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## Post-Liberal Constitutionalism

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# POST-LIBERAL CONSTITUTIONALISM\*

Jorge M. Farinacci-Fernós\*\*

I. INTRODUCTION.....	2
II. SPLITTING THE CONSTITUTIONAL ATOM: A CRITICAL VIEW OF MODERN CONSTITUTIONALISM .....	3
A. Introduction.....	3
B. A General View of Constitutionalism .....	4
1. Definitions and Uses .....	4
2. Birth and Growth .....	6
3. Seeking a Consensus .....	7
C. Core Features .....	8
1. A Government With Limits .....	8
2. Procedural and Substantive Distinction .....	9
3. Rejection of Arbitrary Government .....	10
4. Constitutional Supremacy .....	10
5. Judicial Enforcement.....	11
6. Rights .....	12
7. Written Instrument .....	13
8. Democracy: Democratization, Accountability, Legitimacy, and Representation .....	14
D. Contested Features .....	15
1. Liberal Constitutionalism.....	16
2. Property, Capitalism and the Free Market.....	18
3. Autonomy, Individualism and Some Social Contract Theory.....	19
4. The ‘Proper Role’ of Government .....	21
E. Towards a Broader Constitutionalism .....	23
1. It is Not All About Government: Towards a Broader Notion of Power...	23
2. Liberal and (or Versus) Non-Liberal Constitutionalism .....	24
3. Post-Liberal Constitutionalism.....	25
F. Moving Forward .....	26

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III. A PLURALISTIC TYPOLOGY OF CONSTITUTIONAL MODELS .....	27
A. Introduction.....	27
B. Between Structure and Substance: Constitutional Types .....	28
1. Framework Constitutions .....	28
a. General Overview .....	28
b. Pure Framework Constitutional Model .....	29
c. Liberal Democratic Framework Model .....	30
2. Teleological Constitutions .....	32
a. General Overview .....	32
b. The Content of Teleological Constitutions .....	35
c. Ideology and Economic Issues.....	36
C. Constitutional Self-Government .....	37
D. Constitutional-Ordinary Politics: A Relation of Mistrust .....	37
E. Re-thinking the Counter-Majoritarian Difficulty: Enforcing the Popular Will.....	40
1. Constitutional Intervention and its Impact on the Judicial Role .....	43
2. Constitutional Creation: When the People Write a (Post-Liberal) Teleological Constitution.....	44
a. Introduction .....	44
b. Creating the Constitution: The Process .....	45
IV. CONCLUSION .....	47

## I. INTRODUCTION

Most of the world's constitutions fall between two main categories. First, *framework* constitutions, which are mostly *structural* in nature. The majority of these constitutions can be characterized as *liberal democratic*, though not inherently or exclusively. Many *classical* constitutions fall within this type. Second, *teleological* constitutions, which are mostly *substantive* in nature. The majority of these constitutions can be characterized as *post-liberal*, though not inherently or exclusively. Many *modern* constitutions fall within this type. Even though both models are equally legitimate and “constitutionalist,” teleological constitutions, particularly those of a post-liberal bent, are haunted by the incorrect view that liberal-democratic, framework constitutions are the superior articulation of constitutional theory.

This Article argues that constitutional theory has transcended its historical relationship with liberal democracy. Hence, post-liberal constitutionalism, which, as a specific articulation of the teleological constitutional model, has transformed the foundations of constitutionalism. The existence of this type of constitutional model requires a broader look at constitutional theory to see how post-liberal teleological constitutions have affected it.

In particular, this Article deals with how post-liberal teleological constitutional systems have revolutionized constitutional theory, specifically the notion of

2018]

POST-LIBERAL CONSTITUTIONALISM

3

constitutionalism. I will attempt to prove that post-liberal constitutionalism exists, thus requiring a conceptual distinction between constitutional theory and liberal democracy. In particular, I will analyze the inner workings of the teleological constitutional type, and how it affects constitutional theory in its different manifestations. By doing so, I wish to answer an important question: are post-liberal constitutional models really constitutional systems?

This Article has the following structure. Part I is the Introduction. Part II dives into the constitutive elements of *constitutionalism*, so as to demonstrate the difference between the *core* of constitutionalism and *one* of its articulations: liberal-democratic constitutionalism. By doing so, we are able to better understand that constitutionalism can also have *different, non-liberal articulations*. In this Article, I will mostly focus on the *post-liberal* model. Part III focuses on the issue of so-called *constitutional types*, particularly the dichotomy between framework constitutions and teleological constitutions. As I previewed, liberal-democratic constitutions are the flagship of the former, while post-liberal constitutions are the primary articulation of the latter.

## II. SPLITTING THE CONSTITUTIONAL ATOM: A CRITICAL VIEW OF MODERN CONSTITUTIONALISM

### A. Introduction

In order to fully understand the content and operation of post-liberal constitutionalism, we must first engage critically with the concept of *constitutionalism*. In particular, how that concept has evolved and developed from its more *classical* and *singular* conceptualizations to its more *modern* and *multiple* articulations.

Constitutionalism has not stood still. In this article, I will directly challenge the assertion that constitutionalism is inherently linked with liberal democracy. It is not. Classical constitutionalism is a western creation, but modern constitutionalism is a worldwide phenomenon that boasts several owners. In its current manifestation, constitutionalism is able to fully embrace post-liberal teleological constitutional systems.

In order to fully understand the multiple articulations of constitutionalism, and divorce constitutionalism from liberal democracy, we must first split the constitutional atom. What does this mean? Constitutionalism is not bound to a single model, type, or system. On the contrary, constitutionalism is the combination of several elements, factors, and characteristics which, when added together, make up the complex and comprehensive concept dubbed constitutionalism. As such, we need to dissect its constitutive parts and reach its inner core or nucleus. Constitutionalism lives in that nucleus or core.

Constitutionalism is made up of *core elements* which are shared by all constitutionalist systems, on top of which additional, though not constitutive, elements can be incorporated, as long as they are compatible with the core. In that sense, two things become clear: (1) there is such a thing as constitutionalism, which includes an inherent constitutive core; and (2) there are multiple articulations of constitutionalism, which include additional elements that, although compatible with the inherent core, can actually contradict each other. In the end, we can see that liberal-democratic constitutionalism is merely one of many equally legitimate and effective constitutionalist systems.

Furthermore, we can appreciate that many post-liberal systems are also as constitutionalist as their liberal-democratic counterparts. Once we adopt this view, we can dive into how post-liberal constitutionalism has impacted other elements of constitutional theory previously thought to be singular.

In this Part, we analyze the following issues: (1) the existence, or lack thereof, of a universally accepted definition of constitutionalism, its history, features, and purported benefits, as well as an attempt to propose an alternative definition of constitutionalism based on universally accepted core features; (2) the more contentious ideas about constitutionalism and its components, such as liberalism, separation of powers, property rights, and individualism; and (3) the interaction between constitutionalism and teleological constitutional types that emphasize redistribution and which have transcended classic liberal models. In the end, I wish to demonstrate how post-liberal systems are as deserving of the constitutionalist label as liberal democratic societies.

### *B. A General View of Constitutionalism*

#### 1. Definitions and Uses

The concept of constitutionalism is lauded yet stubbornly elusive. On the one hand, scholars and political leaders use constitutionalism as a yardstick to measure the legitimacy of different legal and political regimes around the world, making value judgments along the way. We all want to be constitutionalists. The term constitutionalism has great normative and legitimizing force, and, therefore, fundamental legal orders and their architects desire their systems to be called constitutionalist. On the other hand, scholars have been unable to come up with an actual definition of what constitutionalism is.

The result is problematic. We judge others using a measurement that we cannot even define: abuse and confusion can follow where a particular system loses legitimacy because it fails the *constitutionalism test*.<sup>1</sup> When we ask why it failed the test, the offered answers are not wholly satisfactory because the test itself is often ill-defined. I believe the lack of a consensus as to the definition of constitutionalism is due to the fact that the core elements of constitutionalism are incorrectly bundled up with the additional features, generating confusion and ambiguity. That is why we need to first split the constitutional atom in order to separate the core from the additions.

If there is a consensus among scholars about constitutionalism, it is that there is no actual consensus definition of the term.<sup>2</sup> Not only is defining the term problematic in terms

1. As we previewed, constitutionalism has two components: (1) an inherent core, and (2) additional elements. The constitutionalism test I will employ in this Article refers to whether a particular system complies with that inherent core, and whether the additional elements that have been built on top of that core are compatible with it. Everything else is *political choice, not inherent constitutional theory*.

2. See David T. ButleRitchie, *Critiquing Modern Constitutionalism*, 3 APPALACHIAN J.L. 37, 39 (2004) (“Constitutionalism as a concept is somewhat nebulous and amorphous.”); Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT’L & COMP. L. 1, 2 (2000) (“There is no widely accepted definition of constitutionalism and constitutional culture.”) Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 3 (Michel Rosenfeld, ed., 1994) (“There appears to be no accepted definition of constitutionalism.”); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 623 (2009) (“A lack of consensus exists in defining the concepts of ‘constitution’ and ‘constitutionalism.’”).

of its vague nature,<sup>3</sup> some even admit that the problem stems from the existence of multiple or conflicting notions of constitutionalism: “[There is] no shortage of conflicting theories about what constitutionalism is and what it demands.”<sup>4</sup> As Karin Arts and Jeff Handmaker acknowledge, “it is not easy, and maybe not even possible or desirable, to provide an adequate general definition of constitutionalism.”<sup>5</sup> Constitutionalism has transcended its original moorings and “has recently taken on something of a life of its own within constitutional theory literature.”<sup>6</sup>

This lack of a precise definition allows for much subjective judgment—a “we know it when we see it” approach. According to András Sajó, “[t]here is no satisfactory definition of constitutionalism, but one does not only *feel* when it has been violated, *one can prove it*.”<sup>7</sup> He also states that “[w]e recognize constitutionalism, or rather its violation, primarily by experience.”<sup>8</sup> But this inherently subjective approach to defining constitutionalism makes an analysis of any particular legal system’s compatibility with constitutionalism a suspect enterprise, where political and ideological considerations can trump legal or objective standards. Such lack of standards allows for conclusions where our preferred systems are deemed to be constitutionalist but those with which we disagree are not. This would seem to be an example of the kind of arbitrary decision making that, as we shall see later on, constitutionalism was supposed to combat.

While constitutionalism seems to elude definition, there is consensus as to its goodness and spread around the world: “Constitutionalism is ubiquitous.”<sup>9</sup> As Richard Kay proudly proclaims: “As the twentieth century comes to a close, the triumph of constitutionalism appears almost complete.”<sup>10</sup> But that just begs the question: If we are not sure what constitutionalism really is, how can we measure its success and emulation? Taking as a given that we do not want constitutionalism to be an empty label used to legitimize our opinions and delegitimize alternative views about constitutional structure and practice, an attempt must be made to discover a universal, minimum core of meaning.

3. See András Sajó, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 9 (1999) (“Constitutionalism is a matter of taste, and taste oscillates around a hard core.”); Sweet, *supra* note 2, at 626 (“[I]t may be impossible to define the concept of ‘constitutionalism’ in a relatively consensual, straightforward way.”).

4. Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U. L. REV. 373, 378 (2012); see also Morly Frishman & Sam Muller, *Introduction*, in *THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION* 2 (Morly Frishman & Sam Muller, eds., 2010) (noting that “constitutionalism may have different meanings and functions depending on the relevant context and perspective”); Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 120 (1991) (describing constitutionalism as a contested term).

5. Karin Arts & Jeff Handmaker, *Cultures of Constitutionalism*, in *THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION* 49 (Morly Frishman & Sam Muller, eds., 2010).

6. Paul Scott, *(Political) Constitutions and (Political) Constitutionalism*, 14 GERMAN L.J. 2157, 2158 (2013).

7. Sajó, *supra* note 3, at 12.

8. *Id.*

9. Albert, *supra* note 4, at 374; see also Morly Frishman & Sam Muller, *Introduction*, in *THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION*, *supra* note 4, at 49 (“Constitutionalism itself has become more widespread than ever before.”).

10. Richard S. Kay, *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16 (Larry Alexander, ed., 1998); see also Rosenfeld, *supra* note 2, at 3. (“The spirit of constitutionalism has so dramatically soared of late that it seems poised to achieve a worldwide sweep.”); Francois Venter, *GLOBAL FEATURES OF CONSTITUTIONAL LAW* 14 (2010).

The triumphalist characterization of the spread of constitutionalism around the world is matched by its proclaimed goodness: “[C]onstitutionalism is one of the best gifts that the West has given to the world.”<sup>11</sup> But as we are about to see, that gift has evolved and taken a life of its own that transcends its original articulation. The world took that gift and reinvented it. As such, constitutionalism no longer belongs to the West or, as I will discuss later on, to liberalism.

Instead of announcing the inherent elusiveness of the concept of constitutionalism, this Article opts for a different approach: identifying a universal core that makes up constitutionalism. This includes excluding from the core additional elements that are politically charged, such as liberal democracy and a market economy. While these may be compatible with the core, they are not part of it. When we separate the core from the additional elements then a consensus can actually emerge.

## 2. Birth and Growth

Classic constitutionalism was born before democracy had taken root.<sup>12</sup> As Jan-Erik Lane points out, “the constitutional State emerged before the democratic State.”<sup>13</sup> It is not my intention here to articulate a history of constitutionalism.<sup>14</sup> Suffice it to say that it was born to a specific historical context. Its growth, development, and maturity has responded to separate historical realities. But history has not stood still; nor has constitutionalism.

At this point, a critical distinction must be made. *Classic* constitutionalism was a reaction to power that already existed and was unlimited. *Modern* constitutionalism can be used to address power that is being created on the spot. That is, classic constitutionalism was mostly used as a shield to protect individual liberty from sovereign power that needed to be controlled.<sup>15</sup> It is in that context that, “[a]ccording to classical constitutionalism, constitutional regulation means the submission of state institutions to the law to ensure that they do not interfere with liberty.”<sup>16</sup> But, modern developments in constitutionalism have transcended that original goal of merely limiting the power of the state. While classic constitutionalism has its origin in the Commonwealth family and tradition,<sup>17</sup> as we will see, modern constitutionalism belongs to a whole host of different systems, traditions, and world-views.

Again, we must not confuse the origins of constitutionalism with its current articulations. In fact, Tom Ginsburg has even made reference to previous articulations of constitutionalism that predate the Enlightenment: “As constitutionalism has spread beyond its alleged homeland in the West, it behooves us to ask about the relationship between the

11. Annen Junji & Lee H. Rousso, *Constitutionalism as a Political Culture*, 11 PAC. RIM. L. & POL’Y J. 561, 563 (2002).

12. When I refer to *classic* constitutionalism I do not mean *ancient* constitutionalism, as it pertains to Greece or Rome. Classic constitutionalism is much more contemporaneous and can trace some of its roots to the Magna Carta and other similar processes and ideas.

13. Jan-Erik Lane, CONSTITUTIONS AND POLITICAL THEORY 263 (2011).

14. For a brief history of constitutionalism see *id.* at 15.

15. See David T. ButleRitchie, *The Confines of Modern Constitutionalism*, 3 PIERCE L. REV. 1, 14 (2004).

16. Sajó, *supra* note 3, at 32.

17. Stephen Gardbaum, *The Case for the New Commonwealth Model of Constitutionalism*, 14 GERMAN L.J. 2229, 2230 (2013).

particular ideas that emerged in enlightenment Europe and North America with the previous political-cultural understandings of non-European societies.”<sup>18</sup> In this Article we will focus on the more recent developments in constitutionalism, but Ginsburg’s point remains an important one: Constitutionalism has never belonged to anyone in particular. “Ultimately, it calls into question the Western narrative of exceptionalism, in which constitutionalism and the rule of law are seen as *distinctive* Western contributions.”<sup>19</sup>

Since World War II, constitutionalism has developed substantially and has cast-off from its initial foundations. As A.E. Dick Howard suggests, “[t]here are many chapters in constitutionalism’s story.”<sup>20</sup> More recently, the U.S.-centered model of constitutionalism has lost much of its influence over current articulations.<sup>21</sup> Constitutionalism has taken on a life of its own, one that distinguishes it from its original manifestation.<sup>22</sup> Yet, western scholars still cling to a U.S.-centered view of constitutionalism, particularly as it pertains to the different measurements used to judge whether a particular system is worthy of the title of constitutionalist. This Article is an attempt to break free from those chains.

Earlier, I expressed my skepticism of being able to state that a particular system is ‘constitutionalist’ while others are not, all the while not being able to come up with an actual definition of constitutionalism. But that skepticism should not be confused with an affirmation of radical indeterminacy. I agree there is such a thing as constitutionalism and that there are political systems in the world that do not match up to its requirements. My point is much simpler: that there are many manifestations and articulations of the constitutionalist idea.

We should be able to distinguish between the optional features and the universal core, so as not to confuse the existence of different constitutionalist systems with them not being constitutionalist. For example, there are liberal and non-liberal (or post-liberal) constitutionalist systems that share a minimum core of features that entitles all of them to an equal claim to the constitutionalist label. At the same time, there are other regimes that simply fail to satisfy the minimum core requirements.

### 3. Seeking a Consensus

There are two ways to achieve a clear definition of constitutionalism: (1) identify the lowest common denominators than can serve as a universal minimum, or (2) impose a definition to the exclusion of other systems. This article argues for a version of the former.

18. Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11 (2012); see also Rogers M. Smith, *Constitutionalism and the Rule of Law: Considering the Case for Antecedents*, 88 CHI.-KENT L. REV. 35, 36 (2012).

19. Ginsburg, *supra* note 18, at 11 (emphasis added); see also Junji & Rousso, *supra* note 11, at 565 (“However, it would be incorrect to say that there were no ideas resembling constitutionalism existing outside western culture.”).

20. A.W. Dick Howard, *The Essence of Constitutionalism*, in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE 8 (Kenneth W. Thompson & Rett R. Ludwikowski, eds., 1991).

21. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012). The authors point to Canada as the most influential model today. *Id.* They are skeptical about the influence of Germany, South Africa and India as alternative models. *Id.* I discuss this at greater length in Part III.

22. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1220 (2011).



The difficulty lies in giving the term substantive content without overreaching or overplaying our hand. It is also tricky to proclaim a universal definition, since it can include some elements that are harder to justify.

This article proposes (1) a universal, minimum definition of what makes a system constitutional; and (2) a variety of additional elements that can create different, and even clashing, versions of constitutionalism that, nonetheless, are compatible with the universal core.

I propose that the core features of constitutionalism are: (1) a government with limits as to the exercise of its powers; (2) the existence of procedural and substantive limits to the exercise of all power; (3) the rejection of arbitrary government; (4) the notion of constitutional supremacy; (5) some form of judicial enforcement of constitutional norms; (6) the recognition of basic rights; (7) the idea of written-ness; and (8) some sort of democratic self-rule mechanism. Excluded from the core features are elements that, although they can be used as legitimate add-ons to the core, are not part of it. In other words, a system may exclude these features without sacrificing its claim to the mantle of constitutionalism. Among these contested features are: (1) liberalism; (2) the existence of private property over the means of production, a capitalist system or a free market; (3) an individualistic view of personal autonomy; and (4) government's proper role in various policy areas.

### C. Core Features

#### 1. A Government With Limits

Because of historic considerations, classic constitutionalism was mostly concerned with *government* power. As we will see later on, more recent teleological constitutions are also concerned with abusive *private* power. While I will attempt to argue further on in this article that constitutionalism's goal of curtailing government power should be extended to all kinds of power that affect a given political community, there seems to be agreement that at least curtailing government power is a universal feature of constitutionalism.<sup>23</sup>

This primary goal of constitutionalism is widely accepted. The idea of limits on government is central to many scholarly approaches to the nature of a constitution in particular and constitutionalism in general.<sup>24</sup> As Arts and Handmaker explain, constitutionalism "is the idea, often associated with the political theories of John Locke and the 'founders' of the American republic, that government can and should be legally

23. Furthermore, it should be noted that constitutions *also constitute and enable the exercise of power*. As such, the existence of government power is, almost inherently, constitutionalist, since it is through constitutions that modern states exercise their power. Also, as we will see in Part III, some modern constitutional systems actually generate *empowered* governments, as part of a process designed to use state power in order to achieve social ends.

24. See, e.g., Russell Hardin, *Why a Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 65 (Dennis J. Galligan & Mila Versteeg, eds., 2013) ("A typical reason for having a constitution is to place limits on government."); Justin Blount, Zachary Elkins & Tom Ginsburg, *Does the Process of Constitution-Making Matter*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 53 (Tom Ginsburg, ed. 2012); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 *YALE J. INT'L L.* 409, 433 (2003); Hannah Lerner, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* 17 (2011); Lane, *supra* note 13, at 1 ("One may argue that the doctrine of constitutionalism entails the idea of limited government.").

2018]

POST-LIBERAL CONSTITUTIONALISM

9

limited in its powers, and that its authority depends on its observing these limitations.”<sup>25</sup> In its narrowest form, Tom Ginsburg suggests that constitutionalism is “the idea of limited government under law.”<sup>26</sup> Again, this emphasis on controlling government is mostly a historic phenomenon, given its common law roots and the particular English and U.S. experiences. In the end, the point is quite clear, power must encounter limits. Now we turn to the obligatory follow-up question: where are those limits?

## 2. Procedural and Substantive Distinction

It is obviously insufficient to simply state that the goal of constitutionalism is to limit the powers of the state without defining those limits. After all, one could limit the state to only torturing with certain tools and not others, or to commit genocide only one month of the year. Defining those limits becomes crucial.

Here, we focus on both procedural devices and substantive requirements. Let’s start with process. These procedural devices do not concern themselves “with the values or substantive principles that do or should appear in a constitution.”<sup>27</sup> Two main types of procedural tools seem applicable: First, legally established ones that are accepted by the political community. This is inherently linked with the issues of legality and the rule of law. Second, democratic processes that legitimize the end-results.<sup>28</sup> Again, I will discuss this issue later on when addressing the interaction between constitutionalism and democracy. Therefore, in this section, I focus mostly on the substantive limits.

It seems that modern constitutionalism is more interested with substantive limits than with procedural ones. As Paul Scott states, “[t]he emergence of substantive limits on power is the modern triumph of constitutionalism.”<sup>29</sup> Mark Tushnet also addresses this issue: “One could of course stipulate that the term ‘constitutionalism’ applies only when some substantive requirements are satisfied. *What substantive requirements, though?*”<sup>30</sup> Once we start proposing and debating candidates for these requirements, the consensus can break down: “The point of the contrast is to suggest that any substantive requirements are going to be substantially more controversial than the minimal formal and procedural ones.”<sup>31</sup> Still, the debate is worth having instead of taking things for granted or without

25. Arts & Handmaker, *supra* note 5, at 49.

26. Ginsburg, *supra* note 18, at 12; *see also* Junji & Rouso, *supra* note 11, at 563 (“Traditionally, constitutionalism has stood for the principle that state power must be limited through the operation of law.”); Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 419 (2009) (discussing limitation on state power as the historical purpose of the written constitution); Rosenfeld, *supra* note 2, at 3 (“[I]n the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.”).

27. Albert, *supra* note 4, at 379; *see also* ButleRitchie, *supra* note 15, at 5 (“Western political theory has, in the last two hundred years or so, reduced the social and political content of societies to a small set of procedural safeguards and institutional mechanisms.”); Scott, *supra* note 6, at 2166.

28. *See* Kay, *supra* note 10, at 26; James A. Noe, *Defining the Rule of Law*, 15-SPG EXPERIENCE 5, 6 (2005).

29. Scott, *supra* note 6, at 2166; *see also* Murphy, *supra* note 4, at 107 (referencing “substantive criteria”); Milewicz, *supra* note 26, at 419 (“Today, constitutionalism is a value-laden concept and refers to the inclusion of basic substantive principles.”). But which ones?

30. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 420 (2015) (emphasis added).

31. *Id.*

adequate deliberation. If constitutionalism is all process and no substance, then it is an empty shell that fails to distinguish itself from legality and rule of law principles. Constitutionalism is different, precisely, because of its substantive nature.

The substantive content of constitutionalism deals with the “question of the rightness of the fundamental laws” of a given political community.<sup>32</sup> But, again, this issue eludes monolithic or simplistic explication due to the existence of competing notions of constitutionalism.<sup>33</sup> I now turn to discuss some individual features that are commonly associated with constitutionalism and which appear to be acceptable to multiple constitutionalist models, and which are both substantive and procedural in nature.

### 3. Rejection of Arbitrary Government

While one may disagree about the exact makeup of the substantive limits on government power—or any power for that matter—, there seems to be universal condemnation of arbitrary conduct. In fact, the historical origin of classic constitutionalism is one of reaction to the unfettered authority of the crown. As such, “[t]he arbitrary exercise of [sovereign] power, was seen as a transgression against individual members of the state.”<sup>34</sup> Arbitrary government can actually violate both the procedural and substantive elements of constitutionalism, since a government that acts arbitrarily is unfettered with respect to both what it does and how it does it. As a result, constitutionalism, and more particularly the rule of law, attempts to “focus on the minimal conditions necessary for law to restrict sheer arbitrariness in the ruler’s use of power.”<sup>35</sup> Of course, the existence of some room for discretion in the exercise of power need not be synonymous with arbitrary action.<sup>36</sup> Rule of law principles mostly deal with procedural arbitrary action (*how* something is done); constitutionalism deals with its substantive manifestation (*what* is done).

I believe the goal of eliminating arbitrary uses of power is the main substantive, and procedural for that matter, goal of constitutionalism. Most of the other individual features normally attached to that concept stem from this proposal. Some of these features are either secondary substantive goals or tools to carry out the main one. The main articulation of a government with limits is one where it cannot act arbitrarily. The rest is mostly up for debate in the pursuit of that goal.

### 4. Constitutional Supremacy

While constitutionalism and constitutions are not synonymous, they are most difficult to separate. Putting aside the issue of the written document, constitutionalism needs an actual source that is binding on a political community and that, at least mostly,

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32. Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 82; Kay, *supra* note 10.

33. See Sweet, *supra* note 2, at 628.

34. ButleRitchie, *supra* note 15, at 10.

35. Amichai Magen, *The Rule of Law and its Promotion Abroad: The Problems of Scope*, 45 STAN. J. INT’L L. 51, 59 (2009); see also Ian Shapiro, *Introduction*, in THE RULE OF LAW 1 (Ian Shapiro, ed., 1994); Gerald F. Gaus, *Public Reason and the Rule of Law*, in THE RULE OF LAW 328.

36. See Sajó, *supra* note 3, at 206; Smith, *supra* note 18, at 36.

incorporates the substantive and procedural features we are currently discussing. The “constitution” is normally that source. Even systems that espouse parliamentary sovereignty encounter and recognize some sort of constitutional limit, which constitutes the sort of constitutional supremacy I propose here.

In order for constitutionalism to work, its commands—however they are articulated—must be supreme; hence the notion of constitutional supremacy. The constitution, or its alternate manifestation, needs to function as higher and controlling law.<sup>37</sup> Constitutional supremacy is a constant member of scholars’ lists of the features of constitutionalism.<sup>38</sup> Of course, there can be disagreements as to the exact extent of this supremacy and its interaction with the legal system of a particular political community. Even the constitution itself can limit its own supremacy. But, in the end, there can be no constitutionalism if the “constitution”—in whatever form it takes—can be ignored or easily brushed aside. The *ism* in constitutionalism signals a central and governing role for the “constitution.” In the end, there must be an ultimate legal source of power, and all other political and social actors must obey it.

### 5. Judicial Enforcement

Of course, constitutions do not vindicate themselves. In a functioning constitutional state, multiple institutional actors are called upon to give practical life to the constitutional text and structure. As I will argue throughout this Article, the people themselves are the ultimate institutional actor that enforces the constitutional structure.

Since constitutions, particularly modern ones, tend to mix legal and political elements, it can be unclear whether it is up to political or legal institutions to have the final say on its interpretation, construction, and application. Historical practice has mostly sealed the deal in favor of some kind of ultimate judicial responsibility over constitutional adjudication. As with constitutional supremacy—as well as many of the other features we have been discussing—there is room for disagreement as to the degree of the operation of judicial supremacy over constitutional questions and issues.

Whether it be so-called weak-form review or aggressive judicial supremacy,<sup>39</sup> some sort of judicial body, which need not be a full-blown court,<sup>40</sup> must guarantee that the constitution will reign supreme.<sup>41</sup> This is the essence of judicial enforcement, which, in

37. Kay, *supra* note 10, at 16; ButleRitchie, *supra* note 15, at 8; Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1331 (2004); Bruce P. Frohen, *Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. 529, 536 (2011).

38. Vojtech Cepl, *The Inspirational Power of American Constitutionalism*, 10 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 72, 72 (2009); Junji & Rouso, *supra* note 11, at 563; Lane *supra* note 13, at 1–2; Ludwikowski, *supra* note 2, at 2.

39. William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1665 (2003), discussing Canada’s ‘notwithstanding clause’ and the U.K.’s Human Rights Act which allows courts to *declare* a statute’s incompatibility with the Act without striking it down. For a discussion on weak form judicial review, see Gardbaum, *supra* note 17, at 2230. For a critical view, see Keith E. Whittington, *An Indispensable Feature? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 21 (2003). I will return to the issue of judicial enforcement in Part 4.

40. Richard Albert makes reference to a body charged with constitutional interpretation and enforcement. Albert, *supra* note 4, at 392.

41. William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1665 (2003) (discussing Canada’s ‘notwithstanding clause’ and the U.K.’s Human Rights

modern times, has been articulated as judicial review and is premised on the existence of courts that are minimally independent from other institutional and social actors.<sup>42</sup> In particular, judicial review allows for an analysis of compatibility of inferior law to constitutional higher law, thus assuring constitutional supremacy.<sup>43</sup> Judicial review or enforcement, in different forms, has become a nearly universally accepted feature of modern constitutionalism.<sup>44</sup> Of course, not all are convinced.<sup>45</sup>

While judicial supremacy over constitutional enforcement was not an essential element of classic constitutionalism—Great Britain’s constitutional monarchy operated without it for much of the system’s history—judicial supremacy has become a central feature of modern constitutionalism. An ideal constitutional system, where actors strictly observe and obey the constitution, would need no recourse to the courts, but the potential for such recourse is essential to constitutional governance in the real world. And because different social, political, and institutional actors may be called upon to address constitutional issues in the first instance, their failure to adequately handle the matter requires the existence of an institution of last instance. While it need not be a judicial or even legal body, due to the politicization of constitution-making, historical practice has settled on bestowing that responsibility to some sort of judicial institution.

## 6. Rights

One could argue that rights are not inherent to constitutionalism because of the existence of other means, mostly structural, procedural or institutional, that can limit government and allow for the rule of law without explicit and enforceable rights. In Part III, I address this approach when discussing the pure framework constitutional type. But, in the age of modern constitutionalism, it is impossible to exclude rights from any workable definition. Furthermore, because of the liberal origins of constitutionalism, the notion of rights as part of constitutionalism is almost historically inevitable.

The popularity gained by rights in the twentieth-century has not been lost on scholars, who constantly make reference to “fundamental rights” as an integral part of constitutionalism.<sup>46</sup> Of course, the issue of which rights takes us back to the substantive requirements dilemma.<sup>47</sup> But the core idea remains: at least some rights may be necessary

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Act, which allows courts to *declare* a statute’s incompatibility with the Act without striking it down). For a discussion on weak form judicial review, *see* Gardbaum, *supra* note 17, at 2230. For a critical view, *see* Keith E. Whittington, *An Indispensable Feature? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 21 (2003). I will return to the issue of judicial enforcement in Part 4. Richard Albert makes reference to a body charged with constitutional interpretation and enforcement. Albert, *supra* note 4, at 392.

42. Gaus, *supra* note 35, at 329.

43. Kay, *supra* note 10, at 16; *see also* Cepl, *supra* note 38, at 72.

44. Forbath & Sager, *supra* note 39, at 1653; Lawrence Friedman & Neals-Erik William Delker, *Preserving the Republic: The Essence of Constitutionalism*, 76 B.U. L. REV. 1019, 1038 (1996); Junji & Rousso, *supra* note 11, at 563; Law & Versteeg, *supra* note 22, at 1198 (noting that “[e]ven more dramatic than the phenomenon of rights creep is the growing popularity of judicial review”).

45. Ginsburg, *supra* note 18, at 17.

46. *See* Kay, *supra* note 10, at 18; Robert S. Barker, *Latin American Constitutionalism: An Overview*, 20 WILLIAMETTE J. INT’L L & DISP. RESOL. 1, 2 (2012); ButleRitchie, *supra* note 2, at 40; Friedman & Delker, *supra* note 44, at 1019; Rosenfeld, *supra* note 2, at 3.

47. *See* Cepl, *supra* note 38, at 72 (referencing basic human rights); Lane, *supra* note 13, at 52; Ludwikowski, *supra* note 2, at 2 (“fundamental rights”).

for a constitutional state to exist.<sup>48</sup> In particular, we have to take into account the international rights regime created after the Second World War.<sup>49</sup>

David Law and Mila Versteeg have addressed the issue of the so-called “rights creep.”<sup>50</sup> After conducting a survey of the world’s constitutions, they found that there is a list of so-called “generic” rights that are “so ubiquitous” as to seem almost automatic.<sup>51</sup> According to Law and Versteeg, “a significant number of constitutional rights are generic they can be found in the vast majority of the world’s constitutions and, in effect, form a part of a *shared global practice of constitutionalism*.”<sup>52</sup> Many of these rights are of a liberal democratic nature (that is, individual, negative, and vertical political rights).<sup>53</sup> Their universal acceptance is the result of both liberal constitutionalism, which that only list these rights and post-liberal constitutionalism that includes these rights, but also adds others. In the end, *both* approaches include these minimum set of rights. In Part III, I describe how these approaches to constitutionalism generally find a home in framework and teleological constitutions, respectively.

The rise of modern, teleological constitutions, however, has created an interesting situation: the list of generic rights is not an exhaustive or closed one; it is ever growing, which means that “new” rights could become “generic” ones in the future, thus gaining universal recognition. As Law and Versteeg explain, “most rights are growing in popularity, with the result that the number of generic rights is increasing over time.”<sup>54</sup>

#### 7. Written Instrument

That a constitution should be written is more of a custom than an actual requirement. As a conceptual matter, a system need have a constitution, much less a written one, for the system to be deemed constitutionalist. But the practice of the last century has signaled an overwhelming preference towards the written constitution that almost raises it to the point of being an inherent feature of constitutionalism.<sup>55</sup> While there is theoretical space for a constitutionalist system to exist without a written instrument, the current trend in favor of a written constitution is such that modern constitutional architects would be unlikely to ignore it. Richard Albert states that constitutions “should be in written form to the extent possible.”<sup>56</sup> According to Richard Kay, the advantage of this option is that it promulgates

48. There is a problem here as it pertains to so-called “framework” constitutions, like Australia, that have no entrenched or express rights. The lack of rights in the constitutional text should not disqualify countries that have this constitutional type from being labeled constitutionalist. However, it does serve as a blind spot for these systems.

49. Bertrand G. Ramchamaran, *Constitutionalism in an Age of Globalisation and Global Trends*, in THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION 16–19.

50. Law & Versteeg, *supra* note 22, at 1164.

51. *Id.* at 1200.

52. *Id.* at 2000 (emphasis added).

53. See Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach*, 41 HASTINGS INT’L & COMP. L. REV. 31 (2017).

54. Law & Versteeg, *supra* note 22, at 1200.

55. See Albert, *supra* note 4, at 377 (noting the international tendency in favor of a written instrument); Kay, *supra* note 10, at 16; Friedman & Delker, *supra* note 44, at 1019; Fritz, *supra* note 37, at 1335; Ginsburg, *supra* note 18, at 12 (noting the dominant status of the written constitution around the world).

56. Albert, *supra* note 4, at 394.

fixed rules which are easier to enforce and is far closer to rule of law considerations.<sup>57</sup> Finally, Law and Versteeg explain that “[t]oday, almost 90% of all countries possess written constitutional documents backed by some kind of judicial review.”<sup>58</sup>

I choose to incorporate written-ness as a core feature of constitutionalism because I think it has somewhat transcended practical convenience and has become conceptually necessary. If only from a purely procedural or structural standpoint, positive law is preferable to pure customary and unwritten law. Arbitrariness has an easier path when there is no positive law to constrain it, particularly in the constitutional realm.

#### 8. Democracy: Democratization, Accountability, Legitimacy, and Representation

Classic constitutionalism is not necessarily democratic. But modern constitutionalism has, at least, some democratic components.<sup>59</sup> Here, I wish to briefly analyze the interaction of constitutionalism with democracy, particularly the democratization of constitutionalism in recent times and issues pertaining to representation, sovereignty, and accountability.

According to Frank Michelman, constitutionalism re-defined democracy by placing substantive limits to its operation, thus preserving its capacity to function effectively.<sup>60</sup> This brings us back to the notion of limited government, this time, in the more difficult case of a democratically-backed government action that, nonetheless, infringes on some procedural or substantive feature of constitutionalism, like an individual right. In these cases, democracy yields to constitutional constraints. This is due both to the operation of constitutional supremacy—since, by definition, ordinary political action is subject to constitutional compatibility—and to the more general operation of constitutionalism in terms of establishing substantive limits on the exercise of power, no matter how democratically it was agreed upon. This creates what David ButleRitchie calls democracy’s “tenuous and complicated” relationship with constitutionalism.<sup>61</sup> The exercise of undemocratic power is the foe of constitutionalism. Democracy is much more compatible, although some inherent tension remains.

Although eventually they would constrain and influence each other, it seems that democracy was “an outgrowth of constitutionalism.”<sup>62</sup> In fact, it was “a late addition to the idea of constitutionalism.”<sup>63</sup> That is, whereas constitutionalism was merely an attempt at curtailing absolute power, democracy redefined the nature of that power. At the same time, constitutionalism developed in order to adequately tame democratic power as well.<sup>64</sup> An argument can be made that a truly modern constitutional state has democratic characteristics. As Jan-Erik Lane proposes, “today a constitutional state must be a

57. Kay, *supra* note 10, at 17, 27.

58. Law & Versteeg, *supra* note 21, at 766.

59. See Ludwikowski, *supra* note 2, at 2.

60. Michelman, *supra* note 32, at 75; Sajó, *supra* note 3, at xv.

61. ButleRitchie, *supra* note 15, at 24.

62. *Id.*; see also Frohnen, *supra* note 37, at 532.

63. ButleRitchie, *supra* note 15, at 26.

64. Barber Oomen, *Soul of a Nation? The Inception, Interpretation and Influence of South Africa’s 1996 Constitution*, in THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION 57.

democracy.”<sup>65</sup> Some may argue, however, that there are different levels of what kind of democratic elements are enough, as in Mark Tushnet’s description of authoritarian constitutionalism.<sup>66</sup> I take the former position. Modern constitutionalism must have real democratic foundations. Of course, as constantly argued in this Part, it need not be liberal democracy, which is not the inherently superior brand of democracy.

Among the democratic additions to constitutionalism are voting rights, popular participation—whether through representative, direct or participatory democracy—and a clearer picture of sovereignty.<sup>67</sup> Some argue that modern constitutionalism requires “a political system based on democratic principles.”<sup>68</sup> I cannot help but agree. Of course, as Henkin points out, “[d]emocracy is in the details.”<sup>69</sup> In its most basic form, this requires some sort of popular consent on the part of the governed.<sup>70</sup> At the very least, some measure of accountability is called for, which would require some sort of process that, while not a full blown electoral contest, does allow for the expression of popular will and consent.<sup>71</sup> As Ton van den Brink puts it, this refers to the capacity of popular influence on “the composition of public authorities and the policies they pursue.”<sup>72</sup> Such connection must exist.

This is linked to the issue of legitimacy and social acceptance of the constitutional system. In that sense, legitimacy is more than merely acting according to pre-existing devices. Legitimacy is acquired “not by promulgation according to preexisting law, but by a widely shared political consensus as to the nature of the constituent authority of the polity.”<sup>73</sup> This would be more easily achieved through some sort of democratic operation. Democracy has re-defined constitutionalism and its objectives.

#### *D. Contested Features*

The elements just discussed, I think to varying degrees, are mostly accepted as inherent or acquired components of modern constitutionalism. Some were inherited from classical constitutionalism; others were acquired along the way. They constitute the core features of constitutionalism and make up the constitutionalism test. Now I wish to discuss the more controversial elements that have been linked to constitutionalism, whether they are relics of the classic constitutional era that are no longer universally accepted in modern constitutional theory or new features that some have attempted to latch on. Most of these features are better characterized as additional features that are compatible with the core, but not part of it. As such, they can be jettisoned and substituted by other, even opposite,

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65. Lane, *supra* note 13, at 127. For his part, Sajó states that “[c]onstitutionalism is suspicious of democracy, but this does not necessarily mean that there is animosity.” Sajó, *supra* note 3, at 53.

66. Tushnet, *supra* note 30.

67. ButleRitchie, *supra* note 15, at 26–27.

68. Junji & Rousso, *supra* note 11, at 563.

69. Louis Henkin, *A New Birth of Constitutionalism: Genetic Influence and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 52.

70. Howard, *supra* note 20, at 18.

71. Lane, *supra* note 13, at 2.

72. Ton van den Brink, *Fit for all Practical Purposes? Constitutionalism as a Legitimizing Strategy for the European Union*, in THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION 126.

73. Kay, *supra* note 10, at 30.



additional features.

### 1. Liberal Constitutionalism

Is constitutionalism inherently and necessarily liberal? My short answer is no. Classical constitutionalism, which was much less pluralistic than modern developments in the area, may well have been.<sup>74</sup> And while liberalism is still compatible with constitutionalism, it ceased to be, if it ever was, a *sine qua non* requirement for its existence. I will address this issue in two separate parts. Later on, I will tackle the liberal, non-liberal, illiberal, and post-liberal distinctions. Here, I merely discuss the proposals by many western scholars that liberalism is an inherent and inseparable part of constitutionalism or, at the very least, its superior articulation. As previously stated, I challenge this very widely shared assertion.

Richard Albert states that the aspirational element of constitutions “assigns substantive meaning to the project of constitutionalism, defines it as more than merely specifying the “rules of the game” and seeks to breathe into it values coherent with the larger project of *liberal democracy*.”<sup>75</sup> I believe this has it up-side down. Maybe liberal democracy must be constitutionalist, but the opposite need not be.<sup>76</sup> I propose that constitutionalism stopped being a by-product of liberalism in the twentieth-century, when the explosion of constitutional pluralism expanded the array of constitutional systems. Constitutionalism is not the exclusive domain of liberal democracy.

Robert Barker is even skeptical about the effectiveness of non-liberal constitutionalism: “Finally, and more troubling, is the movement to constitutionally repudiate the Western tradition, which is the very source of constitutionalism.”<sup>77</sup> The problem with this proposal is that it creates a take-it-or-leave-it model. I see no reason why you cannot have constitutionalism without adopting classic western liberalism, with its obvious economic and social policy implications. Just because the Western tradition is the source of constitutionalism does not imply that constitutionalism is eternally beholden to it.<sup>78</sup> A.E. Dick Howard, even after recognizing the difficulty of providing an adequate definition for constitutionalism, states that “I will now proceed, nonetheless, to suggest some indicia which I believe characterize the constitutional basis *for what is often called ‘liberal democracy’*.”<sup>79</sup> Again, there seems to be an underlying, yet not discussed, premise that liberal democracy is inherently linked with constitutionalism in a mutually reinforcing way. To a non-liberal constitutionalist, this seems unsatisfactory.

András Sajó goes much further and seems to deny non-liberal views the constitutionalist label, in reference to “the fact that there is some sort of deeper attraction

74. See Frohnen, *supra* note 37, at 543 (noting that “[i]dentification of constitutionalism with liberalism has deep roots”).

75. Albert, *supra* note 4, at 381 (emphasis added).

76. See Scott, *supra* note 6, at 2166 (noting that “[s]tandard liberal-democratic orthodoxy demonstrates both substantive and procedural limits forms of such limiting constitutionalism”).

77. Barker, *supra* note 46, at 16, in reference to the new post-liberal constitutions in South America.

78. See Scott, *supra* note 6, at 2165 (referencing the *historical* link between constitutionalism and Lockean liberalism). Obviously, the fact that something was true historically does not mean it remains so today.

79. Howard, *supra* note 20, at 17 (emphasis added).

between classical liberalism and constitutionalism as a limit to state *intervention*.<sup>80</sup> The question is, what kind of intervention are we talking about? In the economic sphere? In terms of social relations? Redistributive goals? If this is what is being referred to, no adequate explanation is given to why that is so. It assumes that constitutionalism is inherently liberal when, in fact, liberalism is merely compatible with constitutionalism, as are other approaches to constitutional theory. Aside from the historical link between classic constitutionalism and liberalism, there is very little added to the proposal that other, non-liberal models of constitutionalism are somehow less valid.

I am not denying that liberalism was very much linked with classic constitutionalism at its inception.<sup>81</sup> But, like many other types of creations, the offspring became a separate and independent entity. The same can be said about the rule of law.<sup>82</sup>

Some scholars see daylight between constitutionalism in general and its liberal articulation in particular. For example, Bruce P. Frohnen states that “there is a prejudice among lawyers in particular that constitutions must be liberal in order to be worthy of the name.”<sup>83</sup> Frohnen’s argues that many of the features normally associated with constitutionalism, such as rule of law, limited government and individual rights, are not exclusive liberal ideas.<sup>84</sup> He persuasively points out why there has been so much intermingling between constitutionalism in general and liberalism: “Part of the reason for the prejudice against non-liberal constitutions is understandable attachment to the idea that liberal democracy constitutes the highest form of political and constitutional development.”<sup>85</sup> And herein lies the key distinction: liberal democracy as a political theory, which can be legitimately championed by those who adhere to its tenets, and liberal constitutionalism, which can also be advocated as an articulation of constitutional theory. Both are legitimate political and constitutional proposals, but neither is inherently superior. The current political triumph of liberal democracy as the dominant model of politics around the world is not evidence of its inherent superiority, nor is it evidence of liberal constitutionalism’s monopoly or superiority over other constitutional regimes in terms of constitutional theory.

As we will see shortly when discussing the liberal vs. non-liberal debate, the point is not that there are, in fact, legal systems that fall just short of “full” constitutional status, such as illiberal systems or Tushnet’s authoritarian constitutionalism. Neither example falls within the constitutional pluralism I propose. What I argue is that here are full-fledged constitutionalist systems worthy of the name that are either non-liberal or post-liberal. The issue here is not the existence of illiberal systems, but the existence of non-liberal models that are equally as constitutionalist as their liberal counterparts.

We should be careful when addressing the liberalism issue as it pertains to constitutionalism. Some ideas of liberalism have been retained by alternative

80. Sajó, *supra* note 3, at 38 (emphasis added).

81. Kay, *supra* note 10, at 18; ButleRitchie, *supra* note 2, at 38 (stating that modern constitutionalism is “derived from a western legal paradigm”).

82. See Magen, *supra* note 35, at 58 (referencing the “liberal-democratic conception” of the rule of law); Brian Z. Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 34 (2004).

83. Frohnen, *supra* note 37, at 529.

84. *Id.*

85. *Id.* at 534.

constitutional models but combined with other elements. In that sense, they are post-liberal. Individual political rights, judicial review and the other features we discussed earlier are examples of this. As to other ideas, such as property rights and the free market, alternative constitutional models reject them; in that sense, they are non-liberal. But, as I am about to argue, because these latter elements are not, like the first ones, inherent to constitutionalism, their rejection does not make the alternative models any less constitutionalist than the more purist liberal versions. Put simply, constitutionalism is not inherently liberal.

I will now turn to some of the more controversial features of liberal constitutionalism: property rights, free markets and capitalism.

## 2. Property, Capitalism and the Free Market

Does constitutionalism require the recognition of private property rights,<sup>86</sup> free markets and a capitalist economic system? My short answer is no. Many say yes.<sup>87</sup> Some scholars see one, some, or all of these features as inherent to constitutionalism.

Among his list of the “key concepts of modern constitutionalism,” David ButleRitchie includes “the need for market (now global market) capitalism” and “the acceptance of rights regimes (especially certain property ownership regimes).”<sup>88</sup> He equates these features with limited government, individual liberties, and representative democracy.<sup>89</sup> But, there can be capitalism without constitutionalism (as many previous South American dictatorships can attest) and also constitutionalism without capitalism. The same goes for private ownership of the means of production. The inherent link is missing.

Because I propose a model of constitutionalism that has plural articulations, I need not prove that there is some tension between capitalism, private property, and free markets on the one hand, and constitutionalism on the other. I do not argue that only non-liberal systems are really constitutionalists. I only need establish that these features are not essential to the existence of constitutionalism or, at least, that it is a contested proposition to say so.<sup>90</sup> Except as it pertains to individual autonomy—a subject we will address right after this one—I see no logical necessity to include these elements. Capitalism is merely a mode of production and distribution of wealth, which is premised on private ownership over the means of production and a market system of exchange. What any of this has to do with constitutional supremacy, judicial enforcement, democratic processes and rejection of arbitrary government has yet to be fully explained in such a manner as to exclude any other type of economic organization from the constitutionalist label.<sup>91</sup> As

86. For purposes of this Article, I limit my analysis to private ownership over the means of production. I do not engage in an analysis of *personal property*.

87. See, e.g., Cass Sunstein, *On Property and Constitutionalism*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 383–91; Sajó, *supra* note 3, at 250; Tamanaha, *supra* note 82, at 44.

88. ButleRitchie, *supra* note 2, at 40.

89. *Id.*

90. See Martha C. Nussbaum, *Introduction to Comparative Constitutionalism*, 3 CHI. J. INT’L L. 429, 432–33 (2002).

91. Venter makes reference to “many countries that are not considered to be constitutional states due to their express socialist or religious character.” Venter, *supra* note 10, at 146. Why socialism is categorically denied

Hirst explains, “[s]ocialists have challenged the proposition [that private property is essential] because it appears to claim that private property, and therefore capitalism, is a necessary condition for political liberty.”<sup>92</sup>

Others, like Annen Junji and Lee H. Rousse go much further and actually argue that one of the standard features of modern constitutions is “the protection of private means of production.”<sup>93</sup> Does this mean that in order to set up a full-fledged constitutional state there must be private ownership over the means of production?<sup>94</sup> I suggest constitutional theory does not require this; it is strictly a political question.

To be sure, I’m not alone in my objections as to the proposal that there is an inherent link between constitutionalism and private property rights. For example, Walter Murphy explains that “constitutional democracy does not presuppose a capitalist economy.”<sup>95</sup> Yet, he qualifies that proposal: “What a constitutional democracy does require is the practical availability of strong legal protections for means through which citizens can achieve a significant degree of economic autonomy.”<sup>96</sup> I will now turn to this issue of the relation between property and individual autonomy as a separate feature of constitutionalism.

I’ve found no convincing independent justification for why private ownership of the means of production or a free enterprise system is a requirement for constitutionalism. In the period before democracy and individual rights, property may have been a *way for a very select few* to limit the power of government. But the advent of democracy and individual rights have made property rights unnecessary in terms of achieving this constitutionalist end. As such, what remains is an ideological commitment to a particular economic system that should be eliminated as a constituent feature of constitutionalism.

### 3. Autonomy, Individualism and Some Social Contract Theory

Here we deal with two separate issues: first, the idea of individual autonomy as a feature of constitutionalism; and second, the connection between individual autonomy and property rights. In the end, I will offer a brief comment on the idea of the social contract in the context of these issues.

Individual liberty is not a homogeneous proposition. It can come in different shapes and sizes, some of which can actually be contradictory. An employer’s economic liberty can be a worker’s denial of material freedom. But, we can stipulate that the general idea of individual freedom is both good and an essential part of modern constitutionalism.<sup>97</sup> Controversy ensues when an attempt is made to give detailed substantive content to that general idea.

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constitutionalist status is not explained.

92. Paul Hirst, *LAW, SOCIALISM AND DEMOCRACY* 7–8, Allen & Unwin, Boston (1986). I will take up this issue again when discussing individual autonomy and its relationship with constitutionalism.

93. Junji & Rousse, *supra* note 11, at 563.

94. Henkin, *supra* note 69, at 49 (commenting on “a clear lack of protection to the right to property” in international human rights models). In particular, Henkin explains that those models “modified eighteenth century liberalism by commitments to communitarianism.” *Id.* He also criticizes the international human rights models’ silence “on the relation of economic systems—of free enterprise, socialism, and the spectrum of mixed systems—to democracy and to individual rights.” *Id.* at 50.

95. Murphy, *supra* note 4, at 134.

96. *Id.*

97. See Michelman, *supra* note 32, at 82; Murphy, *supra* note 4, at 105; Sajó, *supra* note 3, at 245, 251–52.

Some aspects of individual liberty and autonomy are less controversial than others. Issues such as privacy, family life, physical and mental integrity, religious liberty, and freedom of speech and association are key components of this general idea and have near universal acceptance.<sup>98</sup> This is part of what Richard Kay describes as constitutionalism's goal "to fence out certain subjects from potential public regulation."<sup>99</sup> So far so good. Up to this point, the notion of individual autonomy seems uncontroversial and acceptable as an integral component of modern constitutionalism.<sup>100</sup> It should be part of the constitutionalism test in its rights component. The problem begins when attempting to go further. I now turn to the relation between individual liberty and property rights.

First, I wish to address how liberal scholars link the issue of private property and individual liberty and autonomy. For example, Michel Rosenfeld states that "[p]roperty occupies a central place among the fundamental interests that should be afforded constitutional protection in order to secure a boundary between the individual and the state, and between the private and the public spheres."<sup>101</sup> Citing Lockean conceptions of property, Rosenfeld references the need for "enough private space [for the individual] to develop and flourish."<sup>102</sup> Of course, he recognizes that "[c]hanges in the nature of property relations, and the blurring of the public/private distinction, cast significant doubt on the continuing viability of property rights as the primary guarantors of individual liberty."<sup>103</sup>

But others still cling to the importance of property as a source of separation, and thus freedom, between the individual and the state. As Murphy suggests, "without a widely ranging right to private property, [people] are likely to exist as wards of the state."<sup>104</sup> Henkin has a similar view, stating that in international human rights models, which do not protect private property rights or favor a particular economic system, "[t]he individual is guaranteed liberties, but not liberty."<sup>105</sup> Sunstein also echoes the link between property and "personal independence from the government."<sup>106</sup>

I see two main problems with this rationale. First, it completely ignores how many individuals are actually denied freedom by other private actors and entities that hold great economic power precisely because of their property. What exactly is the difference between being a ward of the state or being subordinate to the economic power of your employer? That one can change employers or hypothetically become an entrepreneur seems out of touch with current economic realities around the world. Second, it also ignores the impact of democracy in the individual-state relationship. The warden-of-the-state theory seems to be premised on the notion that the state is an independent entity outside democratic control by the citizenry. But when there is a dynamic democratic

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98. See Howard, *supra* note 20, at 20–22.

99. Kay, *supra* note 10, at 19.

100. Undoubtedly, the issue of individual autonomy is a direct contribution of classic liberalism to constitutionalism: "Liberalism values constitutions as a means of facilitating a particular kind of personal freedom—individual autonomy." Frohnen, *supra* note 37, at 556. Of course, that in no way bars that *other* systems may adopt this notion.

101. Rosenfeld, *supra* note 2, at 33.

102. *Id.*

103. *Id.*

104. Murphy, *supra* note 4, at 134.

105. Henkin, *supra* note 69, at 49.

106. Sunstein, *supra* note 87, at 390.

process at work, the state becomes a conduit of the people's sovereign power. In those circumstances, state-managed property, benefits, entitlements, or wealth is not a gift to the people but something the people actually gave themselves.<sup>107</sup> When that happens, individual autonomy is actually enhanced through democratic action.

In the end, I agree with Arthur Jacobson when he states that "institutions of property are not the only ones that can support autonomy."<sup>108</sup> This is primarily true as to private ownership of the means of production, which is separate from the concept of personal property.

All of this is the product of a tension between the recognition of the importance of individual autonomy and an individualistic worldview.<sup>109</sup> This brings us to the social contract theory,<sup>110</sup> where classic constitutionalism places much importance in the tension between individuals and the state.<sup>111</sup> This is the product of a "particular conception of civil society; a conception which sets the individual in opposition to society in an antagonistic way."<sup>112</sup>

In Part III, I will discuss the ideological underpinnings of this position and its counterpart in progressive and post-liberal teleological constitutions. For now, it is enough to express that this view is premised on an almost natural contradiction and conflict between the state and the individual.<sup>113</sup> Thus, it is claimed, constitutional law is inherently charged with limiting government,<sup>114</sup> which in turn is a formula for expanding, or at least protecting, individual freedom. This brings us to the issue of what is the 'proper' role for government and the difference between limited government and minimal government.

#### 4. The 'Proper Role' of Government

The existence of a government with limits should not be confused, however, with the notion of minimal government—as in a Lockean night-watchman type state—a concept which is not ideologically neutral. While the latter may be a legitimate political theory, the two are not synonymous. Governments that embark on a constitutionally allowed, or even prescribed, interventionist road are still bound by legal and political limitations, some of them established by constitutional design.<sup>115</sup> The existence of limits

107. Sunstein disagrees. "A central point here is that in a state in which private property does not exist, citizens are dependent on the good will of government officials, almost on a daily basis." *Id.* at 391. The issue of citizens being dependent on the good will of private economic forces is left unresolved. When discussing this issue, Sajó suggests "[p]utting aside the inequitable distribution of property." Sajó, *supra* note 3, at 30.

108. Arthur J. Jacobson, *Transitional Constitutions*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 416.

109. See Rosenfeld, *supra* note 2, at 5.

110. See Ginsburg, *supra* note 18, at 14; Howard, *supra* note 20, at 18.

111. "Whether in the Middle Ages or the twenty-first century, the primary object of constitutionalism has been to protect individual freedom and limit state power through the operation of law." Junji & Rousso, *supra* note 11, at 564.

112. ButleRitchie, *supra* note 15, at 7.

113. Venter, *supra* note 10, at 259; Vernor Bognador, *Introduction*, in CONSTITUTIONS IN DEMOCRATIC POLITICS 43 (Vernor Bognador, ed., 1988).

114. Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 865–66 (2008) (noting that "[c]onstitutions exist to restrain government action"); Zachary Elkins, Tom Ginsburg & James Melton, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 38 (2004).

115. Dennis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of*

does not equal a narrow role for government action or for the productive and democratic use of public power. As Usman states as to positive rights, this sort of affirmative and expansive grant of power “flips the paradigm [of limited government] on its head.”<sup>116</sup>

In other words, does constitutionalism establish the “proper ends of government”?<sup>117</sup> We already discussed substantive limits relating to individual autonomy, such as privacy and family life, which are not, even then, absolute. Richard Kay suggests there are “[c]ertain actions are beyond the proper realm of public power.”<sup>118</sup> The issue becomes a problem when one ties this general notion of off-limit actions with social and economic policy. Is it proper or improper for government to nationalize industry, require unionization in the private workplace, or carry out distributive policies?<sup>119</sup> Constitutionalism does not answer these questions;<sup>120</sup> politics do, which, as we will see in Part III, can come in either constitutional or ordinary fashion. But constitutional politics are still politics and are separate from the inherent features of constitutionalism. Just because Locke and others believe that there is a “properly defined domain for state activity” does not mean their chosen domains are the right ones.<sup>121</sup>

The notion of limits on government is, in final analysis, a legal view of power: as we saw, avoiding the arbitrary use of power.<sup>122</sup> Yet, sometimes it seems like there is a fine line between the notion of a government with limits as to the exercise of its powers and minimalist government; a line which some scholars seem to blur.<sup>123</sup> They should not. Some constitutions do not concern themselves exclusively with limiting the powers of government. They also limit the power of private forces, particularly powerful economic interests. The notion of limits on power is not exclusive to government nor is it confined to the public realm. As we will see in Part III, post-liberal teleological constitutions are very aware of this phenomenon, which is why they also address the exercise of private power and place limits on it as well.

We must not fall into the trap of affirming that only liberal constitutionalism limits the use of government power. It is a trait of constitutionalism in general, including post-liberal ones. The crucial distinction is that these latter types re-define the conception of limits on government power by distinguishing it from the legitimate use of public power in an interventionist manner and also by differentiating it from the concept of minimalist government. In other words, while minimal government may be a consequence or even a political goal of liberal democratic constitutionalism, the existence of limits on the use of

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*Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 6.

116. Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALA. L. REV. 1459, 1521 (2010).

117. Kay, *supra* note 10, at 17.

118. *Id.*; see also Sajó, *supra* note 3, at 12.

119. See ButleRitchie, *supra* note 15, at 7–8 (discussing the tension between private ownership and state intervention).

120. According to Stephen Macedo, neither does the rule of law: “I will not follow those who would build into the rule of law not only the formal criteria and constitutional mechanisms referred to above, but also a commitment to the minimal state.” Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, in THE RULE OF LAW 149.

121. Kay, *supra* note 10, at 18.

122. Venter, *supra* note 10, at 34.

123. See Hardin, *supra* note 24, at 66 (“Indeed, ‘constitutional government’ is commonly taken to mean limited government.”); Bognador, *supra* note 113, at 3.

power is not exclusive to it and it is wholly compatible with constitutionally backed interventionism.

### *E. Towards a Broader Constitutionalism*

#### 1. It is Not All About Government: Towards a Broader Notion of Power

As we saw when discussing the distinction between limited government and minimal government, many scholars seem to associate the concept of power exclusively with government, to the exclusion of other forms of equally potential abusive power. This can be traced back to the historical origins of classic originalism where government power was the main threat to liberty. Since constitutionalism was about constraining government, a constitution is seen as the creator of government, as well as the vehicle by which the power it is given is organized, channeled and, especially, limited.<sup>124</sup> This view signals a liberal democratic or classic view of constitutionalism,<sup>125</sup> which takes us back to the social contract rationale and the antagonistic relation between the individual and the state.<sup>126</sup>

Now I wish to propose a broader articulation of the type of power that constitutionalism should, or at least can, impose limits upon. As we saw, most of the surveyed scholarship equates power and its limits with government.<sup>127</sup> For his part, Paul Scott states that “[c]onstitutionalism is a concept pertaining to power.”<sup>128</sup> But power is in no way limited to government. It is true that a constitution, as the generator of government, must address the issue of the limits of the government it has created. If it fails to do so, government is free of limits, which would run counter to the goals of constitutionalism. At the very minimum, constitutionalism requires that those instruments adequately limit government power. But in modern societies, where dominant, non-state entities wield enormous power, constitutionalism cannot simply turn a blind eye. The emergence of horizontal rights and other policy provisions included in modern constitutions address this reality.

András Sajó suggests that “[c]itizens are threatened not only by the . . . almightiness of government but by the tyranny of the majority or by small groups that refuse to recognize the rights of others.”<sup>129</sup> But those small groups do not always act through the institutions of the state. Constitutions can also protect individuals and the people at large

124. Galligan & Versteeg, *supra* note 115, at 6 (noting that a constitution “establishes a system of government, defines the power and functions of its institutions, provides substantive limits on its operations, and regulates relations between institutions and the people”).

125. Bogdanor, *supra* note 113, at 4; Francois Venter, *CONSTITUTIONAL COMPARISON* 50 (2002); Lerner, *supra* note 24, at 209.

126. Galligan & Versteeg, *supra* note 115, at 23.

127. *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 1 (Larry Alexander, ed., 1998); Kay, *supra* note 10, at 17 (“an attempt to keep a government in order”); Arts & Handmaker, *supra* note 5, at 49–50 (describing constitutionalism as a “set of rules or norms creating, structuring and defining the limits of, government power or authority”); Andrew Arato, *Dilemmas Arising From the Power to Create Constitutions in Eastern Europe*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY*, *supra* note 2, at 167–68.

128. Scott, *supra* note 6, at 2160; *see also* Sajó, *supra* note 3, at 9 (“Constitutionalism is the restriction of state power in the preservation of public peace”). The thing is that modern historical events have shown that there are other threats to public peace that may require constitutional attention.

129. Sajó, *supra* note 3, at 29.



from these powerful private forces.<sup>130</sup>

The point here is *not* to argue that a constitution that only addresses limits on government power is not constitutionalist. My argument is that developments in modern constitutionalism have accounted for the need to also limit other kinds of power. As a result, constitutional theory and scholarship should account for this phenomenon in their treatment of constitutionalism and adopt a wider view of power and the necessary limits that constitutionalism should place on it. At the very least, this is a legitimate additional feature that, in fact, many post-liberal teleological constitutional systems have adopted.

## 2. Liberal and (or Versus) Non-Liberal Constitutionalism

Previously, I explained my rejection of the notion that liberalism is an inherent part of constitutionalism. While it may be difficult to adopt liberalism without accepting constitutionalism, the inverse is not necessarily true. This is part of my view on the inner pluralism that characterizes modern constitutional theory. This means that there are non-liberal forms of constitutionalism. This Article has mostly focused on post-liberal constitutions that have found a home in the teleological constitutional type that I will develop in Part III. Post-liberal constitutionalism transcends the basic pillars of classic constitutionalism while preserving some of its elements. For example, post-liberal systems recognize individual political rights, set procedural and substantive limits on the state, and reject arbitrary government, among others. In other words, they adopt the core features of constitutionalism that I have outlined in this Part. But, they have gone far beyond those minimum elements, either by adding some other features or by jettisoning the political, social, and economic components of liberalism, which was previously inherently associated with classical constitutionalism, but are no longer so. Economic policy, redistribution, communitarian approaches to social organization, among others, are examples of this transcendence.<sup>131</sup>

As such, I think it is difficult to deny the existence of pluralism within constitutional theory. But some still believe that liberal constitutionalism is the *optimal* model within that plural family. That is why some scholars make the distinction, not between liberal versus non-liberal or post-liberal approaches,<sup>132</sup> but between liberal and “illiberal” systems.<sup>133</sup> Of course, illiberal is hardly a complimentary characterization. On the

130. See *Id.* at 32 (“When reading modern constitutions, one has the sense that they are not about the basic principles of governing and the institutional limits of power. There is perhaps more concern about organizing and guaranteeing the basic institutions of the social structure.”).

131. Professor Louis Michael Siedman appears to make a distinction between leftists and constitutionalists. See generally Louis Michael Siedman, *Can Constitutionalism be Leftist?*, 26 QUINNIPAC L. REV. 557 (2008). While this may be true as to the *U.S. experience*, where the constitutional design is hardly progressive in nature, it is not true as a matter of general constitutional theory.

132. See Magen, *supra* note 35, at 55, in reference to the applicability of the rule of law to either liberal or non-liberal systems. But even then, Magen seems to make a value judgment between them. *Id.* at 59 (discussing the ability of “minimalist illiberal democracies to mature into effective, liberal ones”). First, are these the only two options? Second, why are liberal democracies automatically positioned at the opposite (presumably preferable) end of the spectrum? See also Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT’L L.J. 1, 4 (2006) (“At one end of the spectrum are consolidated or liberal democracies”); Venter, *supra* note 10, at 13 (“In the second half of the 20<sup>th</sup> century the nature and functions of the modern state, ideally conceived of as the liberal democratic constitutional state, were clear.”).

133. See, e.g., ButleRitchie, *supra* note 15, at 6.

contrary, it is evidently pejorative.

I find that dichotomy superficial and inadequate. Bruce P. Frohnen states that not all constitutions are liberal,<sup>134</sup> which is true. But it does not follow that all constitutions that are not liberal are, therefore, *illiberal*.<sup>135</sup> For example, Amichai Magen characterizes non-liberal societies as “defective democracies,” “illiberal,” “clientelist,” and so on.<sup>136</sup> Why is that so? I agree that illiberal systems are defective, but I reject the notion that all non-liberal systems are, in fact, illiberal. Illiberal and non-liberal *are not synonymous*. Characterizing illiberal as non-liberal is problematic, as it can create the illusion that all non-liberal models share similar traits with illiberal systems.<sup>137</sup>

As Frohnen explains, “Part of the reason for the prejudice against non-liberal constitutions is understandable attachment to the idea that liberal democracy constitutes the highest form of political and constitutional development.”<sup>138</sup> That “understandable attachment” is very particular to the United States and other nations of the liberal, western tradition; but it is not a world-wide phenomenon. Furthermore, the notion that liberal democracy constitutes the highest form of political and constitutional development is a contestable political proposal, not an inherent truth of constitutional theory.<sup>139</sup>

In summary, I believe the liberal-illiberal dichotomy is misleading and unhelpful. As it relates to core constitutionalism, liberalism is irrelevant. Whether a system is constitutionalist depends on if it satisfies the core features of that concept. Authoritarian or illiberal systems will normally fail the constitutionalism test. Most, but not all, liberal systems may pass that test. But, because of the pluralism within constitutional theory and the availability of different constitutional models that satisfy the core elements of constitutionalism, some non-liberal or post-liberal systems can also pass the constitutionalist test; some with even higher-flying colors than classic liberal models.

### 3. Post-Liberal Constitutionalism

Many, although not all, of these teleological constitutions can be identified as post-liberal. What does this mean? As I stated earlier, these constitutions comply with the core features of constitutionalism. As such, they share with their liberal counterparts a common floor of limited exercise of power, individual rights, and a rejection of arbitrary government. But, unlike their liberal counterparts, they address other issues—like economic policy, social organization, and material redistribution—and they reject some of the political underpinnings of classic liberalism, such as individualism and the sanctity of private ownership of the means of production.<sup>140</sup> That is, they reject the “still lively anti-redistributive dimensions of liberal constitutionalism.”<sup>141</sup> Although these constitutions

134. Frohnen, *supra* note 37, at 529.

135. *Id.* at 533 (referencing the alleged common wisdom that “constitutions can only be valid . . . if they are liberal.”).

136. Magen, *supra* note 35, at 97.

137. See Tushnet, *supra* note 30, at 391.

138. Frohnen, *supra* note 37, at 534.

139. See Junji & Rousso, *supra* note 11, at 565 (stating their skepticism that constitutionalism can be successfully adopted in non-Western nations).

140. See Michelman, *supra* note 32, at 76.

141. Forbath & Sager, *supra* note 39, at 1661.

favor an interventionist state and redistributive policies, they still observe the core elements of constitutionalism: “Constitutional obstacles to state flexibility may be valuable even in a state premised on the achievement of collective objectives.”<sup>142</sup> Latin America has been host to many of these constitutional types.<sup>143</sup> I propose that there is a post-liberal articulation of constitutionalism that satisfies its main tenets.

#### *F. Moving Forward*

Some scholars have recognized this dynamic feature of constitutions and the multiplicity of purposes they can serve.<sup>144</sup> Each society must find for itself which models are best suited for its social needs. Slowly but surely, modern constitutionalism has evolved in a direction of a wider view of constitutional function and purpose and, hence, of constitutionalism itself.<sup>145</sup> But the problem still remains that one ideal type is seen as superior to the rest, in particular, the liberal democratic model of the framework type. In that sense, while many recognize the multiplicity of constitutional types, they resist giving them equal status.<sup>146</sup> They do so at their peril and, most importantly, at the peril of negating the democratic thrust of many of the non-framework models and their promising potential.

Modern constitutionalism should keep up with the times. We are constantly witnessing new waves of constitutional creation that are both influenced by generalized notions of constitutionalism and that themselves influence the constant development of constitutional theory. While the constitution-making wave of the 1990’s was characterized by transitions to liberal democratic models, such as in the case of Eastern Europe, more recent trends reveal a shift to the teleological and substantive approach. Post-liberal constitutionalism is alive and well. The challenge for modern constitutional theory is to divorce itself from the dominant model as the ideal measurement or, even worse, as the only real model.

In summary, constitutionalism is plural and dynamic. It has a core that all systems must adhere to, but also a plethora of elements—some even contradictory among themselves—that can be added to the core, as long as these additions are compatible with it. Some systems fail to live up to the core requirements of constitutionalism, as in the case of so-called illiberal and authoritarian regimes. As to the systems that do meet these requirements, they come in different shapes and sizes, from classic liberal regimes, to redistributive post-liberal societies. As long as all of these approaches meet the core requirements of rejection of arbitrary government, legality, rule of law, constitutional

142. Kay, *supra* note 10, at 25. Undoubtedly, there have been experiences in the past of non-liberal systems that, in reality, failed the constitutionalist test. See Rosenfeld, *supra* note 2, at 3. But that was neither inherent to those systems nor inherent to every other non-liberal experiment that may be attempted in the future.

143. Mauricio García-Villegas, *Law as Hope: Constitution and Social Change in Latin America*, 20 WIS. INT’L L.J. 353 (2002).

144. Randall Peerenboom, *Social Foundations of China’s Living Constitution*, in COMPARATIVE CONSTITUTIONAL DESIGN 138 (Tom Ginsburg, ed. 2012).

145. Galligan & Versteeg, *supra* note 115, at 4.

146. See Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, *Introduction*, in CONSEQUENTIALIST COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 22 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, eds., 2013) (stating that the choice is between being “an illiberal or fully consolidated democracy”). This dichotomy seems to suggest that only liberal democracies can be labeled as fully consolidated democracies.

supremacy, judicial enforcement, and the other ones discussed in this part, they are all equally constitutionalist. Whatever they add on top of that, as long as it is compatible with the core, is up to them.

### III. A PLURALISTIC TYPOLOGY OF CONSTITUTIONAL MODELS

#### A. Introduction

From the discussion in the previous Part, we can assert that different constitutional types have equal claim to legitimacy, as long as they all meet the core requirements of the constitutionalism test set out in Part II. In other words, there is no one ideal constitutional model to emulate; there are several. This corresponds with the pluralism within constitutional theory we discussed in Part II and the fact that there are different add-ons that make each constitution different from the rest, while sharing the same common core.

This multiplicity of legitimate constitutional types requires us to step back and recognize the inherent pluralism within constitutional theory, which leads to the articulation of different constitutional models. This pluralism is the product of different historical moments and ideological movements that are created by a variety of social and political forces. This constitutes a direct challenge to the dominant paradigm of constitutional theory that supposes the existence of an ideal type of constitution that is inherently linked with the concept of constitutionalism, to which all constitutions will be measured against. As we saw, currently, that ideal model is associated with the liberal democratic tradition. I challenge that assertion and further my objection in this chapter as it relates to specific constitutional types.

In Part II, we saw that, as long as a constitutional system complies with the core features of constitutionalism and their additional elements are compatible with them, they are entitled to be characterized as constitutionalist. As such, there is no such thing as an optimal constitutionalist model. Many models can have an equal claim to the label.

In this Part, I wish to explain, develop, and sustain my challenge. First, I will attempt to identify and problematize the current paradigm from the perspective of what a constitution is supposed to be and do, and the traditional notions that accompany it. Second, I will propose a new typology of ideal constitutional models that necessarily requires a re-evaluation of the paradigm. In particular, I will analyze the different constitutional types as to their history, structure, and functions, and the different ideological, political, and conceptual underpinnings that characterize them. Third, I will discuss the implications of the typology, especially as to issues such as the so-called counter-majoritarian difficulty and democratic self-governance. Finally, I will analyze and compare the different constitutional types as they pertain to issues such as substantive content and the role of history, constitutional creation, and legitimation. As we are about to see, within the constitutionalist family there are equally legitimate types and models.

Here I will focus on the different constitutional types which are not adequately recognized and discussed. In this instance, the fact that constitutions have transcended their prior restrained designs and have broken free in a new era of democratic self-government. This has changed the very nature and concept of constitutionalism and constitutional theory.

In particular, this Part includes: (1) an analysis of constitutional types, focusing on the framework, and teleological models, including their general characteristics and approach to ideological and economic issues; (2) a discussion about constitutional self-government, focusing on issues relating to the constitutional-ordinary politics dichotomy, the so-called counter-majoritarian difficulty, and the impact teleological constitutions have on judicial intervention and practice; (3) an analysis of the content and operation of post-liberal constitutional systems; and (4) a discussion on the process of constitutional creation, focusing on those that can be characterized as highly participatory, democratic and popular, as well as on issues related to polarization and consensus.

### *B. Between Structure and Substance: Constitutional Types*

#### 1. Framework Constitutions

##### *a. General Overview*

Constitutions create (constitute) something. From a historical perspective, as we just saw, the something that was being constituted was not society, but the government that is to rule over that society.<sup>147</sup> As such, the early constitutional designs and types were constitutions that, simply put, created the structure of government. This type of constitution can be identified as *framework constitutions*, although they can also be labeled as “structural,” “procedural,” or “organic.” Their main characteristic is that they are less concerned with the content of policy than in the process of its creation. In other words, they mainly serve a coordination function that creates the instruments of government so that, once activated, they can take a life of their own. Politics and policy are the indirect result of constitutional law. While the constitution creates the structures of the state, those structures, in turn, generate policy by a self-governing people.

The goal of this type is to create and kick-start the political process and leave everything else to it. Framework constitutions maximize self-government by limiting themselves to creating the structures of government and supplying them with tools to function effectively. The constitution creates—or constitutes—the institutions of government, from which all other legal norms flow.

Once these structures of political self-governance—especially when they are of a democratic nature—are set up, constitutional law stops and ordinary politics start.<sup>148</sup> The role of the Constitution is to kick-start politics, not to direct it. Society is not to be organized *by* the Constitution, but *through* the tools and institutions created by it. Policy and politics are outside the realm of constitutional law.<sup>149</sup> In these systems, constitutional politics, and thus constitutional law, are limited.

147. See Bognador, *supra* note 113, at 17.

148. Professor Balkin’s description of skyscraper constitutions fits within this model. Jack M. Balkin, *LIVING ORIGINALISM* 21 (2011). Later on, we will add a third element, constitutional politics, which are most relevant in teleological systems.

149. “[A] constitution is *not intended* to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*.” William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703 (1976) (emphasis added). Many teleological constitutions reject that characterization; see also Elkins et al., *supra* note 114, at 22.

*b. Pure Framework Constitutional Model*

In its purest form, framework constitutions only address issues related to the institutions and structure of state power. Policy and substantive content are wholly absent. They create the skeleton of government and leave out the fleshing of policy to ordinary politics. Once life has been given to these structures, the constitution takes a step back. Australia is a prime example of pure framework constitution.<sup>150</sup> Its purity lies in literally limiting its text to the structural framework of the created government. Society and individuals are left out of it. Government is the exclusive object of the constitutional text.<sup>151</sup> This is the basic model of the framework constitution.<sup>152</sup> It is a structural view of constitutional law.

Pure framework constitutions are normally devoid of substantive content because of their own nature: their sole purpose is to create or constitute the entities of the state. Public policy, individual rights, allocation of resources, and so on, are left up to the structures of government created by the constitution.<sup>153</sup> In democratic societies, those issues are left up to the people themselves through their elected representatives. In other words, policy is the result of ordinary politics, while structure is the creature of constitutional law. Their link lies in that the constitutional structure allows ordinary politics to ensue.

In that sense, pure framework constitutions are very much linked to the view that representative democracy is the best tool for the channeling of the popular will and, thus, for adopting policy choices. Because the institutions of government created by the constitution will respond to the popular will through democratic practices, the people will be able to protect themselves by selecting representatives that will enact legislation that will secure their rights and implement their substantive views about social organization.<sup>154</sup> For example, if a strong majority of the population rejects the death penalty, there would be no need to entrench that policy decision in the constitutional text. Instead, the people's elected representatives will reflect that popular stance and outlaw the death penalty by way of legislation.

Modern framework constitutions in democratic states are premised on a very tough proposition though: that legislation adopted by elected representatives through the mechanisms of ordinary politics will always and adequately reflect the popular will. It is also premised on the notion that by merely setting up the structures of government, ordinary politics will even itself out and produce appropriate and democratic results.

But many problems arise quickly. Can those institutions work effectively if there are

150. Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 830 (2014).

151. See, for example, Bognador's characterization of post-war debate and the distinction he makes between socio-economic issues on the one hand and *constitutional* matters on the other: "In the post-war[,] politics was widely thought to be dominated by socio-economic problems, *with constitutional matters being of marginal importance*." Bognador, *supra* note 113, at 1 (emphasis added). Note the apparent premise that socio-economic matters are outside or different from constitutional law. As we will discuss when analyzing teleological constitutions, socio-economic matters *became* a constitutional issue.

152. Hardin, *supra* note 24, at 51 (noting that the basic constitutional model is the framework type and that its purpose is to establish institutions).

153. Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 136–37 (Jeff Goldsworthy, ed. 2006).

154. As Goldsworthy states of Australia, "[D]emocratically elected parliaments seemed to [the framers of the Australian Constitution] as the best possible guardians of liberty." *Id.* at 109.

no independently guaranteed individual rights? Can democratic government function with no right of free speech to persuade our fellow citizens whom to select for the bodies of government? Can there be full citizenship when particular sectors of the population are not free to worship a religion not shared by the majority? How can we affect the political process if some are denied the right to associate freely with others who share our views? In other words, the structural rationale of the pure framework constitution is premised on a permanently free citizenry which will, in turn, use the democratic structures of the constitution to perpetuate that political freedom and thus facilitate effective ordinary politics. It also places great faith in the desire by the majority to adopt legal rules that will not single-out insular minorities.

As we will see shortly, most framework constitutional models reject the pure form. But, that rejection is premised on the idea that more is needed. In other words, they keep the structural approach but add something else. As relevant here, the point is that the structural component is still the cornerstone of the framework type, whether by itself in the pure form or by adding something on top of it.

*c. Liberal Democratic Framework Model*

This model retains the framework approach but adds civil and political rights in order to guarantee the adequate operation of the constitutional structure. Liberal rights are combined with the structure. By adding these rights, these constitutions are no longer purely framework. But because the added rights are accessorial to the proper function of the constitutional structure, these constitutions are still within the framework model.

Institutions, even democratic ones, cannot work properly if they are not accompanied by independently guaranteed political rights that more or less make certain that, in fact, those democratic institutions will work effectively. As McConnell points out, without periodic elections, free speech and other similar devices, “we would have no institutions through which self-government could take place. . . . [They] are necessary if democratic self-government is to work.”<sup>155</sup> As a result, many constitutions that are structurally part of the framework model also include a catalogue of minimum, individual rights of a civil and political nature that are designed to facilitate the process of kick-starting politics.

In theory, the mere existence of a democratic parliament should ensure the existence of these rights through statutory enactment. But that rationale has proven insufficient, and so, out of sheer necessity, judicial bodies have had to discern the existence of political rights that accompany the structural aspects of the constitution. Most framework type systems, however, have resorted to the mechanism of incorporating individual political rights to complement the structural elements; thus, the classic Bill of (political) Rights. Notions of fundamental political rights such as free speech, voting, due process, freedom of religion, and association are at the heart of this proposal. In addition to political rights *per se*, liberal democratic framework constitutions also include some sort of political equality guarantee, in order to protect insular minorities from the possible overreach of

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155. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1998).

majorities.

Political rights of constitutional rank came to the forefront of constitution-making. These rights are still seen as accessorial to the framework component of the structural constitution. The rights were meant to enhance democratic self-government by adding safeguards to the institutions created by the constitution. They were not necessarily an end in themselves and lacked inherent substantive content.

Liberal democratic framework constitutions, which have become the standard bearer of framework constitutions and of liberal democratic constitutionalism in general,<sup>156</sup> add to the basic framework of government set up by the structural text by including individual liberties and political rights. In turn, these rights are mostly individual, political in nature, and are inherently related to the idea of a democratic framework constitution. As political rights, they are directly related to the actual functioning of the political institutions. By creating individual political rights, democratic self-rule—which will yield substantive content—is fortified and made more efficient. Individual political rights were not meant as end in themselves, but as a means to allow the democratic machine to work effectively and create adequate policy outcomes. In other words, structural design and political rights results in democracy and ordinary political engagement which, in turn, produces substance and policy. The basic framework model remains, just with added tools to make the structural machinery work better. As a result, this type tends to leave out policy matters pertaining to socio-economic issues, be it through rights or other operative devices.<sup>157</sup>

In particular, the main driving force behind liberal democratic framework constitutions is their attention to individual political rights, which suggests that a wider rationale is at work: the idea of political rights as guarantors of effective democratic self-government. In other words, that these rights make the machinery of government work better and avoid its breakdown. Without individual political rights, there is a substantial risk of malfunction in the structure of government, no matter how democratic it aspires to be.<sup>158</sup> As a result, political rights reinforce the democratic structure and, at the same time, become part of it. This is the main feature of western liberal democratic constitutionalism which has found its home in the framework model.<sup>159</sup> The U.S. constitutional design is a good example of the liberal democratic framework rationale.

Framework constitutions, particularly the liberal democratic model, are the direct product of the *classic* constitutionalism we saw in Part II. I now turn to the counterpart of framework constitutions: teleological constitutions, particularly their post-liberal articulation.

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156. “[O]ne permanent model has been the American Constitution, in particular its Bill of Rights.” Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 821 (1999).

157. Pedro C. Magalhães, *Explaining the Constitutionalization of Social Rights*, in SOCIAL & POLITICAL FOUNDATIONS OF CONSTITUTIONS 433 (Dennis J. Galligan & Mila Versteeg, eds., 2013). Canada is an example of this type of design. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 20 (2009); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 433 (2003).

158. Victor Ferreras Comella, CONSTITUTIONAL COURTS & DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 87 (2009).

159. Donald P. Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS 169 (Jeff Goldsworthy, ed. 2006).



## 2. Teleological Constitutions

### *a. General Overview*

Then we have *teleological* constitutions, also called “substantive,” “programmatic,” or “purposive.” These are mainly, but not exclusively, associated with the so-called second wave of rights which are socio-economic in nature, and were the result of the Second World War.<sup>160</sup> Recognizing the insufficiencies of merely letting loose the instruments of ordinary politics through structural texts, teleological constitutions build on the notion that some rights are necessary for the effective functioning of democratic society. Social and economic inequalities are damaging to the democratic process: hungry, exploited, illiterate, or marginalized individuals are not active citizens and are typically left out of true democratic self-rule. In that sense, these teleological constitutions serve as distant relatives of liberal democratic framework constitutions: the inclusion of socioeconomic rights is part of an attempt to strengthen democracy, not to limit it. This is similar to the accessorial role of rights model.

But, this type does break with the liberal-democratic view that “relatively few issues require constitutional precommitments to ensure democratic self-rule.”<sup>161</sup> Teleological constitutions expand this list of issues. As such, many teleological constitutions can more accurately be characterized as post-liberal constitutions, which we identified in Part II. While there are other types of teleological constitutions that are not post-liberal in nature, the latter seem to be the dominant articulation within the teleological family.

In some instances, a mutation, or even a revolution, has occurred: substantive rights were not adopted merely to strengthen democracy. A new role for the Constitution was adopted: entrenchment of substantive rights and provisions which serve as a model for the type of society the people want to build. Why leave certain important policy choices to ordinary politics where they can be corrupted, weakened, or temporarily high-jacked? The success of entrenchment obtained by liberal democratic framework constitutions convinced people to entrench not just basic political rights, but other provisions that directly improve the quality of life itself. The main articulation of these content-provisions were substantive rights. These rights tend to be both individual and collective, social and economic, and opposable both to the state and to other private parties.<sup>162</sup> Aside from rights, substantive policy provisions were also adopted. Some things were too important to be left to ordinary politics. Constitutional politics were born. Again, due to the success of the entrenchment effect of constitutional provisions in the framework model, other important issues not related to government were given constitutional rank to shield them from ordinary legislation. As a result, “[a]s the reach of constitutional imperatives become more extensive the realm of ordinary politics is bound to shrink.”<sup>163</sup>

Teleological constitutions answer the question of what a constitution is for very differently than framework constitutions. No longer exclusively focused on the creation of

160. Elkins et al., *supra* note 114, at 28.

161. McConnell, *supra* note 155, at 1130.

162. See Farinacci-Fernós, *supra* note 53.

163. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States, Paradoxes and Contrast*, 2 INT'L J. CONST. LAW 633, 640–41 (2004).

the structures of government and the political rights that accompany them, teleological constitutions have a greater purpose which is articulated through substantive provisions: molding society itself.<sup>164</sup> In that sense, teleological constitutions have become a substantive blueprint for society. This is what makes these constitutions *teleological*: they are premised on substantive purpose and include a specific view on what, why, and how society should be.

Political rights can be both accessories and independent carriers of ideology. But, their nature and their effect are mostly procedural: freedom of speech is a device to persuade others about something. We exercise our right of association to create groups with others to do something. We have privacy rights so we can do something which the government cannot intrude upon. Then came, for example, socio-economic rights. When a constitution recognizes a worker's right to not be forced to work for more than eight hours a day, for example, that is a substantive policy choice. The same thing could be said about free public education, access to healthcare, and environmental protection. These constitutions not only prescribe procedures but results as well.

Unlike liberal democratic framework constitutions, this basic type widens the scope of constitutional reach.<sup>165</sup> Also unlike liberal democratic framework constitutions, these constitutions recognize that individuals are not just vulnerable to government abuse; they are also vulnerable to exploitation by private and economic forces, such as creditors, employers, landlords, and industrial interests, and thus, such systems adopt a role for constitutional law in that direction. Whether through rights or other policy provisions, these relationships, previously thought to be exclusively in the realm of private law, obtain constitutional rank.<sup>166</sup> Again, post-liberal constitutions are the main articulations of this type.

As we saw, liberal democratic framework constitutions give special attention to individual political rights. The idea of negative, political rights opposable to the state is not neutral. The notion that individuals need, *above all*, protection against the state in the political context is a historic-specific proposition that, in turn, carries with it ideological formulations: the liberal democratic notion, particularly pre-20th Century, of the state as the primary source of oppression and the individual as the ultimate articulation of liberty. This is a legitimate proposition, but not universal, inherently correct, or superior. From the context of the liberal revolutions that started in 1776, 1789, and so forth, it could be said that men of property feared government intervention more than private interactions, probably because of their economic power.

But, in more recent times, social forces typically excluded from economic power have found in the democratic process, and the public realm to which it is attached, a force of liberation instead of oppression. This has several implications. First, not all oppression is generated by government; hence the notion of rights against private entities. Second, having a "right to" is just as important as having a "right against"; hence the notion of

164. See, for example, W.H. Morris-Jones, *The Politics of the Indian Constitution (1950)*, in CONSTITUTIONS IN DEMOCRATIC POLITICS 139 (discussing India's Directive Principles of State Policy "which exhort the state to direct its policy towards distribution of material resources of the community").

165. Elkins et al., *supra* note 114, at 8.

166. "A constitution can include anything people might want." Hardin *supra* note 24, at 62; Elkins, Ginsburg & Melton, *supra* note 114, at 86 (describing the "how of new issues [that] have arisen").

positive rights. Third, that political deprivation is not the only form of denial of citizenship; hence the notion of socio-economic rights. Finally, society is not just a collection of isolated individuals, but a cohesive whole; hence the notion of collective rights.

The scope of constitutional provisions broadens considerably in teleological constitutions when compared to their framework counterparts. South Africa is an example of this type of constitution. This brings us back to the democratic rationale for substantive rights: non-political rights are necessary to allow the structures of democratic self-government to work more effectively. But more importantly, if citizens only have political rights in their constitutions, and the rest is up for ordinary politics, powerful, private interests can easily highjack ordinary politics. It is more difficult to highjack constitutional politics, when the people's interests are heightened. By ensuring these substantive rights, the people are able to: (1) better arm themselves for the democratic fight, and (2) remove from ordinary politics those rights and issues that are so important as not to be trusted to ordinary politics, where economic forces are stronger.

This clashes with the pure framework rationale. Using an example I employed earlier, the pure framework type argues that there should be no need to ban the death penalty through the constitution because, if that is what the people want, their elected parliament will enact their wishes through legislation. But the teleological response is that many democratic nations suffer from a gap or disconnect between popular will and legislative enactment. In order to prevent fundamental policy issues from falling victim to this disconnect, constitutional entrenchment constitutes a safer bet. In that sense, constitutional politics are preferred over ordinary politics as a means of settling important social issues.

In the end, teleological constitutions give actual policy content to constitutional law. Politics are constitutionalized and the constitution is politicized. As a result, the constitution is placed front and center in the process of shaping society. Through teleological constitutions, the way forward is not left to ordinary politics or legislative judgment. The Constitution points the way, leaving to ordinary politics the details of the journey, but not the destination.

In the case of the most ideologically driven teleological constitutions, these tend to be less stable: a shift in political winds requires constitutional change. For example, the restoration of capitalism in Russia would be contrary to the Soviet constitutional order. As a result, teleological constitutions require continued popular acceptance as to either their substantive content or their process or creation. In that sense, they require constant reaffirmation, which sacrifices some element of stability. Of course, ideological constitutions can also become embedded in a particular political community, thus assuring its future stability.

These more ideological types of teleological constitutions do not limit themselves to binding ordinary politics or to setting out a roadmap for society. Under this type of constitution, broad and general language is not vague and empty. On the contrary, they are broadly applicable because they carry enormous ideological weight. Consider the concepts of equal protection under the law, the dictatorship of the proletariat, and the teachings of Ataturk. Each are open-ended and broad, but the latter two carry ideological content that reigns over a vast domain. These constitutions tend to be the result of a revolutionary

process, be it independence (*e.g.* nationalism; religion; identity); social transformation (*e.g.* socialist revolution; capitalist restoration) or democratic transition (*e.g.* end of apartheid; end of colonialism). Again, post-liberal constitutions are the main manifestation of this type.

Aside from an ever-growing, detailed, yet expansive array of individual and collective rights, more ideologically charged teleological constitutions entrench within the text and structure of the constitution itself content-heavy public policy choices and preferences, as well as actual commands and principles relating to the economic system and social organization. The new Constitutions of Venezuela, Bolivia, and Ecuador are manifestations of this trend in modern constitutionalism.<sup>167</sup> The Portuguese Constitution of 1976 was crucial in the development of this trend, which can be traced back to the revolutionary Mexican Constitution of 1917. All of these constitutions can be characterized as post-liberal. These experiences align with Phoebe King's characterization of "constitutional radicalism."<sup>168</sup> In essence, these constitutions entrench ideologically inspired policy choices, thus giving them legal effect.

One of the main challenges of teleological constitutions is the way courts can sometimes neutralize them by way of under-enforcement or under-use. In these situations, the weakening of the constitution does not come from an authoritarian ruler that violates the constitution, but from a judiciary that abdicates its duty to put the constitution into effect. In both scenarios, the constitution is weakened and, as a result, the sovereignty of the people that adopted the constitution dangerously erodes. Both should be avoided.

#### *b. The Content of Teleological Constitutions*

Because of historical factors, most post-liberal teleological constitutions are the product of victorious popular movements, mainly of the powerless that become powerful at the moment of the constitution-making process. Because many popular movements can be both majoritarian and politically weak, the constitution-making process becomes vital to securing their political victory. These social majorities have more success in the exercise of constitutional politics than ordinary politics. As such, they can be distrustful of ordinary politics; being in a social majority is not always good enough to prevail in that arena.

Whether it is poor people in Venezuela, workers in post-War Europe, black people in South Africa, or indigenous people in Bolivia, these social majorities are constantly being deprived of ordinary political power, even though they are the social majority. But they can achieve constitutional power when politics are full throttle. As a result, historical forces have molded teleological constitutions in progressive and even radical fashions.<sup>169</sup> This explains why so many teleological constitutions are of a post-liberal bent. Because

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167. See Phoebe King, *Neo-Bolivarian Constitutional Design*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 367 (Dennis J. Galligan & Mila Versteeg, eds., 2013); Justin O. Frosini & Lucio Pegoraro, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification*, 3 J. COMP. L. 39 (2015).

168. King, *supra* note 167, at 369.

169. "South Africa's Bill of Rights is often heralded as the crowning achievement of the democratic transition and as having produced some of the most progressive decision-making in the world." Heinz Klug, *South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid*, 3 J. COMP. L. 174 (2008).

social forces want to protect themselves from the ordinary politics of tomorrow, the constitutions they adopt tend to be radical in nature. This is consistent with the type of post-liberal constitutionalism we saw in Part II. Most, but not all, teleological constitutions are the result of transcendental democratic processes where a mobilized social majority engaged in constitutional politics. These constitutional experiences are the main focus of this Article: *post-liberal in content and highly democratic, participatory, and popular in terms of their creation.*

Of course, there are exceptions. There are teleological constitutions that are the result of reactionary triumphs like the *laissez-faire* Chilean Constitution of 1980, adopted under the Pinochet military regime. But, as a general rule, teleological constitutions tend to be progressive in character precisely because they are trying to change a status quo in favor of a new, victorious social movement that wants to entrench its triumphant view of society. Whether it is the social-democratic constitutions of Western Europe after World War II, the nationalist constitutions of nascent African and Asian states, or the new radical constitutions of early 21st century Latin America, teleological constitutions tend to be ideological and that ideology is, historically, though not inherently, radical, and left-wing in nature.<sup>170</sup> Most of these can be included in the post-liberal label.

### *c. Ideology and Economic Issues*

The substantive and ideological nature of teleological constitutions, particularly post-liberal one, is one of the factors distinguishing it from a framework constitution. Writing about the radical Portuguese constitution of 1976, Hermet writes that “[t]he constitution’s ideological orientation was completely different from that of the other constitutions of Western Europe.”<sup>171</sup> Choudhry makes similar statements as to India.<sup>172</sup> Other examples abound.<sup>173</sup> Social-democratic constitutions also belong in this group.<sup>174</sup> Ideology is inherently linked with teleological constitutions.

Economic policy is also embedded in many teleological constitutions, which tend to swing to the left. The most radical constitutions “enshrine economic policies that ensure sustenance and egalitarian distribution of powers.”<sup>175</sup> This can be done through substantive rights and other policy provisions. In relation to substantive socio-economic rights, Magalhaes writes that “in what concerns choices regarding whether and how to introduce, protect and implement constitutional social rights, although they also have, in a general sense, consequences on the distribution of power . . . they are first and foremost about policy, particularly about the roles they impose on the state and market in the social

170. King, *supra* note 167, at 367.

171. Guy Hermet, *Emerging from Dictatorship: The Role of the Constitution in Spain (1978) and Portugal (1976)*, in CONSTITUTIONS IN DEMOCRATIC POLITICS 270. “The 1976 Portuguese Constitution contradicted the standards of free market societies.” *Id.*; Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT’L L. & POL’Y 1233, 1235 (1995).

172. Sujit Choudhry, *Living Originalism in India? ‘Our Law’ and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1, 9–10 (2013) (“It is sometimes said that the Indian Constitution institutionalized a national and social revolution.”).

173. Esin Öricü, *The Constitutional Court of Turkey*, *supra* note 156, at 197–200.

174. Mary Ann Glandon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525–26 (1992).

175. King, *supra* note 167, at 369.

and economic relations.”<sup>176</sup> For their part, liberal democratic framework constitutions were the vehicle for the transition from socialism to capitalism in Eastern Europe in the 1990s.<sup>177</sup> Economic ideology tends to be ever present, from the *laissez-faire* Chilean Constitution, to the radical Constitution of Portugal and, yes, also to the not-so-neutral framework models.

### C. Constitutional Self-Government

Framework constitutions create a structure. Ordinary politics are channeled through that structure in order to produce policy. In democratic systems with framework constitutions, popular self-government is mostly done through ordinary politics. Constitutional law creates the canvas; ordinary politics paint the picture, keeping within the constitutional lines. In the framework model, there is hardly a constitutionally prescribed policy goal.

As we saw, teleological constitutions take a different approach to self-government. Ordinary politics are not just procedurally contained; they are substantively contained as well. In the context of socio-economic provisions, Hershkoff and Loffredo state that the decision to include them in the constitution “is understood as a mandate to the legislature that narrows the scope of political discretion.”<sup>178</sup> Teleological constitutions play an active role in policy making and thus become “an instrument of governance.”<sup>179</sup> Rosenfeld’s characterization of “rule through the constitution” seems fitting.<sup>180</sup> As such, the ordinary politics-as-substance-and-content and constitutional-law-as-procedure-and-structure dichotomy is destroyed. In the teleological sphere, both constitutional law and ordinary politics address issues of policy. Policy-laden constitutional law is the result of constitutional politics. And because of constitutional supremacy, constitutional policy trumps, limiting the reach of ordinary politics with regards to some fundamental issues that have been entrenched in the constitutional text.<sup>181</sup> Here, constitutional politics creates constitutional law and policy that hovers over ordinary politics.

The legitimacy of this type of constitutionally driven self-government lies in its democratic credentials and, as relevant here, to the validity of the skepticism as to the effectiveness of ordinary politics as the most appropriate vehicle for making fundamental policy choices. This lies at the heart of the constitutional-ordinary politics divide. This leads us to the issue of the teleological approach and its role in democratic self-government.

### D. Constitutional-Ordinary Politics: A Relation of Mistrust

Teleological constitutions mistrust ordinary politics. But why? The framework

176. Magalhaes, *supra* note 157, at 437.

177. See Kasia Lach & Wojciech Sadurski, *Constitutional Courts of Central and Europe: Between Adolescence and Maturity*, 3 J. COMP. L. 212 (2008).

178. Helen Hershkoff & Stephens Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 929 (2011).

179. Usman, *supra* note 116, at 1487.

180. Rosenfeld, *supra* note 163, at 11.

181. When an issue is given constitutional rank, it is “removed from the realm of ordinary politics.” *Id.* at 13.

rationale has proven effective in many societies by limiting the constitution to creating the structures of government, while adding key political rights to ensure its effective functioning, and letting the ordinary political process take over. After all, many modern democracies with framework constitutions have established progressive welfare states that guarantee, through non-constitutional devices, a host of socio-economic rights and other important social justice measures. Yet, because of their non-constitutional nature, the constitution is not committed to a particular model of social organization and development, allowing it to maintain its flexibility and to endure throughout time.

It well may be true that many democratic societies are able to take full advantage of ordinary politics in order to enact legislation that actually reflects the popular will. But contemporary history is split as to the universal veracity of this phenomenon. Be it because of unequal distribution of wealth and power, the influence of money in politics, democratic immaturity, entrenched political castes, dysfunctional electoral models, polarized politics, or many other relevant factors, some societies have experienced the constant malfunction of ordinary politics, particularly in the legislative realm. Disconnected legislatures that thwart popular majority will are rampant, even when they are democratically elected. Teleological constitutions correct this disconnect by entrenching widely held policy preferences, thus limiting the damage of disconnected legislatures.

In polarized societies, a social majority can emerge that can implement its policy preferences by way of ordinary legislation. The trick lies in making sure that when the social minority wins an electoral contest—which could be the product of exhaustion, desire for alternation in government leadership, or mismanagement on the part of the majority’s political instrument—that social minority is not able to impose its will because of a hiccup in the electoral process.

Socially divided societies face a political quandary: constantly elect the political movement that adequately reflects the majority will, even if there is corruption, administrative mismanagement, or any other circumstance in which the social majority wants change of administrators without change in their policy preferences, or risk voting for the opposition that does not share the views of the social majority. Teleological constitutions offer an alternative: you are able to vote for the opposition because the constitution will ensure that the majoritarian policy preferences are kept in place, even if the opposition does not share them. In particular, they allow a social majority to entrench its policy preferences in the constitution through the exercise of constitutional politics, which tends to manifest itself through a highly democratic and popular constitution-making process.

In summary, teleological constitutions are crucial in preventing two similar scenarios: (1) a failure of ordinary politics to reflect the popular will; and (2) a change in government leadership that thwarts deeply shared policy preferences. In the first instance, the constitution steps up to ensure that the failure of the political process does not cause social harm. Constitutional politics serves as a safety net for when the ordinary political process misfires. It is premised on the idea that, barring a change in social consensus, constitutional policy-making is more reflective of the popular will than ordinary legislation. That is why some societies whose previous political system were based on a framework model, yet failed to enact policy choices responsive of the popular will, shifted

to the teleological model. In the second instance, the constitution makes sure that legitimate electoral shifts do not reverse the policy gains of the social majority. Changing a government need not require changing the policy preferences entrenched in the constitution. In the end, the challenge is to differentiate between constitutional and ordinary politics, keeping in mind the substantive nature of both in teleological systems.

As a result, entrenchment becomes the main tool of constitutional politics as a defense against political dysfunction at the legislative level. For example, in the context of positive socio-economic rights, Usman states: “The primary constitutional purpose of constitutionalizing a positive constitutional right is to safeguard against the danger of legislative indifference.”<sup>182</sup> When the people decide to elevate a particular issue to constitutional status, they are carrying out a willful political act.<sup>183</sup> By doing so, they are removing an issue from ordinary political vulnerability. This should not be done on a whim.<sup>184</sup> As Green explains, entrenchment “is an instrument through which a domestic, sociopolitical movement seeks to validate its political commitment and to influence courts.”<sup>185</sup> The key lies in determining if the process of entrenchment was, in the end, an un-democratic act by a temporary majority or, as with many teleological constitutions, the careful and conscious act of a sovereign people wishing to entrench their most cherished values and worldviews, through a highly democratic and popular constitution-making process. The latter case has much more normative force and legitimacy.

Blount, Elkins, and Ginsburg believe that “[n]early all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics.”<sup>186</sup> Previously, that distinguishing characteristic was premised on the notion that certain matters, by their own nature, were constitutional, like the structure of government and fundamental political rights.<sup>187</sup> Something was characterized as constitutional, not because it related to entrenched policy preferences, but because it dealt with the institutions of the state.

But, the democratization of the constitution-making process and the adoption of the teleological approach has resulted in a new paradigm: something is constitutional if the sovereign people so decide. No issue is off the table. In fact, those same authors recognize that when there is greater popular participation in constitution-making the:

number and extent of constitutional rights will increase as well . . . In more recent examples, we might expect that participation would be associated with “positive” socioeconomic rights, as the constitution becomes an instrument of redistribution. . . . *[This] suggests that more participatory processes result in more progressive rights provisions and a higher quality of*

182. Usman, *supra* note 116, at 1521–22.

183. “The design of . . . [a] codified constitution is an affirmative political act.” Jeff King, *Constitutions as Mission Statements*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 75 (Dennis J. Galligan & Mila Versteeg, eds., 2013); “[the m]aking law is political,” Rosenfeld, *supra* note 163, at 10.

184. Constitutions are an “ideal platform for ‘locking in’ certain contested worldviews, policy preferences, and institutional structures, while precluding the consideration of alternative perspectives.” Ryan Hirschl, *The Strategic Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 166 (Dennis J. Galligan & Mila Versteeg, eds., 2013).

185. Greene, *supra* note 157, at 6.

186. Blount et al., *supra* note 24, at 42.

187. Claudina Orunesu, Pablo M. Perot & Jorge L. Rodríguez, *ESTUDIOS SOBRE LA INTERPRETACIÓN DINÁMICA DE LOS SISTEMAS CONSTITUCIONALES* 14 (2005).



democracy.<sup>188</sup>

There would seem to be a connection between democratization, participation, and the enactment of progressive policy provisions. This reflects popular frustration with the ability of social majorities to achieve their policy goals through ordinary political processes and is part of the “constitutionalization of the law.”<sup>189</sup> In the end, it seems that more participation generates more constitutional content.

For their part, Kapiszewski, Silverstein, and Kagan have a more dire view of this type of ideological entrenchment:

Sometimes, a number of jostling political parties, none of which can count on being or remaining dominant (or a currently dominant political faction that is losing confidence), seek political insurance by establishing a new constitution that enshrines aspects of their political program, secures political rights, and empowers a constitutional court to enforce these provisions.<sup>190</sup>

Undoubtedly, this can happen. But there is a flip side: a strong social majority that wishes to entrench its policy preferences to protect them from temporary changes in electoral winds that do not correspond to a change as to those policy preferences. When a dying political movement entrenches its program in a constitution, there is a democratic deficit that must be addressed.<sup>191</sup> But when it is done, a strong social majority entrenchment is a legitimate act that, in turn, should be respected by courts.

#### *E. Re-thinking the Counter-Majoritarian Difficulty: Enforcing the Popular Will*

Criticism of the teleological constitution’s intervention in policy matters is sometimes articulated in democratic terms. Magalhaes describes the Portuguese Constitution’s policy-laden provisions as creating “excessive limits on democratic deliberation and popular sovereignty.”<sup>192</sup> Yet, some fail to see that sometimes the real defeat of democracy is actually the frustration of the popular will reflected in the constitutional text, as long as that popular will, of course, holds.<sup>193</sup> Limits on ordinary politics is not synonymous with a limited exercise of constitutional politics. The crucial question is determining which politics—constitutional or ordinary—adequately reflects popular will. Ordinary politics’ main argument is that it reflects the present, while the constitution may have been adopted in a distant past and thus no longer represents the social consensus. There are two answers to this argument.<sup>194</sup>

188. Blount et al., *supra* note 24, at 42 (emphasis added).

189. Luis Roberto Barroso, *The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World*, 16 ILSA J. INT’L & COMP. L. 579, 591 (2010).

190. See Kapiszewski et al., *supra* note 146.

191. This is the current problem in Chile, where the Pinochet Constitution is still in effect. See Druscilla L. Scribner, *Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile*, in CONSEQUENTIA LIST COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 114 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, eds. 2013).

192. Magalhaes, *supra* note 157, at 434.

193. Kapiszewski et al., *supra* note 146, at 7–8 (referencing “conflicts reflecting government failure to recognize or implement constitutionally or legally promised rights”).

194. This is part of the so-called dead hand problem that is inherent to any constitutional system. McConnell, *supra* note 155, at 1127.

First, ordinary politics, precisely because of their mundane nature, tend to occur when the people are politically passive or, at least, less active. Ordinary legislation and other government actions are subject to lobbying, backroom deals, political calculations, undue influences, and many other devices that do not necessarily involve the sovereign people as an active entity. The closest thing ordinary politics has by way of actual legitimation is a clear electoral victory or a single-issue referendum. Ordinary politics are ordinary for a reason: their political weight is small. From a conceptual standpoint, constitutional politics stand above it because of the sheer magnitude of constitution-making compared to ordinary legislation.

Second, one of the key characteristics of many teleological constitutions is that they were created by a deeply engaged, self-constituting people. When writing a constitution, the people tend to be more involved, engaged, interested, attentive, and vigilant. The same thing does not happen with such intensity in ordinary legislation. Therefore, when a clash ensues between constitutional provisions and ordinary legislation, the former must trump the latter, not just because of constitutional supremacy. Teleological systems take this model to the maximum: because the constitution was the creation of a transcendental social process, its product totally supersedes ordinary politics. In teleological systems, constitutional supremacy becomes that much stronger, as long as the original constitutional project still holds. As such, judicial enforcement of constitutionally ranked substantive policy preferences over the choices made by the legislature through ordinary political devices is only temporary. It requires that the social majority eventually corrects the failure of ordinary politics and makes sure they match the policies adopted by the constitution. Judicial enforcement of the policies generated by the exercise of constitutional politics in the face of contrary ordinary political acts cannot be a permanent fix. But, the temporary enforcement of the teleological constitution by courts gives enough room for the social majority to correct the problem and decide if they still cling to the constitution's policy preferences.

This view is not just premised on the notion of constitutional supremacy as it is widely known in constitutional theory.<sup>195</sup> In the teleological case, an additional factor is present. Precisely because teleological constitutions have a central, substantive role to play in policy making, the people may assume that when they participate in ordinary political decisions, like electing a new government, they are not choosing between the constitutional model and the new government's positions, because the constitutional foundation is a given. In other words, with the important exception of constitutionally relevant electoral processes, a disconnect between constitutional policies and ordinary legislation is seen as a failure of the latter, instead of an inconsistent political choice made by the people. The crucial aspect is if the original constitutional consensus still holds and if it was the result of a politically engaged sovereign people. Like Ackerman points out, "[a]lthough constitutional politics is the highest kind of politics, it should be permitted to determine the nation's life only during rare periods of heightened political consciousness."<sup>196</sup> When this happens, there is a strong presumption that the constitutional

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195. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1012, 1020–21 (1984).

196. *Id.* at 1022. The same is true in constitutional adjudication. Ferreres Comella, *supra* note 158, at 71.

consensus is stronger than the result of an ordinary political act.

Suppose the constitution prohibits the death penalty, as a reflection of a strong popular consensus. But, because of the mismanagement of the current government, an opposition party that supports the death penalty wins the election on a good government platform. The people have not changed their minds about the death penalty issue, nor was it a central element in the opposition's electoral campaign. In a country with a framework constitution that is totally silent about the issue, nothing but democratic honesty can prevent the new government from reinstituting the death penalty. If such honesty is absent, the voters will just have to wait until the next time. But, if the teleological constitution includes a ban on the death penalty, the new government will be precluded from moving forward on this issue. The teleological constitution that still enjoys wide popular support stands in its way. The lesson of this example for a discussion of ordinary-versus-constitutional politics is that, barring legitimate but rare situations, an ordinary political victory should not be seen automatically as a shift in majoritarian preferences that trump the substantive content of the constitution. The premise is that because the people may not believe that ordinary politics will always and adequately reflect its policy choices, they simply entrench those choices in the constitutional text to protect them from mundane shifts in electoral politics. In the end, this actually gives the people greater political freedom, as they can elect different governments without sacrificing their commonly held and constitutionally entrenched policy preferences.

This disconnect that happens when legislatures do not adequately reflect the popular will, even when elected, is the reason for constitutional entrenchment of policy preferences. Garbaum questions, for example, the entrenchment of certain socio-economic rights: "those who benefit from positive and social and economic entitlements typically form the electoral majority so that there is no obvious, *prima facie* reason to distrust the democratic process in this area."<sup>197</sup> His logic is correct: social majorities should be able to enact the legislation they want through ordinary political devices, thus making constitutional entrenchment superfluous. But, as we saw, two things happen that defeat this logic: (1) temporary high-jacking of the legislative process by powerful interests that operate when public attention is low; and (2) democratic alternation between political parties, where one of them may win an election but not necessarily share the majoritarian view as to social and economic policy.

Does the United States still need a constitutionally ranked right to free speech? After all, the two main parties that alternate government are solidly pro free speech. So why entrench it instead of leaving it to ordinary politics? Yet, that alternative has never been an adequate answer in certain liberal democracies. Why should it be any different in teleological constitutions that address socio-economic matters? In both cases, a court that strikes down ordinary legislation because it contradicts the constitutional text, whether it is a political or a socio-economic right at issue, would not be acting in a counter-majoritarian fashion. In any case, *the opposite is true*: because we can assume that the majority still supports free speech, a court that invalidates legislation that, for example, allows for censorship, is restoring the majoritarian position. As Ferreres Comella explains,

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197. Gardbaum, *supra* note 17, at 465.

“[i]f, indeed, the constitution is the expression of a higher form of democratic politics than an ordinary statute enacted by the parliament, there is certainly a *democratic gain* if a court strikes down a statute that is unconstitutional.”<sup>198</sup>

In the end, constitutions are as strong as the social consensus behind them. The key for teleological constitutions is that, because they take policy positions, there can be situations when the original consensus that created it breaks. Until then, constitutional supremacy should be enforced, and the constitutional majority should trump the temporary majority of ordinary politics.<sup>199</sup> That is hardly counter-majoritarian. After all, “the Constitution [is] the will of the people,”<sup>200</sup> while ordinary politics is the will of their temporary representatives. The former should trump the latter both because of constitutional supremacy concerns and because of the normative force and legitimacy that characterizes the adoption processes of many teleological constitutions.

### 1. Constitutional Intervention and its Impact on the Judicial Role

The counter-majoritarian issue requires us to discuss briefly some aspects related to constitutional enforcement, a very complex issue that requires careful consideration. For now, I will identify and briefly elaborate on the implications that teleological constitutions have as to their application. As an introductory note, it is worth stating that many constitutional scholars have recognized the inevitable impact of teleological constitutions on the work carried out by judicial bodies.<sup>201</sup>

As King explains, “by making constitutions more normatively ambitious, we invite judges to interfere ever more in policy making.”<sup>202</sup> But, that interference is less discretionary than one might think; discretion and intervention are not synonymous. At the same time, eliminating discretion is not synonymous with restrictive or narrow application.<sup>203</sup> Because of their progressive bent, post-liberal teleological constitutions tend to be interventionist as to social and economic policy.<sup>204</sup> Interventionist constitutions create interventionist courts: “[S]ome positive rights in [U.S.] state constitutions are intended to alter the relation of the judiciary to the other political branches of government, seeming to expand or contract the jurisdictional space in which courts review and assess

198. Comella, *supra* note 158, at 92 (emphasis added).

199. Elster cautions about when, in the process of constitutional creation, drafters “may include temporary preference changes that differ from the permanent and stable attitudes of the agents.” Jon Elster, *Clearing and Strengthening the Channels of Constitution Making*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 25 (Tom Ginsburg, ed. 2012). I extend that concern to the ordinary political process where elected legislators may feel freer to enact legislation that may not be reflective of their constituents’ will.

200. Comella, *supra* note 158, at 90.

201. See Barroso, *supra* note 189, at 590 (“Traditional theoretical, philosophical, and ideological premises have changed, especially with respect to the role of the text of legal norms and to the role of the interpreter.”); Rosenfeld, *supra* note 163, at 5 (commenting on the shift of courts from negative to positive legislators); Usman, *supra* note 116, at 1495 (noting the separations of power and institutional competency issues) and at 1497 (noting the under-enforcement problem in the face of clear textual commands); Venter, *supra* note 10, at 101 (noting the South Africa’s Constitution broad grant of power to its Constitutional Court).

202. King, *supra* note 183, 41; see also Usman, *supra* note 116, at 1486–87.

203. See Orunesu et al., *supra* note 187, at 41.

204. Usman, *supra* note 116, at 1520 (noting that substantive provisions “involve the judiciary deeply in the political process”).

political outposts.”<sup>205</sup> This creates an interesting situation: courts are *forced* to intervene in socio-economic matters. In that sense, their interventionism is not the product of unilateral activism, power-grabbing, or judicial discretion gone wild.<sup>206</sup> Because of the history of conservative judicial action, some teleological systems wish to limit the discretion of judges but do so in the name of progressive goals. In other words, they take away their discretion to prevent them from ignoring progressive policies that are given constitutional rank and, at the same time, force them to actually implement it or, at the very least, not obstruct them.<sup>207</sup> In the end, “[t]he greater the range of mission statement provisions in a constitution, the more guidance the constitutional authors will have provided to the interpreters.”<sup>208</sup> Sometimes, more than substantive guidance, the constitution gives them clear ideological-driven orders.

Some liberal democratic scholars are wary of interventionist courts applying post-liberal teleological constitutions. Yet some of that skepticism seems more ideological than based on arguments related to constitutional theory. It is necessary to remember that we need to differentiate between political objections to interventionist teleological constitutions and objections to their judicial enforcement. While the former may be a legitimate political position, it seems difficult to defend judicial nullification or abdication in the face of democratically adopted substantive provisions.

Once the interventionist constitution is adopted, democratic considerations require courts to abide. A consequence of this reality is the inescapable judicial responsibility to simply strike down attempts by the other branches to implement policy that contradicts the constitution, even if that policy relates to an issue that we typically associate with ordinary democratic deliberation like economic development and resource allocation.<sup>209</sup> This is a necessary consequence of teleological constitutions that include policy provisions.

## 2. Constitutional Creation: When the People Write a (Post-Liberal) Teleological Constitution

### *a. Introduction*

As time has gone by, constitutional creation has been democratized and made more public. Participation has risen and popular attention to the process itself has become heightened. As a result, the *nature* and *role* of the constitution-making process has changed dramatically.<sup>210</sup>

As to the *role* of the history of the creation of the constitution in the adjudication of constitutional cases, two things come to mind. First, the process constitutional creation are not remote events in a distant past whose study is more in the realm of history than law. On the contrary, they are recent processes that created vast amounts of records which are

205. Hershkoff & Leffredo, *supra* note 178, at 929–30.

206. See Comella, *supra* note 158, at 87; Lach & Sadurski, *supra* note 177, at 54 (“The extent of the influence exerted by the constitutional courts inevitably risks the vexed question of their legitimacy.”).

207. See Choudhry, *Living Originalism in India?*, *supra* note 172, at 9.

208. King, *supra* note 183, at 81.

209. Magalhães, *supra* note 157, at 434, as to the Portuguese experience.

210. Compare my description of that process with Venter, *supra* note 10, at 203.

accessible and intelligible, as well as full of detail, explanation, and content.<sup>211</sup> Second, the constitution-making process is not a central aspect of national identity and social alignment; it is a transcendental social process. As such, all eyes of the political community were focused on the process itself, shifting the center of attention from the ratification process to the actual drafting.<sup>212</sup> The people were not merely passive ratifiers of the work done by others. On the contrary, they were *active participants* in the drafting process, whether by (1) electing the delegates who, as part of their selection, publicized their constitutional proposals for popular analysis; (2) generating the political and social forces that gave life to the Constitution itself, like in the case of a revolutionary or transition society; (3) directly proposing specific provisions to the constitution-making body; or (4) actively engaging the process through a constant monitoring of the work done by the drafters. In such cases, the argument in favor of “We The People” is more compelling.<sup>213</sup> As a result, the binding nature of the history of the constitution becomes inescapable.

As to the *nature* of that process, it lies at the heart of purposivism, for it is there that the *why* becomes the *what*. Also, the increased importance given to, and democratization of, the constitution-making process, combined with the tendency to incorporate more and more substantive content into the constitution, makes it a crucial part of the teleological design. The drafters are not writing a legal document that mainly serves a coordination function, coupled with identifying key political rights. Instead, the increased politicization of the constitution has made the drafting itself a fundamental arena for policy making. Finally, attention must also be given to the historical context in which the constitution was written, as well as the social forces that gave it life.<sup>214</sup>

#### *b. Creating the Constitution: The Process*

Others have studied the mechanics and other procedural aspects of constitution-making processes around the world. I wish to focus on the democratic and ideological elements that surround the process itself: the *why* behind the *why*.<sup>215</sup>

Counterintuitively, the first factor to be considered is not selection of the drafters. A truly popular and teleological constitutional process begins *before* that, reflecting the social and historical context of the process and the ideological elements that underlie it. Blount, Elkins, and Ginsburg mention the pre-drafting stage, which includes the “mobilization of interests (and counter interests) prior to the preparation of a text.”<sup>216</sup>

211. For example, the Iranian drafting process produced some 2,500 pages of minutes. Binesh Hess, *The Juristic Republic of Iran*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 343. This is very similar to the approximate 2,500-page Record of the Puerto Rico Constitutional Convention. See Jorge M. Farinacci Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 U.P.R. L. REV. 203 (2016). See also Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS 78 (taking note of the “abundant records of the legislative history of the Constitution Act 1982”); see also Goldsworthy, *supra* note 153.

212. Compare this with the secret drafting process of the U.S. Constitution. Vasan Kesavan & Micheal Stokes Paulson, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 113, 1115 (2003).

213. See Venter, *supra* note 125, at 13 (describing the historical argument for the transference of sovereignty from the people to their elected representatives in constitutional creation).

214. Elkins et al., *supra* note 114, at 86.

215. See Bognador, *supra* note 113, at 5.

216. Blount et al., *supra* note 24, at 35.

Previously, much attention was given to the experts, leaders and bodies that channeled this pre-constitutional process. Now attention has turned to the public itself.<sup>217</sup> Now, public participation need not only come in the process of the direct election of delegates or the individual submission of ideas to the constitutional body. Popular pressure and mobilization can come in different shapes and can be even more effective.<sup>218</sup>

Constitutions are not written in a historical vacuum.<sup>219</sup> They are social creations. Therefore, we must also identify and analyze the social forces that gave it life. As we saw in the discussion about constitutional politics, there are situations in which a strong, social majority, unable to triumph permanently in the ordinary political realm, turns to the constitution to entrench its views as the constitutional majority, and thus start a process of hegemony in an attempt to make ordinary politics reflect the constitutional reality.<sup>220</sup> More ideological constitutions, like post-liberal ones, are sometimes the result of victorious revolutionary movements.<sup>221</sup> Attention should also be given to more general historical elements that shape the social process.<sup>222</sup> As Hirschl points out, “constitutionalization and the expansion of the judicial power more generally are an important manifestation of the concrete social, political, and economic struggles that shape a given political system.”<sup>223</sup> In that sense, “courts hardly ever act alone.”<sup>224</sup>

After recognizing the importance of pre-drafting circumstances, we can turn to the selection of the drafters and the issue of on-going popular participation in the constitution-making process after the selection has been made. Electing the drafters is a crucial element.<sup>225</sup> The same thing goes for public consultation at various stages,<sup>226</sup> which can be formal or informal but almost always requires some sort of formal public approval at the end. The composition and size of the drafting body, as well as the speed of its deliberation are also relevant factors.<sup>227</sup>

General references to the common good and reason make it difficult to identify what should be included and what should be left out. Elster appears to reject teleological constitutions as a general matter, due to the danger of a constitutional majority imposing itself on future political majorities in what he calls the “future tyranny of the minority.”<sup>228</sup>

217. *Id.* (“Public involvement has been the subject of particular attention in recent years.”).

218. *See* Magalhaes, *supra* note 157, at 440 (describing the social mobilization during the Portuguese drafting process).

219. *See* Lerner, *supra* note 24, at 26 (“Constitutions are rarely, if ever, written on a clean slate.”).

220. Bognador, *supra* note 113, at 10.

221. *See* Hermet, *supra* note 171, at 267 (Portugal); Choudhry, *Living Originalism in India?*, *supra* note 172, at 9–10 (India); King, *Neo-Bolivarian Constitutional Design*, *supra* note 167 (Venezuela, Ecuador and Bolivia); Jorge M. Farinacci-Fernós, *When Social History Becomes a Constitution: The Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 101 (2017) (Bolivia).

222. Lerner, *supra* note 24, at 4; Hershkoff & Loffredo, *supra* note 178, at 928 (referencing the different historical contexts of socio-economic provisions in U.S. state constitutions).

223. Hirst, *supra* note 92, at 165.

224. Kapiszewski et al., *supra* note 146, at 6; *see also* Pascal, *supra* note 114, at 878, 886; Tew, *supra* note 150, at 816.

225. Blount et al., *supra* note 24, at 38.

226. *Id.* at 39.

227. *Id.* at 41; *see also* Morris-Jones, *supra* note 164, at 130 (describing the India Constituent Assembly); Magalhaes, *supra* note 157, at 432 (Portugal); Tew, *supra* note 150, at 802 (Malaysia) and 819 (Singapore); Goldsworthy, *supra* note 153, at 106, 114–15 (Australia); Kommers, *supra* note 159, at 162–64 (Germany).

228. *See* Elster, *supra* note 197, at 18.

This brings us back to the constitutional-ordinary politics distinction, which I've already discussed. A constitutional majority need not be an eternal political one; it is entitled to lose a few elections now and then. The crucial question lies elsewhere: if the majority that adopted the constitution is actually a constitutional one or merely a temporary political one that simply coincided with the constitution-making process. I agree that constitution-makers should be aware of their own status as one or the other. But the increased democratization and participation of the constitution-making process makes it harder for social minorities to squeak in and become an effective artificial constitutional majority. That phenomenon happens with greater ease in ordinary politics, when the people lower their attentiveness and active participation. As Blount, Elkins, and Ginsburg point out, visibility "may reduce rent seeking and self-interest, as interest groups seek to exploit the relative anonymity of ordinary politics."<sup>229</sup>

Yet Elster sees danger in public and transparent processes of constitutional creation. On the one hand, he does recognize that the "publicity of debates and votes would induce, if not impartial motivations, at least verbal and nonverbal behavior consistent with such motivations,"<sup>230</sup> thus making it harder for the process to be high-jacked by, for example, powerful economic minorities. On the other hand, he fears grand-standing.<sup>231</sup> He also warns against ideologues winning the upper-hand over "more competent individuals."<sup>232</sup> While there is always a risk that constitution makers will not be up to the task, I disagree with the negativity attached to people with strong ideological principles being able constitutional-makers, as opposed to the experts and technocrats who could be more likely to ignore popular will and impose their "objective" views.

Elster suggests that an emotion driven constitutional process can drive delegates to "include temporary preference changes that differ from the permanent and stable attitudes of the agents."<sup>233</sup> But we normally associate the temporary passions of the majorities with the ordinary political process, not the constitutional stage. Precisely because more people are participating and because there is a recognition of the sheer importance of the process itself, constitutional politics, even if driven by legitimate political emotions, can also be moments of equanimity. Teleological constitutions are based on political passion. But there is a difference between the irrational passion of the mob and the constructive passion of a self-governing people.

#### IV. CONCLUSION

As we have seen, teleological constitutions have changed the way we see constitutionalism. Modern constitutionalism is pluralistic in terms of its possible articulations. Choices about which constitutional type and model to adopt require each political community to analyze and identify the one best suited to its social challenges. There is no correct answer, no optimal design. But modern constitutionalism must also come to terms with its own inner plurality and recognize the important role played and

229. Blount et al., *supra* note 24, at 58.

230. Elster, *supra* note 199, at 19.

231. *Id.* at 27.

232. *Id.* at 20.

233. *Id.* at 25.



contributions made by teleological constitutions, particularly post-liberal ones. They are not shams; they are not naïve aspirational documents; and they are not a threat to democracy. On the contrary, they have revolutionized constitutional theory in a direction of relevance and substantive justice. The world is in constant change and democratic constitutions are no longer a means to an end.