, a political constitution seeks to secure public decisions—whether good decisions or bad decisions—will be the people’ own decisions. To claim control and authorship over political decisions, these decisions are to be made in a forum that citizens can control and have power over.<sup>107</sup> Of course, this model demands an active role from citizens, who are to act in a public-spirit fashion and oriented toward the common good.<sup>108</sup> Public contestation and active engagement are necessary conditions to create the dynamic and interaction that

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<sup>103</sup> *Id.* at 1.

<sup>104</sup> TOMKINS, PUBLIC LAW, *supra* note 40, at 19.

<sup>105</sup> *Id.*

<sup>106</sup> TOMKINS, OUR REPUBLICAN CONSTITUTION, *supra* note 96, at 51-2.

<sup>107</sup> *Id.* at 57-61.

<sup>108</sup> *Id.* at 62-3.

permits popular control. To clarify, Tomkins does not argue there is any way to eliminate governmental discretion.<sup>109</sup> Rather, Tomkins insists we should ask ourselves what forum we should trust with the power to regulate such discretion. His answer admits no waver: if a community wants to have control over its decisions, then the people should grant this regulatory power to the political branches they have better access to.

Not all popular constitutionalists have taken the courts out of the picture. There are those who, like Larry Kramer, have argued courts play a role, however modest, in a larger constitutional deliberation that takes place among the different governmental branches all under the people's supervision. More tellingly, Robert Post and Reva Siegel have affirmed that popular constitutionalism can actually be conciliated with judicial supremacy, as long as courts (or the superior court) are responsive to cultural and popular interpretations.<sup>110</sup>

Larry Kramer published what has become one of the most important pieces on popular constitutionalism.<sup>111</sup> According to Kramer, American history shows the people have had a relevant role in understanding, interpreting and enforcing the constitution. More importantly, this is a role the people have played for the most part outside courts.<sup>112</sup> Kramer does not contend courts should not play a role at all. Instead, what he suggests, read in a normative fashion—and in what has become

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<sup>109</sup> See, TOMKINS, OUR REPUBLICAN CONSTITUTION, *supra* note 96, at 34-5.

<sup>110</sup> Both approaches, as I mentioned before, claim to be describing, rather than prescribing, how American constitutionalism has developed. Here I'm interested in proposing what would be the theoretical principles behind that *positive* account.

<sup>111</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 49.

<sup>112</sup> *Id.*, at 7.

one of the most important variants of popular constitutionalism—, is that courts should not have a final say as to how the constitution is to be interpreted. His is an argument against judicial supremacy.

What matters for this variant of popular constitutionalism is that the people be accorded the preponderant role in defining the constitution. Its paramount objective is to make it clear that “courts have no normative priority in the conversation” or in the constitutional dialogue among the different actors. As Tushnet—commenting on Kramer—has put it, “for popular constitutionalism, it simply does not matter whether, or when, or how, the courts come to accept the constitutional interpretation offered by the people themselves.”<sup>113</sup> This is why Kramer highlights the people’s vigilant role. The constitution, he argues, “remained, fundamentally, an act of popular will ... made by the people ... who were responsible for seeing that it was properly interpreted and implemented.”<sup>114</sup>

If the people are to perform such a paramount role, there is obviously something crucial we lose in terms of democratic self-government when the constitution is understood as a legal text. In that scenario, as the professionalization of law shows,<sup>115</sup> the constitution becomes the terrain of lawyers and its reading their monopoly. Judicial supremacy, meaning that courts have the final authority in expounding the constitution, is therefore at odds with popular

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<sup>113</sup> Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 999 (2006).

<sup>114</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 49, at 6.

<sup>115</sup> *Id.*, at 162-6.

constitutionalism,<sup>116</sup> for in such a model the people are deprived from taking part in the republican process of shaping their constitution, while judges find a free means to erect themselves as the constitution's final expositors.

Interestingly, Kramer shows there is an important burden on the people. Judges will never relinquish the power they have acquired, nor should we expect the constitution itself to return to the people's control. Rather, it is up to the people ("the choice is ours to make")<sup>117</sup> to claim the role they never should have been deprived of: that of being sovereign interpreters of the constitution. If a model of judicial supremacy rests upon a constitution legally understood, and thus to be exclusively read by judges, the first step is to claim the constitution back to the people.<sup>118</sup> The people should make courts aware that they are "our servant[s] and not our master[s] ... who [are] ultimately supposed to yield to our judgments about what the Constitution means and not the reverse."<sup>119</sup> In other words, supreme courts or constitutional courts, whatever the form they take, should come "to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with the power to overturn their decisions."<sup>120</sup>

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<sup>116</sup> And an anomaly in American history, as Kramer saw it. *Id.*, at 233.

<sup>117</sup> *Id.*, at 247.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*, at 248.

<sup>120</sup> *Id.*, at 253.

Kramer's book not only elicited revived interest in the role of the people in constitutional politics, but sparked heated debate as well. Many of the critiques pointed toward his historical account,<sup>121</sup> while others focused on the proposal itself.<sup>122</sup> Perhaps this was what took Kramer to offer a new account of his work where, despite defending the main argument, courts play a more relevant role than the humble enforcement function depicted in *The People Themselves*.

To begin with (I borrow here a doubt posed by Alexander and Solum), when Kramer argues the people themselves have authority to interpret and enforce the constitution, does he really mean the people "have the authority to resolve ambiguities in constitutional meaning or to provide supplemental constructions when constitutional language is vague?"<sup>123</sup> It might be that Kramer is not talking of the people themselves, understood as a collective entity acting by itself, but through institutions of representative democracy.<sup>124</sup> In fact, in his later work Kramer argues the foundations of popular constitutionalism are to be understood as linked to majority rule as the result of a deliberative interaction between all

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<sup>121</sup> L. A. Powe, Jr., *Are "The People" Missing in Action (and Should Anyone Care)?* 83 TEX. L. REV. 855 (2005) (arguing Kramer's historical analysis of the past fifty years is deeply flawed); Richard Posner, *The People's Court*, NEW REPUBLIC, Jul. 19, 2004 ("Kramer's treatment of the history of the struggle between popular constitutionalism and judicial supremacy after the end of Martin Van Buren's presidency in 1841 is just a sketch, occupying only twenty pages in a long book").

<sup>122</sup> Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* 118 HARV. L. REV. 1594, 1602 ff. (2005) (arguing Kramer's concept of popular constitutionalism is "deeply ambiguous at best and deeply confused at worst").

<sup>123</sup> *Id.*, at 1603.

<sup>124</sup> This is one of the critiques Alexander and Solum made; they ask whether Kramer is using the idea of the people as signifying an "organic whole capable of collective action" or as "the collection of human persons who are citizens or residents of a particular polity" (*Id.*, at 1606-07).



three branches, all “to be subject to popular control.”<sup>125</sup> While he remains committed to popular constitutionalism, in the sense of seeing the people’s direct interventions (protests) as politically legitimate, Kramer also suggests those popular readings become institutionally depurated.

Finally, there are those who, like Robert Post and Reva Siegel, think it is possible to reconcile popular constitutionalism with judicial supremacy. The label they have chosen is democratic constitutionalism,<sup>126</sup> which emphasizes the role of the people in culturally shaping constitutional understandings.<sup>127</sup> It strongly asserts the role of the people as the touchstone of constitutional decisions made by institutional actors. Among institutional actors democratic constitutionalism places a strong emphasis on courts and judicial review. Its exponents do not see a radical opposition between the people as constitutional rulers, on the one hand, and judicial supremacy, on the other.<sup>128</sup>

First, democratic constitutionalism understands constitutional law as decisively influenced by the people through interactions with (judicial) authorities. It sees cultural readings of the constitution, “the beliefs and values of nonjudicial

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<sup>125</sup> Larry D. Kramer, *“The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006).

<sup>126</sup> I have taken this label from Post & Siegel, *Democratic Constitutionalism*, *supra* note 50.

<sup>127</sup> Robert C. Post, *Foreword: Fashioning the legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003-4).

<sup>128</sup> Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1029 (2004) (“In contrast to Kramer, we do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering.”). However, they understand constitutional law and popular constitutionalism to stand in a dialectical relation. *Id.*, at 1029; Post, *Fashioning the legal Constitution*, *supra* note 127, at 8.

actors,”<sup>129</sup> as informing institutional decisions. These interactions are dialectically interconnected;<sup>130</sup> the people express their views about constitutional meaning in contestation of longstanding readings of the constitution, but they do so in a frame of common principles—whose very understanding is in dispute. As Post has put it, “constitutional law both arises from and in turn regulates culture.”<sup>131</sup> These disagreements and interactions thus create a constitutional culture, that is, “understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning.”<sup>132</sup>

Two further elements are crucial to understand democratic constitutionalism: the way in which popular readings of the constitution are advanced and how these popular readings limit institutional outcomes.

Although democratic constitutionalism acknowledges there are formal ways to inform courts’ constitutional readings (voting in elections or judicial nominations, to name a few),<sup>133</sup> it also vindicates the politico-constitutional role social movements play. It contends, therefore, that constitutional change may be achieved by non-canonical procedures<sup>134</sup> of norm contestation.<sup>135</sup> Norm

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<sup>129</sup> Post, *Fashioning the legal Constitution*, *supra* note 127, at 8.

<sup>130</sup> Post & Siegel, *Popular Constitutionalism*, *supra* note 50, at 1029.

<sup>131</sup> Post, *Fashioning the legal Constitution*, *supra* note 127, at 8. Robert Post has also explained different understandings of, and relations among, culture and law. Robert C. Post, *Law and Cultural Conflict*, 78 Chi.-Kent L. Rev. 485 (2003).

<sup>132</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1, 3 (2006).

<sup>133</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 380 (2007).

<sup>134</sup> Post & Siegel, *Democratic Constitutionalism*, *supra* note 50, at 28 (“Article V amendments, however, are so very rare that they cannot provide an effective avenue for connecting constitutional to popular commitments.”).

contestation through social mobilization rests upon the recognition of the jurisgenerative capacity of the people themselves.<sup>136</sup> The fact that the people themselves are vested with jurisgenerative capacity also shows that the limit between law and politics is far from being sharply determined, and thus becomes blurred.<sup>137</sup> However, this jurisgenerative capacity is limited as not any cultural interpretation is constitutional. What indicates that these mobilizations are constitutional law is the fact that they are explicitly related to the constitution,<sup>138</sup> for remember that constitutional law comes from below, but at the same time it also limits culture. The dialectical nature of constitutional culture is evident;

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<sup>135</sup> Post & Siegel, *Roe Rage*, *supra* note 133, at 381.

<sup>136</sup> Cover, *Nomos and Narrative*, *supra* note 42.

<sup>137</sup> Siegel, *Constitutional Culture*, *supra* note 132, at 5

<sup>138</sup> Post, *Fashioning the legal Constitution*, *supra* note 127, at 9. What interpretations and proposals are *related to the constitution* can have at least two different, yet complementary, approaches. A *formal* approach would assert that what defines an interpretation as constitutional depends on its reference to the text of the constitution. A *substantive* approach, on the other hand, will emphasize the political strength of the claim; it will be constitutional as long as it is related to the fundamental issues we most care about. Reva Siegel, for instance, commenting on what she calls the public value condition—that popular claims are to be framed as public values to be constitutionally sound—will work as long as challengers are able to present their claims (concerns, grievances) framed under common values. Where are we to find these common values? Claims, she goes on, should be presented as required by the principles that are consistent “with principles and memories of a constitutional tradition.” Siegel, *Constitutional Culture*, *supra* note 132, at 37. This loose understanding of what the *constitutional* is as located inside-outside the constitutional text has been also advocated by TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 37, at 187 ff. (claiming populist constitutionalism focuses on the *thin* constitution—beyond the text of the *thick* written constitution—, thus making constitutional politics possible) & WHY THE CONSTITUTION MATTERS, *supra* note 1, at 6 ff. (arguing many of what we would call constitutional commitments are not expressed in the text of the constitution, but in laws that, for whatever reason, have acquired a constitutional level). If a popular claim is constitutional by reference to its political relevance or fundamental character, this should also imply that not every provision in the constitutional text is as fundamental as to prevent simple changes (interpretations, detailing, etc.). Attributing constitutional character to whatever clause the constitution contains would rest exclusively on the constitution’s formal contours—which I just mentioned are not decisive for popular, not even institutional, readings. I have taken the distinction between substantive and formal constitutions from CARL SCHMITT, *CONSTITUTIONAL THEORY* 67-74 (Jeffrey Seitzer trans. & ed., Duke University Press, 2008). *See also*, TOMKINS, *PUBLIC LAW*, *supra* note 40, at 7-14 (“the importance of the distinction between written and unwritten constitutions is greatly exaggerated.”).

popular readings of the constitution contest longstanding assumptions about constitutional law by resorting, but also ardently embracing, longstanding constitutional principles (contestation/limit).<sup>139</sup>

Finally, democratic constitutionalism does not seek to “take the Constitution away from courts”<sup>140</sup>—as Tushnet proposed—, but rather contends courts’ decisions are limited by non-judicial interpretations. This means that courts, just as any other governmental branch, operate as an agent of enforcement of culturally held constitutional interpretations. In other words, a direct consequence of these discursive interactions between the people and courts is that the courts do not act on their own (arbitrary) will, but are checked by the people. The argument here seeks to clean judicial review from its undemocratic whiff by showing constitutional chambers, when properly paying attention to popular readings, do not act as a small group of aristocrats imposing their will on that of the people, but in accordance with them. As Post put it,

to the extent that a court views the substance of constitutional law as in part dependent upon the outlook of nonjudicial actors, it will exercise ... the

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<sup>139</sup> Jack M. Balkin & Reva B. Siegel, *Principles, practices, and social movements*, 154 U. OF PA. L. REV. 927 (2006). These interactions and contestations, democratic constitutionalism holds, also bring positive externalities (externalities in the sense that they are positive outcomes different from a court embracing the specific interpretation of the constitution posed by a mobilization), for it tells the people that they have a say about how common principles are to be understood, thus renewing their allegiance to the constitution. Dialectical relations of conflict and disagreement thus become essential for democratic legitimacy, rather than disruptive. Post & Siegel, *Roe Rage*, *supra* note 133, at 375. Reva Siegel has also argued the procedural limits cultural readings of the constitution are to respect. These are the consent condition—emphasizing argument rather than coercion—and the public value condition—highlighting common values embedded in the Constitution are the point of departure for any interpretation that aims at becoming *constitutional*. Siegel, *Constitutional Culture*, *supra* note 132, at 30-40.

<sup>140</sup> Post & Siegel, *Roe Rage*, *supra* note 133, at 379.

“awesome power” of judicial review with some attention to the understandings of those actors.<sup>141</sup>

Friedman has called this a model of mediated popular constitutionalism. This is a model that says popular constitutionalists are obtaining what they want, namely that the people are to have a say regarding constitutional meaning, although “not in the precise form in which they ask for it.”<sup>142</sup>

### *C. Avenues (to speak)*

Notwithstanding different ramifications, popular constitutionalism as a whole exhibits a common thrust: its emphasis on the paramount role of the people in interpreting the constitution. How do the people (themselves) present their popular readings? There are many channels through which the people can make governmental institutions (courts in particular) aware of their voice on constitutional matters. These channels are both institutional (political elections,<sup>143</sup> frontal attacks on courts through regulations,<sup>144</sup> presidential elections,<sup>145</sup> popular

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<sup>141</sup> Post, *Fashioning the legal Constitution*, *supra* note 127, at 6-7.

<sup>142</sup> Barry Friedman, *Mediated Popular Constitutionalism*, *supra* note 50, at 2598-9.

<sup>143</sup> Post & Siegel, *Roe Rage*, *supra* note 133, at 381 (arguing voting might be insufficient as a means to contest constitutional detailing).

<sup>144</sup> KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 49, at 249 (noticing judicial supremacy, and thus popular readings, can be advanced through judicial impeachments, reducing courts’ budget and ignoring judicial mandates, among others).

<sup>145</sup> David L. Franklin, *Popular Constitutionalism as presidential constitutionalism?*, 81 CHI.-KENT L. REV. 1069 (2006) (suggesting, not endorsing, that one possible and plausible interpretation is that today popular constitutionalism may well amount to presidential constitutionalism); Jedediah Purdy, *Presidential Popular Constitutionalism*, *FORDHAM L. REV.* 1837 (2009) (arguing presidential rhetoric to be an essential part of any adequate understanding of the practice of popular constitutionalism). *See also*, Post & Siegel, *Popular Constitutionalism*, *supra* note 128, at 1030-1, 1042-3 (arguing that by choosing the President, and through the President appointing judges, “the people retain the final word on the meaning of their Constitution ...”).

selection of judges,<sup>146</sup> and judicial nominations<sup>147</sup>) and non-institutional (protests, boycotts and sit-ins). Social movements resort—as the literature on social mobilizations has shown—complementarily to both formal and informal avenues. I am here concerned with non-institutional mechanisms, specifically social protests, that is, with the people themselves on the streets bawling (in a non-derogatory sense) their constitutional reading.

Is popular constitutionalism sympathetic to these informal and disruptive means of constitutional construction? The answer is a resound yes. First, popular constitutionalism places great emphasis on popular narratives about constitutional meaning.<sup>148</sup> Tushnet for one, when presenting a condensed view<sup>149</sup> about what populist constitutionalism stands for, offered some elements among which I single out the opportunity (right) to criticize the government and a place to form independent views.<sup>150</sup> Admittedly, those spaces of critique and independent formation of views operate outside the State and its institutions—as Tushnet says<sup>151</sup>—, but not necessarily in private—as Habermas has argued.<sup>152</sup>

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<sup>146</sup> David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010).

<sup>147</sup> TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37, at 133-5; Friedman, *Mediated Popular Constitutionalism*, *supra* note 50, at 2609.

<sup>148</sup> See generally, Parker, “*Here the People Rule*”, *supra* note 52, at 580-3 (arguing to vindicate common language on key politico-constitutional matters).

<sup>149</sup> I say a condensed view, for Tushnet offers these elements when rejecting a procedurally driven model of judicial review. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37, at 157-63.

<sup>150</sup> *Id.*, at 157-8.

<sup>151</sup> *Id.*

<sup>152</sup> JÜRGEN HABERMAS: BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 360 ff. (1998).

Popular constitutionalism goes yet another step further, for it calls to remove these instances of political participation from its elitist drapery, thus welcoming informal mechanisms of participation deflated from pretentious language. As Richard Parker put it when talking about the political relevance of freedom of expression, we should enlarge constitutional law comprehension to include forms of political intervention other than those which privilege the “modes and styles of expression associated with the ‘better’ sort of people—relatively ‘reasonable,’ ‘orderly,’ ‘articulate’ speech having ‘social importance.’”<sup>153</sup>

This extension in the understanding of constitutional law certainly included, although cannot be solely reduced to, mobs and protests.<sup>154</sup> This is clear in Kramer’s work as one goes through the historical episodes he quotes when opening *The People Themselves*.<sup>155</sup> As he argues, popular readings of the constitution, as well as constitutional changes in understanding, have been achieved not only by procedures constitutionally enshrined in the constitution, but

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<sup>153</sup> Parker, “*Here the People Rule*,” *supra* note 52, at 577. Robert Post has also advocated an extended vision for freedom of expression. In arguing public opinion is the touchstone of every democratic government, he claims protected discourses that shape opinion are to be broadly understood and protected. Thus, political speech comes in different forms and shapes, which “[s]ometimes ... occurs through language, and sometimes, as with picketing and flag burning, it does not.” ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 14-5 (2012); *See also*, TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 37, at 106-7 (“I am convinced that a ban on burning flags as a political protest is inconsistent with fundamental free speech principles.”).

<sup>154</sup> Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006) (arguing popular constitutionalism encompasses a large spectrum of legal strategies, beings mobs and protests just some strategies among different options).

<sup>155</sup> KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 49, at 3-5.

also by social mobilization outside institutional channels.<sup>156</sup> This is in fact most obvious, although again not exclusively the case, in situations where, despite political challengers are in control of local institutions, changes in law prove difficult if not impossible.<sup>157</sup>

Post and Siegel hold a similar claim. They acknowledge, as noted above, that citizens resort to a myriad of methods when it comes time to shape constitutional meaning. Although Post and Siegel recognize the importance of constitutional lawmaking and constitutional amendments, they call attention to how citizens have “sought to embody their constitutional ideals within the domain of judicially enforceable constitutional law” and other forms that permit a more fluid and ongoing process of communication between courts and the public.<sup>158</sup> Norm contestation, as they label this process, includes—as Siegel herself has put it—informal, disruptive, non-institutional, and sometimes unlawful means. In a similar vein—although assessing popular constitutionalism from a legal theory viewpoint—, Adler has held that protests, among other mechanisms, establish a closer link between citizen engagements, their critical appraisal of the constitution, and the work of officials, which certainly includes constitutional exposition.<sup>159</sup>

## II. Popular institutionalism

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<sup>156</sup> *Id.* at 8.

<sup>157</sup> *Id.*, at 26.

<sup>158</sup> Post & Siegel, *Roe Rage*, *supra* note 133, at 380.

<sup>159</sup> Under democratic regimes—he writes—it is almost impossible to think the work of public officials as totally detached from citizens’ evaluation. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: whose practices ground U.S. Law?* 100 NW. U. L. REV. 719, 733-5 (2006).



This part is intended to clear up some misunderstandings about popular constitutionalism. Popular constitutionalism, although promising to give the people a say in constitutional understanding, actually proposes a mediated process. This means, as I will detail below, that (A) popular readings are channeled through formal institutions of politico-constitutional decision-making. In other words, what the people say the constitution means is what the Congress, a superior court or the President (and his/her administration) says it means when the respective body or authority enacts a law, passes a decision or enacts an administrative rule. Therefore, popular constitutionalism does not reject institutions; rather, it needs them.

This should not be seen (necessarily) as a democratic shortcoming as long as governmental branches are, in line with what popular constitutionalism emphasizes, *responsive* to the people's views.<sup>160</sup> Neither should it prevent us from asking popular constitutionalism's possible limits in light of recent waves of protests. Recent movements of protests have rejected engaging with institutional politics, thus causing a short circuit with the channels that should supposedly mediate popular interpretations. In the last section of this chapter, (B) I argue that these popular interpretations of constitutions might end up being politically nude views, that is, absent mechanisms of enforcement.

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<sup>160</sup> As I will show in the next chapter, whereas popular constitutionalism sees this responsiveness as desirable, a diarchic approach to constitutional interpretation sees the dialogue or dynamic between institutions and non-institutional forms as a necessity.

A. *The need for institutions (avenues to be heard)*

In Larry Kramer's depiction of popular constitutionalism the people play a twofold role. They interpret the constitution, on the one hand, and they are responsible for seeing that those interpretations are properly implemented, on the other.<sup>161</sup> Bearing the people's interpretative role in mind, I ended the last section noting popular constitutionalism is certainly sympathetic to non-institutional forms of participation. I suggested social protests are only one informal means (among many) of political and constitutional contention or negotiation. While the people open avenues to speak through social protests, the question that remains to be answered is where those constitutional interpretations, popularly held and informally presented, go—if they go somewhere. This is the implementation question.

Some critics have rightly pointed out that closer attention to the implementation question may render popular constitutionalism unworkable—or at least not such a radical departure from the way current democratic institutions (allegedly) operate.<sup>162</sup> Alexander and Solum, for instance, ask who is vested with the “ultimate authority ... to enforce the Constitution.”<sup>163</sup> If popular constitutionalism is seen as “the view that the people themselves are the agents who ... enforce ... the Constitution,”<sup>164</sup> we should doubt whether the people (can) really act in an

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<sup>161</sup> KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 49, at 7.

<sup>162</sup> Alexander & Solum, *Popular? Constitutionalism?*, *supra* note 122, at 1624-5 (calling this option “trivial popular constitutionalism,” a form “every effective constitutional order is”).

<sup>163</sup> *Id.*, at 1603.

<sup>164</sup> *Id.*, at 1617.

immediate way. The people certainly do so when reading the constitution. As noted above, the people can resort to social protests to advance their own constitutional understandings. But how do they enforce those interpretations yielded by popular deliberation?

Alexander and Solum argue there is no way the people can proceed on their own in enforcing popular interpretations—unless popular constitutionalism is an excuse to simply dispense with the constitution (text) itself.<sup>165</sup> Although they fail to see the people are not one single body—but comprised of interactions of movements and countermovements—they correctly argue that the people (“a multiplicity of inconsistent interpretations”) “require[] an institutional mechanism.”<sup>166</sup>

To be fair with Kramer—despite his alleged elusiveness in explaining the proper way in which popular constitutionalism is to operate<sup>167</sup>—, neither he nor the other readings of popular constitutionalism argue in favor of disregarding the State and its institutions. Kramer himself, for instance, notes that it is “the people themselves’—working through and responding to their agents in the government—who [are] responsible for seeing that [the constitution is] properly

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<sup>165</sup> *Id.*, at 1620-1. It should be noted, however, that there are certain variants of popular constitutionalism that do not place such a strong emphasis on the constitution’s text, but call to conceive the *constitution* in a broader fashion. *See*, TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37.

<sup>166</sup> I take here their emphasis in institutional mechanisms, as I will tell below, simply because that is what I think is the correct reading of Kramer’s work. This emphasis is not because of their preoccupation: that a constitution understood as a law needs a “single voice of interpretative authority.” *Id.*, at 1621. *See also*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing the Supreme Court is the constitution’s final expositor if we want to satisfy one of law’s main functions: the settlement function). *But see*, TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 37, at 27-30 (discussing the settlement function as solely realizable by a superior court).

<sup>167</sup> Alexander & Solum, *Popular? Constitutionalism?*, *supra* note 122, at 1617-9.

interpreted and implemented.”<sup>168</sup> Therefore, popular constitutionalism answers the implementation question by assigning the people a vigilant role. “Through and responding to their agents in the government,”<sup>169</sup> the people are to observe whether governmental institutions are enforcing their interpretations or not. Popular constitutionalism, thus, does not seek to wither away the State. Quite the opposite, it seeks a way to inform official readings of the constitution with popular interpretations. The emphasis here is on governmental responsiveness.

This is particularly clear when one pays attention to the emphasis authors such as Mark Tushnet<sup>170</sup> and Jeremy Wadron<sup>171</sup> place on legislatures as the proper forum of constitutional interpretation. This is evident when one realizes democratic constitutionalism of the kind Post and Siegel endorse sees the Supreme Court as an avenue to channel cultural and popular interpretations of the constitution—and certainly as an institution whose supremacy is not necessarily conflicting with popular constitutionalism.<sup>172</sup> Undoubtedly, it is also the view of those who assign the President, and with him the whole administrative bureaucracy, a paramount role in popular constitutionalist grammar.<sup>173</sup> More recent accounts argue popular constitutionalism lacks an accurate description as to how it is to operate, thus

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<sup>168</sup> KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 49, at 7.

<sup>169</sup> *Id.*

<sup>170</sup> TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 37.

<sup>171</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 77.

<sup>172</sup> Post & Siegel, *Democratic Constitutionalism*, *supra* note 50; Post & Siegel, *Roe Rage*, *supra* note 133; Post, *Fashioning the legal Constitution*, *supra* note 127; Siegel, *Constitutional Culture*, *supra* note 132.

<sup>173</sup> Franklin, *Popular Constitutionalism as presidential constitutionalism?*, *supra* note 145; Purdy, *Presidential Popular Constitutionalism*, *supra* note 145.

offering an *institutional* mechanism to render it realizable.<sup>174</sup> Finally, this is also the viewpoint of Kramer himself, who deemed popular constitutionalism to be an inter-institutional dialogue happening among different branches—all under the people’s supervision.<sup>175</sup>

This is precisely what Habermas has argued. Under the conditions of the modern State, social power, that is, the political meaning developed by the civil society in the autonomous public sphere, remains nude (of legitimacy) were it not to be transformed into political power.<sup>176</sup> Social power is transformed into political power “only through institutionalized procedures.”<sup>177</sup> Therefore, institutionalized will-formation, such as the parliament, “depends on supplies coming from the informal contexts of communication found in the public sphere ...”.<sup>178</sup> This interaction—“this fact,” Habermas writes—“makes it impossible to conceive politics and law as autopoietically closed systems.”<sup>179</sup> However, there is an

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<sup>174</sup> Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 162 (2012) (arguing “the invisible hand of public opinion is not enough” and that popular constitutionalism needs to advance institutional reforms).

<sup>175</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 49, at 252 (“the authority of judicial decisions formally and explicitly depends on the reactions from the other branches and, through them, from the public.”); Kramer, “*The Interest of the Man*,” *supra* note 125. *See also*, Post & Siegel, *Popular Constitutionalism*, *supra* note 27, at 1041 (arguing the boundaries between the judicially enforceable constitution—what they call constitutional law—and the non-judicially enforceable constitution—what they call the Constitution—is defined by a constitutional dialogue between judicial and non-judicial actors).

<sup>176</sup> HABERMAS, FACTS AND NORMS, *supra* note 152, at 352-73. I emphasize in this transition the legitimacy viewpoint stressed by Habermas (a model of society where the communicative power of public citizens is not bypassed), although he also mentions this transference of social power into political power is needed as a way to “relieve the public of the burden of *decision making*” (*Id.* at 362, his emphasis). According to Habermas, the public sphere acts in a signaling fashion as its capacity to solve problems “*on its own*” is limited (359).

<sup>177</sup> *Id.*, at 363.

<sup>178</sup> *Id.*, at 352.

<sup>179</sup> *Id.*

important caveat, for, as experience shows, the transfer of social power into politically-institutionalized will is not always automatic.<sup>180</sup> This is why this interplay is not relaxed and pacific. In other words, as Cover pointed out, popular jurisgenerative power is always challenging. This interplay creates a latent dichotomy between State power (authoritative), on the one hand, and the different meanings (narratives) the people advance, on the other.<sup>181</sup> Most notably, uncontrolled social narratives have a “destabilizing influence upon power.”<sup>182</sup> The meaning of authoritative precepts, in other words, necessarily “borrow[s] ... from materials created by the social activity that is not subject to the strictures of provenance that characterized what we call formal lawmaking.”<sup>183</sup> This is precisely the jurisgenerative, and therefore destabilizing, force popular constitutionalism aims at rescuing.

### *B. Disregarding the State*

Popular constitutionalism rests on the interplay between the people and political institutions. This presupposes, as the literature on social movements does, that social protesters engage with political institutions. Although this is regularly the case, recent waves of protests have taken a different step by disregarding the State

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<sup>180</sup> I do not want to extend on this point here, but certain readings of popular constitutionalism, as the one Post and Siegel present, accept that Supreme Court rulings are not always going to be in line with cultural and popular interpretations. The reason to this is not, as some have argued, that the people are not a unitary body acting in consensus, but the professional milieu court judges work in when addressing politico-constitutional issues. Citizens, they claim, “understand that the rule of law is rooted in professional practices that are distinct from popular politics and that will often require divergences between the Court’s judgments about the Constitution and their own.” Post & Siegel, *Democratic Constitutionalism*, *supra* note 50, at 27-8.

<sup>181</sup> Cover, *Nomos and Narrative*, *supra* note 42, at 18.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

and its institutions, thus breaking down the interplay popular constitutionalism assumes. Almost every commentator of recent waves of protests highlights their horizontalism as an internal organization and their rejection to engage in any dialogue with the State and its institutions.

Reviewing the protests in Greece, for instance, Paul Mason noticed that “[i]n the people’s minds the regime is already gone ... the whole corrupt party system” which they saw as inept.<sup>184</sup> Although protesters did not seek to break down the State, there is an anomic breakdown: “mass refusals to cooperate with the system.”<sup>185</sup> This is confirmed by Douzinas, who argues anomie appears where formal laws and institutions attack popular values. This fracture creates only “extensive disenchantment, fear and aggressiveness.”<sup>186</sup> The same might be said about the *indignados* in Spain. As Castells reports, the Spanish saw their State as an “unresponsive political system.”<sup>187</sup> By assuming a horizontalist form of organization, they rejected representation and posed neither specific petitions nor demands to authorities.<sup>188</sup> The different branches of the ‘Occupy’ movement across North America have been described in similar terms. Some have claimed ‘Occupy’

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<sup>184</sup> MASON, WHY IT’S STILL KICKING OFF EVERYWHERE, *supra* note 4, at 88-90. There is no reason to address the State when the State is already not there (*Id.*, at 229-30).

<sup>185</sup> *Id.*, at 103-4.

<sup>186</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 5, at 50-1.

<sup>187</sup> CASTELLS, NETWORKS OF OUTRAGE, *supra* note 2, at 111.

<sup>188</sup> *Id.*, at 120-5.

is a movement with anarchist roots with emphasis in rejecting the State and its institutions, advancing direct action and “acting as if one is already free.”<sup>189</sup>

Different authors have coined different, although related, terms to describe, and in a sense support, what these movements do. Professor Douzinas, for one, speaks of democratic disobedience.<sup>190</sup> For him, democratic disobedience seeks a sort of political healing neither civil disobedience nor protests can provide. Whereas these latter mobilizations are, or could be, rooted in the constitution and certainly assume the regime’s legitimacy, democratic disobedience responds to a deeper sense of injustice.<sup>191</sup> Moreover, Douzinas insists, democratic disobedience resorts to a form of manifestation that cannot be accommodated within the current state of affairs, but that aims precisely at challenging that very same status quo. As he puts it, “[d]emocratic disobedience challenges social hierarchy and the flawed democracy that reproduces it,”<sup>192</sup> therefore refusing to engage with current institutions. Democratic disobedience “challenges current policies,”<sup>193</sup> something civil disobedience and protests also do in a sense, “but goes beyond them to the social conditions and institutional arrangements that [have] allowed their dominance.”<sup>194</sup>

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<sup>189</sup> David Graeber, *Occupy Wall Street’s Anarchist Roots*, in THE OCCUPY HANDBOOK 141, 144-5 (Janet Byrne ed., 2012).

<sup>190</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 5, at 93-6.

<sup>191</sup> *Id.*, at 95.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*



Bernard Harcourt, for another, has termed it political disobedience.<sup>195</sup> After stressing—in line with Douzinas—civil disobedience’s respect for institutions and the legal order, Harcourt explains that political disobedience “resists the very way in which we are governed.”<sup>196</sup> This is why occupiers and *indignados*, among others, have neither an agenda nor a set of petitions to be submitted before political authorities, for political disobedience actually “turns its back on the political institutions and actors who govern us.”<sup>197</sup> Political disobedience refuses to engage with authorities in reformist-policy-talk<sup>198</sup> which can only result, this position contends, in furthering the effects of domination. By quoting Foucault, Harcourt argues that “[a]s soon as one ‘proposes’—one proposes a vocabulary, an ideology, which can only have effects of domination ...”.<sup>199</sup>

There are also those who, like Raffaele Laudani, account more generally for disobedience.<sup>200</sup> Although not explicitly related to current waves of protests,<sup>201</sup> Laudani speaks of destituent power.<sup>202</sup> Once again, as both Douzinas and Harcourt do, Laudani distances destituent power from civil disobedience, this latter being a

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<sup>195</sup> Bernard Harcourt, *Political Disobedience*, in *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* 45 (W.J.T. Mitchell et al. eds., 2013).

<sup>196</sup> *Id.*, at 47.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*, at 59-61.

<sup>199</sup> *Id.*, at 58.

<sup>200</sup> RAFAELLE LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT. A GENEALOGY* (2013).

<sup>201</sup> Laudani does mention current protest movements when accounting for contemporary forms of disobedience. *Id.*, at 6. However, Adam Sitze, who wrote the foreword, directly establishes the link between current movements that “consciously refuse[] to carry out the constituted laws and even the law-constituting authority of those who hold formal political power,” and Laudani’s destituent power. Adam Sitze, Foreword, in LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT*, *supra* note 200, at vii.

<sup>202</sup> LAUDANI, *DISOBEDIENCE IN WESTERN POLITICAL THOUGHT*, *supra* note 200, at 4-5.

rather moderate form of dissent which “does not put the existing order in discussion.”<sup>203</sup> Destituent power is different. It encompasses constituent power’s creative energy, in the sense of being a force or will aimed at *constituting* a new order—a new order which is created out of nothing (*ex nihilo*).<sup>204</sup> Nonetheless, it also comprehends the possibility of a political potency that takes place not in a vacuum, as Laudini sees the constituent power, but against a background of “institutional chains that limits its full expression.”<sup>205</sup> Furthermore, different from the constituent power, which ultimately succeeds as it institutionalizes (i.e. the constitution) its goals, destituent power operates as an extra-institutional potency that does not have an institutionalizing end.<sup>206</sup>

Critical voices have already warned about the dangers of movements falling in love with themselves,<sup>207</sup> dismissed the political character of movements’ riots,<sup>208</sup> and criticized their naïve approach to politics.<sup>209</sup> I want to argue in a different, although related, line. I want to suggest that this withdrawal from institutions—to take Mouffe’s terminology<sup>210</sup>—prevents these movements from speaking properly in constitutional terms.<sup>211</sup> More concretely, this withdrawal impedes mobilizations

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<sup>203</sup> *Id.*, at 6-7.

<sup>204</sup> *Id.*, at 4.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*, at 5.

<sup>207</sup> SLAVOJ ŽIŽEK, *THE YEAR OF DREAMING DANGEROUSLY* 77-9 (2012).

<sup>208</sup> ALAIN BADIOU, *THE REBIRTH OF HISTORY. TIMES OF RIOTS AND UPRISINGS* 22-6 (Gregory Elliott trans., Verso 2012).

<sup>209</sup> CHANTAL MOUFFE, *AGONISTICS. THINKING THE WORLD POLITICALLY* 65-84 (2013).

<sup>210</sup> *Id.*, at 65.

<sup>211</sup> As I said at the beginning, I’m not arguing recent movements have sought, but failed to achieve, constitutional redemption. What I’m arguing is that their claims are related to structural issues we care the most about and that those issues are constitutional precisely in that sense and because—as

from contesting hegemonic constitutional readings that stand adamant against their claims.

Popular constitutionalism assumes popular readings are not only to be institutionally linked, but also—crucially importantly—public-oriented. As noted above, this means popular constitutional readings are not totally free but are to respect what Siegel terms the ‘public value condition.’<sup>212</sup> Proposing a new (counter-hegemonic) constitutional reading presupposes “constitutional understandings that the community recognizes and shares.”<sup>213</sup> Partisan contentions, therefore, are to be translated “into language of a common tradition.”<sup>214</sup> This is what social movements do. As Claus Offe has put it, new social movements do not contend those shared values, “but the mode of implementation of values.”<sup>215</sup> They do so not by aiming to become isolated or displaced, but political; movements want their means to be recognized as legitimate and their ends to “become binding for the wider community.”<sup>216</sup> In other words, those shared constitutional traditions, under which new interpretations are presented from *below*, are the concepts mobilizations (and counter-mobilizations) strive to conceptualize.

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I shall say now—they should have a broader impact if they do not want to remain as merely insulated/tolerated.

<sup>212</sup> Siegel, *Constitutional Culture*, *supra* note 132, at 34.

<sup>213</sup> *Id.*, at 34.

<sup>214</sup> *Id.*, at 35. As argued before, this common tradition or constitutional understanding is comprised not only of the words of the constitution itself, but also of those constitutional (unwritten) conventions.

<sup>215</sup> Claus Offe, *New Social Movements: Challenging the boundaries of Institutional Politics*, 52 SOC. RES. 817, 849-50 (1985).

<sup>216</sup> *Id.*, at 826-7.

This means that popular constitutional meaning is created in a two-step process:

(a) a first step, where civil society deliberates and acts independently from the State (an autonomous public sphere where movements and counter-movements take place)<sup>217</sup> in order to deconstruct hegemonic constitutional readings, and

(b) a second step, where these popular readings (deconstructions and re-articulations of former interpretations) are taken by the State and its institutions to be transformed from social power into political power.<sup>218</sup>

Some voices have defended current protest movements taking this withdrawal path. I will consider a couple here. Professor Costas Douzinas has argued—against Badiou—that recent riots and movements should not be dismissed as non-political, but understood as a political baptism, a sort of first step preparing, although not guaranteeing, the path towards the total reconfiguration of the political system.<sup>219</sup> In order to achieve this goal movements should first heal the social ethos already fractured by a misguided formal regulation so that formal institutions can be redesigned.<sup>220</sup> In a related vein, Manuel Castells suggests recent movements are to be understood, not as seeking short-term benefits, but as pursuing deeper changes not achievable through formal politics.<sup>221</sup> This is the case, he argues, despite local specificities, of Spanish *indignados*, Greek *aganaktismenoi*,

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<sup>217</sup> Siegel, *Constitutional Culture*, *supra* note 132, at 40-3.

<sup>218</sup> MOUFFE, *AGONISTICS*, *supra* note 209, at 79-82.

<sup>219</sup> DOUZINAS, *PHILOSOPHY AND RESISTANCE*, *supra* note 5, at 77-84.

<sup>220</sup> *Id.*, at 50-1.

<sup>221</sup> CASTELLS, *NETWORKS OF OUTRAGE*, *supra* note 2, at 133.

and the different 'Occupy' branches. They have turned their backs on the State in order to "raise[] consciousness among its participants and in the population at large."<sup>222</sup> Gatherings, protests and public assemblies were not means of pressure to call governmental attention, "but a goal in themselves"<sup>223</sup> as they collectively pursued "cultural change."<sup>224</sup> As Castells puts it, the process is the product, not the means.<sup>225</sup>

From a popular constitutionalist perspective, above depicted as a two-step process, these movements are anchored at, and refuse to leave, the first step.<sup>226</sup> The question is how long they will remain there, provided they stay mobilized. Furthermore, and perhaps contradictorily, both Douzinas and Castells argue the long-term process of change is likely to lead in last instance to (an unavoidable) interaction with the State. Douzinas, as noted above, contends one of the reasons that best explains the recent uprisings is precisely the lack of attention formal institutions have paid to different social *ethoi*.<sup>227</sup> The great mistake of several governments—the Greek included—has been answering protests with legality, both criminalizing (and aiming at delegitimizing) social protest and calling the people to respect formal rules.<sup>228</sup> Castells has put forth a similar defense.<sup>229</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*, at 134.

<sup>224</sup> *Id.*, at 193.

<sup>225</sup> *Id.*, at 143-4 (arguing movements saw, and still see, the questioning of concrete accomplishments as the logic of capitalism).

<sup>226</sup> I shall note below the dangers of becoming isolated and marginalized from the institutional avenues where power relations are crucially defined.

<sup>227</sup> DOUZINAS, PHILOSOPHY AND RESISTANCE, *supra* note 5, at 54 (arguing resistance appears where formal rules have been passed without having first persuaded the people).

<sup>228</sup> *Id.*, at 50.

I agree with all this. What seems unavoidable, however, is eventually engaging with the State and its institutions (law included) to bring them in accordance with social norms,<sup>230</sup> either by pushing current institutions to pay attention to popular demands<sup>231</sup> or to experiment with institutions—in fact, social movements have made, and can make, enormous contributions in helping us to abandon what Unger called the “false necessity” of accepting institutions in their current shape.<sup>232</sup> In other words, current waves of mobilization have had an important role in highlighting the gross malfunctioning of Western democracies. But as Chantal Mouffe has clearly put it,

this is only the beginning, and to effectively transform power relations, the new consciousness that arises out of those protests requires institutional channels.<sup>233</sup>

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<sup>229</sup> CASTELLS, NETWORKS OF OUTRAGE, *supra* note 2, at 5-10, 142.

<sup>230</sup> The relation between institutions, law and culture, however, depends on several variables. First, those relations are certainly permeated by what we consider law to be and what we deem as cultural. Second, it is worth noticing the relations between culture and law are not unidirectional, always flowing from the bottom (from culture) up (to formal institutions), but a mixture of interrelations where formal institutions also play their part—as “tool[s] of social engineering to accomplish politically desirable purposes ... and [also] to revise and reshape culture.” Robert C. Post, *Law and Cultural Conflict*, *supra* note 131, at 487. *See also*, Sarat & Simon, who have argued legal meanings are not “invented and communicated in a unidirectional process.” Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J. L. & HUMAN. 3, 19-20 (2001).

<sup>231</sup> MOUFFE, AGONISTICS, *supra* note 209, at 111 (actual changes in relations of power will not be brought about “get[ting] rid of representative institutions but improv[ing] them, so as to make them more accountable to the citizenry.”); Robert B. Reich, *Occupy Democracy*, in OCCUPY HANDBOOK, *supra* note 189, 362 (“Our problem isn’t government; it’s who government is for.”).

<sup>232</sup> ROBERTO UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE 1-27 (1998).

<sup>233</sup> This is clear in the work of Mouffe, who argues the emerging consciousness requires institutional channels to effectively transform power relations. MOUFFE, AGONISTICS, *supra* note 209, at 115. In a similar sense *see*, Sarat & Simon, *Beyond Legal Realism?*, *supra* note 230, at 20 (conceptualizing legal meanings as “moving” hegemonies); UNGER, DEMOCRACY REALIZED, *supra* note 232, at 26 (“there is no fixed inverse relation between political institutionalization and political mobilization.”).

There is a second turn the defense of the withdrawal strategy can take. Protesters could argue their movements are to remain local constitutional interpretations whose target does not need to be the State.<sup>234</sup> I'm not saying that this is what identity movements claim to be doing, but there is some resemblance and I take some insight from them. Van Dyke et al. have argued against those who suggest that every social mobilization targets the State, pointing out that certain protests instead focus on civil society itself.<sup>235</sup> For them, "public protest is also used to shape public opinion, identities, and cultural practices and to pressure authorities in institutional arenas not directly linked to the state."<sup>236</sup> These expressive or identity protests, therefore, are "oriented primarily to cultural transformation and identity recognition through expressive actions and alternative institution building."<sup>237</sup> Both Douzinas and Castells, as noted above, make a similar claim regarding current waves of protests. They emphasize the non-institutional processes as *the message*, which means protesters are not interested in posing any specific demands to the State and its institutions. In order to create free communities, autonomous from corrupted governments, the targets are their fellow citizens<sup>238</sup>—an objective allegedly realized in local assemblies.

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<sup>234</sup> Some have persuasively argued that this turn to locality was triggered by a global disempowerment. This is the case of Sparke who, although focusing on the use of spaces to increase presence, notes this shift also showed global ties. Matthew Sparke, *From Global Dispossession to Local Repossession: Towards a Worldly Cultural Geography of Occupy Activism*, in THE WILEY-BLACKWELL COMPANION TO CULTURAL GEOGRAPHY 387 (Nuala C. Johnson et al., eds. 2013).

<sup>235</sup> Nella Van Dyke et al., *The Target of Social Movements: Beyond a focus on the State*, 25 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 27 (2004).

<sup>236</sup> *Id.*, at 27.

<sup>237</sup> *Id.*, at 31.

<sup>238</sup> CASTELLS, NETWORKS OF OUTRAGE, *supra* note 2, at 6.

First of all, as argued above, it is not at all clear that cultural changes occur independently from the State and its institutions.<sup>239</sup> Second, one could also venture that if identity and expressive and consciousness-raising movements are aimed at (re)shaping public opinion, in the long (or sometimes in the short) run the State should be responding to these transformations.<sup>240</sup> What I want to stress here, however, is a rather different question. I want to highlight whether these local constructions of the constitution can be understood as constitutional interpretations or as something else (which is dangerous for the movement itself). I think the latter is the case, for these constructions rest on hegemonic interpretations that these movements refuse to institutionally contest. By doing this they risk becoming marginal and isolated gatherings that are, in the most optimistic case, tolerated by the State.<sup>241</sup>

Robert Cover is of enormous help again. According to Cover, local communities acting autonomously (that is independent from representative avenues) exercise their jurisgenerative capacity to create law “as fully as does the judge.”<sup>242</sup> Ultimately, though—Cover writes—, it is “the state’s capacity to tolerate or destroy

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<sup>239</sup> Post, *Law and Cultural Conflict*, *supra* note 131, at 488-9 (arguing how antidiscrimination laws have been used to “revise and reshape culture”).

<sup>240</sup> In fact, recent demonstrations impacted electoral processes in Greece, Iceland and Spain. However, it should be noted—as Castells does—that these were side effects. CASTELLS, NETWORKS OF OUTRAGE, *supra* note 2, at 138-9.

<sup>241</sup> Legal and constitutional considerations aside (that is, I am not passing judgments as to whether governmental decisions were constitutional or not), most of the movements continued to occupy public spaces as long as States allowed them to do so. Contradicting their withdrawal discourse, many groups sought help from the State itself through courts, even when they declared to be acting “as if” the State was already gone. See, Graeber, *Occupy Wall Street’s Anarchist Roots*, *supra* note 189, at 148-9.

<sup>242</sup> Cover, *Nomos and Narrative*, *supra* note 42, at 28.



this self-contained *nomos* that dictates the relation” of the local community in question and its “political host.”<sup>243</sup> Cover notes there are many reasons, partly principled (he mentions the freedom of association) and partly prudential (to avoid conflicts of certain, although indeterminate, political significance) reasons, to accommodate these local *nomoi*. However, when these reasons are principled and adopt the form of constitutional rights protection (the same freedom of association Cover mentioned, to name one), it should be noted that the political standing of “this self-contained *nomos*” is extremely precarious. For one, the State’s capacity to destroy its local *nomos* persists—as experience showed, public occupations lasted as long as the State tolerated these manifestations. For another, either the toleration or destruction of these local *nomoi* depends on a constitutional interpretation which movements that withdraw do not contribute (precisely because they do not engage) to shape, but that accept as given.

In other words, it is not the movement’s mobilization what leads to a constitutional reading that grants the movement this (however) precarious toleration; rather, what accommodates the movement’s grievances is precisely (what they correctly see as a) top-down hegemonic constitutional reading which movements have nonetheless refused (sometimes because of reasonable dissatisfaction) to directly contend.<sup>244</sup> By refusing to engage with the State and its institutions, movements

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<sup>243</sup> *Id.*, at 30.

<sup>244</sup> As Teubner put it—criticizing those who pay exclusive attention to State-centered and institutional solutions—, “[l]iberal constitutionalism could conceal the question in the shadow of constitutionally-protected individual freedoms.” GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS:

undoubtedly run the risk of becoming marginal political actors (what many say is the current case of 'Occupy') or, at best, being merely tolerated or concealed (before being evicted). This is why Cover was concerned about calling local *nomoi* to transcend their inner boundaries and “reach[] out for validation and seek[] to extend [their] legitimacy by gaining acceptance from the normative world that lies outside its core.”<sup>245</sup> Redemptive constitutionalism—a term Cover coined—is precisely that: a move from the inner core to overcome isolation and mere toleration in order to “change the world in which they live.”<sup>246</sup> Redemptive constitutionalism calls social movements to leave their sectarian fashion in order to advance the vision of the world as they see it. Cover notes that, by moving out of sectarianism, redemptive movements aspire to the replacement of one reality with another,<sup>247</sup> and Mouffe joins him in arguing that counter-hegemonic intervention needs institutions “to re-articulate a given situation in a new configuration.”<sup>248</sup> Exodus from institutional politics neglects social movements' conservative and/or transformative capacity.<sup>249</sup> Social protest movements that remain insular (by self-

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SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 6 (Gareth Teubner trans. Oxford University Press 2012).

<sup>245</sup> Cover, *Nomos and Narrative*, *supra* note 42, at 33.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*, at 34.

<sup>248</sup> MOUFFE, *AGONISTICS*, *supra* note 209, at 79. This is also the argument Claus Offe made. For him, “purely social movements” as religious sects “make use of perfectly legitimate and recognized forms of action, such as the legally guaranteed freedom of religious practice and cultural freedom.” However, these groups do not become political as they “do not intend to win the recognition of their specific values and concerns as binding for the wider community but simply claim to be allowed to enjoy the rights and freedoms.” Offe, *New Social Movements*, *supra* note 215, at 827.

<sup>249</sup> That is the recognition that legal meanings are an ensemble of practices and discourses that can be mobilized either to reproduce or transform the conditions of living. Dorothy E. Chunn & Dany

choice) will risk bringing their constitutional visions into reality, thus remaining subject to the arbitrariness of the State, which they assume to be immutable and therefore to be abandoned.<sup>250</sup> The best antidote to arbitrariness lies precisely in engaging with formal outcomes. As G. A. Cohen put it when commenting on the relation between the economic structure and the legal superstructure,

bases need superstructures ... regulation and order are themselves indispensable elements of any mode of production, if it is to assume social stability and independence from mere chance and arbitrariness.<sup>251</sup>

### **Conclusions**

Popular constitutionalism, here roughly presented, is to be praised for having sought to rescue the role of (and for) the people in constitutional interpretation. Standing against what has been termed 'juricentric constitutions,' popular constitutionalists, despite the differences noted above, agree on contending the view of those who see courts as the exclusive guardians and interpreters of constitutions. Under this approach, constitutions are political matters and thus open to popular readings.

The fact that constitutions are opened to popular interpretations does not mean, however, that institutional branches are out of the picture. In fact, popular

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Lacombe, *Introduction, in Law as a Gendering Practice* 2, 6-8, 11 (Dorothy E. Chunn & Dany Lacombe eds., 2000).

<sup>250</sup> MOUFFE, *AGONISTICS*, *supra* note 209, at 124-5.

<sup>251</sup> G. A. Cohen, *Base and Superstructure: A Reply to Hugh Collins*, 9 OXFORD J. LEGAL. STUD. 95, 99-100 (1989).

constitutionalism—as I have argued—depends to a large extent on the regime remaining in place and therefore on the functioning of governmental institutions. Popular constitutionalism contends that these institutions produce their constitutional interpretations in a responsive fashion.

To whom are they to be responsive? To the people. Popular constitutionalism requires an active citizenry. It demands an active civil-political society be attentive to constitutional matters, on the one hand, and in fluid, although tense, dialogue with governmental institutions, on the other. By drawing on the insights from popular constitutionalism, I have shown that social protests are but one of the means—although currently a very important one—the people themselves resort to in order to participate in the popular interpretation of constitutions. Social protests are thus a means through which the people take part in shaping public opinion, a powerful reason why States should pay more attention to protesters' contentions and why attempts to suppress them are to be regarded with suspicion. In the next and final chapter, I will explore the nature of this institutional responsiveness. Whereas I think popular constitutionalism sees this responsiveness as something desirable, the fact that it is a mediated form of popular constitutionalism signals it is also contingent, that is, it may or may not happen. By exploring the duty of the people to submit their view to institutional avenues (what I term the democratic burdens on social protests), I will explore the correlative institutional duty—not just the mere option—to establish a dialogue.

## CHAPTER 6

### PROTESTS AND INSTITUTIONS: TAKING THE CONSTITUTION WHERE?

#### I. Democratic burdens on social protest

A. *The constitutional burdens on social protests*

B. *A democratic burden*

#### II. Institutional popular constitutionalism

A. *The diarchic character of constitutional interpretation*

B. *Democratic internal viewpoint*

### Introduction

*“ ... what would follow is only the demand for a constitution having within itself the characteristic and principle of advancing in step with consciousness, with actual man, which is possible only when man has become the principle of the constitution.”*

Karl Marx\*

In Chapter 1, I argued that the sociological literature on social movements, being social protest one of the means movements resort to, shows that popular

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\* CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT' 20 (Joseph O'Malley ed. Cambridge University Press 1982 rep.) (1843).

movements are (almost inextricably) related to the State; the State both influences and is influenced by social movements. In this sense the State and its institutions are the target of social movements—they seek to influence their march—but not their enemies—they do not seek to overthrow them.

I have included constitutions under this very same analysis and proceeded from there to distinguish a mixture of protests and related events that have been taking place during the last five years or so. While allegedly based on similar reasons, from a constitutional law viewpoint these social protests movements are different. On the one hand, I identified revolutionary movements, such as those of the ‘Arab Spring,’ that were aimed at overcoming constitutional schemes the people had been living under. The constitutional fact—as I termed it in Chapter 2—of having produced new constitutions signals that a radical (in constitutional terms) objective was achieved. On the other hand, there were social protest movements whose aim was more modest, albeit tremendously important. These movements, I argued, wanted to influence constitutional interpretation by advancing their own readings of constitutions. Different from revolutionary movements, which pursue the enactment of brand-new constitutions, these protesters have played within the constitutional rules already laid down. This was (and still is) the case, to name one, of Chilean students that have been mobilizing since 2006.

Bearing this difference in mind it is possible to notice that constitutional law relates to social protest in, at least, two different ways. Resembling the sociological analysis of social movements, and the annotated relation between them and States

and vice versa, I argued constitutions influence social protests and social protests influence constitutions. First, social protest movements that come to terms with the existence of the State and its institutions, the very constitutional scheme they seek to influence, can claim institutional protection for their non-institutional actions. This is what I argued in Chapters 3 and 4 when showing how Western constitutional schemes of rights (should) protect the (positive) right to protest. The State and its institutions, seen in this light, permit protests (and limit them as well) by opening institutional avenues (such as courts) to redress limitations on citizen participation.

The relation between social protests and constitutions, however, is not merely limited to the protection (and regulation) of the right to protest; it also flows in the other direction as well. Social protests influence constitutional interpretation. As I argued in Chapter 5, citizens' readings of constitutions that are proposed through social protests also impinge constitutional understanding. This is the very sense in which social protests influence the way constitutions end up being understood.

Social protests read through the glass of popular constitutionalism—I ended up suggesting in Chapter 5— are forms of playing by the rules<sup>1</sup> or, as I argued by resorting to the words of Philip Pettit, forms of political contestation that assume the regime remaining in place.<sup>2</sup> In fact, despite popular constitutionalism highlighting the role, many times devaluated, of the people themselves in

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<sup>1</sup> A form of playing by the rules that seeks to substantively influence those very same rules by enhancing both its democratic and political understanding.

<sup>2</sup> Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 *CURRENT LEGAL PROBLEMS* 59, 62 (2012)

producing constitutional understanding, its many variants also acknowledge the need for institutions. Popular constitutionalism certainly democratizes the understanding of constitutional law, but it does not replace it with popular practices that, getting rid of institutions, ground constitutional law.<sup>3</sup> Popular constitutionalism is better depicted as a sort of popular institutionalism. Popular constitutional readings, such as those the people pose through protests, are directed at, and mediated by, institutional politics.<sup>4</sup> Put in other words, popular readings of constitutions are rather nude interpretations whose normative force depends, to a large extent, on their institutional back-up. It is when both popular understanding of constitutions and institutional decisions meet—and not necessarily when they coincide—that the role of the people is vindicated.

It is because popular constitutionalism accepts, to the extent it does not radically contest, institutional dependence that non-institutional forms of participation, such as social protests, are not forms of populism. According to Richard Bellamy, it is populism—which tends to be “anti-system ... a straight appeal against it”—what besets Habermas’ reliance on social movements as democratic input into the constitutional system.<sup>5</sup> Social movements, Bellamy contends, have little incentive

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<sup>3</sup> To put it in the words of Matthew Adler, popular constitutionalism is about the “structure of constitutional decisionmaking” and its content, and not about the practices constitutional law must rest upon. Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* 100 NW. U. L. REV. 719, 798 (2006).

<sup>4</sup> I have taken the concept of mediated popular constitutionalism from Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

<sup>5</sup> RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 139 (2007).



“to relate their demands to those of others within the political community ...”.<sup>6</sup> However, this is not what popular constitutionalism is about.<sup>7</sup> As I have been arguing here, popular constitutionalism needs institutions, and the emphasis it places on public opinion is to bring the people back to their crucial constitutional role: that of being final arbiters of constitutional disputes. According to popular constitutionalists, and depending on their different emphasis, this is a role that the people are to play either in the political (legislatures and executives) or the judicial branch. At any rate, this is a role to be played not dispensing with institutions but engaging with them. Popular constitutionalism’s thrust depends, to a large extent—as I ended up arguing in the last section—, on keeping an open, however robust, tense, and at times unpleasant, dialogue with formal institutions.

However, it is this very reliance on institutions and a certain ambiguity as to the nature of this institutional responsiveness what may take us to conclude that popular constitutionalism does not change things very much. In the best scenario, it merely claims institutional avenues should be permeated with popular interpretations without contending the sovereign character of institutions as constitutional expositors. I believe institutions serve a different purpose. They allow popular understandings of constitutions to be open to all citizens by offering channels where exclusion is not permissible. Seen in this light, as I proceed to

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<sup>6</sup> *Id.*

<sup>7</sup> See generally, NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* (2014) (arguing that, to the extent social movements do not seek to overcome political institutions, but rather engage with them, they are “consistent with the diarchic nature of representative democracy.”). See also, Hanspeter Kriesi, *The Populist Challenge*, 37 *WEST EUROPEAN POLITICS* 361, 363 (2014) (arguing that, in general, “populism has a strong anti-institutional impulse ...”).

argue now, the rule of recognition may, in a sense, be altered—or at least democratized. Amid intense popular participation (although of course this is not always the case), constitutional interpretation cannot be solely located at the institutional level; it needs to be located at the institutional level *in conjunction with* popular and non-institutional practices. It is true that the fact that popular meanings are transformed into political power by institutions signals these interpretations are constitutional—instead of nude popular readings. However, the importance of this process is not the mere fact that these readings have become either embraced or accepted by the State and its institutions, but *the political fact* that institutions are under the duty to engage in a dialogue with popular readings, therefore rendering these readings attributable to the people (the author) as a whole—and not just to a faction of it.<sup>8</sup>

The (I) first part of this chapter furthers this argument. It insists on the relation between social protests as constitutional interpretations and governmental institutions. I will claim that this relation is not merely strategic (it helps to consolidate social changes) nor contingent (this is the way our polity is), but a necessary step for popular readings to be(come), properly speaking, constitutional interpretations. This is what I call a democratic burden on protesters and the only

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<sup>8</sup> Quentin Skinner, *The Genealogy of the Modern State* 162 PROC. BRIT. ACAD. 325, 344-5 (2009) (detailing representation in Hobbes as one of the conditions the modern State exhibits). *See also*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181-2 (1999) (arguing the “Constitution belongs to us collectively, as we act together in political dialogue with each other—whether we act in the streets, in the voting booths, or in legislatures as representative of others”); CARL SCHMITT, CONSTITUTIONAL THEORY 239-41 (Jeffrey Seitzer trans. & ed., 2008) (noting that there is no State without representation and arguing citizenry to be understood as public-, rather than private-, interest oriented).

way, as I will argue in the second part (II), in which their popular understandings can be redirected from a partisan group of protesters to the people as a whole, therefore being universalized (in a constitutional fashion). This interplay, I will end up arguing, also serves to democratize our constitutional practices.

### **I. Democratic burdens on social protest**

This part contends protesters have democratic burdens they should respect; these burdens stem from the fact we are social creatures who organized around common institutions and from conceiving constitutions as common commitments. It therefore takes constitutions, States, and institutions, and the very fact people are social creatures, for granted.<sup>9</sup> It assumes “[y]ou are condemned to life in a polity as a matter of historical necessity”<sup>10</sup> and, at the same time, that that very fact does not (automatically) amount to domination.<sup>11</sup> In other words, it assumes political associations.<sup>12</sup> As professor Ronald Dworkin put it,

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<sup>9</sup> PHILIP PETTIT, JUST FREEDOM. A COMPASS FOR A COMPLEX WORLD 116 (2014).

<sup>10</sup> *Id.* at 117.

<sup>11</sup> *Id.* at 117-9.

<sup>12</sup> It assumes political associations without assuming the modern “nation-state is ... the natural and necessary representation of modern society.” Daniel Chernilo, *The critique of methodological nationalism: Theory and history*, 106 THESIS ELEVEN 98, 99 (2011).

governments do exist, their boundaries and hence claims of dominion are the product of historical accident, and almost all of us are born or brought into one of them.<sup>13</sup>

What this approach suggests is the possibility of evaluating the State and its institutions—in their indifference or subjection to law,<sup>14</sup> in the fairness or injustice of their decisions,<sup>15</sup> in their responsiveness to the people’s views, and so on.<sup>16</sup> As Axel Honneth has argued, this is a normative account that enables us to test the legitimacy of the State and its decisions.<sup>17</sup> Otherwise, as he claims, we would be left without tools for evaluating (what we now consider) advances such as the

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<sup>13</sup> RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 317-8 (2011) (terming debates about imagining people living in a pre-civil State condition as “a philosopher’s parlor game[s]”).

<sup>14</sup> BLANDINE KRIEDEL, THE STATE AND THE RULE OF LAW 5-8 (Marc A. LePain & Jeffrey C. Cohen trans. Princeton University Press 1995) (calling “vulgar anti-statism” the approach that considers the mere existence of a State as a form of despotism).

<sup>15</sup> PETTIT, JUST FREEDOM, *supra* note 9, at 116-20.

<sup>16</sup> While here I am not considering, as I have repeated through this work, the political reasons we (might) have to obey the constitution, the State, and its institutions—nor when those reasons cease to hold—, these are undeniably related topics. In fact, this is, up to a certain point, part of what popular constitutionalism holds—and what I analyzed in Chapter 5. To summarize the argument: popular constitutionalism sees conflict and popular understandings advanced through non-institutional means as the necessary inputs constitutions are to permit if they wish to preserve their legitimacy. Under this approach conflict is neither to be eradicated nor feared as it is the very source of constitutional stability. However, this does not mean that the people are to accept whatever constitutional outcomes may come. This is how professor DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 13, at 323 put it:

These particular policies may stain the state’s legitimacy without destroying it altogether. Its legitimacy then becomes a matter of degree: how deep or dark is that stain? If it is contained, and political processes of correction are available, then citizens can protect their dignity—avoid becoming tyrants themselves—by refusing so far as possible to be party to the injustice, working in politics to erase it, and contesting it through civil disobedience when this is appropriate.

Therefore, faith in constitutions and in the institutional and legal systems citizens live by is one thing and shall not be confused with idolatry. Once faith in the actual chances of influencing constitutional understandings ceases, “[i]f the stain is dark and very widespread, and ... protected from cleansing through politics,” (*Id.*) the legitimacy of the State gets critically shaken. “Revolution ... is then in the cards” (*Id.* at 321).

<sup>17</sup> AXEL HONNETH, FREEDOM’S RIGHT. THE SOCIAL FOUNDATIONS OF DEMOCRATIC LIFE 306 (Joseph Ganahl trans. Columbia University Press 2014).

extension of the franchise to women.<sup>18</sup> Denying this evaluative stance would leave us with no tool to judge “the progress and the regressions” of the State in light of its normative achievements.<sup>19</sup> Moreover, without this evaluative approach we would be forced to accept the State’s extra-legal violence “as entirely normal application[] of state power.”<sup>20</sup>

The following sections show (A) the constitutional burden is defined by a certain understanding of constitutions as common commitments, rather than as empty frameworks to be captured by whoever happens to succeed in doing so. It explains that (B) this understanding poses on protesters the democratic burden of respecting political equality, which—I end up claiming in this section—institutions help to secure. Whereas this (political) duty to engage stems from a burden placed on citizens, it also explains why institutional openness to dialogue cannot be merely optional.

*A. The constitutional burdens on social protests*

When social protesters engage in constitutional interpretation they do so to propose an understanding of constitutions. Whether written or not, whether limited to a canonical text called ‘The Constitution’ or to a set of important practices we regard as constitutional,<sup>21</sup> constitutional interpretation requires a common point of departure. In this regard, constitutional interpretation amounts

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<sup>18</sup> *Id.* at 307.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 308.

<sup>21</sup> What the word constitutional distinguishes, Waldron argued, are “*issues* in terms of their importance.” JEREMY WALDRON, *THE LAW* 69 (1990).

to bringing forward an understanding of what already is a common (yet certainly contested as to its specific contours) ground.<sup>22</sup> On the other hand, it is only by offering an account of common concerns that social movements actually exert a popular influence.<sup>23</sup>

It is this common ground, along with its practices and concerns, what I think professor Reva Siegel had in mind when presenting what she considers to be the conditions social movements must meet in order to influence constitutions—excuse the redundancy—in a constitutional fashion.<sup>24</sup> According to Siegel, social movements influence constitutional interpretation by guiding, in myriad ways that include protests, officials whose actions expound our most basic commitments.<sup>25</sup> This is what she terms constitutional culture: “the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning ...”.<sup>26</sup> These interactions are what ground constitutional understanding.<sup>27</sup>

But if a mobilized group brings its interpretation into the constitution, wouldn't it be acting as a faction or an interest group whose influence must be checked? How could we distinguish between illegitimate groups advancing their own parochial interests, no matter how public-oriented they are presented to be, from those

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<sup>22</sup> As I hope it is clear, I'm restricting myself to the analysis of constitutional interpretation. This emphasis should not mislead our analysis to (falsely) believe that that very framework is placed “beyond challenge” (*Id.* at 81-2).

<sup>23</sup> PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 227 (2012).

<sup>24</sup> Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

<sup>25</sup> *Id.* at 1323-1325.

<sup>26</sup> *Id.* at 1325.

<sup>27</sup> *Id.*

pointing toward the common understanding? Certainly, “[c]onstitutional culture both licenses and limits [constitutional] change.”<sup>28</sup> What are the limits? What are then the conditions social protests movements must meet to *constitutionally* influence constitutional understanding? Siegel mentions two conditions: the consent condition and the public value condition.<sup>29</sup>

The consent condition, roughly put, requires those contesting constitutional meanings to advance their views “by conviction rather than coercion ... [they] must advance their views without resort to violent coercion.”<sup>30</sup> This does not mean that constitutional interpretations cannot be presented “in procedurally irregular, disruptive activities in an effort to make themselves heard, at times using unlawful conduct for their purposes,”<sup>31</sup> as in the case of social protest. Instead, it means these disruptive, and sometimes even illegal means, are mobilized in order to persuade and convince rather than to impose, coerce and force.

The public value condition, on the other hand, imposes on popular readings the duty to situate their constitutional understandings on the larger constitutional picture. In Siegel’s words, it “requires advocates to justify new constitutional understandings by appeal to older constitutional understandings that the

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<sup>28</sup> *Id.* at 1327.

<sup>29</sup> Others have preferred to distinguish by looking to the substantive differences between social movements and interest groups. This is the case of Lani Guinier & Gerald Torres, *Changing the Wind: Notes toward a Demosprudence of law and social movements*, 123 YALE L. J. 2740, 2745, 2756-62 (2014).

<sup>30</sup> Siegel, *Constitutional Culture*, *supra* note 24, at 1352.

<sup>31</sup> *Id.* at 1355.

community recognizes and shares.”<sup>32</sup> This condition requires challengers to not defer to current understandings, but to consider and engage with them.<sup>33</sup> As some have argued, this could help trigger an evaluation of whether these current understandings better answer our founding constitutional commitments as of today.<sup>34</sup> However, to insist, for this evaluation to be constitutionally permissible—or, in the words of professor Dworkin, ‘fair’<sup>35</sup>—it has to be channeled through “principles and memories of a constitutional tradition.”<sup>36</sup>

In Siegel’s words, the consent and the public value conditions work as disciplining “the way that movements make constitutional claims to others who do not share the movement’s interests and aims.”<sup>37</sup> These conditions permit taking the

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<sup>32</sup> *Id.* at 1356. *But see*, LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 4-9 (2012) (arguing our decisions should be guided not by reference to a “deeply flawed, eighteenth-century document,” but considering “the merits” of political proposals of each side).

<sup>33</sup> *Id.* I see an inevitable resemblance with the work of the late professor Ronald Dworkin, who argued that

Fairness in the constitutional context requires that an interpretation of some clause be heavily penalized if it relies on principles of justice that have no purchase in American history and culture, that have played no part in the rhetoric of national self-examination and debate. Fairness demands deference to stable and abstract features of the national political culture ... not to the views of a local or transient political majority just because these have triumphed of a particular political occasion.

RONALD DWORKIN, *LAW’S EMPIRE* 377 (1996).

<sup>34</sup> Professor Siegel herself, for example, writing on equal protection has argued that notwithstanding the constitutional text remains the same, we cannot be totally certain that “the body of equal protection law we inherit today is ‘true’ equal protection ...”. Reva Siegel, *Why Equal Protection no Longer Protects: The evolving forms of status-enforcing state action*, 49 *STAN. L. REV.* 1111, 1113-4 (1997).

<sup>35</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note 33.

<sup>36</sup> Siegel, *Constitutional Culture*, *supra* note 24, at 1359. *See also*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 11 (1996) (“The moral reading asks them [in Dworkin’s theory, judges] to find the best conception of constitutional moral principles—the best understanding of what moral status for men and women really requires, for example—that fits the broad story of America’s historical record.”). Of course, Dworkin is of utility here to signal that constitutional interpretations needs to fit within a certain tradition, background, etc. His theory, however, was hardly one that showed too much sympathy for popular approaches to constitutional understanding.

<sup>37</sup> Siegel, *Constitutional Culture*, *supra* note 24, at 1357.



jurisgenerative capacity of popular mobilizations seriously by acknowledging them as authoritative interpretative communities of constitutional interpretation.<sup>38</sup> But, at the same time, they also rule certain conditions that cultural or popular constitutionalism is to take into consideration, if not respect.

What drives my attention in this, however, is a certain understanding of constitutions these conditions lay upon, for here constitutions—understood beyond the constitutional text, although certainly including texts—embrace an ideal of public good in the sense of common belonging. We care about the constitution for many different reasons, but particularly because it designates common commitments rather than empty formulas anyone may capture in order to secure sectorial benefits. It is this understanding of constitutions what explains why we expect constitutional interpretations to be attributed to the people (as a whole) and not to some fraction of it.<sup>39</sup> If we were to deem the constitution and its

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<sup>38</sup> Guinier & Gerald, *Changing the Wind*, *supra* note 29, at 2745, 2751-5 (2014) (arguing that constituencies of non-experts become authoritative interpretative communities as long as they both provide the foundation and exert legitimizing power over legal change).

<sup>39</sup> This is not to deny there are group-relative accounts of what constitutional law is, but rather a way of allowing these groups to come to the forum and so influence the larger constitutional scheme. After all, there are many different groups who advance their own views as to what the constitution commands (permits or prohibits), and they claim their group, and their practices, to have authority to do so. However, this understanding of constitutions as common belonging does deny there are group-relative accounts as to what the recognitional constitutional community (group) is. *See*, Adler, *Popular Constitutionalism and the Rule of Recognition*, *supra* note 3, at 798-802. In other words, this is an approach amenable to legal pluralism as long as a constitutional scheme permits a complementary coexistence of different systems, but it rejects legal pluralism adopting a more radical approach in order to dispute the authority (i.e. separatists groups) of the very constitutional scheme they all inhabit. *See generally*, Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 400-7 (2008). An alternative is explored, among others, in Neil Walker, *The Idea of Constitutional Pluralism*, 65 THE MODERN L. REV. 317 (2002).

vision of the public good as “competing private interests,”<sup>40</sup> there would be little point in being concerned about its subordination to specific sectors of the body politic.<sup>41</sup> But this is not how we see constitutions.

### B. *A democratic burden*

How can we secure those two conditions will be respected? The answer to this question brings in what I think is a third condition of social protesters: an egalitarian turn that flows, the way I see it, from the understanding of constitutions as common commitments. This is none other than a requirement of political equality.

Political equality requires an equal distribution of power among citizens who see one another as equals in origin, dignity, and moral and political agency.<sup>42</sup> It is the normative thrust behind democratic rule that, as Dahl observed some time ago, there are no persons seen as better qualified to exclusively conduct public affairs.<sup>43</sup> This is a foundational principle of democracy that, to paraphrase Dworkin, demands we are treated with equal concern and respect, and thus accorded equal

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<sup>40</sup> Zephyr Teachout, *The unenforceable corrupt contract: corruption and Nineteenth-Century law*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 135, 145 (Monica Youn ed. 2011).

<sup>41</sup> This is not to deny that constitutions themselves involve certain a form of closure. In fact, a constitutional framework defines a *we/they* relation upon which politics is based. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 42-5 (2000). *But see*, Stefan Rummens, *Democracy as a Non-Hegemonic Struggle? Disambiguating Chantal Mouffe's Agonistic Model of Politics*, 16 CONSTELLATIONS 277 (2009) (arguing that Mouffe herself builds her agonistic theory of politics based on certain universal politico-constitutional values).

<sup>42</sup> URBINATI, DEMOCRACY DISFIGURED, *supra* note 7, at 18-9.

<sup>43</sup> ROBERT A. DAHL, ON POLITICAL EQUALITY 4 (2006) (“Among adults no persons are so definitely qualified than others to govern that they should be entrusted with complete and final authority over the government of the state.”).

political status.<sup>44</sup> Political equality is, to further insist, the belief that each of us is an ordinary and equal person, a member of a polity<sup>45</sup> whose views are to be given no more (individual) weight than the (individual) weight everybody else also enjoys.<sup>46</sup>

Reva Siegel is explicit on the relevance of political equality and the sense of belonging. In fact, far from seeing disagreements about constitutional meaning as divisive, she believes they help to create a more robust sense of community. Contestation as to constitutional meaning promotes forms of collective deliberation that are important “not only as a procedure for deciding how we act, but also as a practice for articulating who we are.”<sup>47</sup> According to what I have been arguing so far, it is not only that communities are given the opportunity and space to review themselves in light of common commitments, but also that constitutional lawmaking depends upon these very same processes.<sup>48</sup> Therefore, citizens guide officials in charge of applying the constitution (*guiding*), and precisely because of that they get attached to the constitution they see themselves expounding (*attaching*).<sup>49</sup> However, they do not play this role in solitude. “Citizens,” Siegel

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<sup>44</sup> DWORKIN, FREEDOM’S LAW, *supra* note 36, 7-8; Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 1-2 (1987-1988).

<sup>45</sup> CHARLES R. BEITZ, POLITICAL EQUALITY. AN ESSAY IN DEMOCRATIC THEORY xiii (1989).

<sup>46</sup> JEREMY WALDRON, GOD, LUCK, AND EQUALITY. CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT 128, 130-31 (2002).

<sup>47</sup> Siegel, *Constitutional Culture*, *supra* note 24, at 1341.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1341-2.

argues, “must enlist the voice and accommodate the views of others if they are to persuade officials charged with enforcing the Constitution.”<sup>50</sup>

Dworkin concurs. For him integrity—as he pictured it—involves the right of “each person or group in the community [to] have a roughly equal share of control over the decisions made by Parliament or Congress ...”.<sup>51</sup> It accepts and expands the role of citizens in contributing to shape public standards of the community,<sup>52</sup> but it also places demands on them;

It asks the good citizen, deciding how to treat his neighbor when their interest conflict, to interpret the common scheme of justice to which they are booth committed just in virtue of citizenship.<sup>53</sup>

This means that the political exposition of constitutional commitments impose associational demands binding on all citizens,<sup>54</sup> demands that, at the same time, are also open to be shaped by those very same individuals who are bound by them.<sup>55</sup> In the end, the mutual consideration in constitutional exposition that political equality demands comes from an associational obligation where the

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<sup>50</sup> *Id.* at 1343.

<sup>51</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note 33, at 178.

<sup>52</sup> *Id.* at 189.

<sup>53</sup> *Id.* at 189-90.

<sup>54</sup> *Id.* at 211-215 (arguing a model of principle better serves the objectives of a community that accepts to be governed “by common principles ... [where] each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means.”).

<sup>55</sup> *Id.* at 190 (arguing there is an expressive value involved when “people in good faith try to treat one another in a way appropriate to common membership in a community governed by political integrity and to see each other as making this attempt, even when they disagree about exactly what integrity requires in particular circumstances.”).

dignity,<sup>56</sup> liberty,<sup>57</sup> justice,<sup>58</sup> fairness,<sup>59</sup> and self-respect of community members are (also) at play.<sup>60</sup>

Now we can ask again. Following Reva Siegel, popular readings of constitutions are to respect both the consent and the public value conditions. This is so because, following Dworkin and others, we assume constitutions represent the common principles of justice that picture how we see one another. We are bound by these principles and at the same time are invited to interpret them in an egalitarian fashion, that is, under the assumption we are but one among many. How can it be secured that these conditions will be respected? Here is where the diarchic character of constitutional interpretations comes in.

## II. Institutional popular constitutionalism

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<sup>56</sup> Here I follow Jeremy Waldron, *How law protects dignity*, 71 CAMBRIDGE LAW JOURNAL 200, 201-2 (2012), who claims dignity to be a relational status: “the standing ... that a person has in a society and in her dealings with others.”

<sup>57</sup> As Philip Pettit has defended, it is the equal standing (an “equally accessible influence”) we all have in controlling government and public affairs what provides for political liberty, the idea that citizens “would each be able to walk tall, live without shame or indignity, and look one another in the eye without any reason for fear or deference.” PETTIT, ON THE PEOPLE’S TERMS, *supra* note 23, at 2-3, 179. *See also*, BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* 5, at 165 (arguing that the advantage that everyone is to be counted equally, the basis upon which democracy is erected, “lies in its non-dominating character.”).

<sup>58</sup> *See*, Thomas Christiano, *The Authority of Democracy*, 11 THE JOURNAL OF POLITICAL PHILOSOPHY 1, 19-22 (2003) (“A fair way of making decisions ... treats each publicly as an equal and respects each citizen’s judgment ...”).

<sup>59</sup> JOHN RAWLS, A THEORY OF JUSTICE 194-5 (1999 rev. ed.) (“the principle of (equal) participation ... requires that all citizens are to have an equal right to take part in, and to determine the outcomes of, the constitutional process that establishes the laws which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone’s advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented.”).

<sup>60</sup> DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 13, at 319-21.

This part begins contending (A) that constitutional interpretation rests, just as representative democracy, on a diarchy; it rests on the interaction between informal and non-institutional avenues, on the one hand, and institutional lawmaking procedures, on the other. It also argues, in line with the previous two sections, that (B) the interaction between popular readings of constitutions advanced through social protests and political institutions not only serves political equality (a benefit that only considers the burdens on protesters), but also permits democratizing our constitutional understandings (the institutional duty). When this interaction occurs, an interaction that I see as mandatory for institutions, constitutional decisions carry greater democratic pedigree and attributing them to the people is no longer just a matter of superstition.

*A. The diarchic character of constitutional interpretation*

According to Nadia Urbinati, democracy is a diarchy. This means that democracy is based on the interplay of two different sovereign powers: that of the democratic opinion, on the one hand, and that of democratic will, on the other.<sup>61</sup> Whereas the latter accounts for “procedures, rules and institutions,”<sup>62</sup> the former stands for “the opinion of those who obey and participate only indirectly in ruling.”<sup>63</sup> While will evokes formal avenues of authoritative power (i.e. a congress passing a law), public opinion’s force “is external to the institutions and its authority is informal (as not translatable into the law directly and not endowed with the signs of

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<sup>61</sup> URBINATI, DEMOCRACY DISFIGURED, *supra* note 7, at 22.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

command).<sup>64</sup> Democracy's legitimacy is erected upon this interplay between will and opinion, a relation where each domain influences, and cooperates with, the other, but "without merging."<sup>65</sup> Where opinion is overlooked, laws become oppressive and pure arbitrary imposition.<sup>66</sup>

Constitutional interpretation is also diarchic. As I argued in Chapter 1, social movements, protest movements among them, relate with the State and its institutions; they influence the State and the State influences them.<sup>67</sup> In Chapter 5, I insisted that this is the sort of relation popular constitutionalism also entails, for popular constitutionalists, contrary to what some have suggested, count on institutional avenues—whether courts, legislatures or administrations—as the means to channel popular readings, thus rendering them authoritative. Institutional politics, in other words, transform public opinion into public will,<sup>68</sup> and social power of influence, as Habermas termed it, into political power.<sup>69</sup> However, whereas popular constitutionalism sees the relation between institutions and citizens as contingent, I see it as an unavoidable burden on institutions.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 39.

<sup>67</sup> The constitutional implications of this mutual influence, notwithstanding the enormous regulatory power of the State, has been analyzed in Mark Tushnet, *The Constitutional of Civil Society*, 75 Chi.-Kent L. rev. 379 (1999-2000). From a social movement perspective, see, Edwin Amenta & Neal Caren, *The legislative, organizational, and beneficiary consequences of state-oriented challengers*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 461 (David Snow et al. eds., 2007).

<sup>68</sup> ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM. A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 14-5 (2012).

<sup>69</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 363 (William Rehg trans., MIT Press 1998).

There is one pivotal reason that explains why constitutional interpretation cannot be but diarchic. This is so because the very act of constitutional foundation establishes a system of non-institutional/institutional functioning.<sup>70</sup> The state of exception, where the true political force of the sovereign is manifested, needs the law (and its institutional form) for its own validity; the law, in turn, is the product and the reaffirmation of the exceptional moment of decision.<sup>71</sup> Just as a constitution, along with the legal system that is erected under its auspices, is “the inner truth of the revolution ... the revolutionary exception is the inner truth of constitution,” as Kahn observed.<sup>72</sup> This is a clear indicator that “[t]he decision concerns neither a *quaestio iuris* nor a *quaestio facti*, but rather the very relation between law and fact,” as Agamben put it.<sup>73</sup> This relation is inescapable—such as that of the slave/master divide in Hegel—; as such, constituent power and constituted power stay in this relation.<sup>74</sup>

This paradox of sovereignty, the very fact that constituent power as a manifestation of sovereignty is “at the same time, outside and inside the juridical

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<sup>70</sup> I utilize the voice *system* here only to denote the institutional (the State) and non-institutional (public opinion) systems are (themselves) individual systems. These systems, although related, do not substitute each other, as explained in Habermas (*Id.* at 372). Still more accurate is the idea put forward by Martin Loughlin, who contends “we can overcome the fact-norm divide by treating both juristic and sociological sides as dimensions of [the] social practice [of the power of the state].” MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 221 (2010). In a similar fashion, professor Nadia Urbinati, *Free Speech as the citizen's right*, in CITIZENS DIVIDED. CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 125, 134 (Robert C. Post 2014) (arguing that in the characterization of democracy as a diarchy “‘will’ and ‘opinion’ are the two powers of the democratic sovereign; and that they are different and should remain distinct, although in need of constant communication.”).

<sup>71</sup> GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 15-25 (Daniel Heller-Roazen trans., Stanford University Press 1998).

<sup>72</sup> PAUL W. KAHN, POLITICAL THEOLOGY. FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 47 (2011).

<sup>73</sup> AGAMBEN, HOMO SACER, *supra* note 71, at 26.

<sup>74</sup> LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 70, at 227.



order,”<sup>75</sup> projects itself along regular (as distinguished from the constituent) moments of the constitutional State.<sup>76</sup> As Loughlin argues, the State itself can only be understood once we consider “both its juristic and sociological sides.”<sup>77</sup> Arguing exclusively in favor of one of these sides, say rejecting the role of institutions or that of public opinion, blurs the fact that the constituent power is both political and legally constituted.<sup>78</sup> In addition, it also overlooks the reflexive relation of collective self-determination these components stay in throughout governmental times—times that certainly include constitutional exposition.<sup>79</sup> In fact, this process of collective self-determination, the process of defining what *we* (politically) are, extends beyond the constitutive moment to encompass the work of constituted institutions.<sup>80</sup> The words of Loughlin are more illustrative here; he says,

constituent power cannot be understood without reference to constituted power; it acts for the purpose of establishing a constitutional form of

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<sup>75</sup> AGAMBEN, *HOMO SACER*, *supra* note 72, at 15.

<sup>76</sup> This distinction was widely popularized by BRUCE A. ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 6-10 (1991).

<sup>77</sup> LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW*, *supra* note 70, at 221.

<sup>78</sup> Just as democracy is based on an adequate and balanced relation between public opinion and authoritative will formation, constitutional interpretation risks becoming disfigured when one of the wills takes over the other. URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 7, at 5-12. *See also*, Urbinati, *Free Speech as the citizen's right*, *supra* note 70, at 135 (“in representative democracy, the sovereign is not simply the authorized will (franchise), but is instead a dual entity in which the will or decision is one component, the other being the opinion of those who obey the law and participate only indirectly ruling.”).

<sup>79</sup> 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. 2008).

<sup>80</sup> As Webber explains, we usually consider constitutions as an ‘end-state’ and thus we struggle to frame every political decision within borders that, we assume, are already determined. Contrary to this, “[a] constitution should not be understood as a completed project; rather, consistent with political legitimacy, one should conceive of a constitution as an *activity*.” GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION. ON THE LIMITATION OF RIGHTS* 13 (2009) (emphasis in the original).

government, and it continues to work through the established constitutional form by questioning and modifying the meaning of that structure.<sup>81</sup>

This is what constitutional interpretation—the constant definition and revision of what type of political community we are—is about.

There are other very important reasons—important in light of my discussion here—that concur in highlighting the crucial role democratic institutions play. First, institutions help to secure political equality. Popular and protest movements are not unitary nor have a single will. It is not that once we eliminate the State a natural unity will emerge. If we take politics seriously it is hard to believe that in the absence of the State “the Multitude can immediately rule itself and act in concert without the need of law or the State,”<sup>82</sup> as if—as Kriegel put it—society were “the antidote to the expanding malignant tumor of the state...”.<sup>83</sup> This is something Reva Siegel also acknowledges. As she put it when presenting the consent condition social protest movements are to respect, this condition “does

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<sup>81</sup> LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 70, at 227.

<sup>82</sup> CHANTAL MOUFFE, AGONISTICS. THINKING THE WORLD POLITICALLY 78-9 (2013).

<sup>83</sup> KRIEDEL, THE STATE AND THE RULE OF LAW, *supra* note 14, at 7 (arguing against vulgar anti-statism and the consequent fetishization of society). This is something that stands even when *that* anti-statism is based, as recent waves of discontent were based, in the disconnection between States and the people. In fact, those who believe the multitude alone—“a sphere of common affairs that is no longer state-run ... experimentations of forms non-representative and extra-parliamentary”—can provide the answer to current injustices overlook forms of hegemony they themselves (may) adopt. MOUFFE, AGONISTICS, *supra* note 82, at 69-75. For example, the horizontal character many supporters of recent mobilizations endorsed and praised—such as ‘Occupy’ and the *indignados*—implied the elimination of dissent; during general assemblies those participating in them were all granted a one-person veto.

not guarantee speakers equality of resources or authority...".<sup>84</sup> Furthermore, depending on the social structures of power and oppression, this condition can actually "naturalize radically antidemocratic forms of subordination."<sup>85</sup>

Therefore, some form of institutional articulation becomes unavoidable. We need not refer back to Hobbes' Leviathan, but to H.L.A. Hart's *The Concept of Law* to understand why this form of articulation is needed:

It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules.<sup>86</sup>

The same applies to constitutions.<sup>87</sup> For this is precisely the kind of common normative (not necessarily in a legalistic sense) background constitutions provide, "mak[ing] politics possible among people who disagree, often quite radically, about values, principles, rights, justice, and the common good."<sup>88</sup> This frame cannot be solely based on a sort of tacit or consensual fashion, for—as Jeremy Waldron put it—when there is

a large and complex polity ... where members are diverse, it may be doubtful whether stable political practices can be identified just by implicit know-how. In those circumstances, written norms seem necessary; formality has to take the place of tacit or clubbish understanding, and

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<sup>84</sup> Siegel, *Constitutional Culture*, *supra* note 24, at 1356.

<sup>85</sup> *Id.*

<sup>86</sup> H.L.A. HART, *THE CONCEPT OF LAW* 91 (1997).

<sup>87</sup> *See generally*, WEBBER, *THE NEGOTIABLE CONSTITUTION*, *supra* note 80, at 19-21.

<sup>88</sup> Jeremy Waldron, *Book Review: Never Mind the Constitution*, 127 HARV. L. REV. 1147, 1169 (2014).

constitutional formulations themselves have to serve as a focus of unity in an otherwise pluralistic community.<sup>89</sup>

Whereas the informal public sphere is (not only relevant, but) crucial in providing the State, its institutions, and its decisions with legitimacy, this work cannot be done in an egalitarian (=mutual understanding) fashion without the State and its institutions.<sup>90</sup> Whether by opening institutional channels to all so they may collectively concur<sup>91</sup> or providing material access to the public sphere so that material inequalities will not dominate,<sup>92</sup> the State and its institutions offer their avenues as a common depository of recognition and dignity everyone is to enjoy.<sup>93</sup> As Honneth explains, the democratic constitutional State institutionalizes and expands “the right that citizens have already accorded to each other for the purpose of unforced self-legislation.”<sup>94</sup> Following Habermas, the constitutional State is meant to enable “effective utilization of equal communicative freedom”<sup>95</sup>

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<sup>89</sup> *Id.* at 1171. The same has been held from a republican perspective. Consider the words of PETTIT, JUST FREEDOM, *supra* note 9, at 111:

But it is hard to see how such a spontaneous, state-independent order could identify basic liberties reliably and maintain equal resourcing and protection of those liberties that is required by social justice.

<sup>90</sup> HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 69, at 132 (“The moment of a reciprocal conferral of rights remains a metaphorical event. It can perhaps be recalled and ritualized, but it cannot become permanent unless state power is established and put to work.”).

<sup>91</sup> WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 80, at 19 (“The actualization of the principle of democracy requires a system of rules, procedures, and institutions to allow citizens to speak and collectively to act.”).

<sup>92</sup> JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE. AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 227-8 (Thomas Burger trans. MIT Press 1991).

<sup>93</sup> See, Charles Taylor, *Some Conditions of a Viable Democracy*, in DEMOCRACIA REPUBLICANA / REPUBLICAN DEMOCRACY 67, 74-5 (Renato Cristi & Ricardo Tranjan eds. 2012). See also, JEREMY WALDRON, LAW AND DISAGREEMENT 111, 116-8 (1999).

<sup>94</sup> HONNETH, FREEDOM’S RIGHT, *supra* note 17, at 305.

<sup>95</sup> HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 69, at 170.

and “to secure”—as he explains—“an effective exercise of the political autonomy of socially autonomous citizens.”<sup>96</sup>

The egalitarian value the State and its institutions serve is further noticed once we pay attention to the special, as opposed to common, status those who fail to comply with common rules and procedures claim for them, for in that case such a person is not only “violating a duty of justice to his [her] fellow citizens,”<sup>97</sup> but also asking to be assumed of a special kind. For one, Pettit has argued that a contestatory citizen requires “a commitment to living under an arrangement where all members of the community can share in a system of equal popular influence.”<sup>98</sup> This virtue—recall Pettit talks from the republican tradition—supposes not a sectarian disposition, but one of “compromise and accommodation.”<sup>99</sup> Otherwise, rejecting interaction and submitting your sense of justice to others’ views assumes you, and your group, are of a special kind.<sup>100</sup> As Christiano put it, this rejection to engage supposes that one is not considering others as equals but “in effect expressing the superiority of one’s interests over others.”<sup>101</sup>

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<sup>96</sup> *Id.* at 176.

<sup>97</sup> Christiano, *The Authority of Democracy*, *supra* at 58, at 18.

<sup>98</sup> PETTIT, ON THE PEOPLE’S TERMS, *supra* note 23, at 228.

<sup>99</sup> *Id.*

<sup>100</sup> PETTIT, JUST FREEDOM, *supra* note 9, at 114.

<sup>101</sup> Christiano, *The Authority of Democracy*, *supra* at 58, at 12.

Second, institutions help make social changes effective and secure.<sup>102</sup> As Guinier has argued, effective social change, including advancing a new constitutional understanding, demands decoupling previous assumptions. To be sustainable, these changes at both social and cultural levels are to be “institutionalized” so that it would be easier to oversee them. As she puts it, change is “a process that must be continuously monitored under the watchful eye of engaged political and social actors.”<sup>103</sup> Thus, change in public opinion alone is not enough<sup>104</sup>—or at best it is only the beginning,<sup>105</sup> for rights alone, or alleged social change, provide no set of policies to implement these (new) understandings.<sup>106</sup>

Again, you may consider these implementations unnecessary if you believe it is up to society itself to enforce its own interpretations. But how? Whose decisions will be reputed to be those of society? How will changes become tangible? The diarchic nature of constitutional interpretation solves these problems by requiring social changes to move through institutional politics until they transform into political

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<sup>102</sup> In fact, as Honneth illustrates, it is the State the organ we have charged with the duty of “implementing the democratically negotiated will of the people.” HONNETH, *FREEDOM’S RIGHT*, *supra* note 17, at, at 304.

<sup>103</sup> Lani Guinier, *Beyond Legislatures: social movements, social change, and the possibilities of demosprudence. Courting the people: demosprudence and the law/politics divide*, 89 BOSTON U. L. REV. 539, 551 (2009).

<sup>104</sup> Guinier & Torres, *Changing the Wind*, *supra* note 29, at 2758. *See also*, Guinier, *Beyond Legislatures*, *supra* note 103, at 551 (“social change is only sustainable if it succeeds in changing cultural norms, is institutionalized through policy decisions and the oversight of administrative actors ...”).

<sup>105</sup> MOUFFE, *AGONISTICS*, *supra* note 82, at 115-6.

<sup>106</sup> Guinier & Torres, *Changing the Wind*, *supra* note 29, at 2759.

power. This political power, in turn, will produce policies “that can be converted into binding decisions and programs to be implemented.”<sup>107</sup>

*D. Democratic internal viewpoint*

Formal changes (expressed either in laws or in constitutional amendments) account for the political fights displaced voices have fought and serve as testimonies of the struggles we have experienced. Institutions, as argued above, contribute (sometimes decisively) to secure these social changes, but this does not mean that institutions replace public opinion, just as public opinion does not replace institutions. What institutional outcomes do is validate social rhetoric offering a new constitutional vision.<sup>108</sup> This diarchic nature of constitutional interpretation, as I have argued, is far from being purely contingent, but a democratic requirement that stems from the understanding of constitutions as common commitments—an understanding that invites what some call an “ongoing dialogue between constitutional law and constitutional culture ... [a] public debate about the meaning of constitutional principles.”<sup>109</sup>

That political institutions help us deal with the requirements of political equality is something the different variants of popular constitutionalism accept. As I explained in Chapter 5, popular constitutionalists themselves rely on institutions. Theirs, as it has been put, is not a “philosophy of unmediated preference gathering

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<sup>107</sup> HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 69, at 331.

<sup>108</sup> Guinier & Torres, *Changing the Wind*, *supra* note 29, at 2798.

<sup>109</sup> Guinier, *Beyond Legislatures*, *supra* note 103, at 559.

(like the populist initiative process or the market).<sup>110</sup> Rather, as Guinier and Torres explain, theirs is a “commitment to the lawmaking force of meaningful participatory democracy.”<sup>111</sup>

Whereas it is therefore true that social changes alone lay no constitutional interpretation but when complemented with institutional change, the opposite holds true as well: “rule shifting without culture shifting” is neither capable of producing “real and sustainable change”<sup>112</sup> nor of encouraging “popular ownership of the Constitution’s text.”<sup>113</sup> In fact, when changes are only formal—as Douzinas has convincingly argued—we risk the total collapse of our institutions by increasing (if not fueling) the gap between common and conventional (sometimes unspoken) social commitments, on the one hand, and social and economic policies and laws, on the other.<sup>114</sup>

The interplay between popular readings of constitutions and institutional outcomes I am talking about here seeks precisely to overcome this mismatch. It permits a process that enhances democratic credentials of our constitutional commitments by giving the people a crucial say on what the constitution is. In other words, by inviting the people to directly be involved in constitutional exposition, institutional outcomes become democratized and thus legitimized. When we see social mobilizations as complementing institutional outcomes we can

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<sup>110</sup> *Id.* at 553 n.97.

<sup>111</sup> Guinier & Torres, *Changing the Wind*, *supra* note 29, at 2751.

<sup>112</sup> *Id.* at 2797-8.

<sup>113</sup> Gerald Torres & Lani Guinier, *The Constitutional Imaginary: just stories about we the people*, 71 MD. L. REV. 1052, 1054-5 (2012).

<sup>114</sup> COSTAS DOUZINAS, PHILOSOPHY AND RESISTANCE IN THE CRISIS 49-51 (2013).



appreciate this interaction deepens—to the extent this is possible—the correspondence between what Nadia Urbinati terms the ‘legal’ country and the ‘real’ country, thus emancipating power “from the plague of being identified with a command-obedience relationship ...”.<sup>115</sup>

As can be seen, the interaction that a diarchic constitutional interpretation produces democratizes—going back to Hart once again—the internal viewpoint. According to Hart, we are participants in a legal system, rather than mere observers in search of certain regularities, when we “use the rules as standards for the appraisal of their own and others’ behaviour.”<sup>116</sup> The violation of a rule, accordingly, justifies a hostile reaction that will follow—it is “a reason for hostility.”<sup>117</sup> Of course, as Hart himself made it clear, there are many reasons—other than a moral or a political commitment—to hold such a view:

their allegiance to the system may be based on many different considerations: calculation of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.<sup>118</sup>

Notably, as Hutchinson elaborated, the democratic credentials of legal decisions seemed irrelevant,<sup>119</sup> which, at least in the contexts we talk from now, is plainly

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<sup>115</sup> URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 7, at 36-8

<sup>116</sup> HART, *THE CONCEPT OF LAW*, *supra* note 86, at 98 (emphasis in the original).

<sup>117</sup> *Id.* at 90.

<sup>118</sup> *Id.* at 203.

<sup>119</sup> ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* 45-63 (2009). *See also*, SCOTT J. SHAPIRO, *LEGALITY* 96 (2011) (commenting on Hart’s Concept of Law and noticing that “[t]he existence of legal authority need not depend on the moral legitimacy of the body claiming power.”).

inadmissible. A model where citizens are not required to take stance toward institutional decisions based on these decisions' democratic pedigree is "ill suited to the institutional demands of strong democracy."<sup>120</sup> In fact, a democracy committed to self-government aims at reducing the gap between institutional decisions and society.<sup>121</sup> In such a context citizens evaluate decisions—laws included—precisely considering their legitimacy. In the words of Hutchinson:

A strong democracy depends upon its citizen's willing acceptance of the system's overall legitimacy through their own participation rather than a begrudging resignation to rules developed and administered by official others.<sup>122</sup>

Consequently, a participatory-based (substantive) bound to the rules does much more than merely increasing the stability of the system, as Hart pointed out.<sup>123</sup> Political participation actually *is* the condition of its legitimate existence.<sup>124</sup> This is critical for constitutions and their interpretations. As Waldron argued,

the constitution cannot do any of the work it is supposed to do in framing and defining a political system unless people are prepared to accept it, for the time being, as authoritative.<sup>125</sup>

The diarchic interpretation of constitutions brings democracy in. It claims, as noted above, that institutional interpretations of constitutions can be attributed to

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<sup>120</sup> HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED*, *supra* note 119, at 54.

<sup>121</sup> *Id.* at 55.

<sup>122</sup> *Id.*

<sup>123</sup> HART, *THE CONCEPT OF LAW*, *supra* note 86, at 203.

<sup>124</sup> HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED*, *supra* note 119, at 56.

<sup>125</sup> Waldron, *Book Review: Never Mind the Constitution*, *supra* note 88, at 1169.

the people as a whole only when having been spurred by political participation— included that carried out through protests. Does this mean that those institutional interpretations of constitutions approved without contentions from the citizenry are not (legally) valid? Of course not. They are as valid as those primary rules Hart talked about—rules that, for a variety of reasons, will be deemed as standards of critique for one’s own and others’ actions.<sup>126</sup> However, they will not be regarded as expressions of the people themselves and their constitutional credentials will certainly be poor.<sup>127</sup> If, as I started arguing in this chapter, a State’s intervention can be evaluated in terms of justice, fairness, and responsiveness to the people’s views, the same can be done for institutional readings of constitutions: some will be formal, although valid, decisions.<sup>128</sup> Others, instead, will be attributed to, and supported by a practice of democratic respect by, the people.<sup>129</sup>

## Conclusions

My concern in this chapter has been that of securing both horizontal as well as vertical power in interpreting constitutions. Whereas horizontal power refers to the distribution of power among different private citizens, vertical power answers

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<sup>126</sup> Jeremy Waldron, *Are constitutional norms legal norms?* 75 *FORDHAM L. REV.* 1697, 1709 (2006).

<sup>127</sup> As Hutchinson notices, mere acquiescence is not enough. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED*, *supra* note 119, at 56.

<sup>128</sup> After all, as Webber has insisted, legitimacy is a matter of degree. WEBBER, *THE NEGOTIABLE CONSTITUTION*, *supra* note 80, at 16-8.

<sup>129</sup> As Waldron has argued criticizing the way Hart saw fundamental secondary rules, there is “little or nothing in Hart’s account to characterize, explain, or make plausible the existence of a similarly clear distinction between the positive moral aspects and the legal aspects of the secondary rules of a political system.” Waldron, *Are constitutional norms legal norms?* *Supra* note 126, at 1710-1.

the relations of power of citizens vis-à-vis governmental officials.<sup>130</sup> I have argued that constitutional interpretation that works in a diarchic fashion meets this objective. A diarchic constitutional interpretation requires popular constitutional readings advanced through protests to be complemented, not replaced, with institutional avenues where those cultural opinions can be openly discussed. While institutions serve political equality by offering avenues open to all to concur, they also provide stable social changes and allow the people to appropriate the constitution.

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<sup>130</sup> I have taken this distinction from Dworkin, *What is Equality? Part 4*, *supra* note 44, at 8-9.

## CONCLUSIONS: PROTESTS AS NEGOTIATING TOOLS

Constitutions are normally depicted as *end-states*. Not surprisingly, constitutions' political understanding has turned around its limiting and constraining character on political actions—including those of the people themselves. Hence, that democracy, so we are usually told, is to move within certain borders whose true comprehension is placed beyond the reach of the people and their representatives. In fact, under this prism constitutions are legal texts and their understating is therefore reserved to an elite trained in reading and explaining legal materials. This is the reason why, when the channels of political life that constitutions establish are to be clarified, an elite (normally of judges) exposes those principles for, and instead of, us. Furthermore, this is an activity that takes place in chambers shielded from politics and suited to discuss in a principled fashion.<sup>1</sup>

This work has held a different approach. It has conceived constitutions as an *activity*.<sup>2</sup> It has presented constitutions as open-ended projects where basic commitments are recognized, although inevitably left open.<sup>3</sup> Despite the fact constitutions normally assert basic political principles all concur in celebrating,

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<sup>1</sup> As the school of critical legal studies has amply demonstrated, we know that courts do make political decisions. However, precisely because mainstream constitutional approaches deny this, these political decisions—critical, as constitutional exposition happens to be—take place in a context with a lack of transparency (courts) and which only furthers obstacles for popular engagement with them, at least when we compare them with legislatures. *See generally*, Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 336-40 (2009) (“Parliaments and congresses and state assemblies are set up and publicly identified as lawmaking bodies.”).

<sup>2</sup> GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION. ON THE LIMITATION OF RIGHTS* 13 (2009).

<sup>3</sup> *Id.* at 7.

these principles are not self-evident in their specific content. “[N]o definitive account of the principles of political legitimacy or of their reconciliation—as Grégoire Webber has put it—is readily available.”<sup>4</sup> The content of those principles and the relations among them are therefore to be actualized.

This is why, rather than highlighting constitutions as mere constraints, this work has understood constitutions as open projects whose contours are the subject of an ongoing reflection and development. In this sense democratic constitutionalism is better seen, and more accurately described, as an activity through which constant agreements are worked out.<sup>5</sup> Constitutions, in other words, do not have fixed meanings. In fact, their understandings are being constantly negotiated or “continuously ‘conciliated’.”<sup>6</sup> This is what bestows legitimacy on constitutional orders.<sup>7</sup>

I have joined others in remarking this political comprehension of constitutions. A political (as opposed to an exclusively legal) constitutionalism highlights the role of politics and democratic avenues, and it also welcomes people to have a say about it—something the more sophisticated and juridified approaches would not.<sup>8</sup>

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<sup>4</sup> *Id.* at 14.

<sup>5</sup> James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204, 208 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> “The constitution or the principles justifying it cannot be seen as a permanent foundation or framework which underlies democratic debate and legislation. They must be reciprocally subject to legitimation through practices of the democratic exchange of reasons by those subject to them over time” (*Id.*).

<sup>8</sup> Waldron, *Representative Lawmaking*, *supra* note 1, at 340 (“Because they are at pains to conceal the fact that lawmaking is what they are engaged in, courts are not as open to the sort of reasons and arguments that any reasonable person would regard as indispensable for rational and responsible lawmaking.”).

As Bellamy has put it, a legalist understanding of constitutions places key political decisions out of the reach of the people, therefore risking political domination of one sort (*we cannot decide upon constitutions*) or another (it is possible to make decisions about constitutions, but that is a task *we cannot perform*).<sup>9</sup> A political conception, on the other hand, warns against depoliticizing constitutional negotiations precisely to enable a self-governing political order that can do justice to political equality.<sup>10</sup>

Constitutions therefore are to be seen as not only restricting power and politics; they have a positive, enabling, face as well. They permit politics—they set “the terms of discourse”<sup>11</sup>—and actually demand it in order to actualize the relations among the principles they establish. In fact, the very acts of offering and deciding a certain “relationship between the principles of political legitimacy is [itself] another instance of political judgment.”<sup>12</sup> Seen in this light, politics is the very *activity* through which communities constantly negotiate and continuously conciliate their own political understanding. Politics, as I argued in Chapter 6, is the very *activity* through which constitutions are continually being developed, detailed and deepen. As I put it there, the process of collective self-determination, the process through which *we* keep on defining what *we* are, extends beyond the

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<sup>9</sup> RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM. A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 147-54 (2007).

<sup>10</sup> *Id.* at 146. As Adam Tomkins put it, republicanism—the theoretical basis where he rests his political constitutionalist conception—“is concerned not with government-through-judiciary but with *self-government* through processes of informed, public-spirited deliberation.” ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 45 (2005).

<sup>11</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 185 (1999).

<sup>12</sup> WEBBER, *THE NEGOTIABLE CONSTITUTION*, *supra* note 2, at 26.

constitutive moment to encompass the work of constituted institutions and regular politics. In the words of Loughlin—already quoted in Chapter 6—,

constituent power cannot be understood without reference to constituted power; it acts for the purpose of establishing a constitutional form of government, and it continues to work through the established constitutional form by questioning and modifying the meaning of that structure.<sup>13</sup>

Clearly, this is a comprehension of constitutions that can be as elitist and a source of domination as strong as the legal understanding before explained, for if avenues of political engagement are to be reduced exclusively to institutional avenues the risks of domination persists.<sup>14</sup> To prevent authoritative decisions from becoming “purely formal norm[s] with no conscious acceptance by the citizens,”<sup>15</sup> a supplement of legitimacy is needed here. This is why I have argued the people are to play a crucial role in expounding those principles. Traditional liberal approaches present courts (or in the best scenario any other institutional avenue) as exclusively entitled to work out constitutional meaning. Even when these approaches contend that these institutional avenues should be permeated with popular readings of the constitution, institutional avenues and formal procedures remain the sovereign practices that produce constitutional understanding.

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<sup>13</sup> MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 227 (2010).

<sup>14</sup> As I explained in Chapter 2, this was one of the main contentions recent waves of popular unrest expressed.

<sup>15</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 38-9 (2014).



Instead, I have showed there are others political fora where constitutional negotiations also take place. If the thrust behind popular constitutionalism is to “return[] constitutional law to the people, acting through politics,”<sup>16</sup> then institutional avenues are to be supplemented with fora laypeople usually resort to. These fora are informal, non-institutional and less-stylized when compared to courts or other institutional avenues.<sup>17</sup>

This is why the places where constitutional negotiations take place and the actors that get to participate in those negotiations become important indicators of democratic legitimacy. Of course this concern for democratic legitimacy depends to a large extent on the concept of constitutional negotiation and that of the constitution behind it.<sup>18</sup> On the one hand, a negotiation may be understood as an activity where participants intervene speaking for, and pursuing, their own individual interests. This is a business-like negotiation or bargaining. As I explained in chapter 6, this sense of constitutional negotiation would imply that constitutions are a political booty that, despite their inviting (and at times fraternal) language, are to be appropriated by whoever succeeds in translating his or her private interests into ruling political understandings.

There is, however, a second sense—the one I have privileged in this work—in which constitutions could be understood. Indeed constitutions could be, and are

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<sup>16</sup> TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 11, at 186.

<sup>17</sup> These informal fora, as noted through this work, “do[] not operate in the presence of the institutional sovereign (the assembly) but underneath it and through sympathetic imagination rather than rational inference.” URBINATI, *DEMOCRACY DISFIGURED*, *supra* note 15, at 38-9.

<sup>18</sup> I rely here on the two senses of constitutional negotiations identified in WEBBER, *THE NEGOTIABLE CONSTITUTION*, *supra* note 2, at 27-8.

normally, understood as common commitments setting a common framework for politics. In this sense constitutions distribute power and we expect them to distribute it evenly.<sup>19</sup> This concept of constitutions is followed by a different sense of constitutional negotiations. One where citizens communicate with others “for the purposes of arranging a shared goal by mutual agreement, by compromise, by settlement.”<sup>20</sup> In this second sense, citizens come to constitutional negotiations in order to share their own constitutional understanding with others.<sup>21</sup>

We know, however, that constitutional landscapes show, and have been erected upon, traces of exclusion of certain minorities; hegemonic imposition of constitutional understandings; and limited recognition of those, and the means, welcome to appear in constitutional negotiations. As I explained at the beginning of this work, reigning constitutional understandings—a specific configuration of power relations—have restricted, and privileged certain, means of “political engagement to the *constitutional*”.<sup>22</sup>

Social protests, as I have argued throughout this work, function as a negotiating tool in the second sense aforementioned. It is a means that permits citizens to appear politically in a space where they were before excluded and to express their views about common constitutive commitments that no one bothered to ask

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<sup>19</sup> This explains the emphasis I placed on the political equality and moral agency of all members of a political community to have a say as to what these common commitments entail.

<sup>20</sup> WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 2, at 28.

<sup>21</sup> *Id.*

<sup>22</sup> Christopher May, *The rule of law as the Grundnorm of the new constitutionalism*, in NEW CONSTITUTIONALISM AND WORLD ORDER 63, 69 (Stephen Gill & A. Claire Cutler eds. 2014).

before.<sup>23</sup> Seen in this light, social protests allow citizens to be included and enable them to renegotiate current constitutional understandings. They become—to insist with Tully—“practices of freedom in which democratic actors seek, by means of traditional and new forms of deliberation and negotiation, to challenge and modify the non-democratic ways they are governed.”<sup>24</sup> Social protests, as the examples I drew from Chile and Québec show, facilitated the voices of adolescents, who are seldom considered to have a political say, to be heard. In this way protests permitted the constitutions to be sensitive to voices seldom listened to, thus enhancing the “polyphonic articulation[s] of social autonomy” plural societies show.<sup>25</sup> It was the tool of protest what triggered a process of renegotiation of constitutional understanding, thus permitting off-the-wall considerations to step in and eventually become ruling understandings.

These interactions were possible thanks to the diarchic character of democracy, which, as I have argued in this work—particularly in Chapters 5 and 6—, extends to constitutional negotiations. The diarchic nature of both democracy and constitutional interpretation demands a virtuous, although tense and conflicting, equilibrium between institutional and non-institutional avenues. The emphasis I have placed specifically on protests therefore aims not at replacing institutions,

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<sup>23</sup> Protests allow those previously excluded to fight so that they may be taken into account. As Arendt put it, “a space of appearances is not to be taken for granted wherever men live together in a community”. HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 152 (2006).

<sup>24</sup> Tully, *The Unfreedom of the Moderns*. *supra* note 5, at 221.

<sup>25</sup> See, GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 3 (Gareth Teubner trans. Oxford University Press 2012).

but to complement them, thus enhancing democratic credentials. The kind of protests I have focused on throughout this work seek—as I explained in Chapter 2—not to overthrow governments, but to contest relations of exclusion (power) and bring those formerly excluded “into practices of democratic negotiations.”<sup>26</sup> This is why the protests that in this work I have qualified as events taking place within the rules of the game, rather than favoring a form of direct democracy, actually aim at restoring the diarchic equilibrium between formal and informal avenues. In the words of Nadia Urbinati, these events

bring[] us somehow back to the Roman plebs that used to interact with their leaders in the forum, not in order to replace them in ruling, but to feel they could control them by imposing the burden of inspection on them.<sup>27</sup>

This discord between the rulers and the ruled (and also among these latter) far from posing a threat to democracy is actually a condition for its deepening. The frictions these interactions generate—frictions in front of which authorities seem to have stopped in their appreciations—are, as Machiavelli put it centuries ago, the conditions to secure the liberty of republics and good outcomes. “Good laws,” he wrote back in 1531, proceed “from those very tumults which many so inconsiderately damn.”<sup>28</sup> Furthermore, those very tumults are the means through which many of those who were before excluded got a voice and a share in common matters:

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<sup>26</sup> Tully, *The Unfreedom of the Moderns*. *supra* note 5, at 221.

<sup>27</sup> Nadia Urbinati, *A Revolt against Intermediary Bodies*, 22 *CONSTELLATIONS* 477, 478 (2015).

<sup>28</sup> NICCOLÒ MACHIAVELLI, *THE DISCOURSES* 114 (Bernard Crick ed., repr., Penguin Classics 2003) (1531).

if tumults led to the creation of the tribunes, tumults deserve the highest praise, since, besides giving the populace a share in the administration, they served as the guardian of Roman liberties.<sup>29</sup>

Tumults, in the words of Machiavelli, or protests, in the words of this work, open constitutional negotiations, thus allowing new voices to step in. This openness, in turn, triggers a “dynamic and politically potent relationship between [legal elites] and aggrieved communities.”<sup>30</sup> By doing so, protests contribute to establish a dynamic equilibrium between institutional avenues of lawmaking and constitutional detailing, on the one hand, and citizens, on the other.<sup>31</sup> Therefore, courts, legislatures, administrations, or any other institutional forum “are not the sole expositors of constitutional or legal meaning.”<sup>32</sup>

This is precisely the sense in which social protests are a form of constitutional interpretation. They are so not by simply moving institutional avenues to produce new legislation or by altering public opinion, thus ultimately changing and “creating an alternative narrative of constitutional meaning,”<sup>33</sup> but by showing that constitutional meanings are the result and “the work of mobilized citizens in conjunction with, not separate from, legal professionals” and institutional

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<sup>29</sup> *Id.* at 115.

<sup>30</sup> Lani Guinier, *Beyond Legislatures: social movements, social change, and the possibilities of demosprudence*, 89 B. U. L. REV. 539, 548 (2009).

<sup>31</sup> Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2759-60 (2014).

<sup>32</sup> *Id.* at 2759.

<sup>33</sup> *Id.* at 2757.

avenues.<sup>34</sup> Far from destabilizing constitutional schemes, social protests further the stability and legitimacy of constitutional orders by, while operating as a tool for negotiating interpretations, also becoming a means by which the people appropriate and attach to their constitutional orders.<sup>35</sup> As Tushnet put it, “the Constitution belongs to us collectively, as we act together in political dialogue with each other—whether we act in the streets, in the voting booths, or in the legislatures as representative of others.”<sup>36</sup>

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<sup>34</sup> *Id.* at 2760.

<sup>35</sup> Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1341-2.

<sup>36</sup> TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 11, at 181.

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