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# Constitutional Referendums: A Theoretical Enquiry

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**Keywords:** referendums, constitutional law, republicanism, deliberative democracy, sovereignty

## Abstract

In recent decades the use of referendums to settle major constitutional questions has increased dramatically. Addressing this phenomenon as a case study in the relationship between democracy and constitutional sovereignty, this article has two aims. The first is to argue that these constitutional referendums are categorically different from ordinary, legislative referendums, and that this has important implications for theories of constitutional sovereignty. Secondly, the article suggests that the power of these constitutional referendums to re-order sovereign relations raises significant normative questions surrounding the appropriateness of their use. The article engages with these normative questions, enquiring whether the recent turn in republican political theory towards deliberative democracy may offer a model through which sufficiently democratic referendum processes can be constructed.

## INTRODUCTION

The use of referendums around the world has grown remarkably in the past thirty years<sup>1</sup> and in some places, such as California and Switzerland, they act almost as adjuncts to the legislature. A particularly notable development in recent decades, however, is that referendums have been used not simply in the ordinary legislative process, but increasingly in the settlement of fundamental constitutional questions, and often in countries with no tradition of direct democracy.<sup>2</sup> There are four ways in which referendums are used today at the constitutional level: to found new states;<sup>3</sup> to create or radically change constitutions;<sup>4</sup> to establish complex new models of sub-state autonomy;<sup>5</sup> and to transfer sovereign powers from the state to international

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<sup>1</sup> Lawrence LeDuc estimates that of the 58 functioning electoral democracies in the world with a population of more than three million, 39 had conducted at least one national referendum between 1975 and 2000. L. LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (New York: Broadview Press, 2003), 29.

<sup>2</sup> In 2005 the Netherlands conducted its first ever referendum on the draft European Union Constitutional Treaty.

<sup>3</sup> East Timor, 1999 and Montenegro, 2006.

<sup>4</sup> Fairly recent, albeit unsuccessful, attempts include the referendum over the draft Charlottetown agreement in Canada in 1992 and that concerning the head of state in Australia in 1999.

<sup>5</sup> The UK is an interesting case with referendums following the Belfast Agreement 1998 and others on Scottish and Welsh devolution in 1979 and 1997. Spain has also seen referendums on sub-state autonomy since 1978 and more are planned by the Basque Country and Catalonia by 2014.

institutions.<sup>6</sup> What connects these four types of referendum is that they each address the location or distribution of ultimate lawful authority within the polity, and in doing so implicate the sovereign relations between people and government.<sup>7</sup> It seems, therefore, that referendums offer a novel perspective on how these relationships are encapsulated in constitutional moments across a range of settings. Constitutional moments differ from ordinary politics both in terms of their significance<sup>8</sup> but also in the way they change how ordinary politics is thereafter conducted.<sup>9</sup> It will be argued in this article that, in similar ways, constitutional referendums can be said to differ from ordinary or legislative referendums.

The starting point for this argument is to explore what is particularly significant about constitutional referendums in the context of sovereignty theory. Despite their growing prominence in processes of constitutional creation and change, it is surprising that constitutional referendums have rarely been subjected to systematic classification or critical analysis by constitutional theorists.<sup>10</sup> Insofar as referendums have been studied, the focus has usually come from empirical political scientists who are generally concerned more with the detail of the electoral process than with the constitutional implications of referendums.<sup>11</sup> More noteworthy is a general failure on the part of constitutional lawyers and theorists to address referendums at all, far less to distinguish the particular legal implications of ‘constitutional referendums’ from those of ‘ordinary referendums’.<sup>12</sup> Therefore, we will seek to develop this field of enquiry by asking what implications constitutional referendums have for the relational dimension – people to government – of constitutional sovereignty today. The principal argument is that constitutional referendums can serve to unsettle the traditional balance between constituent power and constitutional form in the contemporary polity, substituting the people directly for the representational role traditionally played by the democratic constitution. This supplanting of representative constitutionalism is a very different function from that performed by ordinary referendums which, in merely replacing the legislature in ordinary law-making, carry no real implications for constitutional supremacy.

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<sup>6</sup> France as well as the Netherlands famously held a referendum on the draft Constitutional Treaty in 2005 and in 2008 the Irish referendum on the draft Reform Treaty caused controversy.

<sup>7</sup> Following Loughlin, who has defined sovereignty as ‘an expression of a political relationship between the people and the state’. M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) 95.

<sup>8</sup> B. Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991).

<sup>9</sup> B. Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998).

<sup>10</sup> Notable contributions include: I. Budge, *The New Challenge of Direct Democracy* (Cambridge: Polity Press, 1996) and M. Setälä, *Referendums and Democratic Government* (New York: St Martin’s 1999).

<sup>11</sup> D. Butler and A. Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Hampshire: Macmillan, 1994); M. Gallagher & P. Uleri (eds), *The Referendum Experience in Europe* (London: Palgrave/MacMillan, 1996); M. Mendelsohn and A. Parkin, *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (Basingstoke: Palgrave, 2001); M. Qvortrup, *A Comparative Study of Referendums: Government by the People* (Manchester: Manchester University Press, 2005).

<sup>12</sup> Certain political scientists are at least alive to the category of constitutional referendums. LeDuc, n 1 above, introduces the species although understandably, given his focus, he makes little of it in fundamental distinction with ordinary referendums. See also A. Auer and M. Bützer (eds), *Direct Democracy: the Eastern and Central European Experience* (Aldershot: Ashgate, 2001), introductory chapter. Recently there has been a recognition of the importance of constitutional referendums at the EU level: (M. Shu, ‘Referendums and the Political Constitutionalisation of the EU’ (2008) 14 *European Law Journal* 423), but broader theoretical work remains lacking.

This exposition of the specific legal consequences of constitutional referendums for sovereignty theory has important normative ramifications which we turn to in Section II. Existing analysis of referendums by constitutional theorists tends to focus on whether or not, in democratic terms, they are an appropriate mechanism of law-making.<sup>13</sup> This is a debate that also generally fails to distinguish between the respective appropriateness of constitutional and ordinary referendums, with a seemingly implicit assumption that each raise the same normative issues. A second claim, therefore, is that the distinctive positive legal issues we identify have knock-on implications for the democratic debate. As we will see, it is both the importance of the issues at stake in constitutional referendums and the ways in which they involve the very identity of a constitutional people that together bring up these discrete and important normative concerns. Since the democracy issues addressed in Section II flow directly from the sovereignty questions raised in Section I, this takes us to the heart of contemporary debates between republican theorists who view a coherent and politically active demos as a fundamental prerequisite of a healthy democracy, and pluralists and ‘difference democrats’ who to varying extents worry that the referendum can be a dangerously homogenising device that ill-serves the subtle matrix of identity patterns that characterise the modern polity. The final section of the article asks whether deliberative democracy can offer a way of constructing referendum processes that might make them an acceptable model of decision-making, even for a culturally and politically diverse society.

### **I. CONSTITUTIONAL REFERENDUMS: RE-AWAKENING POPULAR SOVEREIGNTY**

In addressing the implications which constitutional referendums present for how we theorise sovereignty, it is helpful to situate the distinction between constitutional referendums and ordinary or legislative referendums in the context of the two orders of legal rules that together comprise a constitutional system and the respective levels of representation that typically attend the formation of each of these orders of rule. The concept of two orders of legal rules is well-established. Kelsen used the term *grundnorm* to describe the basic, and hence ultimate, rule within a legal system. Hart of course deviated in important ways from Kelsen’s holistic model of positivism, but nonetheless his notion of ‘primary’ and ‘secondary’ rules shares at least one commitment with Kelsen, that ordinary laws and higher laws can be distinguished by the capacity of the latter to offer a legally legitimate process for the creation and amendment of the former. This is a defining characteristic of the *grundnorm*, but it is also captured in Hart’s ‘rule of recognition’ which establishes a set of criteria by which we can identify the validity or otherwise of both constitutional and lower order rule-making.<sup>14</sup>

These categories develop the notion of legal supremacy but it is also important to note that this supremacy rests upon political foundations. Here the distinction offered by Kalyvas between ‘command sovereignty’ and ‘constituent sovereignty’ is

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<sup>13</sup> S. Chambers, ‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ (2004) *Constellations* 153; A. Eisenberg ‘When (if Ever) Are Referendums on Minority Rights Fair?’, in D. Laycock (ed), *Representation and Democratic Theory* (Vancouver: University of British Columbia Press, 2004); J. Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Boulder, CO: Westview Press, 2001).

<sup>14</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 89-96.

useful.<sup>15</sup> The former is the classical model of the final word, central to modernist accounts of the legal system as *Rechtsstaat*. Within the Westphalian tradition of state-building, as conceptualised by Kelsen and Hart, it is considered that any legal order must have an absolute and final arbiter, and hence the sovereign is characterised, for example by de Spinoza, as he who ‘has the sovereign right of imposing any commands he pleases’.<sup>16</sup> Constituent sovereignty, however, is for Kalyvas a neglected model which is concerned not with ‘coercive power’ but rather ‘constituting power’: ‘Thus, contrary to the paradigm of the sovereign command that invites personification and can better be exercised by an individual who represents and embodies the unity of authority – from the ancient imperatore to the king to the modern executive – the constituent power points at the collective, intersubjective, and impersonal attributes of sovereignty, at its cooperative, public dimension.’<sup>17</sup> This involves seeing the sovereign as ‘constituent subject’, as the one who shapes not only the governmental structure of a community but also its juridical and political identity,<sup>18</sup> in other words, as the source of the constitution and of its authority.

In addressing referendums we are interested in sovereignty in this sense, as creative force rather than merely as legal restraint. Moving on from the narrow legalism that has encapsulated so much work on sovereignty we are asking: in a constitutional referendum, can ‘the people’ be envisaged as intervening directly to ‘produce’ sovereign decisions in a way which affirms that legitimate democratic authority emanates from popular consent rather than the institutions of state? In other words, do these referendums encapsulate a real world manifestation of the notion of the people as ultimate source of legitimate power? Therefore, our enquiry concerns how constitutional referendums are used to produce higher order law, which in turn makes them a very different animal from referendums engaged in ordinary law-making. Constitutional referendums implicate what is perhaps the central relationship within constitutional democracy - that between constituent power and constitutional form. It is often argued (or rather assumed) in much of the existing literature on referendums that this is the case also with referendums engaged in first order law-making; ‘referendum democracy’<sup>19</sup> is frequently cited as the mobilisation of ‘popular sovereignty’, regardless of the issue at stake. But such a generalisation is in fact a category mistake, and one of some significance.

There is certainly a sense in which, whenever the people are directly engaged in any law-making process, their exercise of collective will-formation and expression acts as a symbolic reminder that democratic authority finds its legitimacy in the consent of the people. But at the same time we must not lose sight of the fact that ‘sovereignty’ refers to the ultimate source of legal power within a legal system, identifying second order competence to determine authoritatively the status of first order rules; and, therefore, any reference to popular ‘sovereignty’, to remain a coherent concept for legal theory, particularly within the elaborate constitutional frameworks that exist today, must be concerned precisely with those situations where ‘the people’ can be shown to exercise direct control over second-order law-making – in other words, acting to ‘produce’ sovereignty in Kalyvas’ sense. Just as we must not

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<sup>15</sup> A. Kalyvas, ‘Popular Sovereignty, Democracy and Constituent Power’ (2005) 12 *Constellations* 223, 224.

<sup>16</sup> B. de Spinoza, *A Theologico-Political Treatise*, tr. R.H.M. Elwes (New York: Dover, 1951) 207, cited by Kalyvas, n 15 above.

<sup>17</sup> Kalyvas, n 15 above, 235-236.

<sup>18</sup> Kalyvas, n 15 above, 226.

<sup>19</sup> Mendelsohn and Parkin, n 11 above.

elide first and second order rules, nor should we confuse the modes of their respective creation, or the role citizens play in these different law-making processes. Legislative referendums do not impact upon the location and distribution of sovereign power within the state; rather they are constrained to play a role within mainstream *representative* democracy, subordinate to the second order rules that provide these referendums with their normative competence. Therefore, even the categorisation of legislative referendums as an instance of *direct* as opposed to *representative* democracy is perhaps something of an over-simplification. In playing a role within a broader representative system of government, where the authority of these referendums is clearly subsidiary to those constitutional institutions which retain the competence to create and change higher order rules, they should perhaps more accurately be portrayed as being part of that representative system, since the effect given to the outcomes they produce is ultimately subject to the representative competence of constitutional institutions, most obviously legislatures, but also courts. In contrast, the people's direct democratic capacity to act as, or at least to influence the location and distribution of, the supreme source of constitutional law within a polity, distinguishes constitutional referendums as, potentially at least, true conduits of popular determination. Of the four types of constitutional referendums set out in the introduction, those which found new states or create constitutions are the most obvious manifestations of popular sovereignty, but those which establish complex new models of sub-state autonomy or transfer sovereign powers from the state to international institutions, can also be viewed as acts of constitution-making.

But we must still ask, why does this matter? What is it about the use of constitutional referendums in sovereign decision-making that causes us to reflect on the nature of legal sovereignty itself? It seems that, in legal terms, constitutional referendums raise important and discrete challenges to how we understand the nature of supremacy within a representative system of government in a way which legislative referendums simply do not.<sup>20</sup> The very notion of a 'representative democracy' recognises that while the authority of a legal order might be conceptualised as deriving originally from direct popular authority (whether real or imagined), the act of constitution-making replaces this authority with two levels of representation. At the first (lower) level, the role of representative of the people is assumed by legislators, and at the second (higher) level by the normative supremacy of the constitution itself. Each to a different extent supplants the people's original direct decision-making competence. Before turning to the specific implications of constitutional referendums for these two levels of representation, it is necessary to explore this notion of representation further.

The American revolutionary experience provides a classic example of how the democratic constitution of the modern era assumed this second-order representational function. Following the success of the 1776 constitutional revolt and, subsequently, the inchoate nature of legal authority in the unsettled Confederation period, the authority of the revolutionary people was transformed, or, to use a term that perhaps more accurately catches the temporal as well as the legal significance of the moment, crystallised, in the constitutional moment of 1787 into that of a constitutional

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<sup>20</sup> We should be careful to note that not all 'constitutional' referendums supplant constitutional institutions in their entirety; the line from constitutional to legislative referendums can be a blurred one. The claim here is merely that they can do so, and even when they operate within existing constitutional frameworks, they still involve the people directly in fundamental issues of constitutional design.

people.<sup>21</sup> The pre-constitutional revolutionary subject was no more, being at once both conceptually re-created and frozen in time by the constitutional settlement. In other words, although the constitution can be seen as the progeny of the revolutionary demos in terms of the popular legitimacy that this constitution claimed for its new legal supremacy, it in fact also served to re-shape the identity of its creator in its very own likeness: a legally-defined (and controlled) constitutional demos superseding the radical, revolutionary people of the pre-constitutional polity.<sup>22</sup>

Despite its conservative outcome, the process culminating in 1787 was genuinely revolutionary. In the transition to the new constitution, the people(s) of the thirteen states were envisaged as sovereign – albeit that this sovereignty was represented indirectly through each state’s delegates at Philadelphia – in the sense of being unconstrained by the existing constitutional arrangements of the Articles of Confederation.<sup>23</sup> But in this act of constitutional creation this sovereignty was transformed from the direct to the representative – the real to the symbolic – through subsumption of that sovereignty by the constitution itself. Passing into the new constitutional order, the ‘sovereign people’ remained in theoretical terms as a legitimising concept, but the reality of sovereign power and the pathways of its permissible exercise, were now in the keeping of the people only as represented, constitutional subject.<sup>24</sup> In the European idea of the *Rechtsstaat* we see a similar process at work whereby constituent power is replaced by the representational force of constitutional authority. The result is that in most democratic constitutions today the principle of popular sovereignty, where it survives at all, does so as a constitutional ephemera, ‘no more than a verbal homage to the democratic-representative character of contemporary political systems.’<sup>25</sup>

This process is captured in juridical terms by the concept of representation. At the first order level of ordinary legislation, politicians and political institutions represent the people functionally in terms of will-formation and expression. And at the constitutional level we find something similar: the institutions of the constitution

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<sup>21</sup> Of course, whether the USA represented only one sovereign people or a collection of sovereign states remained an open issue until settled in favour of the former conceptualisation by the Civil War and its subsequent legal consolidation: e.g. *Texas v White* 74 U.S. 700 (1869).

<sup>22</sup> Gallagher introduces a distinction between ‘the *conceptual people* from whom the constitutional order derives and ... the *empirically given people* who actually live under the constitution.’ M. Gallagher, ‘Popular Sovereignty and Referendums’, in Auer and Bützer, n 12 above, 228, 228.

<sup>23</sup> The Philadelphia Convention was established by the Articles of Confederation, but in the end it displaced these powers and claimed that the legitimate source of the new constitution was ‘the transcendent and precious right of the people to “abolish or alter their government as to them shall seem most likely to effect their safety and happiness”.’ James Madison, ‘The Federalist No. 40’, citing a similar sentiment expressed in the Declaration of Independence. For all references to the Federalist Papers see I. Kramnick (ed), *The Federalist Papers* (Harmondsworth: Penguin, 1987). Jon Elster described this as ‘constitutional bootstrapping’: ‘the process by which a constituent assembly severs its ties with the authorities that have called it into being and arrogates some or all of their powers to itself.’ J. Elster, ‘Constitutional bootstrapping in Paris and Philadelphia’, (1992-93) 14 *Cardozo Law Journal* 549, 549.

<sup>24</sup> It is not the case that constitutional form simply replaced constituent power in this process. In fact, constitutional form itself transplants *the idea of the people* as source of constituent power, and instead we find a merging of the two concepts; the new constitutional order is supreme but this new order embodies the people as constitutional subject. As Elster puts it, ‘the ultimate act of the American assembly of Philadelphia was to break with the past in order to redefine American *national identity*.’ Elster, n 23 above, 550 (emphasis added); in other words, a national identity emerged that mapped perfectly onto a constitutional identity.

<sup>25</sup> L. Ferrajoli, ‘Beyond sovereignty and citizenship: a global constitutionalism’, in R. Bellamy (ed), *Constitutionalism, Democracy and Sovereignty* (England: Avebury, 1996) 152.

come to represent the people in acts of will-formation and expression when the constitution is amended by institutions in place of and in the name of the people. But, in addition, the constitution as a concept takes on a second, symbolic representational role, encapsulating the very identity of the people itself. Rather than being merely functional, as it is at the legislative level, this form of representation is an emblematic feature of the constitution's very meaning – as embodiment of the settled will of a democratic people. And individuals come to identify with one another, therefore, through their shared commitment to this constitution which itself becomes a central component of their collective identity. It is in the context of this nation-building potential of constitutional law-making that we must address constitutional referendums. When referendums are used to make or re-create constitutions they too can take on a vital nation-building role. Constitutional referendums are not, like ordinary legislative referendums, merely a decision-making mechanism; instead they become part of the identificatory symbolism of the constitution and of the state. In other words, constitutional referendums can intervene in the most fundamental acts of constitutional self-definition. This has important implications for sovereignty theory, since in these acts the people can come to supplant the representative institutions that (in the name of the people) have become the accepted receptacle of legal supremacy in contemporary democracies. And it is this radical legal potential of these referendums, with the power they carry to override both levels of constitutional representation, that brings with it important normative consequences for how we understand constitutional democracy today.

We will turn now to arguments for and against the use of referendums, exploring how these need to be addressed afresh in the context of constitutional referendums. The role of these referendums in deciding the most fundamental issues of constitutional law and in influencing the very constitutional identity of the polity confronts us with novel and unsettling normative challenges for the democratic polity.

## **II. THE NORMATIVE IMPLICATIONS OF CONSTITUTIONAL REFERENDUMS**

### **1. Framing the challenge**

In taking the representational distinction between the functional and the symbolic further in order to assess normative arguments for the appropriateness or inappropriateness of constitutional referendums, we will take republican theory as a benchmark. This branch of democratic theory, which has enjoyed a recent renaissance,<sup>26</sup> is a broad church, but its advocates share a commitment to a politically-engaged demos in partial realisation of the ideal of 'government by the people'. We will explore both how this commitment to participatory democracy can be squared with an entrenched (representative) constitution, and how the constitutional referendum can be contextualised within this republican revival.

We have observed that one way to understand the role of referendums is to envisage them as a means by which representation is itself supplanted, returning direct power to the people; in other words as some kind of reversal of the original act of transference, or at least as a temporary return of power to the people. In such a conceptualisation it is important to maintain the distinction between those

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<sup>26</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 1999); J. Maynor, *Republicanism in the Modern World* (Cambridge: Polity, 2003); D. Weinstock and C. Nadeau (eds), *Republicanism: History, Theory and Practice* (London: Frank Cass, 2004); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).



referendums which displace only first order (legislative/functional) representation and those that interpose direct popular decision-making at the second order (constitutional/symbolic) level, since what is being reclaimed in the name of the people directly in the latter situation is not just the capacity for direct will-formation and expression, but also competence to control the definition of a people's self-identity and that identity's constitutional manifestation.

The distinction between the two levels of representation therefore has implications for the legitimacy of referendums. Those who argue that there is no place for referendums in a democracy typically contend that politicians are better able to make decisions on behalf of the people. There are various justifications for this argument, but usually it rests on the expertise of politicians and the time and interest they can bring to politics, in contrast to ordinary citizens.<sup>27</sup> This 'expertise argument' is typically more one of pragmatics than principle. It might be conceded that popular decision-making is the ideal model of democracy but, the argument goes, in practice this is unrealistic because of a lack of knowledge of complex issues on the part of ordinary people and the motivational, organisational and related difficulties in educating people about these matters. Indeed, referendums are not just impractical, they can be dangerous, because people will often make ill-informed choices without proper deliberation. Therefore, a referendum can in reality be no more than an exercise in aggregating pre-formed wills without any prospect that people will engage in democratic decision-making in a reflective, responsive and deliberative way with a preparedness to change their minds.<sup>28</sup> These arguments feed into a more general concern that referendums held in such circumstances are open to elite manipulation, to the point where they cannot be seen in any meaningful sense as acts of direct self-determination.<sup>29</sup>

Even if we accept these arguments at the legislative level, however, there are reasons to doubt their grip on the constitutional plane. There are two specific features of higher order law-making that seem to offer a stronger *prima facie* argument for direct democracy. The first concerns the importance of the issues at stake, which prompts the question: are there matters too fundamental to the system of government to be left merely to political institutions through constitutional entrenchment? In response, as we shall discuss, it might be argued that it is the very importance of these issues that demands more than ever the cool judgment of professional representatives. The second feature concerns the second level of representation that exists at the constitutional level. Does the fact that the definition of the very identity of the demos is at issue call for direct popular deliberation in a way that ordinary law-making does not? These two questions will be considered in turn in the next two sub-sections.

## 2. Constitutional entrenchment and the challenge of referendums

Since the importance of the issue at stake in constitution-making seems to offer strength to arguments both for and against direct democracy at the constitutional level, we will begin from a negative perspective with the argument that processes of constitutional change should be elevated beyond the vagaries of transient majorities – popular or otherwise. We will then consider the counter-argument that the transformation of an existing constitutional settlement, or the founding of a new

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<sup>27</sup> For example, M. Setälä, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45 *European Journal of Political Research* 699, 699. See also e.g. G. Sartori, *The Theory of Democracy Revisited* (London: Chatham House, 1987) 120.

<sup>28</sup> See e.g. Chambers, n 13 above.

<sup>29</sup> Haskell, n 13 above.

constitutional settlement in the name of the people, should involve direct deliberation and consent, given the fundamental impact such a process promises for the people's governmental arrangements.

The argument that referendums are particularly inappropriate for major constitutional decisions is similar to that which opposes referendums in general. But in these situations it is often made more forcefully. Echoing the claim that ordinary people lack specific knowledge of the detail of political issues, the argument proceeds that the risk of mistakes is all the more serious when matters of the highest constitutional consequence are at stake. Constitutional entrenchment, therefore, is purposely crafted to guard against rash judgments being made either by citizens directly or by political institutions.<sup>30</sup> Furthermore, entrenchment is usually given effect by a super-majoritarian model, thereby distinguishing the process of constitutional law-making from that for ordinary laws which are typically made by a simple majority of representatives in a parliament (albeit that such a majority may need to be found in two houses rather than one, and may also require executive consent). Therefore, we can characterise entrenchment as the combination of two constraints: inter-temporal and counter-majoritarian; the former a logical concomitant of the latter. A simple majority, however constructed, cannot change the constitution and, therefore, the authority of the constitution extends into the future until a super-majority can be found to change it, thereby bringing later generations under its authority in a process justified typically by the Lockean principle of tacit consent.<sup>31</sup>

But why are constitutions protected in this way, and what are the implications for direct democracy? Perhaps the principal reason is, once more, a pragmatic one - stability. The danger of constitutional volatility has been apparent to constitutional founders at least since Philadelphia.<sup>32</sup> It may be a psychological reaction to the turmoil and violence of revolution that in consequent processes of constitution-building the aspiration is for a fixed and durable settlement. Furthermore, constitutional constancy seems an obvious requirement to protect complex societies from the ramifications of dangerous schisms.<sup>33</sup> It may be unfortunate, given the ongoing democratic commitment of a new constitution founded in the name of one sovereign people, but it is a social fact that a legal order requires a set of secondary norms to provide clarity and strength to primary rules; and, therefore, there is a compelling argument that this higher order set of norms should be protected from easy amendment by way of ordinary laws. This has combined with a second concern, that there are certain values inherent in a constitutional order that should be protected. Since the dominant philosophy of contemporary Western constitutionalism is now

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<sup>30</sup> A common metaphor is Ulysses tied to the mast. E.g. J. Elster, 'Ulysses Unbound: Constitutions as Constraints', in J. Elster (ed), *Ulysses Unbound: Studies in Rationality, Precommitment and Constraint* (Cambridge: Cambridge University Press, 1979).

<sup>31</sup> J. Locke, *Two Treatises of Government* (P. Laslett ed) (Cambridge: Cambridge University Press, 1963) ch 1, s 2, 308.

<sup>32</sup> Jefferson who advocated frequent popular overhauls of the constitutional order is, therefore, often associated in American constitutional historiography with the danger of constitutional caprice, a reaction evident in Madison's reply to Jefferson. *The Federalist Papers*, n 23 above, No. 49 (James Madison).

<sup>33</sup> Arendt voiced concern that an unconstrained constituent power would never be at peace with itself. 'If the constituent sovereign can never limit itself, it will by no means establish an enduring constitutional order. Consequently, it will be trapped in its own illusionary omnipotence, remaining in a perpetual exception, stuck forever in a normless state of nature.' H. Arendt, *On Revolution* (London: Penguin, 1963) 163.

liberalism, the constitution has often come to be seen as a vehicle for protecting individual rights by elevating them beyond the reach of day to day flux.<sup>34</sup>

But although the concerns for stability and individual interests may be important, there still lingers the question: whence comes the authority for such a foundational document to bind a republican people into the future? While liberalism sees the protection of a priori individual rights as sufficient justification for entrenchment, we will concentrate upon another democratic tradition - republicanism - since it is here we find a commitment to the politically active and self-determining demos as one of the primary values of democracy; and therefore, it is within this theory that the challenge to embedded constitutionalism's constraints becomes most acute. The justification for such a level of constitutional protection does of course exist within republican thinking and is often based upon a real or imagined moment of popular deliberation whereby 'the people',<sup>35</sup> often led by a wise elite (founding fathers or the like), in a moment of enlightened epiphany set out a path for the future harmony of the polity. In other words, if we look beyond the pragmatic reasons for entrenchment advanced by Madison and others, or the liberal argument based upon the protection of individual rights, the republican justification, where it exists, is an almost metaphysical belief that the founding moment involved some kind of higher reasoning worthy of constitutional entrenchment.

This notion of higher reasoning is problematic in itself as it is seemingly at odds with the idea that equality is a pre-existing justification for democracy in the first place, but it is also somewhat ironic that there should be such a reification of the revolutionary moment when the ideological impetus of revolutionaries often rejects such mythical sources of legitimacy, for example, the purportedly enlightened level of reasoning/revelation that underpinned theories such as divine right. Indeed, Madison's place in ideological history can be attributed to his very articulation of an overtly positivist vision of power based on reason and consent that served to refute the mystical pretensions of the *ancien regime*. In other words, American republicanism offered the chance 'to bring about a revolution by the intervention of a deliberative body of citizens' which would dispel forever spurious foundation myths.<sup>36</sup> In this context it seems especially odd that such a process of deliberation at one particular moment came to take on, as it has in American constitutional narratives, its own mythical aura that serves to elevate its legitimacy above that of subsequent deliberative processes. Therefore, one objection to entrenchment is that it can assume a deeply conservative bent, arguably aggrandising the value of tradition over that of democracy, as caricatured impishly by Chesterton:

Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All

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<sup>34</sup> D. Dyzenhaus, 'The Rule of Law as the Rule of Liberal Principle' in A. Ripstein (ed), *Ronald Dworkin* (Cambridge: Cambridge University Press, 2007) 56. That the latter justification has largely emerged subsequent to the democratic imperative of constitutionalism is, however, evident from the fact that the American Bill of Rights was something of an afterthought at Philadelphia, proposed as a series of amendments in 1789.

<sup>35</sup> Using 'the people' as a singular noun in English carries its own linguistic constraints, as Canovan has shown, but it is this collective, republican construction with which we are dealing. M. Canovan, 'Populism for political theorists?' (2004) 9 *Journal of Political Ideologies* 241, 250.

<sup>36</sup> *The Federalist Papers*, n 23 above, No. 38 (James Madison).

democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death.<sup>37</sup>

The modernist tradition of radical republicanism, evident in the willingness of the American founders to disregard the existing constitutional shackles of the Articles of Confederation, can also be traced to the French revolution.<sup>38</sup> This latter tradition, in particular, rejects the idea that the pre-existing popular sovereignty of the people should have been constrained entirely by constitutional representation, thereby denying the legitimacy of constitutional rules that would lock in a super-majoritarian requirement for the constitution's own revision.<sup>39</sup> And Arendt can be prayed in aid here because, although alive to the pathology of permanent revolution, she also saw its antinomy in a conservative revolution that came to belie its own origins by supplanting republicanism with traditionalism.<sup>40</sup>

A counter to traditionalism in the republican tradition, therefore, is that entrenched constitutionalism is akin to 'rule from the cold graves of dead men of constitutions past',<sup>41</sup> and hence illegitimate. Jefferson argued against entrenchment, stating famously that one generation was to another what one independent nation is to another; nations cannot make laws for each other, neither should one generation have such a power.<sup>42</sup> There is today a tradition of Jeffersonian republicanism in America that advocates a more active role for the people,<sup>43</sup> and this is where the argument for constitutional referendums gains some leverage. Amar has gone so far as to advocate the revival of popular sovereignty through a national referendum as an alternative constitutional amendment mechanism to complement the careful balancing of institutional roles set out in Article 5 of the US Constitution.<sup>44</sup> For him it is the people at any present time who constitute the republican ideal of 'the people', and not an abstraction of this concept through the representation offered by a constitution.<sup>45</sup> This radical approach, therefore, envisages a self-governing people at any moment as

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<sup>37</sup> G. K. Chesterton, *Orthodoxy* (London: Fontana, 1961).

<sup>38</sup> L. Jaume, 'Constituent Power in France: The Revolution and its Consequences' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

<sup>39</sup> We see modern manifestations of this in de Gaulle's preparedness to invoke popular sovereignty in referendums that were, by any standards of the Fifth Republic, illegal. See Gallagher, n 22 above, 230-231.

<sup>40</sup> Arendt, n 33 above. American constitutional traditionalism, with almost a Burkean level of obeisance, has become of course such an *idée fixe* that it is taken to represent an ideal type of one model of conservatism today: that of 'tradition, order and authority.' D. Held, *Models of Democracy* (Cambridge: Polity Press, 1987) 243.

<sup>41</sup> A. R. Amar, 'Popular Sovereignty and Constitutional Amendment' in S. Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) 89, 115.

<sup>42</sup> Thomas Jefferson, letter to John Cartwright, 1824. See also Locke, n 31 above ch 8, s 116.

<sup>43</sup> E.g. C. Sunstein, *Why Societies Need Dissent* (Cambridge, Mass.: Harvard University Press, 2005); B. Ackerman and J. S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2005).

<sup>44</sup> Amar, n 41 above.

<sup>45</sup> James Wilson was a dissonant voice who expressed the radical promise of the American revolutionary experience, since truncated by constitutionalism: 'in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.' Wilson, cited by J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington: US Congress, 1901), 2:432.

having the capacity legitimately to displace both the super-majoritarian and temporal constraints of constitutional entrenchment.<sup>46</sup>

Another argument, this time from the critical republican tradition, contends that constitutionalism can act as a hegemonic force, not only constraining the republican, political potential of the people, but in doing so serving to uphold powerful vested interests. Law crystallises constitutional rules which are in fact tools used by elites to entrench their status.<sup>47</sup> We find in this movement a charge that liberalism as an ideology is well-served by such conservative entrenchment. Indeed, Dryzek characterises liberal constitutionalism as an exercise in solidifying an ‘aggregation of pre-determined interests under the auspices of a neutral set of rules: that is, a constitution.’<sup>48</sup>

The arguments both that the people should not be constrained by decisions of a mythical people in the past, and that such constraints are often in fact reactionary devices to protect vested interests, lead radical republicans towards the conviction that popular sovereignty ought to be kept alive: the people should be able directly to challenge those vested interests that can otherwise use constitutionalism to protect their privileged positions. This is not in itself an argument for referendums, but it is a commitment to direct democracy in the broadest sense of seeking the active engagement of citizens in matters of the highest constitutional importance. The people as democratic reality rather than as represented, constitutional symbol is *the only* legitimate source of democratic authority. It is a short step to argue for a constitutional referendum on the basis that when an issue that goes to the heart of the constitutional settlement is implicated, then the people should be directly engaged in the decision-making process.<sup>49</sup>

It should be observed that arguments for direct democracy in these situations, and even for the use of referendums, can be and most often are, arguments for the exceptional resort to such a device as an occasional supplement to the generality of representative government. This is one of the reasons why it was important to distinguish constitutional law-making from ordinary law-making. The argument against direct democracy is often categorical and absolute in its negativity, but advocates of constitutional referendums can argue for a mixed system, with direct democracy serving to complement representative democracy in extraordinary circumstances only. Indeed, as will be observed shortly, referendums in these

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<sup>46</sup> See also B. Ackerman, ‘Neo-federalism?’ in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1993), and for a recent English articulation see Bellamy n 26 above.

<sup>47</sup> Wood famously characterised the American revolution in this way: G. S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C.: The University of North Carolina Press, 1969).

<sup>48</sup> J. S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestations* (Oxford: OUP, 2000), 9. A classic critique of the hegemonic juridification of democracy is J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). See also E. Christodoulidis, ‘Against Substitution: The Constitutional Thinking of Dissensus’, in Loughlin and Walker, n 38 above.

<sup>49</sup> As Canovan argues: the ‘democratic’ strand as opposed to the ‘liberal’ strand of democracy ‘is concerned with the sovereign will of the people, understood as unqualified majority rule and typically expressed through referendums.’ Canovan n 35 above, 244. There is no necessary concomitance between arguments for entrenchment and outright rejection of direct democracy; commonly, however, proponents of the former double as opponents of the latter. By contrast, it is no surprise that republican opponents of constitutional entrenchment such as Amar are often advocates of direct democracy; the reason being that the normative argument underpinning radical republicanism is founded upon the right of a free people from time to time to determine its own form of government. This is returned to below.

situations can be argued for precisely because of the exceptional nature of the major constitutional change that is at issue.<sup>50</sup>

A third argument that challenges the norm of entrenchment to the exclusion of direct popular involvement in constitutional decision-making is that there might be perceived to be a conflict of interest if constitutional institutions have the exclusive authority to make decisions which amend their own constitutional prerogatives.<sup>51</sup> Furthermore, a fourth argument counters the idea that people have no expertise, time or inclination for direct engagement. The exceptional nature of constitutional referendums arguably makes it easier to generate popular enthusiasm to participate in one-off referendums. This and the fundamental importance of the issue at stake both seem relevant factors in generating public interest. As Arato argues: ‘constitutional politics due to its extraordinary nature, has the potential to promote the public participation of individuals otherwise dedicated to private happiness, and whose political involvement is inevitably a shifting one.’<sup>52</sup> Frey also notes:

As the voters are taken to be badly educated and ill informed, subject to manipulation and to emotional decisions it is often argued that referenda should be admitted for small and unimportant issues, only. In contrast, issues of great consequence - such as changes in the constitution – should be left to the professional politicians. The opposite position makes more sense. Major issues can be reduced to the essential content. Evaluation then is not a matter of (scientific) expertise but of value judgements. Following methodological individualism, only the citizens may be the final judges when it comes to preferences, and a substitution by representatives is, at best, a second best solution. As the politicians have a systematic incentive to deviate from the voters' preferences, a substitution leads to biased outcomes.<sup>53</sup>

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<sup>50</sup> ‘The constituent sovereign evokes the extraordinary moment of the direct manifestation of collective autonomy and popular mobilization during those rare periods of political innovation and original constitutional making, where there is growing mass intervention and participation in the process of establishing a new constitution. Political freedom as the will to live under one’s own laws is best actualized when those laws are the higher, fundamental laws of a free government. This formulation of popular sovereignty in terms of the constituent power of an expansive political community is a more sophisticated re-statement of the old, fundamental democratic principle of self-government and self-determination, according to which the people are the authors of the laws that govern them.’ Kalyvas, n 15 above, 238.

<sup>51</sup> According to Madison, whenever legislatures - ‘transcendent and uncontrollable’ - retain the power of constitutional change, there is a threat of tyranny (he cited, by way of example, the power of the Parliament of Great Britain to extend its own life without election). *The Federalist Papers*, n 23 above, No.53 (James Madison).

<sup>52</sup> A. Arato, ‘Dilemmas Arising from the Power To Create Constitutions in Eastern Europe’ (1993) 14 *Cardozo Law Review* 661, 669-670. Canovan observes that the idea of the authority of ‘the people’ is all about myths. But that is not an invitation to cynicism: ‘A less dismissive response might perhaps suggest that our familiar myths of the people as founder and redeemer of polities have rather more substance than that. If there is a kernel of truth hidden in the myths, it might be a truth about the basis of political power and political community. On that view, the hidden truth of the myth is that ordinary individual people do have the potential (however rarely exercised) to mobilise for common action. On occasion, such grass roots mobilisations generate formidable power, bringing down a regime; more rarely, they sometimes manage to make a fresh start and to lay the foundations of a lasting political community.’ Canovan, n 35 above, 251.

<sup>53</sup> B. S. Frey, ‘Direct Democracy for Transition Countries’, Working Paper Series, Working Paper No. 165 (University of Zurich: Institute for Empirical Research in Economics, 2004) 18.

The turnout in the Quebec referendum in 1995 (93%), and that of 86.5% of Danes in the second Maastricht referendum in 1992, lend some support to these arguments, though, it must be said, this assumption needs to be tested by political scientists.

There is also the possibility that civil engagement potentially brought on by a referendum will bring a fresh eye to high constitutional politics that politicians lack. A related argument is that referendums might in fact be beneficial for such extraordinary matters, removing them from ordinary political processes where party interests and other established dynamics might frustrate the possibility of a broader and fresher debate. It may even be suggested that these processes provide the time and the openness of decision-making that is lacking in institutionalised forms of decision-making.

To conclude, constitutional entrenchment is an established norm of liberal democracy for good reasons, but on the other hand there are strong arguments from the radical and critical republican traditions that the people should be directly engaged in important constitutional decisions. This is not in itself an argument for referendums, but those who are concerned by the conservative and constraining potential of constitutional entrenchment seem more open to the merits of referendums as an alternative and occasional model of constitutional decision-making. But even if a *prima facie* case is made for constitutional referendums in certain circumstances, we must not lose sight of the attendant dangers that direct democracy can bring. This is clear as we turn to normative arguments for constitutional referendums that concern the issue of identity in constitutional politics. A strong case for referendums might be made in this context, but it is also here that we see the significant risk of majority hegemony that they entail. We will now address the issue of constitutional identity including how referendums are criticised for their homogenising tendencies before turning in Section III to the possibility of applying deliberative democracy as a model for referendums that might help obviate some of these hegemonic and homogenising risks

### **3. Constitutional referendums and constitutional identity**

The magnitude of constitutional issues can be encapsulated in the two dimensions of self-determination. The preceding subsection considered the question of ‘determination’ (will-formation and expression), and the issues that arise from direct involvement of the people as they supplant, or at least complement, the determining role of constitutional institutions in higher order law-making. Here we turn to the implications constitutional referendums hold for the ‘self’. Fundamental constitutional decisions within a democracy, whether taken through the direct agency of citizens or by their representatives, can involve reflection on the nature of the collective demos, i.e. the very identity of ‘the people’ as constitutional subject. But it is in the former case, direct democracy, that this process is more evident. As Kalyvas puts it: ‘Constituent politics might be seen as the explicit, lucid self-institution of society, whereby the citizens are jointly called to be the authors of their constitutional identity and to decide the central rules and higher procedures that will regulate their political and social life.’<sup>54</sup> The very act of staging a constitutional referendum is itself both a declaration that a people exists and a definition of that people. In this sub-section we will explore how controversial even the act of holding a referendum can be when the identity of the people, and/or its territorial limits, are deeply contested.

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<sup>54</sup> Kalyvas, n 15 above, 237.

The notion of the demos offers democratic legitimacy to the modern state, with any democratic act within the polity implicitly bearing the name of the people. But what gives substance to the collective character of this politically-mobilised people is rarely subjected to deep deliberation in ordinary political life. In processes of representative government the polity typically operates without any grand, symbolic mustering of a state-wide personality. Therefore, the referendum can intervene in such an environment in an unsettling way, since the direct engagement of citizens qua ‘the people’ makes the purported collective identity of the demos much more difficult to ignore; and, indeed, a referendum on the very question of constitutional sovereignty makes such self-reflection almost inescapable. As we will observe, this can be particularly challenging where the idea that the polity contains only one, unified demos is challenged.

It is indeed notable that the idea of the people does tend to lie dormant and largely unarticulated not only in democratic practice through the established contours of representative democracy, but also, and more surprisingly, in democratic theory. Canovan has recently observed: ‘Unlike ‘freedom’, ‘justice’, or even ‘nation’, ‘people’ has attracted hardly any analysis, even by theorists of democracy’, a fact she deems ‘astonishing’.<sup>55</sup> However, this seems to be changing, particularly as we now see so much academic debate concerning the issue of cultural identity<sup>56</sup> and the implications of cultural and national diversity for the maintenance of rights and duties within the modern state.<sup>57</sup> Indeed, within these debates we can identify a tension between two normative traditions: one that promotes the value of cultural pluralism, and one that stresses the benefits of nation-building republicanism. And here the constitutional referendum becomes particularly controversial because it is argued, within the former tradition in particular, that, in asking a ‘people’ to speak with one voice, a referendum can serve to suppress the deep diversity within the community.

The pluralist tradition appears to be suspicious of the traditional narrative of ‘the people’ altogether. The origins of this scepticism are to be found in reactions to the revanchist nationalism of the 1930s. Indeed Arendt, herself deeply uncomfortable with nationalism, considered that one reason for the neglect of the constituent sovereign was its potential for reactionary manifestations through ‘the multitude’.<sup>58</sup> Arendt’s suspicions extended to the very idea of sovereignty as a generality<sup>59</sup> and popular sovereignty in particular.<sup>60</sup> Today the danger of fascism is less of a concern, but a related suspicion has been inherited by pluralist politics; namely that the very notion of the demos can imply a level of homogenisation that does not reflect the kaleidoscopic reality of its composition. Although the demos is traditionally taken as a logical prerequisite within democratic theory, the very coherence of the notion of one demos, and indeed of the nation-state as locus for it, is increasingly called into question in a more cosmopolitan climate. Critics in the post-modern tradition object that the idea of ‘the people’ is too holistic to be serviceable today; and this can be a

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<sup>55</sup> Canovan, n 35 above, 247. Below we will observe historical reasons for this as discussed by Arendt and others.

<sup>56</sup> W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); M. Moore, *Ethics of Nationalism* (Oxford: Oxford University Press, 2001).

<sup>57</sup> K. Banting and W. Kymlicka, *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford: Oxford University Press, 2006).

<sup>58</sup> As Arendt put it: ‘the so-called will of a multitude (if this is to be more than a legal fiction) is ever-changing by definition, and... a structure built on it as its foundation is built on quicksand.’ Arendt, n 33 above, 163.

<sup>59</sup> H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) 57.

<sup>60</sup> Arendt, n 33 above, 60.



more general point about the purported uniformity of collective identities in a time of fragmentation.<sup>61</sup>

But not all difference democrats are so pessimistic. For example, Young is open to the possibility of a shared language of reasonableness provided this leaves content open and is non-oppressive. This seems to be a useful starting point which permits an epistemology of common reason without setting the terms for the content that flows from it.<sup>62</sup> And, interestingly, Young shares to an extent the republican position that, as a matter of logic, some idea of the public is needed. However, for her this must be a fluid construction that can develop through deliberation; it should not be an aggregative ensemble of pre-fixed wills because an aggregative model ‘lacks any distinct idea of a *public* formed from the interaction of democratic citizens and their motivation to reach some decision.’<sup>63</sup>

This point about the inherent incompatibility of republicanism and a non-deliberative approach to democracy is well-made. But at the same time, to give up on the idea of the people almost seems to be akin to surrendering the idea of democracy. The republican tradition holds to the idea of a *demos* and sees it as a vital point of shared identification that consolidates the collective identity of a free people around the notion of the polity, with resulting benefits for the shared responsibilities of citizenship that attend such a project.<sup>64</sup> David Miller, for example, has argued that the idea of the nation is essential in building the civic resources necessary to establish a sense of mutual obligation within a particular, territorially-bounded commonwealth. And as a matter of more abstract philosophy there is also a strong argument that a sense of ‘we the people’ as a collective is *logically* a priori to any workable notion of either democracy or constitutional form.<sup>65</sup> Therefore, although it is important to achieve ‘inclusiveness without exclusion’,<sup>66</sup> the notion of a united people taking collective decisions is the basis of any democratic system. And so, in this debate between sceptics and advocates of the idea of ‘the people’ as a viable resource for democratic theory, how can we situate constitutional referendums? In the next section we will ask: can referendums be used in the making of fundamental constitutional decisions without riding roughshod over the complex differences within society? And we will turn to deliberative democracy as a possible way to address this question.

### III. IS DELIBERATIVE DEMOCRACY POSSIBLE IN CONSTITUTIONAL REFERENDUMS?

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<sup>61</sup> C. Mouffe, *The Democratic Paradox* (London: Verso, 2000); H. S. Richardson and M. S. Williams, *Moral Universalism and Pluralism*, NOMOS Series, No. XLIX (New York: NYU Press, 2008).

<sup>62</sup> I. M. Young, *Inclusion and Democracy* (Oxford: OUP, 2000); J. S. Dryzek, ‘Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia’ (2005) 33 *Political Theory* 218, 219-220.

<sup>63</sup> Young, n 62 above, 20. See also a recent article addressing the problems of representative democracy for identity politics: L. Guinier, ‘Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger’ (2008) 71 *MLR* 1.

<sup>64</sup> S. D. Gerber, ‘The Republican Revival in American Constitutional Theory’ (1994) 47 *Political Research Quarterly* 985; Pettit, n 26 above.

<sup>65</sup> H. Lindahl, ‘Democracy, Political Reflexivity and Bounded Dialogues: Reconsidering the Monism-Pluralism Debate’ in E. Christodoulidis and S. Tierney (eds), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 110. This position is one of some pedigree. Mill took the view that a successful democracy depends on citizens sharing a sense of common national identity. J. S. Mill, *Considerations on Representative Government* (London: Parker and Bourn, 1861), chapter 16.

<sup>66</sup> Lindahl, n 65 above.

So far we can say that in the modern civic republican tradition a *demos* is necessary not only so that citizens will assume their share of responsibilities but also to make easier the arrival at, and subsequent acquiescence in, political and legal decisions. But how can decisions be made in a way that will make diverse groups feel included across a diverse polity? In this context the theory of deliberative democracy has emerged to complement modern republicanism in order to help supply ‘inclusion without exclusiveness’.<sup>67</sup> This deliberative turn in democratic theory will be introduced briefly before we ask whether direct democracy, and in particular constitutional referendums, can operate in a deliberative way, thereby helping to overcome the dangers of hegemony and homogenisation.

The notion that unites deliberative democratic theorists across the spectrum from radical pluralism to more communitarian republicanism, as we have seen in Young’s work, is that decision-making is best made in a deliberative way, namely in an open and reflective manner, where participants listen as well as speak, and in doing so are amenable to changing their positions. This depends upon a willingness to see the other’s point of view and to accommodate it even at the expense of what seems to be one’s immediate, rational self-interest. This is characterised as ‘responsiveness’ by Gutmann and Thompson.<sup>68</sup> And as Dryzek puts it: ‘Sometimes participants may, as a result of reflection induced by communication, be open to changing their minds; this is where deliberation enters the picture.’<sup>69</sup> This seems to align with republican approaches in identifying a necessary condition for over-coming the self-interest that is central to aggregative politics. The argument runs that if we are to have a process that will transcend the mere aggregation of pre-formed wills then there must be, for those taking part, a sense of a community to which one belongs and owes obligations. Again, Lindahl argues that the idea of a people must, as a matter of logic, be conceptualised prior to deliberation: ‘a simple opposition between representative and participative democracy conceals the essential political problem concerning the genesis of political community: the preliminary questions (i) *who* may participate in citizen deliberation and decision-making, and (ii) what interests are *shared* interests, worthy of deliberation and decision-making between citizens, are not themselves the outcome of deliberation and decision-making between citizens.’<sup>70</sup>

One division even within this tradition is, however, that between what has been called elitist and populist deliberative democracy. Exponents of the former believe that decision-making should be deliberative but their focus is upon elites such as politicians and judges.<sup>71</sup> Populist deliberative democrats, in contrast, promote the

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<sup>67</sup> Perhaps the earliest expression of this new turn is to be found in Rawls’ idea of ‘public reason’: J. Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971). See also: J. Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA: MIT Press, 1996); J. Cohen, ‘Deliberation and Democratic Legitimacy’ in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997); Dryzek n 48 above; A. Gutmann and D. Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996).

<sup>68</sup> They have suggested various features of deliberative democracy. In a recent monograph they focus upon: reason-giving (responsiveness), accessibility, decision-making and dynamism. A. Gutmann and D. Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), chapter 1. See also Young, n 62 above, 18.

<sup>69</sup> J. S. Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (Cambridge: Polity, 2006) 6.

<sup>70</sup> Lindahl, n 65 above, 111.

<sup>71</sup> Gutmann and Thompson, n 67 above.

ideal of decision-making processes that involve ordinary citizens.<sup>72</sup> Dryzek neatly encapsulates the populist position: the ‘essence of democratic legitimacy should be sought . . . in the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision.’<sup>73</sup> In our account of referendums it is the latter that is of primary interest.<sup>74</sup> And in this advocacy of an active populace again we see a strong link between the civic republican and populist deliberative democracy traditions, for example in scholars such as Bruce Ackerman and James Fishkin.<sup>75</sup> Finally, we might refer to another commitment that seems to be shared by civic republicans and populist deliberative democrats, namely that participation is an inherent good. This of course has classical provenance in the work of Aristotle but it is also a strong strain of modern republicanism in the so-called ‘civic humanist’ tradition.<sup>76</sup> Together these factors link popular republicanism to popular deliberative democratic theory, a link that is a central building block in a republican argument for the normative value of constitutional referendums. We can now turn to how the constitutional referendum fits within these debates, situating it in the context of both republican and pluralist traditions. Having explored arguments that constitutional referendums may be an appropriate mode of constitutional decision-making due to the interests at stake, not least the identity implications for people in processes of major constitutional change, we are still left with the question, can referendums be democratic in the republican sense of due deliberation and inclusion?

We will make three points. The first is that the referendum does indeed presuppose a *demos* in the republican tradition, indeed the identity of the *demos* has been central to a number of significant referendums in recent decades. The second is that many pluralist objections are well made in that there is a danger that referendums will act as homogenising devices, especially in divided societies. Therefore, the demands for inclusion and genuine equality presented by the likes of Young and Eisenberg set severe tests which the referendum must meet before it can be included in the portmanteau of democratic decision-making, particularly given the evidence from political scientists that referendums can act as aggregative models of decision-

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<sup>72</sup> E. J. Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (Pennsylvania: Penn State Press, 2004) 35-40.

<sup>73</sup> Dryzek, n 48 above, v. Here the republican strain clearly finds common ground with pluralist theories. For example, the imperative for direct participation can stem from a desire for *respect* for all parties to deliberation – Young; while others focus on equality: S. Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996); Eisenberg, n 13 above.

<sup>74</sup> There is something intuitively unappealing in the elitist approach. For example, Young seems to ask whether opposition to mass participation is in fact just snobbery and a mechanism for elite control of popular aspirations. Young, n 62 above, 39. JS Mill is often associated with this form of elitism; with Rawls held up as a modern exponent. Therefore, there seems to be in the radical republican approaches we will return to below a desire to retrieve what is fully democratic and even dangerous about direct democracy from elitist and hegemonic representation.

<sup>75</sup> Ackerman and Fishkin, n 43 above.

<sup>76</sup> I. O’Flynn, *Deliberative Democracy and Divided Societies* (Edinburgh: Edinburgh University Press, 2006) 66. See also J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); P. A. Rahe, *Republics Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill: University of North Carolina Press, 1992). Others in the civic republican tradition, such as Pettit, prefer to emphasise non-domination rather than participation as the key principle of republicanism, with participation seen as only instrumentally important in helping to guarantee political freedom. It is difficult to find much light, however, between such a theory and traditional liberalism’s commitment to liberty as non-interference, despite Pettit’s strenuous efforts to articulate one. This will be returned to shortly.

making.<sup>77</sup> The third point, however, is that, for republicans, the tradition of deliberative democracy may provide a way of building constitutional referendums that might satisfy both traditions if an acceptable process can be built that is sufficiently deliberative and inclusive.

Taking our first point, it has been observed that one feature of a constitutional referendum in particular is that it presupposes a demos. But more than this it seems to force participants to confront their shared identity; by calling on ‘the people’ to speak, the constitutional referendum implies the very idea that there is a collective that can be called ‘the people’. The constitutional referendum presses this issue more than an ordinary referendum because it provides a constitutional moment not only of decision-making but of self-expression and self-definition.<sup>78</sup> In requiring a *prima facie* definition of the boundaries of a self-determining people, such a referendum can, therefore, be a very useful prism through which to study some of the difficulties in theory and practice that surround the identity of the people in the contemporary polity. In other words, when a constitutional referendum intervenes in democratic decision-making, the idea of the people cannot be neglected in practice as Canovan alleges it has been in theory. Useful examples of referendums that force this issue include those concerning the foundation of a new state. When Slovenians (1990) and Croatians (1991) took part in referendums they were required to confront the issue of whether they did indeed constitute discrete peoples, ready to call for state recognition on this basis. The overwhelming majority in both cases did feel this way, but the Croatian referendum also highlights problems; the treatment of Serbs in Croatia demonstrates how a reflection on the identity of ‘us’ can also sharpen a sense of ‘them’, the other, excluded from the demos. And in a deeply divided society the referendum can bring such divisions to a head as it did in Northern Ireland in 1973 and Bosnia in 1992, where referendums served to exacerbate ethnic conflict. Another example is referendums that offer the further limitation of a people’s sovereign power through transference to a supranational entity. People have on occasion shown considerable reluctance to commit to such processes as we saw in Denmark in the first referendum on the Maastricht Treaty in 1992, in France and the Netherlands on the draft Constitutional Treaty in 2005, and in Ireland on the draft Reform Treaty in 2008; in each a majority was prepared to resist the aspirations of elites pressing for the transfer of further constitutional powers to the EU, in what were arguably active reclamations of vernacular popular sovereignty.

It is, therefore, perhaps no surprise that we see demands for referendums when issues of sovereignty arise and the implications for identity may well suggest that, from the perspective of republican deliberative democratic theory, there is indeed a *prima facie* argument for the use of referendums in such situations, at least when a referendum is favoured by a plurality of people within the polity. But turning to our second point there remain deep concerns about the democratic legitimacy of referendums, particularly from the perspective of pluralism which identifies the potential injustices that can attend their use, especially in divided societies. The main objection is that referendums are, of their essence, inherently incompatible with the democratic needs of a complex multicultural society. In today’s complex society can we really conceive of a demos able to speak as one in a sovereign act? Or does the referendum merely empower a majority to make decisions for an oppositional

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<sup>77</sup> Haskell, n 13 above.

<sup>78</sup> And so in this tradition we need to understand ‘the role that public deliberation has to play in creating a stronger sense of common national identity among members of a divided society.’ O’Flynn, n 76 above, 67.

minority? This is a serious question, because if a constitutional referendum is not just about will creation and expression but also about defining the identity of a people, then the injustice done to a minority might not only be the neglect of their political interests but the imposition upon them of a constitutional identity that ill-fits their sense of self. It seems that a study of how the demos is mobilised in recent referendums across a range of sovereignty areas might cast light on this.

Therefore, turning to our third point, republicans who see a sense of collective self as essential in sovereignty decision-making must be attentive to the need for inclusion.<sup>79</sup> More than this, the implicit promise of deliberative democracy is not just that views are open to change, but that in deliberating on matters of sovereignty, the very identity of the demos is fluid not fixed and can in fact be shaped in the moment of constitution-building. As Parekh puts it: 'a general identity of this sort is not a property, something we possess, but a relationship, a form of identification that citizens create and recreate among themselves over time'.<sup>80</sup> Here Maiz's idea of the nation as 'political community' is instructive as a variation on the civic nationalism idea. What is central to this is that deliberation concerns not only the people's constitutional future, but its very identity in 'an open process of constant rearticulation of ideologies, cultures and interests, rather than as an immutable fact'.<sup>81</sup> Again this begs the question whether constitutional referendums can be processes which facilitate this form of reflection and change. This is a stiff test since for many deliberative democratic theorists a process that culminates in voting lends itself to the aggregation of pre-formed wills and makes very difficult, if not impossible, genuine forms of deliberation.<sup>82</sup>

Much then seems to depend upon the process of a particular referendum and how it meets the tests of inclusion and open deliberation. The standard objection to referendums in this context is that they are elite-led, questions are pre-set which involve stark Yes/No alternatives, and people only enter the procedure at the end, voting in processes that have been carefully tailored to produce a desired outcome. But these are aspects of particular referendums, and we have seen in recent years that there can be scope for substantial citizen deliberation before a referendum is even settled as the mode of decision-making;<sup>83</sup> for popular deliberation to influence the framing of the question;<sup>84</sup> and for the substantive issue eventually put to the people to be the outcome of these deliberations.<sup>85</sup>

The process of the referendum on the Belfast Agreement is particularly interesting given the background of deep division. Here the referendum came at the

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<sup>79</sup> Pettit, n 26 above, 190-194.

<sup>80</sup> B. Parekh, 'Defining National Identity' in E. Mortimer and R. Fine (eds), *People, Nation and State: The Meaning of Ethnicity and Nationalism* (London: I.B. Tauris & Co., 1999) 68.

<sup>81</sup> R. Maiz, 'Nation and deliberation' in R. Maiz and F. Requejo (eds), *Democracy, Nationalism and Multiculturalism* (London: Frank Cass, 2005) 72.

<sup>82</sup> Chambers characterises deliberative democracy as a process where '[t]alk-centric democratic theory replaces voting-centric democratic theory'. S. Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307, 308. See also Haskell n 13 above, 11, 15-16; Dryzek n 69 above, 62.

<sup>83</sup> R. Johnston et al, 'The People and the Charlottetown Accord' in R. L. Watts and D. M. Brown (eds), *Canada: the State of the Federation 1993* (Kingston: Institute of Intergovernmental Relations, 1993).

<sup>84</sup> The question eventually set in the Quebec referendum in 1995 was very different from that originally proposed. R. A. Young, *The Struggle for Quebec: From Referendum to Referendum?* (Montreal: McGill-Queen's University Press, 1999).

<sup>85</sup> J. McGarry and B. O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland' (2006) 41 *Government and Opposition* 43.

end of a very complex deliberative process of dispute resolution. What this suggests is that a referendum can meet stiff democratic tests if both the substantive issue to be tested and the process are agreed to by actors across a deeply divided spectrum. This allows the outcome to be seen as legitimate even by those whose position might be unsuccessful in the eventual referendum. As Bellamy puts it: ‘The test of a political process is not so much that it generates outcomes we agree *with* as that it produces outcomes that all can agree *to*, on the grounds that they are legitimate.’<sup>86</sup> One other device here is concurrent majorities, whereby it is possible to track if multiple demoi in a multinational polity each assent to the issue. There was no such official tracking of nationalist and unionist voters in Northern Ireland as there would be in a ‘de Hondt referendum’ as it were (i.e. a referendum where a majority within two or more distinct groups, as well as an overall majority, would be needed to approve the question), but exit polls showed that a majority of nationalists and unionists did in fact vote Yes, albeit by a larger majority in the former case.<sup>87</sup>

So, is it possible that constitutional referendums can be a mechanism through which some reconciliation of the republican and pluralist traditions can be achieved, making them acceptable decision-making mechanisms for both traditions? Again the answer would seem to hinge on whether it can be shown that a particular referendum process really does meet the exacting tests for meaningful participation and open-mindedness set by deliberative standards. There seems in fact to be surprisingly little research on whether referendum processes have in fact been capable of overcoming the aggregation criticism. But although it is difficult to reach a definitive conclusion, it seems intuitively plausible that a referendum, carefully tailored to meet the specificities of a particular society, can help bring a populace together in a deliberative, constitutional moment.<sup>88</sup> And there is evidence that people are indeed capable of reacting in a deliberative and responsive way when considering constitutional issues.<sup>89</sup> We noted earlier how the magnitude of constitutional

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<sup>86</sup> Bellamy, n 26 above, 164.

<sup>87</sup> The 1998 Northern Ireland Referendum and Election Study found that 57% of Protestants voted for the Agreement compared to over 90% of Catholics. J. K. Curtice et al., ‘Northern Ireland Referendum and Election Survey, 1998’ (Colchester, Essex: UK Data Archive SN: 5442, 2006); B. C. Hayes and I. McAllister, ‘Who voted for peace? Public support for the 1998 Northern Ireland agreement’ (2001) 16 *Irish Political Studies* 73.

<sup>88</sup> Estlund makes the argument that this is *only* possible in these situations. D. Estlund, ‘Who’s Afraid of Deliberative Democracy? The Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence’ (1993) 72 *Texas Law Review* 1437. See also R. Blaug, ‘New Developments in Deliberative Democracy’ (2007) 16 *Politics* 71.

<sup>89</sup> Although little empirical work has hitherto been done on this, James Fishkin’s research is a notable exception. He, together with colleagues, has developed the ‘deliberative poll’ whereby a random sample of people is first polled on a particular issue and then invited to deliberate together on the issue. Then a second poll is taken, and the resulting changes of opinion are taken as evidence of the influence of these discussions. J. Fishkin and R. C. Luskin, ‘Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion’ (2005) 40 *Acta Politica* 284. The evidence from the polls the Fishkin teams have carried out do indicate that there are high levels of attitude mutation among participants. As Fishkin and Luskin put it: people ‘learn from the articulation of interests very different from their own when they speak across social cleavages, class differences and geographical boundaries’. J. S. Fishkin and R. C. Luskin, ‘The Quest for Deliberative Democracy’ in M Saward (ed), *Democratic Innovation: Deliberation, Representation and Association* (London: Routledge, 2000) 26. It is of course another matter to extrapolate such a small scale process to a national electoral event. But one interesting project was undertaken in Australia at the time of the referendum in 1999, and the data suggests that among those who participated in deliberative processes at that time many did indeed change their view of the matter, voting differently from the way in which they had originally intended. (Project organised by Issues Deliberation Australia in collaboration with the Research School of Social Sciences at the Australian National University, 1999).

questions and the identity issues involved can motivate popular interest. Related to this, grand constitutional issues are often more easily understood than ordinary political questions which can involve complex policy considerations in a particular subject area. Given that constitutional referendums are a burgeoning feature of contemporary democracy, an important task for constitutional theorists and practitioners, therefore, is to assess how referendum processes can build upon this popular interest in the most inclusive, educative and genuinely deliberative ways possible.

### CONCLUSION

This article has sought to analyse what is particular to constitutional referendums, how they fit within republican theories of sovereignty, and the challenges they pose to contemporary normative theories of democracy. It has been argued that they can serve to supplant the two levels of representation that are present within democratic constitutionalism. The first level, that of will formation and expression, is the typical and proper function performed by representative democracy. It was, however, observed that when fundamental constitutional issues are at stake, there are *prima facie* arguments from a republican perspective that people should have a direct say, and that opposition to referendums based upon the lack of capacity people have to engage in politics might be less compelling in these exceptional moments of great significance. Another claim we have made is that constitutional decision-making involves a second level of representation, namely the representation of the very identity of the demos encapsulated in the constitution itself. Again similar, and perhaps even more forceful, arguments can be made to the effect that when the very existence and manifestation of a constitutional people is at stake, there is a strong rationale for direct popular engagement.

In all of this, however, we have also been mindful of the pluralist critique that referendums are, or at least have the potential to be, homogenising, aggregative and elite-driven. It has, therefore, been argued that an inclusive model of civic republicanism informed by deliberative democratic theory, demands that any constitutional referendum, if it is to meet the normative requirements of pluralist democracy, must be carefully crafted to ensure that an inclusive and genuinely discursive and responsive debate can take place, where even the very content of the people's identity should be open to contestation in the public space. The feasibility of such referendums have been hinted at, for example, by that which endorsed the Belfast Agreement in Northern Ireland. With the rapid spread of the constitutional referendum as a mechanism of decision-making, it is imperative that constitutional theorists continue to develop the theoretical and practical framework for properly deliberative referendums.

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One notable feature of the deliberative poll is that it is modelled on a situation where decisions are reached at the end; in other words they are not merely talking shops. O'Flynn observes that the Fishkin research 'has provided considerable evidence showing not just that deliberation can lead to more informed decisions, but that it can also change the way in which people vote. Crucially, the deliberative poll does not prescribe consensus but instead assumes that deliberation will end in voting.' O'Flynn, n 76 above, 86-87. He concludes (88): 'It suggests that there need be no inherent, unavoidable tension between the requirement of reciprocity and the act of voting.'