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## The Seeds of Change: Popular Protests as Constitutional Moments

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# THE SEEDS OF CHANGE: POPULAR PROTESTS AS CONSTITUTIONAL MOMENTS

JULIANO ZAIDEN BENVINDO\*

*Bruce Ackerman's influential theory of "dualist democracy" posits that in American history some extraordinary moments of constitution-making are "constitutional moments," distinguishable from other periods of ordinary lawmaking. What is missing from the Ackermanian account of constitutional moments, however, is a deeper appreciation of the nature of popular protests, specifically that they may sometimes constitute the core of a constitutional moment, but on other occasions, they may serve as a very different inflection point in the evolution of a constitutional democracy. Up until now, the legal literature has not devoted much attention to such application of Ackerman's theory. In this Article, I refine the theory of constitutional moments by drawing from some relevant mass protests around the world—"Occupy Wall Street" in the United States in 2011, the "Indignados" in Spain in 2011, "The Protests of May" in France in 1968, and especially "The Protests of June 2013" during the FIFA Confederations Cup in Brazil—to expose the*

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*paradoxical nature of constitutional precommitments and how social uprisings form, and sometimes fail, to try to remake them. As the seeds of change, this Article concludes that those popular protests are constitutional moments, but not those constitutional moments the legal literature is so fascinated by.*

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## I. INTRODUCTION

Bruce Ackerman’s influential theory of “constitutional moments,”<sup>1</sup> although focusing on American history,<sup>2</sup> has grown wings and caught the attention of numerous scholars worldwide who have applied it to their own realities.<sup>3</sup> His straightforward and persuasive narrative of how some moments of constitutional history are more special than others has become a normative parameter to evaluate a variety of events in different parts of the world.<sup>4</sup> Distinguished constitutionalists have

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1. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–33 (1991).

2. See *id.* at 32–33 (arguing that “America is a dualist democracy” and comparing with other constitutional realities).

3. See *infra* Part II.A.

4. See *infra* Part II.A.

interpreted their own realities through the eyes of Ackerman's constitutional moments, and a legion of supporters and critics have provided a rich debate over the main aspects of his arguments.<sup>5</sup> However, despite its relevance and brilliance, his theory does not deeply delve into a special type of event that may put some of the premises of his concept of constitutional moments in doubt: popular protests whose outcomes are paradoxical. For example, history has shown that congressional elections held in the aftermath of mass protests tend to yield a conservative backlash, clearly contradicting many of the claims of those protests.<sup>6</sup> France in 1968 (Protests of May), Spain in 2011 (the "*Indignados*"), the United States in 2011 (Occupy Wall Street), and Brazil in 2014 (Protests of June 2013) show this paradox between social uprisings claiming a new future and the traditional politics clinging to the past.<sup>7</sup> With these contradictory outcomes, could they be constitutional moments? In this Article, I contend that mass protests as such can be interpreted as constitutional moments, even if they seemingly do not further lasting structural changes in constitutionalism. Moreover, I argue that, when those popular uprisings are deeply examined, the concept of constitutional moments should be radically reconstructed and demystified.

Little has been done to associate mass protests as such with the idea of constitutional moments. In fact, constitutional theorists have all but ignored this association, stressing instead the values of those normative criteria to assess distinct events of their constitutional realities.<sup>8</sup> Usually related to a set of incredible moments of superior lawmaking, when individuals and institutions interact with each other to radically change constitutionalism,<sup>9</sup> it may sound meaningless to connect the idea of constitutional moments to events such as those mass protests. After all, when a particular event does not comply with the normative criteria to qualify for a constitutional moment, it becomes less attractive and is

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5. *See infra* Part II.A.

6. Juliano Zaiden Benvindo, *Brazilian Elections and Demonstrations of June 2013: The Rise of Conservatism?*, INT'L J. CONST. L. BLOG (Nov. 1, 2014), <http://www.iconnectblog.com/2014/11/brazilian-elections-and-demonstrations-of-june-2013-the-rise-of-conservatism/> [<https://perma.cc/ASZ4-7LWC>] (arguing that, paradoxically, history shows that, after popular protests, it is not rare for conservative backlashes to occur, contradicting thereby many of the claims those mass protests raise).

7. *Id.*

8. *See infra* Part II.A.

9. *See id.*

normally set aside. What is left unexplained is that many of those mass protests, even though not complying with those normative criteria, can directly or indirectly impact constitutionalism and pave the way for relevant social and political changes. Those protests normally spur valuable debates over the necessary changes in society and in constitutional democracy.<sup>10</sup> Moreover, like most of the literature discussing constitutional moments, many of those protests also encourage an emotional engagement of the citizenry and possibly some institutional responses to make those changes a reality.<sup>11</sup> On their bases at least, the connection between those mass protests and the theory of constitutional moments seems feasible. Yet, because those mass protests die down and seemingly no structural change occurs, many could argue that they are not constitutional moments at all. This Article fills this gap by connecting the debate over the concept of constitutional moments with those commonly overlooked popular uprisings.

Bruce Ackerman brings a normative argument for qualifying an event as a constitutional moment based on a careful interpretation of American history.<sup>12</sup> There is a search for the fundamental criteria that makes a reality a special event not compared to any other or, at least, only compared to few others.<sup>13</sup> His dualist model of democracy is anchored in differentiating the moments of higher lawmaking—those constitutional moments—from the moments of ordinary lawmaking.<sup>14</sup> My argument goes, however, in the other direction. I shall discuss the idea of constitutional moments with a more prosaic viewpoint. With support of rational choice theory, systemic analysis, and political philosophy,<sup>15</sup> my purpose is, first, to demystify the concept of constitutional moments and, second, to challenge it with those overlooked mass protests.

For this purpose, this Article will comparatively discuss some relevant overlooked examples of mass protests worldwide to challenge this traditional theory of constitutional moments and to refine this concept. Among them, one stands out: the Brazilian popular protests of June 2013 during the FIFA Confederations Cup. I shall focus on this

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10. *See infra* Part II.F.

11. *See infra* Part III.

12. *See generally* 1 ACKERMAN, *supra* note 1.

13. *See generally id.* at 266–95.

14. *See generally id.* at 3–33.

15. *See infra* Parts II.A–C.

case as the main empirical example for my argument based on the following reasons: (a) the dimension of that event (over one million people in different cities); (b) the claims and their connections with changes in the political and constitutional landscape; (c) the rather frustrating outcomes at first sight despite the seemingly positive reaction of the political system; (d) the immediate conservative backlash, especially in the new congress elected; (e) the particularity of being a democratic country with relatively stable institutions; and (f) the similarity with other mass protests worldwide.<sup>16</sup> More important, however, is that the constitutional literature interpreted those mass protests as if they did not represent a constitutional moment, comparing it to other events in history.<sup>17</sup> But why are they not constitutional moments? I argue, instead, that not only are they constitutional moments but also they contradict some of Bruce Ackerman's normative criteria.

Furthermore, these empirical examples add relevant inputs for comparative analyses, especially regarding the endurance of democracies. After all, those popular protests can both challenge those normative criteria and serve as a useful tool for evaluating how constitutionalism and its institutions are affected during moments of crisis as such. By using some arguments of systemic analysis,<sup>18</sup> we can verify whether those mass protests are indeed a threat to democracy or, rather, a continuation of a broader constitutional project that might strengthen the “performative meaning”<sup>19</sup> of the very constitutionalism. Even though the outcomes of such popular uprisings are unpredictable, they might reveal how these moments can generate—and also be a

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16. See *infra* Part II.

17. See Cristiano Paixão Araújo Pinto et al., *Constituinte Exclusiva é Inconstitucional e Ilegítima* [*The Exclusive Constituent Assembly Is Unconstitutional and Illegitimate*], CONSULTOR JURÍDICO (June 27, 2013), <http://www.conjur.com.br/2013-jun-27/proposta-constituente-exclusiva-inconstitucional-ilegitima> [<https://perma.cc/7SJH-UMVW>] (arguing that Brazil, after those mass protests of 2013, was not facing a constitutional moment able to engender changes in the constitutional system outside of the regular procedural rules of constitutional amendment).

18. See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 5 (2011) (arguing that constitutional orders are two-level systems involving institutions and individuals with their complex relationships).

19. See Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 775–76 (2001) (claiming that the “performative meaning” of the constitution regards to a practice taken place “in the course of applying, interpreting, and supplementing constitutional norms,” as it happens when each citizen critically review the texts and decisions of the past generations).

result of—an increasing curve of constitutional living and constitutional learning. In this case, even though seemingly not qualified as a constitutional moment according to Ackerman's normative premises, they may promote some interactions among individuals and institutions that, in the long run, foster the exercise of political freedoms and reinforce the integrity of institutions. In short, they can show the pedagogical value of democracy.

This Article proceeds as follows. In Part II, I will introduce the debate on how the legal literature has applied the concept of constitutional moments to examine certain events of distinct democracies. This comparative study will prepare the ground for introducing a more prosaic approach of that concept, which will be based on what I call the matter of legitimacy and the matter of institutional dialogue with the citizenry. In so doing, my purpose is to demystify that concept, thereby showing a more realistic view of political change that might better translate what does happen in such overlooked popular protests. After examining how the legal literature has made use of the concept of constitutional moments, especially Bruce Ackerman's dualist democracy and its application to distinct constitutional realities,<sup>20</sup> I will confront it with three complementary perspectives. First, I will challenge those conceptions of constitutional moments by stressing the prosaic nature of precommitments, thereby showing that, more than those normative criteria, constitutional democracy may be what it is because of far more prosaic reasons.<sup>21</sup> Individuals may believe in constitutional democracy simply because it brings them the benefits of stability and predictability, enhances cooperative interactions, and expands their comfort zones. In fact, maybe they abide by its norms and principles merely because of the inertial effect of time, as the natural tendency to leave things alone. The argument here is that when the matter of legitimacy and the matter of institutional dialogue with the citizenry are working well together, constitutional democracy turns out to be an interesting and strategic choice of political commitment.<sup>22</sup> Therefore, more than the magical aura that stems from some of those normative assumptions, I argue that those moments are nothing other than political commitments, with all their inherent fragilities, which are, in some occasions like those mass protests, directly confronted.

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20. *Infra* Part II.A.

21. *Infra* Parts II.C–D.

22. *Infra* Part II.E.

Paradoxically, however, this fragility is also what makes constitutional democracy possible.

This will lead us to the second perspective, one that examines more directly the stabilizing behavior of constitutions.<sup>23</sup> In Part II.E, the focus is on the premise that the very nature of constitutional democracy as a back-and-forth process is not compatible with the idea that some moments are more special than others. The central argument here is that the tense and dynamic paradox of constitutional democracy, fragile and risky as it is, yields a “performative meaning” that is itself cause and consequence of the stability and predictability of constitutional democracy.<sup>24</sup> This “performative meaning” differs from Ackerman’s concept of constitutional moments, as long as it denies the anachronistic idea of a temporality that remains above the others. Rather, it affirms the permanent transition of temporalities that constitutional democracy is. Finally, the third and conclusive perspective seeks to discuss those constitutional moments as simple periods that remind us how constitutional democracy cannot rest on any ground, foundation, or causality. Instead, it should be an ongoing negotiation between the reality and the promise constitutional democracy holds, showing how it is the very “experience of impossible.”<sup>25</sup> As such, those constitutional moments are interpreted as simple political commitments full of history, violence, and faith.<sup>26</sup> In the end, the very notion of constitutional moments becomes an aporetic utterance, which naturally says many things but not all those things Ackerman’s theory holds.

In Part III, the central argument will connect the conclusions of the previous part with the empirical examples of popular uprisings, mostly those protests of June 2013 in Brazil during the FIFA Confederations Cup. Especially through systemic analysis,<sup>27</sup> those mass protests, empirically examined, will directly challenge many of those premises discussed in Part II and, above all, those normative criteria Bruce Ackerman’s theory of constitutional moments holds. The purpose here is to focus on how constitutionalism and institutions behave in such

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23. *Infra* Part II.E.

24. Habermas, *supra* note 19, at 775–76.

25. JACQUES DERRIDA, NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS, 1971–2001 343, 352 (2002) (arguing that any tradition, any legacy—and this applies to constitutional democracy—can only be understood as the “experience of the impossible,” which, according to him, is what deconstruction means); *infra* Part II.F.

26. *Infra* Part II.F.

27. *See infra* Part III.B.



moments of crisis and how they react to those events. My goal here is to raise a relevant discussion about the endurance of constitutional democracies. Moreover, I aim to bring some interesting insights about how those mass protests can cohere with the learning curve of democratic life despite their seemingly paradoxical outcomes.

The minimal ambition of this Article is to remind us that a demystified concept of constitutional moments is necessary to capture the complexities of those overlooked mass protests. In the end, by challenging the idea of constitutional moments with those popular uprisings, I aim to cast doubt on why we still believe in the existence of constitutional moments and whether there is any sense at all in still insisting on the incredible qualities of such moments. My goal is to show that, even though those moments have a special flavor for whatever reason, their symbolic feature might not be enough to explain why and how we keep being so enthusiastic about constitutional democracy and why and how we strive so hard for making it durable from generation to generation. Some simpler aspects of social life and human behavior might have a more relevant role in this aspect. Those popular demonstrations, according to this new argument, are interpreted as constitutional moments, but as such, they do not carry that magical aura that surrounds Ackerman's theory. As the seeds of change, those mass protests may prove that a new viewpoint of constitutional moments is necessary and relevant. This Article attempts to provide a new perspective for this concept and to show that, when those popular uprisings are in play, neither constitutionalism nor our societies, as beautiful as they are, could be that romantic.

## II. CONSTITUTIONAL MOMENTS PROSAICALLY INTERPRETED: THE PARADOX OF PRECOMMITMENTS

### A. *Conceptions of Constitutional Moments*

Bruce Ackerman is the constitutional scholar who coined the theory of constitutional moments, which has had great influence on the constitutional literature.<sup>28</sup> His argument has received, since the introduction of his concept of "dualist democracy" in his article

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28. See Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 760 (1992) ("Ackerman's incipient formulations of this theory of constitutional moments have attracted widespread attention among constitutional law scholars.").

*Constitutional Politics/Constitutional Law*<sup>29</sup> and then in his book *We the People: Foundations*,<sup>30</sup> such a great amount of criticism<sup>31</sup> and support<sup>32</sup>

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29. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461 (1989) (“[A] dualist constitution seeks to distinguish between two different kinds of decision that may be made in a democracy. The first is a decision by the American People; the second, by their government.”).

30. See 1 ACKERMAN, *supra* note 1, at 3–33 (introducing his argument that “America is a dualist democracy”).

31. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1080–82 (2001) (noting that “Ackerman’s theory is of little help normatively,” especially “during political events that might turn into a full-fledged constitutional moment or might fizzle out at some undetermined point in the future” and, even though being a “theory of constitutional revolution,” it does not serve as a “theory of constitutional retrenchment”); Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman’s We the People*, 108 YALE L.J. 2237, 2239–77 (1999) (bringing a perspective in political science to challenge Ackerman’s constitutional moments based on what he calls “punctuated equilibria”); Don Herzog, *Democratic Credentials*, 104 ETHICS 467, 479 (1994) (stressing how Ackerman makes use of patriotic rhetoric to sustain his arguments); Klarman, *supra* note 28, at 792 (arguing that, in spite of Ackerman’s important contribution, he fails to discuss the countermajoritarian difficulty both in descriptive and in prescriptive ways); Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 932 (1996) (“Ackerman focuses on generalities and abstractions at the expense of the particular and the concrete.”); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 704 (2011) (“[I]t is hard to see any connection between the political norms that might be deemed constitutional based on their enactment process or democratic pedigree, and the norms that are most deeply entrenched.”); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman’s We the People*, 9 CONST. COMMENT. 309, 337 (1992) (noting that Ackerman, by denying the relevance of some decisions such as *Griswold*, “deprives representative institutions of any meaningful role in determining the values to be expressed through constitutional law”); Thomas L. Dumm, *Books in Review*, 20 POL. THEORY 341, 345 (1992) (book review) (showing how Ackerman’s dualist democracy fails to address the crisis the United States has entered in the last years); Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1201 (1992) (book review) (noting that “Ackerman’s historical approach is puzzling” and that he fails to justify why American history and tradition should be “the normative starting point” for interpreting the Constitution); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992) (book review) (“Ackerman’s theory is merely originalism flying under liberal colors.”).

32. See, e.g., Peter L. Lindseth, *Law, History, and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49, 56 (1997) (extending the concept of constitutional moments to the “Republican Moments” in France); Jonathon W. Penney, *Deciding in the Heat of the Constitutional Moment: Constitutional Change in the Quebec Secession Reference*, 28 DALHOUSIE L.J. 217, 219 (2005) (applying Ackerman’s theory of constitutional moments to the Quebec Secession Reference in Canada); András Sajó, *Constitution Without the Constitutional Moment: A View from the New Member States*, 3 INT’L J. CONST. L. 243, 243 (2005) (claiming that the European Constitution “without the blessing of a constitutional moment” is particularly problematic in Eastern Europe); Neil Walker, *The Legacy of Europe’s Constitutional Moment*, 11 CONSTELLATIONS

that no one could deny the large impact of his thoughts on contemporary legal thinking. His main thesis is that, in American history, there are some extraordinary moments in which people get actively involved in the definition and construction of the meaning of the Constitution.<sup>33</sup> This popular involvement results in serious constitutional transformations and effective constitutional amendments, even though they are not necessarily the consequence of the procedure described in Article V of the Constitution of the United States of America.<sup>34</sup> These rare periods differ from the daily “normal politics,” which Ackerman associates more directly with the decisions made by the government (and not the people as in those special moments),<sup>35</sup> whose authority is controlled by the very features of the dualist Constitution,<sup>36</sup> and so by the American people and the decisions they had made during those constitutional moments.

Ackerman’s theory is undoubtedly intriguing. First, because he needs to introduce a credible argument to sustain the premise that those moments—normal and higher lawmaking—strongly differ one from the other. Notwithstanding his brilliant and straightforward narrative, this is not a simple task, and indeed one could even say an impossible one.<sup>37</sup> For the empirical research, as exhaustive and inevitably controversial as it is,<sup>38</sup> will demand a normative dimension, which is also an arena for the

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368, 368–79 (2004) (using “Ackerman’s path-breaking analysis of the history of American constitutionalism” to examine European constitutionalism); see also Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. JURIS. 5, 20 (2009) (arguing that, although Ackerman’s theory “has attracted considerable criticism,” “one need not rely on the Ackermanian theory of constitutional moments to accept that the United States adheres to the political model of constitutional amendment”).

33. Klarman, *supra* note 28, at 759–60.

34. U.S. CONST. art. V.

35. Ackerman associates those constitutional moments to “decisions made by the People,” while the concept of “normal politics” relates to “decisions made by the government.” This is the core of his “dualist democracy.” 1 ACKERMAN, *supra* note 1, at 6.

36. *Id.*

37. Indeed, as Mark Tushnet says, “formal criteria by definition cannot precisely identify all and only constitutional moments.” Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 859 (1996).

38. See Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 YALE L.J. 1990, 2053 (2013) (indicating, through an impressive statistical process which examined U.S. newspapers during the debate over the ratification process of the Fourteenth Amendment (1866–1884), that his findings “are consistent with the predictions of Ackerman’s theory that sustained popular attention to constitutional politics peaks during transformative constitutional moments and then declines as normal politics once again take center stage”).

most complex theoretical disputes. Ackerman is compelled to deliver some of these normative premises to make his thesis credible.<sup>39</sup> According to him, in order for a moment to be qualified as a constitutional moment, it must pass through four stages.<sup>40</sup> First, there is the “signaling phase,” wherein whoever is proposing the change must have a broad, serious, and deep support of the American people to the initiative.<sup>41</sup> Usually, as history shows, but not necessarily, the President takes this role of claiming the popular support for constitutional change.<sup>42</sup> Second, this momentum for change must be channeled through solid proposals, providing concrete directives for public deliberation.<sup>43</sup> Third, there must be fair opportunity for counterarguments and possible resistance among the different branches of the government, paving the way for conflicting political opinions so that the support of the majority of the people results from careful decision making.<sup>44</sup> Fourth and finally, as a consequence of this “broad and deep” popular support for constitutional change, the victorious political position must be “translated” into constitutional principles that will determine the functioning of constitutionalism in the future, forcing all the resisting branches of the government, especially the Court,<sup>45</sup> to promote what he calls a “switch-in-time” in their opinions.<sup>46</sup>

Particularly, three moments in U.S. history can be described as following those criteria, according to Ackerman: (a) the Founding, when the Constitution was drafted despite the violation of the Articles of Confederation; (b) Reconstruction, right after the Civil War, when the Thirteenth and Fourteenth Amendments were created through some type of coercion and, therefore, without authentic approval of state assemblies; and (c) the New Deal, during which, after a long battle

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39. See 1 ACKERMAN, *supra* note 1, at 48–49, 266–69, 272–90.

40. *Id.* at 266–67.

41. *Id.* at 266, 272–80.

42. See, e.g., Tushnet, *supra* note 37, at 848 (“There seems to be no reason to insist that signals or proposals emanate solely from the President.”).

43. See 1 ACKERMAN, *supra* note 1, at 266–67, 280–84.

44. *Id.* at 266–67, 285–88.

45. Ackerman argues that the U.S. Supreme Court undertakes a “preservationist” role of the People’s will, according to what is expressed during the moments of higher lawmaking. In his view, this would overcome the countermajoritarian difficulty. See *id.* at 43, 315–16. This assertion obviously does not come without serious criticisms. See Klarman, *supra* note 28, at 792–797 (claiming that he sees no criteria whatsoever in Ackerman’s conservative view of this Court’s “preservationist role”).

46. See 1 ACKERMAN, *supra* note 1, at 266–67, 288–90.

between Franklin Roosevelt and the Supreme Court, we could observe the “switch-in-time” of the Court and the birth of its “transformative opinions” in favor of the President’s policies.<sup>47</sup> In each one of these moments, Ackerman delivers a detailed explanation to demonstrate that, in American history, there is a creative and republican<sup>48</sup> mobilization of fellow citizens that makes the constitutional change into a practice that is not bound to a certain procedure as the one established in Article V.<sup>49</sup> This formality is thus replaced by a narrative of popular involvement and institutional arrangement strong enough to legitimize, as constitutional amendments as any other, the Supreme Court’s “switch-in-time” during the New Deal or other similar mobilization to be seen in the coming times.<sup>50</sup>

The problem is that the normative premises Ackerman brings forward could be attacked in their core elements. There is no simple explanation in those premises as to what makes a period of higher lawmaking—and especially those three<sup>51</sup>—strictly distinct from the one of normal lawmaking,<sup>52</sup> and also there is no “good account”<sup>53</sup> of why

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47. *See id.* at 282.

48. There are some criticisms about the association of Ackerman’s theory with republicanism. *E.g.*, James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 304–05 (1990).

49. *See* U.S. CONST. art. V; 1 ACKERMAN, *supra* note 1, at 37–50.

50. *See* 1 ACKERMAN, *supra* note 1, at 289.

51. *See* Pope, *supra* note 48, at 305 (“Professor Ackerman has come to praise republicanism only to bury it. His theory celebrates a system that has produced only three constitutional moments in two centuries, and two of those involved full-scale warfare. Ackerman’s three moments are not, however, intended as a comprehensive list of popular republican periods.”); *see also* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 116 (1994) (sustaining the existence of a fourth constitutional moment from 1877 to 1954, which he calls “the forgotten constitutional moment”).

52. *See* Jack Balkin and his connection of a living constitution with redemptive constitutionalism, according to which the real transformations of the Constitution are not limited to some periods of higher lawmaking, but they are instead the result of the “processes of constitutional development produced by the interaction of the courts with the political branches” in different times of American history. JACK M. BALKIN, *LIVING ORIGINALISM* 297 (2011). Mark Tushnet also argues that “[t]he judgments made by representatives during periods of ordinary politics and by the People during constitutional moments are, in short, simply *different* judgments. They implicate different characteristics of situations of choice, but each characteristic is relevant to sound decision-making.” Tushnet, *supra* note 37, at 854 (emphasis in original); *see also* Herzog, *supra* note 31, at 471 (noting that Ackerman’s dichotomy between normal and constitutional politics diverge in distinct contexts and cannot capture every reality); Klarman, *supra* note 28, at 769, 791 (arguing that Ackerman’s dualist democracy distorts constitutional history); Kramer, *supra* note 31, at 895 (“Ackerman’s theory still seems weak.”); Schauer, *supra* note 31, at 1194–95 (“[Ackerman] fails to come to grips with the political and constitutional import of shifts in background understandings that

history and traditions must be the basis, particularly in the way as described,<sup>54</sup> for constructing some normative assumptions that will guide how the Constitution is to be interpreted. Indeed, this focus on dualism, founded on specific moments of American history, might simplify the inherent complexity of constitutionalism,<sup>55</sup> which is based on a “far more fluid, complex process.”<sup>56</sup>

Even more serious, his narrative seems to be anchored to the idea that the people during those superior moments behave as if they were oriented to the common welfare in a way that they would forego their individual interests for the sake of the community,<sup>57</sup> regardless of all the profound divisions of society.<sup>58</sup> In addition to setting aside the common interested behavior of human beings in different aspects of private and social life, and necessarily pointing out the self-interested behavior of “ordinary” politics as inferior to the people’s altruistic choices in those constitutional moments,<sup>59</sup> Ackerman’s assumptions go further to the point of expressing the idea of deliberation as something so special as to be “a sufficient condition for constitutional transformation,”<sup>60</sup> bringing about an ideal of deliberation that might not correspond whatsoever to

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do not meet these criteria.”).

53. See Schauer, *supra* note 31, at 1201 (arguing that Ackerman does not provide a good account of why history and traditions should be the normative basis for interpreting the Constitution).

54. See Kramer, *supra* note 31, at 897 (showing that Ackerman defines “the tradition at a level of generality so high as to make comparative evaluation difficult”).

55. As Larry Kramer affirms, “Ackerman focuses on generalities and abstractions at the expense of the particular and the concrete.” *Id.* at 932. In the same way Suzanna Sherry argues that “[t]his part of the book detracts from Ackerman’s real contribution by combining weak analysis with sloppy history.” Sherry, *supra* note 31, at 923.

56. See Sandalow, *supra* note 31, at 324.

57. See Klarman, *supra* note 28, at 764 (questioning how Ackerman “portray[s] these historical episodes as moments of suspended self-interest”).

58. See Herzog, *supra* note 31, at 470 (showing how profoundly divided is American society and how these differences play a special role in distinct moments of law and constitutional-making).

59. There is the simple assumption that a non-interested behavior is superior to the self-interested one, which is a controversial assertion. See Tushnet, *supra* note 37, at 853 (“[T]here is simply no good reason to accept that assertion or its supporting ground.”); Schauer, *supra* note 31, at 1197 (criticizing Ackerman’s reliance on “the virtues of deliberation”). Furthermore, according to Michal Klarman, Ackerman sees the “modern system of constitutional change,” as it happened in the New Deal, as superior to that one described in Article V of the Constitution of the United States. Klarman, *supra* note 28, at 767–68.

60. Schauer, *supra* note 31, at 1197.

the “darker side of public political life.”<sup>61</sup> Political commitments, after all, are much more fragile than those words seem to express and can last for a long time not because they have a sort of entrenchment stemmed from the special qualities of such constitutional moments but simply because people are not in the mood to make changes (either because there is no political opposition or simply because most of the people agree with how reality goes on).<sup>62</sup>

Finally, there seems to be a significant intergenerational conservatism in Ackerman’s point of view insofar as, for him, the present time, when ordinary politics takes place, is rather bound to the people’s voice expressed during those constitutional moments, whose role of preservation is addressed to the Court.<sup>63</sup> There is the premise that the people’s voice, as magical and uninterested but unclear as it is, is superior to today’s voice, with all the risks of anachronism involved in this presupposition,<sup>64</sup> as well as all the risks of simplifying the debate over institutional design and separation of powers.<sup>65</sup> There is here

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61. *Id.* at 1188; *see also* Herzog, *supra* note 31, at 470–75 (ironizing some of Ackerman’s assumptions by relating them to complicated periods of American history); Klarman, *supra* note 28, at 770 (“Once Ackerman abandons his own constraining criteria, he opens himself up to the criticism that every historical episode of mass popular mobilization arguably qualifies to a constitutional moment.”).

62. Levinson, *supra* note 31, at 702 (“If popular majorities ever change their minds about these issues, then Ackerman’s ‘constitutional’ commitments will dissolve. There has been no obvious process of political entrenchment that would make these commitments more stable than the first-order political preferences they reflect.”).

63. *See* Klarman, *supra* note 28, at 765 (“[F]undamentally conservative nature of the dualist democracy thesis . . .”); Sherry, *supra* note 31, at 934 (“[O]ne of modern liberalism’s most forceful spokesmen is reduced to this last resort of conservatives.”).

64. *See* Klarman, *supra* note 28, at 765–66 (“Ackerman is no less conservative (and wrongheaded) than those constitutional theorists who contend that the countermajoritarian problem is an illusion.”).

65. For Ackerman, the countermajoritarian difficulty, which is a central debate over legitimacy in constitutionalism, is an illusion. As long as we understand the dualist nature of American constitutionalism, there is no sense anymore in discussing this matter. In this case, the Supreme Court acts to preserve the people’s voice expressed during the periods of higher lawmaking. In his words:

[T]he dualist will view the Supreme Court from a very different perspective than the monist. The monist treats every act of judicial review as presumptively antidemocratic and strains to save the Supreme Court from the “countermajoritarian difficulty” by one or another ingenious argument. In contrast, the dualist sees the discharge of the preservationist function by the courts as an essential part of a well-ordered democratic regime. Rather than threatening democracy by frustrating the statutory demands of the political elite in Washington, the courts save democracy by protecting the hard-won principles of a mobilized

maybe, as Mark Tushnet points out, an “overly celebratory” interpretative narrative of national identity,<sup>66</sup> which might have made him overlook, in some way, how institutions and the people themselves really behave in their day-to-day political life.<sup>67</sup>

His provocative narrative, at any rate, has produced some other analyses that attempted to adapt those criteria to other realities, even though Ackerman’s theory is strictly based on American history. Indeed, his project is, for him, so American that he says that, more than borrowing arguments from foreign thinkers and because “[Americans] have also built a genuinely distinctive pattern of constitutional thought and practice,”<sup>68</sup> the investigation is to be made “without the assistance of guides imported from another time and place.”<sup>69</sup> Therefore, those projects using Ackerman’s theory to apply to other countries and contexts are rather an adjustment of his idea of constitutional moments, with all the inherent difficulties in this task.<sup>70</sup> This is, for instance, what Jonathon W. Penney does in allusion to Canada,<sup>71</sup> where he sees,

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citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations.

1 ACKERMAN, *supra* note 1, at 10. Against this viewpoint, see Sherry, *supra* note 31, at 929 (“Without a means of separating constitutional politics from normal politics, Ackerman’s directive that the Court preserve the will of the people (as reflected in times of constitutional politics) from governmental attempts to subvert it (in times of normal politics) becomes meaningless.”); Jeremy Waldron, *Bruce Ackerman: We the People: Volume I, Foundations*, 90 J. PHIL. 149, 153 (1993) (book review) (“Even if one concedes the superior authority of Ackerman’s higher law making, one is left unsure why it should be the special function of the courts to interpret that legislation.”).

66. See Tushnet, *supra* note 37, at 855; see also Herzog, *supra* note 31, at 479 (contending that Ackerman’s theory is marked by rhetoric).

67. See Dumm, *supra* note 31, at 343 (“[F]or those who worry that it means an alienated disengagement by the citizenry from higher politics as a consequence of the intense corruption of political life, Ackerman’s faith seems overly optimistic to the point of naïveté.”).

68. 1 ACKERMAN, *supra* note 1, at 3.

69. *Id.*

70. See Mark Tushnet, *Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm*, 3 INT’L J. CONST. L. 262, 262 (2005) (claiming that Ackerman’s theory “might not be related conceptually, or related empirically in other national settings”).

71. Penney knows the difficulty of this task of using Ackerman’s premises in Canada, but even so, he is a clear enthusiast of this possibility. According to him:

There are, of course problems with using a theory based on unique aspects of American history to discuss Canadian constitutionalism. Still, Ackerman’s historical approach to constitutionalism provides a “bridge” between Canadian and American traditions, as his theory has been likened to the “living tree” doctrine of constitutional development so prominent in Canada.



especially in regards to the Quebec Secession Reference, “events surrounding the decision [that], for the most part, can be understood to involve a ‘constitutional moment,’”<sup>72</sup> associating this moment to a “‘switch-in-time’ by the Supreme Court of Canada.”<sup>73</sup> Sujit Choudhry also investigates the same event, identifying it with the idea of Ackerman’s constitutional moments, although in a critically reinterpreted approach.<sup>74</sup>

We can observe similar movements from authors investigating constitutional realities whose backgrounds are largely distinct from the one in the United States. Peter L. Lindseth is a very interesting example of someone who attempts to connect Ackerman’s criteria to what he calls “republican moments” in France, identifying them with the role of constitutional review in that country.<sup>75</sup> Particularly interesting is how he associates those premises to a reality whose constitutional review is historically limited and the idea of supremacy of Parliament is a longstanding tradition, this one, according to Lindseth, brought to an end by a new attitude of French Constitutional Council<sup>76</sup> from 1971<sup>77</sup>

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Penney, *supra* note 32, at 219.

72. *Id.* at 220.

73. *Id.*

74. Choudhry leaves aside much of Ackerman’s magical aura surrounding those constitutional moments and focuses rather on what he sees as Ackerman’s main contribution, i.e., “placing illegal moments of regime change at the center of constitutional theory.” Sujit Choudhry, *Ackerman’s Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT’L J. CONST. L. 193, 210 (2008). This leads to a new interpretation of Ackerman’s premises. According to him, “Ackerman’s constitutional moment, thus reinterpreted, consists of an extralegal constitutional change, resorted to because of a failure of the formal rules of constitutional amendment.” *Id.* at 214.

75. See Lindseth, *supra* note 32, at 56–57. In his words:

Upon close inspection we should begin to see that Professor Ackerman’s concepts can also be applied to the French case. . . . [T]he [French] Constitutional Council’s decision of July 16, 1971 [which is the turning point in French constitutionalism] . . . was an exercise in dualist democracy not unlike judicial review in the United States, as Professor Ackerman describes it. However, the “evolving historical practice” that underlines French dualism is not so much expressed in constitutions [but] . . . is embodied in an abstract concept of the “Republic” itself.

*Id.*

76. *Id.* at 51 (“The Council’s 1971 decision thus brought to an end France’s Rousseauian tradition of legislative supremacy and national sovereignty theoretically represented by Parliament.”).

77. Lindseth mentions that that the French Constitutional Council’s decision of July 16, 1971, is a turning point in French constitutionalism because, for the first time, the Constitutional Council “struck down a piece of legislation—particularly one introduced by

onwards. Moreover, Lindseth puts forward the theory that this Council's decision, following Ackerman's steps, "arguably evidences this same historically preservationist (or mnemonic) function,"<sup>78</sup> in such a way that it "was able to preserve, legitimately, some of the higher lawmaking achievements of France's most memorable Republican moments, which we might now rechristen, in view of the nature of the controlling norms to which they gave rise, as constitutional moments."<sup>79</sup> The court responsible for exercising constitutional review is, also here, projected to a whole new level of making the necessary transformations in constitutionalism, preserving thereby the "republican moments" of France.

More recently, the Hungarian Professor András Sajó also used the concept of constitutional moments to analyze the project of the European Constitution, especially in regards to the post-communist countries and examined what he calls "constitutional enthusiasm," which is an idea intimately linked to the idea of "constitutional identity" and largely inspired by Ackerman's premises.<sup>80</sup> Here again, there is the association of constitutional moments to an emotional engagement of the citizenry towards the construction of national—and in this case also transnational—identities. But Sajó goes further by stressing this emotional quality to the point of saying that "an emotionally grounded identification with the constitution contributes to its unconditional 'bindingness'" and also that "it is binding due to an emotionally supported and unquestionable sociocultural fact."<sup>81</sup> According to him, "[t]he overwhelming majority of the constitutions that we know do not have these specificities,"<sup>82</sup> which turns out to be a grave disadvantage because, "without the blessing of a constitutional moment,"<sup>83</sup> those constitutions—as the ones in Eastern Europe—lack a "sense of union, or the formation of identity, among the members of the society to which it applies."<sup>84</sup> "Constitutional enthusiasm" then becomes the antagonist of "constitutional alienation,"<sup>85</sup> a characteristic that is well visible—either

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the Government—for a purported violation of a constitutionally protected right." *Id.* at 50.

78. *Id.* at 59.

79. *Id.* at 80.

80. Sajó, *supra* note 32, at 244–45.

81. *Id.* at 245.

82. *Id.* at 243.

83. *Id.*

84. *Id.*

85. *Id.* at 246.

for historical or political reasons—in the East Central European States.<sup>86</sup> In the same way, “constitutional enthusiasm,” recalling somehow Ackerman’s moments of higher lawmaking,<sup>87</sup> is also capable of transforming decisions and other considerations into acts that are “not only dictated by interest politics and graft.”<sup>88</sup> Once again, there is the view of a community engaged in making a new moment, one that is characterized by this eagerness to build an “emotionally appealing” constitution that identifies itself with the enthusiastic people.<sup>89</sup>

This very idea of a community engaged in transforming the reality to the point of giving rise to a new constitutional moment is also discussed in the form of a societal constitutionalism struggling against the contemporary hegemonic economic constitutionalism. Saki Bailey and Ugo Mattei, in a fascinating paper examining the new configuration of social movements and more particularly the commons (*beni comuni*) movement in Italy, argue that those social movements have become the “new *pouvoir constituant* as an oppositional force to the process of economic constitutionalism imposed by international economic institutions.”<sup>90</sup> As a model against the liberal constitutionalism, which is anchored in the idea of sovereign state, representation, and private ownership,<sup>91</sup> Bailey and Mattei contend that, in the current scenario of rising economic constitutionalism transcending state borders while state sovereignty becomes weaker,<sup>92</sup> those social movements engender a reconfiguration of the concept of sovereignty of the people as well as of constituent power by fostering a democratic process taking place “from

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86. *Id.*

87. In any case, Sajó is careful in using Ackerman’s premises and indeed applies them to the simple purpose of examining the new context of Europe, and especially of those Eastern European countries. As Tushnet argues:

I conclude by observing that Professor Sajó avoids many of the pitfalls created by Ackerman’s metaphor of constitutional moments. As I have suggested, he implicitly does distinguish among the components of Ackerman’s analysis, and uses only those components that are relevant to the questions posed to the European Community’s newest members by their accession.

Tushnet, *supra* note 70, at 268.

88. Sajó, *supra* note 32, at 246.

89. *Id.* at 245.

90. Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, 20 *IND. J. GLOBAL LEGAL STUD.* 965, 1012 (2013).

91. *Id.*

92. *Id.* at 973.

below.”<sup>93</sup> Similar to the other examples above, the concept of constitutional moment, also using Ackerman’s intuition,<sup>94</sup> appears strongly connected to this capacity of fellow citizens to create the *momentum* for change but now focusing more directly on how those popular protests can bring about a more democratic, participative, and egalitarian approach to constitutionalism. After all, as Mattei sustains in another text, “[l]iberal constitutionalism fails to provide a shield against private interests without the active constituent role of the people to enforce constitutional public purpose guarantees.”<sup>95</sup>

In Brazil, the occurrence of a constitutional moment is normally identified with the Constitutional Assembly of 1987–1988, when strong popular mobilizations claimed a democratic constitution that could address the people’s expectations and needs.<sup>96</sup> In this respect, we can observe some literature connecting that moment to Ackerman’s theory. Rodrigo Brandão, for instance, mentions the overwhelming popular participation of civil society during that moment, the universalization of concepts such as constitutional entrenchment and judicial review, the fact there is a constitution drafted in order to consolidate democracy, and, finally, its extensive bill of rights as a clear evidence of “the adoption of the premise of dualist democracy in Brazil.”<sup>97</sup> In the same

93. *Id.* at 1007.

94. *Id.* at 966, 975.

95. Ugo Mattei, *Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle Against Neoliberal Governance*, 112 S. ATLANTIC Q. 366, 375 (2013), <http://saq.dukejournals.org/content/112/2/366.full.pdf+html> [<https://perma.cc/MGH9-2DFM>].

96. As Leonardo Barbosa says, in certainly one the most brilliant analyses of the Brazilian recent constitutional history:

The constituent process of 1987–1988 tells a story according to which it is not possible to clearly consider this moment of self-reflection. A reflection which was not merely undertaken by the Framers, but which was genuinely carried out by the Brazilian society. . . . [The Constitution is the result of] a long process of maturation achieved by the claim for a new Constitution throughout the whole 70’s and half of 80’s. The convening is not a magnanimous and condescending gesture of the President of the Republic, but rather the result of a set of claims which, for more than fifteen years, have interpenetrate—and converged on—the established political power. . . . [Besides], the convening provided a valuable opportunity of articulation between Congress and civil society.

LEONARDO AUGUSTO DE ANDRADE BARBOSA, *HISTÓRIA CONSTITUCIONAL BRASILEIRA: MUDANÇA CONSTITUCIONAL, AUTORITARISMO E DEMOCRACIA NO BRASIL PÓS-1964* [BRAZILIAN CONSTITUTIONAL HISTORY: CONSTITUTIONAL CHANGE, AUTHORITARIANISM AND DEMOCRACY IN BRAZIL AFTER 1964] 246 (2012).

97. Rodrigo Brandão, *Rigidez Constitucional e Pluralismo Político* [*Constitutional*

way, Daniel Sarmento, also making reference to Ackerman, places particular emphasis on this popular mobilization during the Constitutional Assembly, arguing that “the country experienced a typical ‘constitutional moment,’ characterized by the political effervescence and genuine popular mobilization in favor of a new ‘beginning.’”<sup>98</sup> Even in a recent polemic case judged by the Brazilian Supreme Court,<sup>99</sup> one of its Justices, Luiz Fux, mentioned that “the Constitution of 1988 was promulgated in an environment of large popular mobilization. There was between 1987 and 1988 a ‘constitutional moment,’ to use an expression also coined by Ackerman.”<sup>100</sup>

Actually, the relevance of the concept of constitutional moment in reference to the Brazilian Constitutional Assembly of 1987–1988 is so central that many scholars employ it—either with direct reference to Ackerman or not—to examine the constitutionality of a certain bill or even a proposal for amendment to the constitution. For instance, Cristiano Paixão, in evaluating a proposed amendment to the constitution that would establish a sort of “fast track” procedure circumventing the amendment rules as set out in the constitution, raised a specific objection to it.<sup>101</sup> His argument was that it would dissipate the role of the constitution and that “there would be no more constitutional moment,” as long as “every moment of politics [would be], potentially, a constitutional moment.”<sup>102</sup>

The same discussion reappeared right after those mass protests of June 2013 in Brazil during the FIFA Confederations Cup. President

*Entrenchment and Political Pluralism*], 5 DIREITOS FUNDAMENTAIS E JUSTIÇA 86, 92 (2008). In any case, Brandão acknowledges the existence of many private interests at stake. This is why, according to him, “it is wrong to give to the constitutional deliberations the aura of sanctity.” *Id.* at 93.

98. Daniel Sarmento, *21 Anos da Constituição de 1988: A Assembleia Constituinte de 1987/1988 e a Experiência Constitucional Brasileira sob a Carta de 1988* [21 Years of the Constituent Assembly of 1987–1988 and the Brazilian Constitutional Experience Under the Constitution of 1988], 30 DPU 7, 12 (2009).

99. The case related to a bill introducing new party rules that had just been approved by the Chamber of Deputies. Lei No. 12.875, de 30 de Outubro de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 31.10.2013 (Braz.).

100. S.T.F., M.S. N. 32.033, Relator: Min. Gilmar Mendes, 20.06.2013, 190, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 25.06.2013 (Braz.).

101. Proposta de Emenda à Constituição No. 157, de 4 de Setembro de 2003, DIÁRIO DA CÂMARA DOS DEPUTADOS [D.C.D.], 26.09.2003, 50457 (Braz.).

102. Cristiano Paixão, *A Constituição Subtraída: Inconstitucional e Ilegítima* [The Subtracted Constitution: Unconstitutional and Illegitimate], CONSTITUIÇÃO & DEMOCRACIA, Feb. 5, 2006, at 4.

Dilma Rousseff reacted to those demonstrations by presenting an agenda of reforms.<sup>103</sup> Among them, she attempted to push a political reform through a plebiscite, which would authorize what scholars called an “exclusive constituent assembly.”<sup>104</sup> This “exclusive constituent assembly” would introduce a sort of “fast track” procedure of constitutional amendment to discuss the political reform that would, nevertheless, soften the strict rules for constitutional amendment.<sup>105</sup> The scholarly and political backlash was immediate, some of them also recalling the idea of constitutional moments. Cristiano Paixão, Juliana Neunschwander Magalhães, Marcelo Cattoni, and Vera Karam de Chueiri, all very prestigious professors from different universities in Brazil, for example, argued that “exclusive constituent assembly” would clearly mean the “abandonment of the democratic Constitution promulgated on October 5, 1988,”<sup>106</sup> especially because, at that very moment, there was no reason to disrupt a “history built from several struggles and mobilizations of civil society.”<sup>107</sup> Gustavo Binenbojm, professor of constitutional law at the Rio de Janeiro State University, in an interview for *Consultor Jurídico*, also presented a similar view.<sup>108</sup> According to him, those protests could not be compared to the Constituent Assembly of 1987–1988, for, in this case, there is no break with the legal order and Brazil lives a democratic regime.<sup>109</sup> In other words, those mass protests of 2013 were not a constitutional moment as was that transition to democracy in 1988.

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103. The plan focused on (1) urban mobility; (2) investment of oil revenue, particularly from the pre-salt, to fund education; (3) a program destined to bring in foreign doctors to areas lacking physicians; and (4) political reform. See Marco Sibaja et al., *Brazil Protests 2013 Grow: One Million Brazilians Hit the Streets*, WORLD POST (Aug. 21, 2013), [http://www.huffingtonpost.com/2013/06/21/brazil-protests-2013\\_n\\_3478101.html](http://www.huffingtonpost.com/2013/06/21/brazil-protests-2013_n_3478101.html) [https://perma.cc/YD3V-EJGA].

104. See Paixão et al., *supra* note 17.

105. According to the Constitution of the Federative Republic of Brazil, “the proposal [for amendment of the constitution] shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, § 2 (Braz.).

106. Paixão et al., *supra* note 17.

107. *Id.*

108. See Rafael Baliardo & Rodrigo Haidar, *Constituinte Exclusiva é Desnecessária e Perigosa* [Exclusive Constituent Assembly Is Unnecessary and Dangerous], CONSULTOR JURÍDICO (June 24, 2013), <http://www.conjur.com.br/2013-jun-24/constituente-reforma-politica-desnecessaria-perigosa> [https://perma.cc/NY73-XBK8].

109. *Id.*

Therefore, the idea of constitutional moments reaches the most distinct contexts and historical events. Despite the fact that many of these events and theories are very particular, which bring difficulties in achieving consensus on their premises, it is possible to outline some general arguments connecting them. The following section aims to discuss them by stressing what I call the matter of legitimacy and the matter of dialogue with the citizenry.

*B. The Matter of Legitimacy and the Matter of Institutional Dialogue with the Citizenry*

It is obviously not my goal to restrict the concept of constitutional moments to Ackerman's premises and all the features surrounding it. This concept has naturally a much greater scope.<sup>110</sup> But some relevant aspects can already be extracted from what Ackerman himself calls a constitutional moment and the distinct uses the legal literature has made

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110. Other authors will examine the idea of constitutional moments without directly making reference to Ackerman's premises. James Gray Pope, who is critical of Ackerman's constitutional moments, *see* Pope, *supra* note 48, at 304–05, aims to “explore the role of direct popular power in general,” *id.* at 305, and for this purpose, he calls those moments “republican moments,” which have some differences to Ackerman's. First of all, Pope is less incisive as regards to the suspension of private interests during those periods. For him, in “republican moments,” “[t]he everyday liberal priorities of autonomy over community, acquisitiveness over civic virtue, and instrumental rationality over moral choice were reversed, albeit only partially and temporally.” *Id.* at 310–11. Besides, he places less emphasis on the institutional reaction to popular claims and stresses, instead, the movement of the citizenry. According to him, there are five defining features of those “republican moments”:

The first three track the republican-liberal distinction: (1) large numbers of Americans engage in serious political discourse; (2) their arguments are couched primarily in moral rather than pecuniary terms and appeal to the common good rather than private interest; and (3) the subjects of debate include fundamental aspects of the social, political, or economic order.

The last two track the distinction between direct popular power and representative politics-as-normal: (4) representative politics are overshadowed by extra-institutional forms of citizen participation such as popular assemblies, militant protest, and civil disobedience; and (5) social movements and voluntary associations displace interest group and political parties as the leading forms of political organization.

*Id.* at 311. Accordingly, there is, in his view, a much stronger dualism between citizenry, on one hand, and the incapacity of politics to react to popular demands, on the other. We could not call, anyway, his point of view as anti-institutional, but it is certainly one that understands periodic direct popular power—against the political anomie that historically paved the way for totalitarian forms of government—as a requirement for the rejuvenation of democracy. *Id.* at 323.

of it in distinct contexts, as we discussed above.<sup>111</sup> First of all, there is this close relationship between those moments and the concept of a people. Regardless of whether those people are American, Canadian, French, Italian, Brazilian, and so on, the idea of constitutional moment is identified with a certain popular engagement for a new time, and also a popular commitment to transform the reality. This is the structural cause, which can have its origins catalyzed by a political authority or strategy. However, unless those people support it and claim the change, that political authority or strategy alone cannot promote a constitutional moment. A matter of legitimacy and citizenship is in the core of this qualification.

Second, those people, even being the structural cause of transformation, cannot make the change alone, for their claim must be channeled into institutional mechanisms of decision making. Indeed, none of those approaches imagine the situation of the change being made entirely outside of an institutional framework, without this meaning that the people cannot make use of extra-institutional forms of exercising their citizenship, such as assemblies, civil disobedience, or demonstrations, nor that they are controlled or necessary dependent on a political system. Transformation can obviously mean transforming the very political system or replacing it with a new one, but at some point, a kind of dialogue between the people and the institutions has to take place. A matter of institutional appropriation and subsequent resolution of some of those popular claims through institutional mechanisms emerges. Therefore, without entering into the most complex debates over the benefits or insufficiencies regarding a specific concept of constitutional moment, either Ackerman's or any other, we can point out two main elements therein involved: (1) the matter of legitimacy (and naturally citizenship) and (2) the matter of institutional dialogue with the citizenry (and obviously the legitimacy of that discourse).

From these two central elements, the following analysis will address the discussion of how they connect to each other in the real practice of constitutionalism, trying to deconstruct some of the aura normally associated with constitutional moments. This does not mean that we do not envisage those moments as special moments in the different worldwide constitutional histories. No one will deny that Ackerman's constitutional moments, the turning point in constitutionalism in Canada and France, the different constitutional movements in Europe, the

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111. *Supra* Part II.A.



Constitutional Assembly of 1987–1988 in Brazil, and so on, represent fundamental changes in their respective realities to the point of creating a memory of certain temporality that should remain active in our lives. Likewise, this does not mean that those moments did not bring a strong emotional feeling to the people, who could see that, at that very moment, they were also making their own future.<sup>112</sup> But, on the other hand, as impressive as they are, they are also facts of social life, with all the not-so-beautiful aspects of it.

It is a type of discussion that intends to bring a different approach to those moments and see in them a kind of normal behavior of individuals who, from time to time, wish to promote a certain change in their political institutions, in how people should be represented in their interests, in how the government should conduct a political agenda able to accomplish popular demands, and in how their rights and duties should be interpreted and acknowledged in different aspects of social life—in short, in how people and institutions should establish a productive dialogue for the sake of their interests and well-being. After all, no constitutional system, as perfect as it might seem, would last long without public support. The matter of legitimacy and the matter of institutional dialogue with the citizenry are central here.

*C. The Prosaic Nature of Precommitments and the Paradoxical Nature of Constitutional Democracy*

Naturally, when we mention the two elements usually involved in the debates over the concept of constitutional moments—the matter of legitimacy, on the one hand, and the matter of institutional dialogue with the citizenry, on the other—we acknowledge the complexities of terms such as legitimacy, institution, and citizenry. As most of the concepts associated with constitutionalism, they are characterized by a certain

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112. In a commentary to a previous draft of this Article, the German legal historian Michael Stolleis stressed some other interesting moments when we could observe this emotional feeling of constitutional moments in Germany, such as from 1848 to 1849, January 1919, from September 1948 to May 1949, and naturally 1990. According to him, during those moments, the German people knew that, during that week and those days, many relevant decisions about their future were being made and that the “lava was still fluid and would presumably cool down soon.” Other examples he pointed out are the drafting of the Norwegian Constitution of 1814, when the Norwegian people knew they were making history, and France, in Paris, on August 1, 1789, when the French people had the feeling that the world history, through the postulate “l’abolition du régime féodal” was seriously changing. E-mail from Michael Stolleis, Former Director of the Max-Planck Institute for European Legal History, to the author (Feb. 14, 2014) (on file with the *Marquette Law Review*).

aura of abstraction<sup>113</sup> and ambiguity and, especially, by a sort of insurmountable disconnection with immediate practices of social life, even though needing to “bear some resemblance to fact.”<sup>114</sup> Constitutionalism needs to work with some fictions and abstractions, even to methodologically justify many of its premises.<sup>115</sup> In Edmund Morgan’s words, it requires “make-believe” and the “willing suspension of disbelief.”<sup>116</sup> In the core of the words legitimacy and citizenry, we find the concept of people, which is by far one of the most controversial in constitutional literature,<sup>117</sup> and certainly one that represents such an abstraction from reality<sup>118</sup> that many people and their real struggles for

113. The abstraction of those concepts can lead to the fallacy of composition or the fallacy of division. As Adrian Vermeule argues, “a great deal of constitutional theory and analysis goes wrong by overlooking that constitutional orders are two-level systems of this sort. Analysts uncritically assume that institutions must have the properties of their members, or that an overall constitutional order must have the properties of its component institutions.” VERMEULE, *supra* note 18, at 5.

114. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 14 (1988) (“[I]n order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact.”).

115. *See id.*

116. *Id.* at 13.

117. See how Jacques Derrida examines the insurmountable circularity at the core of the act of foundation of a new order, how the retrospective perspective of the people acting during those moments is part of the legitimation process of a political framework. There is, in those moments, what he calls the “mystical foundation of authority,” i.e., the foundation could not be deemed legal or illegal; however, it shall give, although practicing some violence, an aura of legality and legitimacy through the signature, as if it were the expression of self-evident laws. These self-evident laws agree with the people represented by the signature. *See* Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 943 (1990). *See contra* Sheyla Benhabib, *Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida*, in THE DERRIDA-HABERMAS READER 128, 142 (Lasse Thomassen ed. 2006) (“[T]his focus on the act of foundation is extremely distorting for it ignores the institutional and historical learning processes which ‘really existing democracies’ have gone through.”).

118. Indeed, who are the real people during those moments? If we examine, for example, the Brazilian Constitutional Assembly of 1987–1988, where different groups of society actively participated in the debates, the strategic behavior of the elites were clearly represented and vigorously acted to avoid some democratic breakthroughs in favor of some minority groups. This leads to the question: Why will those groups, originally excluded from the debates during the Constitutional Assembly, abide by the rules and principles of the constitution? *See generally* BARBOSA, *supra* note 96, at 204–37 (arguing that, in spite of the elites’ strategic behavior during the Constituent Assembly, the process of constitution-making was clearly marked by popular participation); Denise Rollemberg, *Memória, Opinião e Cultura Política: A Ordem dos Advogados do Brasil sob a Ditadura (1964–1974)* [*Memory, Opinion and Political Culture: The Brazilian Bar Association and the Dictatorship (1964–1974)*], in MODERNIDADES ALTERNATIVAS 57, 57–96 (Daniel Aarão Reis & Denis Rolland

recognition during those moments are not taken into account.<sup>119</sup> Institution, in turn, is certainly one of those concepts whose meaning differs radically depending on which discipline or theory is under consideration.<sup>120</sup>

Still, it is not the purpose of this Article to deeply discuss the different nuances of those concepts. As was the case of constitutional moments, both the matter of legitimacy and the matter of institutional dialogue with the citizenry are to be regarded in a much less ambitious way. Indeed, to deconstruct the magical aura that normally flows from constitutional concepts as such, the itinerary here is more prosaic. It thus focuses on simple facts of social life, on how people behave when challenged by circumstances that might directly affect their lives, as what happens when political or economic breakdowns or crises lead them to call for a change.

Interaction is a key premise here. Much of human behavior is rather

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eds., 2008) (explaining how the Brazilian Bar Association supported the beginning of the military regime); Frances Hagopian & Scott Mainwaring, *Democracy in Brazil: Problems and Prospects*, 4 *WORLD POL'Y J.* 485, 486 (1987) (arguing that, after the transition to democracy, the “political arrangements represent a mix of democratic procedure and authoritarian practice”); Andrei Koerner & Lígia Barros de Freitas, *O Supremo na Constituinte e a Constituinte no Supremo [The Supreme Court in the Constituent Assembly and the Constituent Assembly in the Supreme Court]*, 88 *LUA NOVA* 141 (2013) (showing how the Brazilian Supreme Court acted to keep untouched their Justices’ privileges during the Constitutional Assembly); Maria José de Rezende, *A Lógica Autoritária do Regime Militar e os Cálculos para Controlar a Democratização: A Análise do Jurista Raymundo Faoro sobre o Processo Político Brasileiro [The Authoritarian Mindset of the Military Regime and the Calculations to Control the Democratization: The Jurist Raymundo Faoro’s Analysis of the Brazilian Political Process]*, 5 *REVISTA BRASILEIRA DE CIÊNCIA POLÍTICA* 167, 167–92 (2011) (showing how the military regime made use of many mechanisms to control the process of transition to democracy); Maria José de Rezende, *Raymundo Faoro e os Enigmas da Transição Política no Início da Década de 1980 no Brasil [Raymundo Faoro and the Enigmas of the Political Transition in the Beginning of the 1980s in Brazil]*, 42 *REVISTA DE CIÊNCIAS HUMANAS* 165, 165 (2008) (“[T]he political process [kept], inside itself, elements that were capable of making state practices to be perpetuated.”).

119. See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 1 (Joel Anderson trans., 1995) (introducing a model of a “struggle for recognition” as “the foundation for a social theory with normative content”).

120. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 *J.L. ECON. & ORG.* 213, 213 (1990) (conceptualizing political institutions as “the structural means by which political winners pursue their own interests, often at the great expense of political losers”); Underhill Moore, *Rational Basis of Legal Institutions*, 23 *COLUM. L. REV.* 609, 609 (1923) (“A legal institution is the happening over and over again of the same kind of behavior.”); Douglass C. North, *Institutions*, 5 *J. ECON. PERSP.* 97, 97 (1991) (“Institutions are the humanly devised constraints that structure political, economic and social interaction.”).

conditioned, even unconsciously, to expand its comfort zone.<sup>121</sup> It demands less energy, less effort, less direct involvement when things go as planned. Predictability and stability make life easier; order and certainty prevent unpleasant surprises. If a person knows beforehand what the probable consequences of her actions are, she can more effectively prepare for them, use the necessary tools to face any difficulty that may arise, establish mechanisms to dilute risks, build bridges to take advantage of positive benefits, etc. In a broader dimension, she can take steps in the face of those consequences to maximize her position in the social environment, or, at least, to avoid diminishing the one she already owns. As a member of society, she will act as to make her wishes become true, sometimes strategically placing her private interests above those of the public in general, sometimes strategically or discursively interacting with others in order to obtain certain benefits or even to simply help the others uninterestedly (even though indirectly receiving some benefit, such as social recognition, religious commitment, individual satisfaction, etc.). But, in any case, her actions tend to keep or expand her comfort zone.

History shows that cooperative interactions through impersonal institutional frameworks tend to promote the so-desired stability and predictability that are able to transform society in a way that enables the political, economic, and, naturally, social forces to engender virtuous and self-enhancing practices directed to the interests of all.<sup>122</sup> In this scenario, each individual will find, in the great benefits of cooperative interaction, an efficient mechanism to keep or expand her comfort zone. Strategically, individuals will make agreements or follow certain rules, even when they might not achieve their immediate desired outcome, as long as they realize that not making or following them could yield more unfavorable consequences in the long run.<sup>123</sup> In a broader sense, society

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121. Alina Tugend, *Tiptoeing Out of One's Comfort Zone (and of Course, Back In)*, N.Y. TIMES, Feb. 12, 2011, at B6.

122. See North, *supra* note 120, at 98 (“[E]ffective institutions raise the benefits of cooperative solutions or the costs of defection, to use game theoretic terms.”); see also Levinson, *supra* note 31, at 730–31 (indicating how decision-making institutions act to “[increase] the benefits of coordination and cooperation and therefore the costs of noncoordination and defection”).

123. This is what Darryl Levinson calls the beneficial effects of coordination. According to him,

[i]n many contexts, social groups with otherwise divergent interests can achieve common benefits from coordinating their actions or expectations. . . . n the purest form of a coordination game, social groups care only about the fact of settlement,

will adopt this mechanism as a means of self-improvement and self-preservation, transforming individual and strategic interests into coordinated procedures that will promote democratic stability and predictability.<sup>124</sup> Rule-makers, rule-enforcers, and rule-followers will coordinate their normally conflictive interests and actions in order to reach stability and predictability, with possible gains to everyone.<sup>125</sup> The consequence is, quoting Barry Weingast, “a set of mass behaviors that create a ‘civic culture,’ including a consensus on values and stable democracy.”<sup>126</sup> Stability and predictability through impersonal institutional frameworks then become a strong argument in favor of keeping and expanding the comfort zone of democratic societies, a necessity due to its complexity and pluralism.

Obviously, in order for the different ways of interaction to take place, some form of regulation of individual behavior has to be laid down.

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not about how, substantively, the issue is settled. But coordination can also be effective when actors have divergent preferences about outcomes or about institutions for resolving these outcome-oriented disagreements. Each actor will obviously prefer the arrangement most likely to further its own interests. Nonetheless, in many contexts actors will be willing to sacrifice their first choices of outcomes or institutions in exchange for the benefits of avoiding conflict and agreeing on a common way forward. The higher the costs of unresolved disagreement—in the currency of political or violent conflict, or the inability to carry through on collective action and achieve collective goods—the greater the coordination benefits of any institutional settlement. Likewise, the greater the costs of re-coordinating on a different settlement, the more resilient we should expect current institutional arrangements to be. Institutional arrangements that are costly to set up and costly to do without will be protected by substantial coordination buffers.

*Id.* at 683–84.

124. According to Barry R. Weingast,

[a]lthough scholars have tended to focus exclusively on one or the other, my approach suggests that both are necessary to understand democratic stability. It is elites who choose whether to construct pacts, initiate democratization, violate citizen rights, and implement public policies. Mass behavior is relevant to elite choices because it determines part of elite incentives. In a society that has resolved its coordination problems, citizens hold the power to threaten political elites with loss of power if they violate agreed limits on government. When citizens have failed to resolve their coordination problems, however, some violations of citizen rights will go unpunished. Citizen values and elite interests are thus complementary aspects of democratic stability.

Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 261 (1997).

125. *Id.* at 246.

126. *Id.*

Legal norms and contracts, for example, become institutional frameworks that allow society to maintain a certain necessary order and certainty for keeping or expanding its comfort zone, constraining individuals to act as planned, or, to use a systemic theoretical approach, to “protect[] expectations,”<sup>127</sup> thereby promoting “counterfactual stability.”<sup>128</sup> Likewise, the constitution represents an instrument that, by placing itself as the highest norm, functions as a gravitational institution of other institutions, reinforcing the legal system in itself and protecting society from the paradoxical “self-destructive tendencies” of democracy.<sup>129</sup> By the same token, “constitutionalism is a system of systems,” springing from complex interactions among institutions and, at a lower level, individuals.<sup>130</sup> Constitutionalism thus emerges as a sort of impersonal institutional framework whereby cooperative interactions can occur more efficiently for the purpose of promoting stability and predictability within the context of plural and complex societies. In other words, it keeps and expands the comfort zone of society.<sup>131</sup>

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127. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 140 (1989) (“[I]n that it protects expectations, the law frees us from the demand that we learn from disappointments and adjust to them.”).

128. *Id.* (“From the sociological point of view, normativity is nothing but counterfactual stability.”).

129. See Gert Verschraegen, *Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*, 29 J.L. SOC’Y 258, 258 (2002) (“Human rights are considered as a social institution, whereby modern society protects its own structure against self-destructive tendencies.”).

130. See VERMEULE, *supra* note 18, at 27.

131. This conclusion does not deny that promoting stability and predictability, even in the context of plural and complex societies, could also mean a certain defense of the maintenance of the status quo against the possibility of more radical changes in the structure of society. This is a serious and relevant point to the argument presented here. Indeed, if we take the history of constitutionalism in different worldwide realities, we could see that many constitutions were drafted, and rights and benefits were therein incorporated, somehow as a consequence of a negotiation between distinct elite groups and not exactly of the exercise of popular sovereignty during those constitutional moments. Therefore, keeping stability and predictability could also mean preventing the dominant structures of society from being disrupted by more radical changes. See David L. Epstein et al., *Democratic Transitions*, 50 AM. J. POL. SCI. 551, 566–67 (2006) (explaining how “partial democracies” behave in democratic transitions); Adam Przeworski, *Democracy as an Equilibrium*, 125 PUB. CHOICE 253, 253–73 (2005) (explaining how the democratic culture provides equilibrium for the stability of constitutional orders). However, although this observation is true, it does not contradict the premise that, in complex and plural societies, it is imperative that the rules of the game constitutionalism brings forth shall represent a focal point where those individuals, with their different conceptions of the good, can get along with each other. Rawls’s concept of “reflective equilibrium,” which leads to the idea of adjusting those different conceptions of the good until they are in “equilibrium,” and thereby achieving a sense of justice that might

Nonetheless, no matter how sound and efficient a constitution is for those purposes, it is ontologically dependent on the support of society. There is no constitution, at least one able to promote stability and predictability within the context of plural and complex societies, unless people uphold and share its norms and principles. Evidently, we are not denying that, in a sense, constitutions also exist in authoritarian backgrounds and even with great public support;<sup>132</sup> however, they are normally anchored to personalistic or coercive means that structurally contradict the premise of complexity and pluralism.<sup>133</sup> In democratic constitutionalism, on the other hand, the fragility and instability that are at the core of democracy itself are always there as a threat to constitutionalism and, consequently, to the very democracy. But they are also paradoxically there as a condition of preservation and functioning of constitutionalism and democracy. This instability and fragility simultaneously constrain and enable democratic constitutionalism. As Jacques Derrida says, “democracy protects itself and maintains itself precisely by limiting and threatening itself.”<sup>134</sup>

Constitutionalism then becomes the “Other” of democracy, opening it up for the future, which is, nonetheless, uncertain. Between both, there

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provide some stability, is an important argument in this matter. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 10 (1987). Moreover, while, at the constitutional level, the idea of “reflective equilibrium” provides some stability to the distinct conceptions of the good, at the institutional level, those rules of the game constitutionalism brings forth emerge as an important instrument for economic development. See North, *supra* note 120, at 109–12. This is a paradox: On the one hand, promoting stability and predictability might mean maintaining the status quo against more radical changes; on the other, promoting stability and predictability might also mean providing the tools for social, economic and institutional development. How both perspectives will cope with each other is unknown and depends on each context.

132. See DENISE ROLLEMBERG & SAMANTHA VIZ QUADRAT, A CONSTRUÇÃO SOCIAL DOS REGIMES AUTORITÁRIOS: LEGITIMIDADE, CONSENSO E CONSENTIMENTO NO SÉCULO XX: BRASIL E AMÉRICA LATINA [THE SOCIAL CONSTRUCTION OF AUTHORITARIAN REGIMES: LEGITIMACY, CONSENSUS AND CONSENT IN THE TWENTIETH CENTURY: BRAZIL AND LATIN AMERICA] 11–32 (2010) (showing how some authoritarian regimes had great social support); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 201 (2013) (indicating how popularity plays a special role in semi-authoritarian regimes which make use of abusive constitutionalism) [hereinafter Landau, *Abusive Constitutionalism*]; David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 934 (2012) (arguing that a high degree of popular participation within a weak institutional system might impair democracy) [hereinafter Landau, *Constitution-Making Gone Wrong*].

133. Tom Ginsburg & Alberto Simpser, *Introduction*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 7 (Tom Ginsburg & Alberto Simpser ed., 2014).

134. JACQUES DERRIDA, *ROGUES: TWO ESSAYS ON REASON* 36 (Pascale-Anne Brault & Michael Naas trans., 2005).

is a permanent and deferred negotiation marked by an always-remained undecidability, and this is indeed the condition of constitutional history.<sup>135</sup> For without this interaction between constitutionalism and democracy, the very dynamics of time is jeopardized in favor of other sorts of domination, such as authoritarian coercion, strategic relationships in which “force is exercised by one against others,”<sup>136</sup> or totalitarian tendencies of different spheres of society<sup>137</sup> that affect the individual and social autonomy.<sup>138</sup> In a constitutional democracy, human rights appear instead as a protection of individuals and as a guarantee of freedom of discourses against those types of coercion.<sup>139</sup> This is the reason why one is mutually ground of—and alterable by—the other: “Constitutionalism must be at once iterable by (because the ground of) and alterable by (because the product of) democracy.”<sup>140</sup>

Without public support, accordingly, there is no sense in sustaining the existence of democratic constitutionalism because there are no people upholding its premises. After all, democracy relates to the sovereignty of the people responsible for continuously interpreting and shaping the constitution, thereby bestowing its legitimacy. On the other hand, constitutionalism defines how people will exercise their rights and duties by submitting them to the rule of law and basic rights. The matter of legitimacy and the matter of institutional dialogue with the citizenry are, in this negotiation between constitutionalism and democracy, directly represented.

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135. See Derrida, *supra* note 117, at 1043 (arguing that this undecidability derives “from the fact one could not distinguish between founding violence and conserving violence”); see also JULIANO ZAIDEN BENVINDO, *ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM* 182 (2010) (arguing that the relationship between democracy and constitutionalism is marked by an insurmountable undecidability).

136. Jürgen Habermas, *A Reply to My Critics*, in *HABERMAS: CRITICAL DEBATES* 219, 269 (John B. Thompson & David Held eds., 1982).

137. See Verschraegen, *supra* note 129, at 258 (“Human rights are considered as a social institution, whereby modern society protects its own structure against self-destructive tendencies.”).

138. See Christoph Beat Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere?*, 18 *OXFORD J. LEGAL STUD.* 61, 61 (1998) (“[A] discursive concept of constitutional rights should be directed against any social system with totalizing tendencies.”).

139. *Id.*

140. Lasse Thomassen, ‘A Bizarre, Even Opaque Practice’: Habermas on Constitutionalism and Democracy, in *THE DERRIDA-HABERMAS READER* 176, 185 (Lasse Thomassen ed., 2006).



Yet, people must be interpreted in a broad sense, involving naturally the rule-follower, rule-enforcer, and the rule-maker, all of them addressees of the constitution. Therefore, the different spheres of society—politics, economy, media, science, religion, etc.—have to be committed to following the constitutional principles as a condition of preserving them as social spheres of a democratic society. This naturally implies hard choices, and even unpopular ones, for sometimes an expressive part of the people and the constitution are in opposite sides. They may desire an immediate response of the criminal system in case of a crime, but the constitution demands that the criminal system function according to the due process of law, which makes an eventual judgment a result of a presumably prudent and skillful analysis and the consequence of a time-demanding procedure. They may wish to change the electoral system in the year of elections as to make ineligible possible candidates whose pasts, according to many people, are marked by homophobic and racist behavior, while the constitution forbids changes as such in the electoral year<sup>141</sup> and, to make the case even more complex, prescribes freedom of speech as a basic right (which, in this case, may be in conflict with equality rights).<sup>142</sup> In these and other circumstances, constitutionalism limits and paradoxically enables democracy.<sup>143</sup> The question, however, is this: To what extent does this equilibrium or negotiation remain possible?

*D. The Prosaic Nature of Precommitments and the Fragility of Self-Binding*

The risks are that, because of the very fragility of constitutional democracy, a skewed equilibrium emerges. Examples are many. It is well known, for instance, that Carl Schmitt's "identity of ruler and ruled, governing and governed, commander and follower"<sup>144</sup> leads to a clearly authoritarian concept of democracy based on "the general identity and homogeneity of the people."<sup>145</sup> But it is the "subtler" forms of skewed

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141. See U.S. CONST. art. V; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, § 2 (Braz.).

142. U.S. CONST. amend. I.

143. See STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 136 (1995) ("[C]onstitutionalism and democracy are often mutually supportive.").

144. CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY] 234 (2010).

145. *Id.* at 235.

equilibrium that gain momentum nowadays.<sup>146</sup> This occurs, for example, when practices disrupt, in distinct areas of social life, the cooperative interactions through impersonal institutional frameworks.<sup>147</sup> In these circumstances, stability and predictability, qualities of a society that aims at keeping and expanding its comfort zone (especially in the circumstance of fragility and instability of complex and plural societies) are no longer promoted by the adequate functioning of impersonal institutions, as the constitution itself. “Personalistic” relationships dominate instead every corner of society, which inevitably leads to structural instability and unpredictability at some point.<sup>148</sup> As a consequence, the social forces lose their ability to engender self-enhancing practices directed to the interests of all, either because they are controlled and coercively constrained or because they lose faith in how institutions operate.<sup>149</sup>

This is, in fact, the perfect scenario for what David Landau calls “abusive constitutionalism,” that is “the use of mechanisms of constitutional change—constitutional amendment and constitutional replacement—to undermine democracy.”<sup>150</sup> Or what Steven Levitsky and Lucan A. Way define as “competitive authoritarianism,” that is “regimes [that] are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents.”<sup>151</sup> Therefore, instead of promoting a radical change through a *coup d'état*, changes are made using the very constitutionalism, thus creating an authoritarian or semi-authoritarian regime that has the appearance of a democratic order.<sup>152</sup> In this case, by examining these regimes through a systemic view, constitutional mechanisms that should be used to reinforce democracy are weakened in favor of rules that prove self-undermining over time, that is “rules [that] tend to select a corps of officeholders who work to undermine or destabilize the rules

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146. See Przeworski, *supra* note 131, at 253.

147. See North, *supra* note 120, at 110.

148. See *id.* at 111.

149. Landau, *Abusive Constitutionalism*, *supra* note 132, at 191.

150. *Id.* (arguing that, in such cases, “[p]owerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power”).

151. STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 5 (2010).

152. See Landau, *Abusive Constitutionalism*, *supra* note 132, at 189.

themselves.”<sup>153</sup> History, in fact, is full of examples of how democracy and constitutionalism were radically left aside in favor of authoritarianisms or semi-authoritarianisms, many of them with huge popular support.<sup>154</sup> In the same way, there are plenty of examples of how the prevalence of personalistic relationships led to erratic political, economic, and social developments, making stability and predictability a distant promise.<sup>155</sup>

Nonetheless, it is necessary to understand the solution to the equilibrium or negotiation between constitutionalism and democracy in a completely different viewpoint. Instead of looking at solutions that do destroy democratic constitutionalism, we should look at those that keep it alive and make it even more dynamic. In other words, we should ask: Why do constitution and democracy keep being intimately related—and fortify themselves as such—even in those circumstances in which it really seems they are heading towards mutual suicide? Why do people—rule-followers, rule-makers, and rule-enforcers alike—still believe in constitutional democracy and abide by its norms and principles when it directly affects their most immediate wishes?

As might be expected, normative arguments appear to answer those questions.<sup>156</sup> The concept of constitutional moments, as we have seen, arises in this context: The period of higher lawmaking becomes the source of normative assumptions that will influence the generations ahead and thereby the people at a certain point, when normal lawmaking takes place, are not legitimate to promote such changes in the constitutional order.<sup>157</sup> They have instead to be committed to those principles, even when they challenge their most intimate desires. Still, this belief in those normative assumptions as a possible answer to the stability of societies seems rather overstated. They might be seen as a persuading and even “rational” (against our emotive reactions to those circumstances) response to those dilemmas and, thus, an efficient

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153. VERMEULE, *supra* note 18, at 102.

154. See Landau, *Abusive Constitutionalism*, *supra* note 132, at 189.

155. See DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 73–76 (2012) (indicating that extractive institutions are one of the main reasons for poverty in the nations); Landau, *Constitution-Making Gone Wrong*, *supra* note 132, at 923 (indicating the risks of quasi-authoritarianism when assemblies are left unconstrained and institutions do not act as they should); North, *supra* note 120, at 111 (indicating how personalistic relationships play a relevant role in impairing the development of nations).

156. See *supra* Part II.C.

157. Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1759 (2003).

intergenerational argument against immediate changes.<sup>158</sup> They assume somehow the symbolic figure of a tradition that ought to be respected because they have borne considerably good fruit throughout history.<sup>159</sup> However, it is quite evident that other causes are much more structural regarding the maintenance of a constitutional order because, if those people really want the change, there is no normative assumption that will stop them from promoting it, even if the result is to put constitutional democracy in jeopardy. This is the inherent fragility and instability of democracy, but it is also what makes it so challenging.

As already mentioned, instead of relying on those normative assumptions, it is interesting to discuss some more prosaic aspects of social life that might best explain why the people commit themselves to the constitution, why they uphold its principles and rules, and why they follow it, even when their deepest wishes tell them not to do it. The idea of precommitment or “self-binding” has been a central topic of relevant studies on social behavior, and they can certainly shed some light on this discussion.<sup>160</sup> Jon Elster, who has devoted many of his works to this theme,<sup>161</sup> examining both individual and collective precommitments, sees in the constitution a type of collective self-binding that is “quite fragile,”<sup>162</sup> especially because it is based on a “virtual representation” of a generation towards the future ones and also because not all framer’s preferences have the quality of intergenerational relevance.<sup>163</sup> The founding generation expects the future generations to abide by the rules and principles of the constitution. Continuous changes, after all, contrast with a stable and predictable institutional framework, and this can seriously impair cooperative interactions and, consequently, the comfort zone of societies. In Elster’s view, it is rational to “prevent wasteful investments in constitutional change by majorities that fluctuate around fifty percent,” especially with regards to “a standing concern which can be assumed to be important for all generations.”<sup>164</sup> This is one of the reasons why techniques such as the requirement of supermajorities to

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158. *Id.* at 1755.

159. *Id.* at 1758.

160. *Id.* at 1757.

161. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000).

162. Elster, *supra* note 157, at 1758.

163. *Id.* at 1759.

164. *Id.*

amend the constitutional text, an institutional design based on the separation of powers, time-demanding deliberation procedures (to cool down immediate passions),<sup>165</sup> and entrenchment of judicial review turn into paramount characteristics of constitutionalism.<sup>166</sup> However, those techniques are still very fragile inasmuch as “there is nothing external to society” that could promote the binding force of the constitution.<sup>167</sup>

In any case, notwithstanding the fragility and instability of this sort of collective precommitment—which is, indeed, an insurmountable feature of constitutional democracy—there are naturally some mechanisms that can foster constitutional binding. Usually, as we see in those explanations on how certain periods of constitutional history could be regarded as constitutional moments, popular mobilization, and involvement towards the elaboration and interpretation of the constitution, on the one hand, and gathering, filtering, and resolving those popular claims through institutional mechanisms, on the other, appear as premises of that concept.<sup>168</sup> Both the matter of legitimacy and the matter of institutional dialogue with the citizenry are part of this qualification.

People and institutions come together to build a new world, at least one that corresponds to the people’s claims, on the one hand, and one that results from gathering, filtering, and resolving those claims according to an institutional framework, on the other. There is the coordination of the people’s wishes and demands via institutions in order to reach a comfort zone that can promote democratic stability and predictability, bringing benefits to all.<sup>169</sup> As Stephen Holmes says, “constitutions not only limit power and prevent tyranny, they also construct power, guide it to socially desirable ends, and prevent chaos and private oppression.”<sup>170</sup> In a stable democratic society, where the matter of legitimacy and the matter of institutional dialogue with the citizenry are working well together, following the constitution, a powerful impersonal institutional framework, has many benefits.

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165. See *id.* at 1765; see also Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT’L J. CONST. L. 655 (2015).

166. See Albert, *supra* note 165 (arguing that constitutional amendment rules should be redesigned as to observe: sequential approval and escalation, and entrenching judicial review).

167. Elster, *supra* note 157, at 1760.

168. *Id.* at 1783.

169. *Id.* at 1761.

170. HOLMES, *supra* note 143, at 6.

On the other hand, the functioning of cooperative interactions for the sake of constitutional democracy is, nonetheless, marked by, using Jon Elster's terminology, a mixture of passion, interest, and reason.<sup>171</sup> In fact, usually many of those so-called constitutional moments stem from radical regime transitions, from dictatorships to democracies, from colonies to new nations, from old constitutions to new constitutions (either formally or informally).<sup>172</sup> This is why Elster's argument that there is a "striking contradiction"<sup>173</sup> when we use the constitution as a tool for cooling down future generations' passions, bringing them back to reason, goes straight to the point: constitutions—and this applies also to constitutional moments—are not usually what we could call the best example of reasoned decisions, derived from exhaustive and thoughtful political, economic, and social reflection.<sup>174</sup> So why do we keep following the past? Why do we, reasonable people, commit ourselves to passions, interests, and reasons of those moments?

Passions naturally have a very persuading effect, especially in the short-term. People, when they see the response to their claims been given, it does not really matter whether it was the consequence of a reasoned, interested or passionate decision. They simply want to have it done as fast as possible. Constitutions, in any case, usually are not capable of giving immediate response to these claims.<sup>175</sup> They may immediately provide a new institutional design, new mechanisms of popular participation, new rights and benefits, but even in these cases, it will probably take some time until they become part of a stable constitutional culture.

For example, the Brazilian Constitution of 1988, as it was drafted, already established a radical transformation in many aspects of social life, especially in what refers to some practices from the prior period of dictatorship (1964–1985).<sup>176</sup> In addition to expanding the bill of rights that could already be enforced (freedom rights, equality rights, etc.), it also provided many institutional mechanisms that were there to make

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171. Elster, *supra* note 157, at 1755.

172. *Id.* at 1768; see also Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387 (2015).

173. Elster, *supra* note 157, at 1755.

174. *Id.* at 1768–69.

175. *Id.* at 1765; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, § 2 (Braz.) (as an example of how long it takes to amend a constitution).

176. See BARBOSA, *supra* note 96, at 49–118.

democracy a reality (elections, participation rights, etc.).<sup>177</sup> It also rearranged the way institutions worked for the sake of society according to this new democratic paradigm.<sup>178</sup> The Brazilian people were eager to live in this new reality, even though there were strong popular mobilizations during the Constitutional Assembly.<sup>179</sup> In fact, the Constitutional Assembly of 1987–1988 was marked by the absence of a hegemonic block that could dictate the paths of the new constitution, and this paved the way for “an intensive and influential participation of organized civil society, a phenomenon of unique magnitude in Brazilian history.”<sup>180</sup> The time of the constitution then accelerated in an unpredictable way.<sup>181</sup> Yet, this time, as magical as it might have been, was also a promise, a deferred promise. It was not as fast as to meet everyone’s wishes.<sup>182</sup> After all, the constitution was elaborated before Brazil had already an institutional and democratic practice, let alone a political culture within this context.<sup>183</sup> Even with all this legitimate procedure of lawmaking, one that we can see clearly the matter of legitimacy and the matter of institutional dialogue with the citizenry working side by side, it was not enough, as it never is.

It provided nevertheless a symbolic effect towards the future. Regardless of whether those decisions were based on the passions, interests, or reasons of this transition to democracy, the fact is that it created a sort of binding in the following generations.<sup>184</sup> The way citizens and institutions managed to settle and coordinate their inevitable disputes yielded the positive outcome of certain stability and predictability as never before in Brazil. There is, of course, somehow a

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177. *See id.* at 204–37.

178. *See id.*

179. *See id.*; *see also* Marcos Nobre, *Indeterminação e Estabilidade: Os 20 Anos da Constituição Federal e as Tarefas da Pesquisa em Direito* [Indetermination and Stability: The 20 Years of the Federal Constitution and the Tasks of the Research on Law] 82 NOVOS ESTUDOS CEBRAP 97, 98 (2008) (arguing that the Brazilian Constitution is the result of an “intense and influential participation of the organized civil society”); Cristiano Paixão, *Direito, Política, Autoritarismo e Democracia no Brasil: da Revolução de 30 à Promulgação da Constituição da República de 1988* [Law, Politics, Authoritarianism: From the Revolution of 30 to the Promulgation of the 1988 Constitution of the Republic] 13 ARAUCÁRIA 146, 165 (2011) (showing how the civil society actively participated in the activities of the Constituent Assembly).

180. Nobre, *supra* note 179, at 98.

181. *See* Paixão, *supra* note 179, at 165.

182. *Id.* at 155.

183. Nobre, *supra* note 179, at 98.

184. Elster, *supra* note 157, at 1759.

still authoritarian heritage in the Brazilian contemporary reality, such as personal relationships that produce erratic social, political, and economic consequences; elite groups opposing policies aimed at decreasing poverty; and including historically oppressed and disadvantaged social groups; and difficulties in implementing certain basic rights, among others, but none of them seems, at least at this point, to structurally jeopardize the main conquests of the constitution.<sup>185</sup>

Accordingly, legitimacy and institutional dialogue with the citizenry, when working well together, can indeed have some relevance to the binding effect of constitutions. The legitimate procedure of constitution-making in Brazil, marked by a relative strong pluralism and a visible claim to making a new country, provided the tools that might explain, at least at the political level, why some institutional stability has been achieved since then. Still, constitutionalism is naturally a process with ups and downs, and, even though that special period of higher lawmaking really brought a new horizon of possibilities, time is crucial here. On the one hand, there is the inertial effect of following the rules that are working well for most of the people.<sup>186</sup> On the other, cooperative interactions through impersonal institutions become more coordinated among the different social actors,<sup>187</sup> thereby creating “institutional arrangements [that] both facilitate compromise and blunt the incentives of political losers to defect.”<sup>188</sup> Or because the costs of changing the constitution are higher than leaving things alone, time catalyzes stability when things go somehow as planned. As a consequence, “[c]hange becomes psychologically and socially costly, hard to understand or envision, and normatively dubious.”<sup>189</sup>

Time also makes passion-based decisions more difficult to implement structural changes in the constitution when the matter of legitimacy and the matter of institutional dialogue with the citizenry are present.<sup>190</sup> For instance, Dilma Rousseff’s proposal that June 2013 for a plebiscite that would establish a sort of “fast track” procedure for

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185. See *infra* Part III.

186. As Daryl Levinson argues, “In politics as in society more broadly, the status quo exerts a powerful (though not unbreakable) hold on human behavior that often far exceeds the intrinsic merits of status quo arrangements.” Levinson, *supra* note 31, at 691.

187. See *id.* at 685 (“[I]nstitutional stability can be explained by the cooperative surplus the relevant arrangements provide.”).

188. *Id.* at 730.

189. *Id.* at 691.

190. Elster, *supra* note 157, at 1768.



constitutional amendment regarding the political reform, as a reaction to the popular demonstrations during the FIFA Confederations Cup, could have been more easily implemented in 1994 than right after those demonstrations.<sup>191</sup> Some of the popular claims really resulted from the inobservance of basic rights as laid down in the constitution of 1988 (right to quality public transport, right to non-discrimination) or from some structurally problematic constitutional provisions (the electoral system of representation, for example), and indeed it would be much simpler to implement some of those changes without all the strict procedure of amendment.<sup>192</sup> Yet, the simple suggestion of promoting a structural constitutional change without following the procedures for constitutional amendments lost momentum after a couple of days,<sup>193</sup> not because there was no constitutional moment at that time, as some suggested,<sup>194</sup> but simply because it would demand so much energy and political mobilization that it was not worthwhile. The immediate reaction of different sectors of society, such as legal experts,<sup>195</sup> Justices of the Brazilian Supreme Court,<sup>196</sup> and political parties,<sup>197</sup> was a clear sign that this could not take place easily.

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191. See Benvindo, *supra* note 6; Anthony Boadle, *Brazil's Roussef Pushes Political Reform to Quell Discontent*, REUTERS, July 2, 2013, <http://www.reuters.com/article/2013/07/02/us-brazil-politics-plebiscite-idUSBRE96115A20130702> [<https://perma.cc/9B7X-QRCX>]; Paulo Prada & Maria Carolina Marcello, *One Million March Across Brazil in Biggest Protest Yet*, REUTERS, June 20, 2013, <http://www.reuters.com/article/2013/06/21/us-brazil-protests-idUSBRE95J15020130621> [<https://perma.cc/3SGY-NDVJ>].

192. See Benvindo, *supra* note 6.

193. Paixão et al., *supra* note 17.

194. See *id.*

195. See *id.*

196. According to Justice Gilmar Mendes, of the Brazilian Supreme Court, “for complex problems, sometimes, there are simple answers . . . and wrong answers. This was the case.” *Ministro: Pedido de Constituinte Exclusiva foi um Erro “Extremamente Grave”* [Justice: The Claim for an Exclusive Constituent Assembly Was an “Extreme Serious” Mistake], TERRA (July 1, 2013), <http://noticias.terra.com.br/brasil/politica/ministro-pedido-de-constituente-exclusiva-foi-um-erro-extremamente-grave,ba1dff3cb99f310VgnVCM5000009ccceb0aRCRD.html> [<https://perma.cc/78XC-G5AN>]; see also Débora Zampier, *Para Juristas, Convocação de Constituinte Exclusiva para Debater Reforma Política é Inviável* [For Legal Experts, the Convening of an Exclusive Constituent Assembly to Debate the Political Reform Is Unfeasible], ECODEBATE (June 25, 2013), <http://www.ecodebate.com.br/2013/06/25/para-juristas-convocacao-de-constituente-exclusiva-para-debater-reforma-politica-e-inviavel/> [<https://perma.cc/AU5Z-5BD9>] (showing that Justice Marco Aurélio de Mello, Luís Roberto Barroso and former Justice Carlos Velloso, all of the Brazilian Supreme Court, also argued that the change could be made by constitutional amendments).

There were, after all, other painless mechanisms to promote some changes, even if not as efficient as a “fast track” procedure.<sup>198</sup> The costs of affecting the procedural rules of amendment as set out in the constitution, even as an exception, were higher than seeking alternatives.<sup>199</sup> Moreover, time produced the effects of first cooling down the passion-based arguments manifested during those demonstrations (time in the short term) and second recalling the memory of the relevance of stability and predictability of following the procedural rules of the constitution as an instrument against arbitrary rulings and as a protection of democracy, even in circumstances as such (time in the long term).<sup>200</sup> Certainly, other more prosaic causes played a special role here, such as the lack of interest of a substantial number of congressmen to mobilize for a change that would affect their comfort zones, the undemanding psychological effect of leaving things alone, or the inertial effect that, after about twenty-five years of democratic constitutionalism, made the institutions rather vaccinated against sudden actions to the detriment of the constitutional rules that regulate them and the people.<sup>201</sup> Changes, therefore, should be made by playing the rules of the game and not by making those rules a game.

On the other hand, changing the rules of the game every time groups of people go to the streets demanding change is counterintuitive and costly. After all, the impersonal institutional framework laid down by the constitution can be replaced by a sort of personal relationship between the government and the people. Popular uprisings, which are usually marked by short-lived passions,<sup>202</sup> can be followed not by reason but by an interested-based strategy of the government.<sup>203</sup> The constitution becomes a milestone in the struggle for something new, and the government, in turn, becomes the great agent for change. A sort of personal relationship with the people replaces the impersonal institutional dialogue with the citizenry. These are, again, the circumstances in which we see the occurrence of “abusive

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197. See Zampier, *supra* note 196.

198. Paixão, *supra* note 17.

199. See generally Levinson, *supra* note 31.

200. Elster, *supra* note 157, at 1764, 1769.

201. See *supra* Parts II.A–D.

202. See Elster, *supra* note 157, at 1783 (“Delays can prevent the constitution from being changed under the influence of short-lived passions.”).

203. See Landau, *Abusive Constitutionalism*, *supra* note 132, at 189 (explaining how the government can abusively make use of the constitution to strengthen its powers).

constitutionalism”<sup>204</sup> or “competitive authoritarianism.”<sup>205</sup>

But this is also the case whereby institutions, as “humanly devised constraints that structure political, economic, and social interaction,” lose their ability to create order and reduce uncertainty, affecting directly cooperative interactions among distinct sectors of society.<sup>206</sup> If this is so, it can create the snowball effect of expanding inefficient institutions and policies in the future, spoiling the gains society has achieved so far.<sup>207</sup> Following the constitution, in this circumstance, turns into a condition of self-preservation of democracy but also of maintaining certain gains in political, economic, and social area, and this certainly counts as a strong element of self-binding. It might have taken, after all, a huge effort and time to establish a new constitutional order as a constitutional culture, and it might have involved a great amount of energy and work to establish the necessary confidence to improve political, economic, and social behavior for the well-being of the people.

Naturally, this conclusion neither denies the fragility of this precommitment to the constitution nor sustains the conservative argument that no change in the rules of the game could be positive whatsoever. After all, precommitments can indeed represent an interested-based strategy of the status quo.<sup>208</sup> This is not the point here, though. The question is why people keep following the constitution even in situations in which their wishes tell them not to do so. Aspects such as the benefits of impersonal institutional frameworks; cooperative interactions coordinating contrasting human behaviors; the inertial effect of time; the high political, economic, social costs of change; the self-learning process in favor of constitutional democracy; the memory of an authoritarian past that is just right there and is not welcome at all; the tendency of human behavior to keep and expand its comfort zone as

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204. *Id.*

205. LEVITSKY & WAY, *supra* note 151, at 5 (“Competitive authoritarianism is a hybrid regime type, with important characteristics of both democracy and authoritarianism.”).

206. North, *supra* note 120, at 97.

207. See Daron Acemoglu, *Why Not a Political Coase Theorem?: Social Conflict, Commitment and Politics*, 31 J. COMP. ECON. 620, 622 (2003) (“Existing evidence suggests that societies often choose inefficient policies and institutions, and in most cases they do this not because of differences in beliefs, but because of severe misalignments in the economic interests of politically decisive actors and the rest of the society.”).

208. See Levinson, *supra* note 31, at 675 (“Political commitments can also provide private benefits to some actors at the expense of others.”); see also RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 16 (2004) (noting how judicial review serves the interests of the hegemonic elites).

well to be unwilling to take risks; and the human behavior in favor of actions based on reason instead of interests and passions, among many others, all of them help answer this question.<sup>209</sup> None of them, however, prevents those people from leaving aside the constitution if they *really* intend to do so, especially if institutions in dialogue with the citizenry (they are unable to transpose their demands into institutional actions), and are bringing to the end the possibilities of any concession as regards their legitimacy.<sup>210</sup>

### *E. The Stabilizing Behavior of Constitutions*

For this reason, the constitution does have a stabilizing behavior over time. If the constitution relies on a political commitment, if it seeks to dialogue with the citizenry, if it intends to keep being legitimate, it has to be at each given moment and context both the old and the new constitution. The constitution has to be the past, the present, and the future altogether. After all, the constitution is not simply a text but a back-and-forth process, an ongoing movement of moments, a permanent transition of temporalities. No constitutional moment is thus more special than other moments.

Even if we do believe in the transcendent qualities of a history that is to remain in everyone's minds, even if we do share the common grounds of what makes us people, nothing denies the prosaic conclusion that those moments are just moments. They might be the result of vigorous political commitments, the mobilizing effect of the people toward a new temporality, the consequence of a strong desire for change. They may also have the confluence of numerous factors that make them relevant for constitutional history, for bringing a fresh impetus to society, for paving the way for new horizons and possibilities. In short, they may

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209. As Jon Elster argues:

In general, we cannot assume that interest-based decisions at the post-constitutional stage will be superior to emotion-based ones *from the point of view of reason*, although either will be inferior to decisions directly based on reason. In fact, as I have argued, the same is true of the constitution-making process itself.

Elster, *supra* note 157, at 1786–87.

210. Obviously, we are not disregarding the fact that political institutions and governments can have a strong influence upon social behavior and, through different means, guarantee the stability of those in power. People, in many circumstances, even when they are willing to change the constitution, might face tremendous difficulty in implementing any change, and the successes or consequences of the conflict between those in power and the people varies, depending naturally on the context.

make the constitution constitutions, show how temporalities build new temporalities, and expose how constitutions transform their meanings throughout history. Still, prosaically speaking, they are just outcomes of human behavior. As incredible and magical as they seem, they do not have the power to be more than simple political commitments, nor do they have the ability to prevent future political commitments if people really mean to do so.

In any case, if the matter of legitimacy and the matter of institutional dialogue with the citizenry are working well together, new political commitments may not seem necessary, as we have seen.<sup>211</sup> The constitution, after all, has a stabilizing behavior over time, and as a back-and-forth process, it can adapt to new temporalities and therefrom build new temporalities. Not only through the formal procedure of constitutional amendment<sup>212</sup> but also by means of a new constitutional meaning due to a change in interpretation,<sup>213</sup> a constitutional

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211. See Landau, *Constitution-Making Gone Wrong*, *supra* note 132, at 923–24 (showing how in Venezuela, Bolivia, and Egypt, the institutions could not constrain politics, thereby creating the path to what he calls “the worst-case outcome”).

212. See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96 (Tom Ginsburg & Rosalind Dixon eds., 2011) (comparatively examining the formal procedures for constitutional amendment and the difficulties of this task); see also Albert, *supra* note 165 (“[W]ritten and unwritten limits to formally amending formal amendment rules are unsatisfactory.”); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *INT’L J. CONST. L.* (forthcoming 2015) (arguing that constitutional amendment difficulty depends more on the amendment culture than on institutional constraints).

213. Indeed, we can regard constitutional interpretation as a strong mechanism of the constitution’s stabilizing behavior because it promotes coordination among the different political actors within the context of ambiguity, openness, and vagueness of the constitutional content. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 106–09 (2009) (examining how judicial review plays a relevant role for the endurance of constitutions). For an analysis of judicial interpretation as a stabilizer of complexities in constitutional democracies, see MARCELO NEVES, *ENTRE HIDRA E HÉRCULES: PRINCÍPIOS E REGRAS CONSTITUCIONAIS [BETWEEN HYDRAS AND HERCULES: CONSTITUTIONAL PRINCIPLES AND RULES]* (2013). For an analysis of judicial interpretation as a stabilizer of the political game especially regarding the Presidency and its agenda, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007). For an analysis of judicial interpretation as a stabilizing mechanism promoted by the political elites, influential economic stakeholders, and judicial leaders to foster their agendas, see HIRSCHL, *supra* note 208; see also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 194–238 (1996).

convention,<sup>214</sup> desuetude,<sup>215</sup> or political consensus, the constitution changes. As a powerful impersonal institutional framework, it can establish a fruitful dialogue with the citizenry, bringing about mechanisms that strengthen cooperative interactions and elevate the costs of change, among other causes. More importantly, it can establish the self-learning positive effect of popular commitment to its rules and principles, developing a constitutional democratic culture that should remain in force for many years ahead.<sup>216</sup>

Therefore, in order for a constitutional democracy to succeed, its stabilizing behavior must connect to the people's claims but also make popular commitment to its rules and principles a longstanding and shared practice. Constitutional democracy thus produces a "performative meaning" that is there "in the course of applying, interpreting, and supplementing constitutional norms."<sup>217</sup> The tense and dynamic paradox of constitutionalism and democracy, with all the risks involved in this negotiation, is itself a producer of stability and predictability, of keeping and expanding the comfort zone of society.<sup>218</sup> Hence, the paradox is not only limited to the structural conflictive negotiation between democracy and constitutionalism, between legitimacy and the institutional dialogue with the citizenry. It also affects the very characteristics of this negotiation: the tense, risky, and fragile feature of constitutional democracy is itself cause and consequence of the stability and predictability of constitutional democracy and of keeping and expanding the comfort zone of society. "Constitutional democracy is the most humane political system because it thrives on the ability of individuals and communities to recognize their own mistakes."<sup>219</sup>

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214. See Albert, *supra* note 172, at 387 ("[W]ritten constitutions change informally as a result of the development of an unwritten Constitutional norm, otherwise known as a constitutional convention.").

215. See Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 641 (2014) ("Informal amendment by constitutional desuetude occurs when a constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by political actors."); see also Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1029 (2014) ("Article V of the United States Constitution is in decline and disuse.").

216. See Habermas, *supra* note 19, at 775 (arguing how the intergenerational feature of the constitution provides a self-learning positive effects of popular commitment to its principles).

217. *Id.*

218. *Id.*

219. HOLMES, *supra* note 143, at 177.

However, if the matter of legitimacy and the matter of institutional dialogue with the citizenry are, nevertheless, going through a wave of disruption and crisis, that political commitment might become unviable. Maybe the institutional framework is not working anymore; maybe the cooperative interactions cannot coordinate any longer contrasting human behaviors; maybe time has made that constitution overly outdated to meet today's demands;<sup>220</sup> maybe its mechanisms of adaptation to new contexts reached a saturation point that has no further possible compromise; or maybe the costs for change are not as high as before. In short, the constitution loses its ability to construct new temporalities or, in other words, its stabilizing behavior is incapable of adapting to new contexts.

In this circumstance, there is no constitutional moment that remains, no matter how originally democratic it was. Its "performative meaning" is not able anymore to prevent it from the "coming" of a new order. Contrary to other times, when the political process gives to the supporters of this regime "sufficient power to fend off attacks from opponents,"<sup>221</sup> the insurmountable power of the people transforms the constitutional order, with all its binding force, into an inconvenient and bothersome commitment. In this case, institutions, as impersonal as they might be, are not recognized as legitimate "humanly devised constraints that structure political, economic and social interactions,"<sup>222</sup> nor can they fruitfully dialogue with the citizenry. A new beginning is beginning.

Even so, this new beginning is just a moment marked by the inherent controversies and dilemmas of human behavior. It might result in a new political commitment, one that modifies many of the previous assumptions and the way institutions and people dialogue with each other. How it will evolve from that time onwards is uncertain. Perhaps an authoritarian force is afoot; perhaps it is just a rearrangement of a constitutional culture toward enhancing democracy by other means. In

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220. This is a paradox, according to Daryl Levinson,

enduring constitutional rules and arrangements will tend to become both increasingly dysfunctional and increasingly difficult to change over time. This paradox arises because the political dynamics that entrench institutional arrangements operate independently of both the initial motives for establishing these arrangements and the arrangements' ongoing functional justifications.

Levinson, *supra* note 31, at 714.

221. *Id.* at 704.

222. North, *supra* note 120, at 97.

any event, its qualities of constitutional moment, such as the matter of legitimacy and the matter of institutional dialogue with the citizenry, do not deviate it from the prosaic conclusion that it is a simple political commitment. It does not bind the future, although it might yield some sort of fragile precommitment and self-binding by reason of other aspects of human behavior, as we have seen.<sup>223</sup> It does not mean a special moment incomparable to any other, for the constitution is a back-and-forth process that is itself a complexity of moments.

Still—and this is the conclusive crucial point—in spite of the fragility and the complexity of temporalities a constitution bears, the so-called constitutional moments might indeed have something to say. This might go beyond the idea that constitutional moments are the result of a strong popular mobilization, when the people are eager for a new beginning, or that they transform the dialogue between institutions and the citizenry, developing therefrom a new constitutional culture. Perhaps they say something because they unveil the deferred promise constitutional democracy is. It is a performative utterance that exceeds the reality where it expresses itself, showing that this reality never fulfills the promise but that, in doing so, it paradoxically prints on it the “impossibility of stopping.”<sup>224</sup> In other words, those constitutional moments might show the very impossibility of constitutional democracy, an impossibility that is nonetheless the very possibility of constitutional democracy. This paradox, however, may mean the very denial of those constitutional moments, at least as usually the legal literature uses it.<sup>225</sup> By unveiling the impossibility of the promise, those constitutional moments become then just moments, a reality that is never there.

#### F. *The Paradoxical Nature of Constitutional Moments*

As we have seen, a constitution is an ongoing movement of moments, a permanent transition of temporalities, a back-and-forth process. As such, if it succeeds, a constitution is itself a set of constitutional moments. In each of these moments, there is what Jacques Derrida, using Montaigne and Pascal’s words, calls the “mystical foundation of authority,”<sup>226</sup> i.e., we cannot find, in any of them, a ground

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223. See Elster, *supra* note 157, at 1758 (“[T]he idea of collective precommitment emerges as quite fragile.”).

224. DERRIDA, *supra* note 25, at 13.

225. See *supra* Part II.A.

226. Derrida, *supra* note 117, at 943.



or a foundation “[s]ince the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground.”<sup>227</sup> Therefore, these moments show up as the very living constitution, they reveal this never-stopping negotiation between the reality, where we find ourselves, and the promise that never arrives but which is there to make constitutional democracy a possibility in its very impossibility.

Accordingly, there is no sense in saying that they bind the future, nor that they disrupt the past as to whether what has happened so far has no future. They are not the masters of the constitutional time, nor are they the ground of other moments, for there is no causality in the complexity of temporalities constitutional democracy is. Nothing guarantees the future; nothing is capable of keeping the past as permanence or of erasing the past as forgetfulness; nothing overcomes the fragility of all temporalities. Those constitutional moments, if they can be qualified as such, merely reveal the indefatigable and incessant process of invention and reinterpretation of the constitution. They only show the critical perspective that constitutions cannot be seen as stabilized over time.

If a constitution, as a powerful impersonal institutional framework, promotes stability and predictability, it only does so by being itself this tireless negotiation between this promise that never comes—but which is there to make constitutional democracy possible—and the reality that aims at keeping its comfort zone, a reality where the matter of legitimacy and the matter of institutional dialogue with the citizenry are working well together. Moments such as Ackerman’s constitutional moments, the turning point in constitutionalism in Canada and France, the different constitutional movements in Europe, the Constitutional Assembly of 1987–1988 in Brazil, among many others, are clear examples of this incessant negotiation. They may have represented the peak of popular mobilization. Still, they were not a sort of “magical entity” transforming the future into their then-original future, nor did they make the people during those periods more than simple people. They have not suspended the inherent fragilities and strategic behavior of human beings, nor have they turned constitutions into something more than a political commitment. On the other hand, they might have inscribed in people’s minds the very meaning of constitutionalism; they might have stamped in people’s actions this ongoing tense, fragile, albeit indispensable, and necessary, negotiation. In short, they, as a sort of

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227. *Id.*

performative utterance, might have made evident constitutional democracy as this “experience of the impossible.”<sup>228</sup>

We follow the constitution for different reasons, and we change the constitution as a result of other reasons, many of them not so romantic as we have seen. A metaphysical standpoint in the concept of constitutional moments, such as some of those assumptions we discussed previously,<sup>229</sup> thus can blind us to this intrinsic characteristic of human behavior. They are not the ground, as we have argued, but merely history, violence, and belief. They are just facts full of complexities and contradictions. However, for being so full of history and making history, they unveil the performative feature of constitutional democracy, which goes beyond those facts themselves.

This performative utterance yields a principle of political legitimacy, which becomes a “weapon aimed at the enemies of democracy.”<sup>230</sup> No one will deny that Ackerman’s constitutional moments, the Constitutional Assembly of 1987–1988 in Brazil, and so on, give meaning to what we mean by constitutional democracy, creating a memory within the context of many temporalities that protect constitutional democracy. Naturally, as we have discussed, many prosaic aspects of social life are central here for this purpose and explain a lot this precommitment throughout generations. Yet, constitutional democracy, while going on by reinventing itself in its very repetition throughout history, while being this continuous negotiation between the promise and the reality, protects itself against its disruption. Its fragility is thus, paradoxically, its guarantee. Its performative feature is thus, paradoxically, its very reality.

This conclusion leads us inevitably to the question: Is there any sense in still insisting that we have some constitutional moments in our histories? If the answer is affirmative, those constitutional moments are as such qualified merely because they might remind us of this promise, this negotiation that takes place throughout history. They are moments as such simply for being full of history, violence, and faith. At the most, as Jack Balkin says, we would have a “faith in the constitutional project, which is also a faith in its redemption throughout history.”<sup>231</sup> Therefore, temporality is in its utmost expression. But this is also the very denial of

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228. DERRIDA, *supra* note 25, at 352.

229. *See supra* Part II.A.

230. DERRIDA, *supra* note 134, at 86.

231. BALKIN, *supra* note 52, at 74.

that celebratory concept of constitutional moment.<sup>232</sup> What remains, in the end, is aporia, myth. Paradoxically or not, this aporetic condition is what makes history so relevant. Constitutional moments thus elevate history.

### III. POPULAR PROTESTS AS CONSTITUTIONAL MOMENTS?

#### A. Introduction

We are thereby led to the conclusion that, if those constitutional moments say many things—after all, they are history and make history—they might not say all those things. Precommitments as those of constitutional democracies are always marked by dilemmas, paradoxes, and expectations. Moreover, as we have seen, they are continuously challenged by facts of social life that can, naturally, undermine the very features of constitutional democracy. From explicit authoritarian regimes to other “subtler” forms of authoritarian practices, such as what the legal literature calls “abusive constitutionalism,”<sup>233</sup> “competitive authoritarianism,”<sup>234</sup> “stealth authoritarianism,”<sup>235</sup> and the like, the differences may not be that high, and the democratic assurances we have may be much more fragile than they seem. This is why it is important to interpret those constitutional moments in a prosaic approach by stressing, more than the magical aura and normative assumptions usually associated with them, the two elements introduced before: the matter of legitimacy and the matter of institutional dialogue with the citizenry. They certainly do not say everything, but at least they shape that idea of constitutional moments in a much less celebratory fashion,<sup>236</sup> allowing us to investigate how institutions and the people themselves behave and coordinate their activities in their everyday political life. With these two simple elements in mind, we can better understand how the people get involved in building their constitution, the rules and principles that govern them, on one hand, and also how institutions gather, filter, and resolve the distinct popular claims, on the other. Briefly, institutions—and the constitution as a powerful impersonal institutional framework—

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232. See Tushnet, *supra* note 37, at 855.

233. See Landau, *Abusive Constitutionalism*, *supra* note 132, at 189.

234. LEVITSKY & WAY, *supra* note 151, at 5.

235. See Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2015) (discussing, through rational-choice theory, how the sub-constitutional mechanisms are used to perpetuate political power either in nondemocratic or democratic regimes).

236. See Tushnet, *supra* note 37, at 855.

and the people are mutually cooperating, with reciprocal gains, and over time, these ties become stronger.

All the same, this combination of factors implies important analyses of real causes that engender those distinct behaviors and interactions in constitutional democracies. This is obviously not a simple task, for it would demand discussions of institutional design, institutional capacities, systemic effects, and so on, which goes way beyond the scope of this Article.<sup>237</sup> My goal is, therefore, much less ambitious. I will use some of the previous conclusions about constitutional moments prosaically interpreted to examine a particular type of phenomenon: popular protests whose outcomes are paradoxical. In empirically examining how those mass protests impact constitutionalism, the purpose is to bring that theoretical discussion of the previous part to the very reality of social life. More importantly, when we deeply investigate those popular uprisings, we conclude that that celebratory idea of constitutional moments Bruce Ackerman and his followers hold needs some refinement.<sup>238</sup>

The mass protests of June 2013 in Brazil, when the FIFA Confederations Cup was taking place, will be the prime example for this purpose. This case will not only empirically allow broadening the scope of the discussion of the concept of constitutional moments but also provide a rich debate over the endurance of a democratic system when it has to face such challenges. The analysis will, however, not be limited to those popular protests. In fact, although June 2013 is paradigmatic when it comes to the configuration of mass protests that strongly have an effect on constitutional and political institutions, some significant associations with other popular uprisings worldwide are possible. The question is: Why has the constitutional literature interpreted those mass protests as if they were not constitutional moments?<sup>239</sup> With this question in mind, ultimately, my goal is to reveal how both the concept of constitutional moments and the debate over the endurance of constitutional democracies are closely intertwined. As for the seeds of change, my argument will reveal that those events are indeed

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237. See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003); see also VERMEULE, *supra* note 18; Marcus André Melo, *Institutional Design, Normative Political Theory and Accountability*, 1 REVISTA DIREITOGV 195, 195 (2005) (“[T]he link between institutional design and accountability, with a focus on the normative assumptions of current views about this link.”).

238. See Tushnet, *supra* note 37, at 855.

239. See *supra* Part II.A.

constitutional moments and play a special role in the very endurance of constitutional democracies.

*B. The Popular Protests of 2013 in a Comparative Perspective: When Constitutional Moments Face the Systemic Analysis*

In June 2013, Brazil was faced with an interesting but intriguing phenomenon. During the FIFA Confederations Cup that June, more than one million people thronged the streets of many cities all over the country with a wide variety of grievances and agendas.<sup>240</sup> Mass protests became suddenly a routine without any leadership or specific demand. The amorphous and diffuse agendas, many clearly aimed at cross-purposes, dominated the scenario, from calls for justice for oppressed social groups to banning gay marriage; from specific claims such as the hike in bus fares to generalities like traditional politics or corruption.<sup>241</sup> The social catharsis caught the attention of many in Brazil and different parts of the globe by surprise and rapidly came under the spotlight from the international media. Many that viewed Brazil as a relevant example of a rising democracy that has born good fruits in the last decades and that has achieved many goals virtually unthinkable before were intrigued by the phenomenon.<sup>242</sup>

The moment was also very sensible: the matches of the FIFA Confederations Cup were just happening while the streets outside the stadiums were thronged with thousands of people from everywhere.<sup>243</sup> Violence naturally erupted in many circumstances and the police reaction, with rubber bullets and tear gas to scatter the crowd, was disastrous, especially in the beginning of those movements.<sup>244</sup> All this mixture of social catharsis, violence, and the FIFA Confederations Cup was explosive. In the beginning, it was the hike in public transport fares that caused it, but in the end, the general agenda prevailed.<sup>245</sup> Corruption, human rights in general, the political system, decrying inflation, poor allocation of public funds, privatization of government services, all different agendas were raised, many of them conflicting with

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240. See Prada, *supra* note 191; see also Sibaja, *supra* note 103.

241. See Benvindo, *supra* note 6.

242. See Prada, *supra* note 191.

243. See *id.*

244. *Id.*

245. *Id.*; see also Sibaja, *supra* note 103.

each other.<sup>246</sup> The *New York Times* argued that “Brazil now seems to be pivoting toward a new phase of interaction between demonstrators and political leaders with its wave of protests,”<sup>247</sup> and many saw in those demonstrations the sign of a new political culture in Brazil, with new actors and new demands for rights.<sup>248</sup>

Nevertheless, the outcomes of those mass protests might have been rather disappointing. Although some political leaders immediately attempted to respond to those protests, nothing structural seems to have changed at first sight. President Dilma Roussef rapidly claimed on national television the need of a “fast track” procedure of constitutional amendment with a previous plebiscite for the purpose of promoting a political reform.<sup>249</sup> But this proposal failed. In the beginning, Congress reacted by saying that a plebiscite would not be possible for the complexity of the subject and that it would be best to have a referendum instead.<sup>250</sup> Then, as things calmed down, the idea just disappeared for a while from the public debate. After Dilma Roussef’s reelection in 2014, one of her agendas is political reform.<sup>251</sup> Although this proposal has lost steam since her election, the idea of a plebiscite and possibly through a sort of “fast track” procedure of constitutional amendment could naturally come up again. Still, her second term has just begun, and reactions against this agenda are already noticeable.<sup>252</sup> Especially with a Congress more conservative than the previous one, which is a paradox after those mass protests,<sup>253</sup> and amid a political turmoil,<sup>254</sup> there is little

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246. See Prada, *supra* note 191.

247. Simon Romero, *Thousands Gather for Protests in Brazil’s Largest Cities*, N.Y. TIMES, June 18, 2013, at A5, <http://www.nytimes.com/2013/06/18/world/americas/thousands-gather-for-protests-in-brazils-largest-cities.html> [<https://perma.cc/GDC8-MXMM>].

248. See Ilse Scherer-Warren, *Manifestações de Rua no Brasil 2013: Encontros e Desencontros na Política* [*Street Demonstrations in Brazil 2013: Matches and Mismatches in Politics*], 27 CADERNO CRH 417, 418 (2014) (indicating the pluralism of the social movements in the those mass protests); André Singer, *Brasil, Junho de 2013, Classes e Ideologias Cruzadas* [*Brazil, June 2013, Classes and Cross-Ideologies*], 97 NOVOS ESTUDOS CEBRAP 23 (2013) (arguing that those protests derive, among other reasons, from the “traditional middle class grievances with several aspects of the national reality”).

249. See Benvindo, *supra* note 6.

250. See Boadle, *supra* note 191.

251. See Fernanda Krakovics et al., *Congresso já Reage à Ideia de um Plebiscito Proposto por Dilma* [*Congress Already Reacts to the Idea of a Plebiscite as Suggested by Dilma*], O GLOBO (Oct. 29, 2014), <http://oglobo.globo.com/brasil/congresso-ja-reage-ideia-de-plebiscito-proposto-por-dilma-14381463> [<https://perma.cc/F8RP-WP3R>].

252. *Id.*

253. See Benvindo, *supra* note 6.

chance of success in this matter.<sup>255</sup>

The mass protests of 2013, even though being regarded as an expression of democracy and social participation, were thereby beaten by the structural reality of Brazilian political institutions. In addition, signs of the strategic behavior of the elites to capitalize on that moment, promoting their agendas, were after all largely present.<sup>256</sup> As those movements moved forward, the shift from a specific claim, such as the canceling of bus-fare increases to a generalized, diffuse, and unfocused one, strongly encouraged by the press and the new media, made those movements easily ripe for co-option. That environment of social catharsis validated any claims, and consequently, the elites could seize control of the movement in general while reaffirming their traditional values.<sup>257</sup> It is no wonder that, right after those events, the following elections of the Brazilian Congress in 2014 were characterized by the expansion of the conservative right.<sup>258</sup> The new Congress elected could observe an increase of congressmen from military, religious, rural, and other typically conservative groups in an incomparable proportion with any other period since the transition to democracy.<sup>259</sup> The elites, although threatened by these movements, could thereby keep untouched or even expand their power and influence.<sup>260</sup>

Those mass protests of June 2013 represent a perfect configuration of a type of popular uprising with paradoxical outcomes, not seemingly affecting constitutionalism as deep as it should to be qualified as a constitutional moment. Still, the Brazilian example is just one among many. History is full of examples of popular demonstrations whose immediate outcomes fell short of expectations, even though in the middle to long run they might have engendered some relevant changes. This is particularly true when it comes to elections, for example. In

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254. See Simon Romero, *Brazil's President, Dilma Rouseff, Faces Prospect of Impeachment*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/world/americas/brazil-president-faces-prospect-of-impeachment.html> [https://perma.cc/4NDK-GXPV]; see also Juliano Zaiden Benvindo, *Why Impeachment? Brazilian Democracy Revisited*, INT'L J. CONST. L. BLOG (Aug. 28, 2015), <http://www.iconnectblog.com/2015/08/why-impeachment-brazilian-democracy-revisited/> [https://perma.cc/3467-23AT].

255. See Benvindo, *supra* note 6.

256. *Id.*

257. *Id.*

258. *Id.* (discussing how after protests, the elections that follow are typically more conservative).

259. *Id.*

260. *Id.*

1968, de Gaulle and his right-wing coalition won a landslide victory in the French Parliament after the famous mass demonstrations that May.<sup>261</sup> Although one could argue that those events “transformed the popular image of socialism in France,”<sup>262</sup> it also proved that, notwithstanding the spontaneity and the good ideas of those protests, in the end, de Gaulle was able enough to circumvent the opposition and guarantee his victory.<sup>263</sup> One could even argue that those protests “produced few coherent policy proposals, left a disorganized and almost-collapsed movement in its wake, and led to an enlarged conservative majority and a dispirited and divided opposition[.]”<sup>264</sup> A window for reform was nonetheless open but only when that wave of protests died down and some bargaining with the conservative reformists took place.<sup>265</sup>

In the United States, despite the economic meltdown in 2007–2008 and many protests such as Occupy Wall Street in 2011 in the streets of New York and other American cities, the aftereffects of those events were also paradoxical. As a movement characterized by “*radical* politics of inclusion”<sup>266</sup> and a “form of living constitution in itself”<sup>267</sup> that challenges how traditional social movements behave,<sup>268</sup> its potential to create a *momentum* for change is noticeable. However, even though its

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261. See ANDRÉ BARJONET, *LA RÉVOLUTION TRAHIE DE 1968* [THE BETRAYED REVOLUTION OF 1968] (1968); ANDREW FEENBERG & JIM FREEDMAN, *WHEN POETRY RULED THE STREETS: THE FRENCH MAY EVENTS OF 1968* (2001); Serge Berstein, *1968–1969: Une Nouvelle Trahison des Élités?* [1968–1969: A New Treason of the Elites?], in DE GAULLE ET LES ÉLITES [DE GAULLE AND THE ELITES] 300, 300–15 (Serge Berstein et al. eds., 2008).

262. See Douglas Kellner, *Foreword* to FEENBERG & FREEDMAN, *supra* note 261, at xxi.

263. See *id.* at xvii.

264. Sidney Tarrow, *Social Protests and Policy Reform: May 1968 and the Loi d’Orientation in France*, 25 COMP. POL. STUD. 579, 581 (1993).

265. See *id.* at 599 (arguing, particularly with regard to the French educational reform of 1968, that those protests, if not able to yield significant reforms, could help them happen as long as some “well-placed reformists . . . turn[ed] the impetus for change into concrete proposals and pilot[ed] them through the political process”).

266. Manissa McCleave Maharawal, *Occupy Wall Street and a Radical Politics of Inclusion*, 54 SOC. Q. 177, 180 (2013) (emphasis in original).

267. Simon Thorpe, *Rights, Constitution and Radical Democracy in Occupy Wall Street and Occupy London*, 1 BIRKBECK L. REV. 225, 228 (2013).

268. See *id.* at 227 (“Occupy poses a particular challenge to mainstream traditions of political and social movements.”).



demands were raised in the very process of building consensus,<sup>269</sup> and its core slogan—“We are the 99%”—pointed to general claims against inequality and injustice,<sup>270</sup> those protests were also followed by a conservative backlash. The subsequent American congressional elections were marked by the growth of polarization between Republicans and Democrats.<sup>271</sup> There was also the expansion of right-wing political groups connected to movements such as the Tea Party,<sup>272</sup> which also took advantage of the public ire over Wall Street in order to defend a radical program of fiscal austerity and expand the attacks over marginalized groups and minorities.<sup>273</sup> On the other hand, whether inspired or not by those protests, President Barack Obama’s administration has made some moves to lessen income and social inequality, despite this increase in political polarization.<sup>274</sup>

Also in 2011, Spain underwent a right-wing takeover of its Parliament<sup>275</sup> despite thousands of students—the “*Indignados*”—

269. See *id.* at 254 (claiming that “the slow, steady, disalienating process of consensus that would eventually formulate demands, if that was the wish of the assembly, was successfully framed as a power” against the need of a specific agenda).

270. See Sarah Kunstler, *The Right to Occupy — Occupy Wall Street and the First Amendment*, 39 *FORDHAM URB. L. J.* 989, 990 (2012).

271. Thomas Carsey & Geoffrey Layman, *Our Politics Is Polarized on More Issues Than Ever Before*, *WASH. POST* (Jan. 17, 2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/17/our-politics-is-polarized-on-more-issues-than-ever-before/> [<https://perma.cc/A9G8-JUJY>].

272. See Peter Dreier, *Occupy Wall Street and the Tea Party*, *HUFFINGTON POST* (Oct. 21, 2011, 5:04 PM), [http://www.huffingtonpost.com/peter-dreier/occupy-wall-street-and-the-1\\_b\\_1025828.html](http://www.huffingtonpost.com/peter-dreier/occupy-wall-street-and-the-1_b_1025828.html) [<https://perma.cc/G7QY-ZEVD>]; see also David Lawder, *On Anniversary, Tea Party Vows to Move U.S. Congress to Right*, *REUTERS*, Feb. 27, 2014, 7:46 PM, <http://www.reuters.com/article/2014/02/28/us-usa-politics-teaparty-idUSBREA1R01G20140228> [<https://perma.cc/9AUM-B3YB>].

273. See Jeffrey Juris & Maple Razsa, *Occupy, Anthropology, and the 2011 Global Uprisings*, *CULTURAL ANTHROPOLOGY* (July 27, 2012), <http://www.culanth.org/fieldsights/63-occupy-anthropology-and-the-2011-global-uprisings> [<https://perma.cc/VS4W-YKCE>].

274. See Paul Krugman, *Elections Have Consequences*, *N.Y. TIMES* (Jan. 4, 2016), [http://www.nytimes.com/2016/01/04/opinion/elections-have-consequences.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&\\_r=0](http://www.nytimes.com/2016/01/04/opinion/elections-have-consequences.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0) [<https://perma.cc/5UGF-B3PN>].

275. The 2011 general elections kept the two party-system virtually untouched and expanded the power of the right-wing *Partido Popular* (PP) of the Prime-Minister Mariano Rajoy. The right-wing *Partido Popular* (PP) won 186 seats, and the left-wing *Partido Socialista Obrero Español* (PSOE) won 110 seats (out of 350 seats). See José Manuel Romero, *Rajoy Supera Hasta la Marca de Aznar [Rajoy Even Surpasses Aznar’s Mark]*, *EL PAIS* (Nov. 21, 2011, 01:05 AM), [http://politica.elpais.com/politica/2011/11/20/actualidad/1321813632\\_531207.html](http://politica.elpais.com/politica/2011/11/20/actualidad/1321813632_531207.html) [<https://perma.cc/HBX9-58KG>].

protesting against the economic crisis.<sup>276</sup> Like Occupy Wall Street, the “*Indignados*” started as a “collective political practice[] testing forms of non-representationist democracy . . .”<sup>277</sup> Amid a serious economic crisis and a discredited political system, the movement rapidly gained momentum with thousands of people thronging the streets of many cities in Spain,<sup>278</sup> providing a very interesting example of expressive popular response through a “broad frame of ‘real democracy’ within social networks.”<sup>279</sup> After it had dispersed, this movement started building some solidarity networks and setting up mechanisms of direct participation, such as neighborhood assemblies.<sup>280</sup> Yet, as it happened with the Occupy Wall Street movement, some doubts were raised about whether the “*indignados*” could effectively transform the “abstract and purely political notions of ‘real democracy’”<sup>281</sup> into practice by politically institutionalizing its various agendas.<sup>282</sup> In this case, albeit the immediate paradoxical outcome of those protests, the “*indignados*” movement may have been more successful in the medium-long term. The 2015 general elections, unlike the previous one, substantially changed the political landscape. The longstanding two-party system was clearly affected by the growth of the “new politics”<sup>283</sup> represented by the parties *Ciudadanos* and, above all, *Podemos*, a structured political organization originated from the “*indignados*” movement.<sup>284</sup> This

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276. See Eva Anduiza et al., *Mobilization Through Online Social Networks: The Political Protest of the Indignados in Spain*, 17 INFO. COMM. & SOC’Y. 750, 750–64 (2014); Greig Charnock et al., *¡Indignate!: The 2011 Popular Protests and the Limits to Democracy in Spain*, 36 CAPITAL & CLASS 3, 3–11 (2011).

277. Isabell Lorey, *The 2011 Occupy Movements: Rancière and the Crisis of Democracy*, 31 THEORY CULTURE & SOC’Y 43, 43 (2014).

278. See John Postill, *Democracy in an Age of Viral Reality: A Media Epidemiography of Spain’s Indignados Movement*, 15 ETHNOGRAPHY 51, 54 (2013) (showing the demographic explosion that happened during those events).

279. Anduiza, *supra* note 276, at 762.

280. See Lorey, *supra* note 277, at 47.

281. Charnock, *supra* note 276, at 9.

282. See Anduiza, *supra* note 276, at 762 (questioning whether “these loose networks of organizations and individual participants will be able to uphold their momentum, articulate specific demands and continue to influence the political agenda”).

283. See Marcos Nobre, *Laboratório Espanha [Laboratory Spain]*, VALOR ECONÔMICO (Jan. 18, 2016, 5:00 AM), <http://www.valor.com.br/politica/4396408/laboratorio-espanha> [<https://perma.cc/P5HM-J864>] (mentioning that, in Spain, there is a visible battle between the “old” and the “new” politics).

284. *The Ciudadanos* won 40 seats and the *Podemos* won 69 seats, while the established parties *Partido Popular* (PP) won 123 seats (down from 186 seats) and the *Partido Socialista Obrero Español* (PSOE) won 90 seats (down from 110 seats). See Raphael Minder, *Governing Party in Spain Loses Majority in Parliamentary Election*, N.Y. TIMES (Dec. 20,

outcome has certainly upset the balance of power, and now the main challenge has been how to harmonize these “new politics” own conflicting agendas, keep its multiple groups following a coherent political platform,<sup>285</sup> and negotiate its claims with a still strong “old” politics.

Therefore, these examples show that, although the links between mass protests and subsequent political changes in democracies have been much discussed by legal scholars and political scientists,<sup>286</sup> one cannot overlook their immediate paradoxical outcomes and their effective impacts on constitutionalism. After all, these moments, now prosaically construed, can engender distinct arrangements in the very structure of constitutionalism and its institutions.<sup>287</sup>

For example, in a systemic viewpoint according to which individual interactions may not necessarily correspond to how institutions and, even more broadly, constitutionalism behave, this paradoxical outcome is what may effectively change the constitutional reality.<sup>288</sup> Perhaps it can be this strategic behavior of the elites combined with other opposite radical actions of distinct social groups that provides some gains and benefits both at the institutional and constitutional levels. Perhaps, without this pluralism of positions, institutional constraints and constitutional thresholds would be much more fragile and flexible to adapt to the interests of a specific group. In the specific case of those mass protests of June 2013, paradoxically or not, despite congressmen defending their very political interests and, therefore, acting against the idea of a “fast track” procedure for constitutional amendment, in the

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2015), <http://www.nytimes.com/2015/12/21/world/europe/spain-election-rajoy-citizens-podemos.html> [<https://perma.cc/A2KD-NHGD>].

285. See Nobre, *supra* note 283.

286. See Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF. 2 (2011); Mohamed A. Arafa, *Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup d'État?*, 24 IND. INT'L & COMP. L. REV. 859 (2014) (discussing the mass protests of June 30, 2013, in Egypt); Jack A. Goldstone, *Understanding the Revolutions of 2011: Weakness and Resilience in Middle Eastern Autocracies*, 90 FOREIGN AFF. 8 (2011); Wolfgang Rüdiger & Georgios Karyotis, *Who Protests in Greece? Mass Opposition to Austerity*, 44 BRIT. J. POL. SCI. 487 (2014); Alfredo Saad-Filho, *Mass Protests Under 'Left Neoliberalism': Brazil, June-July 2013*, 39 CRITICAL SOC. 657 (2013) (examining the protests of June 2013 in Brazil and how they affect the Brazilian democracy).

287. See *supra* Part II.

288. See VERMEULE, *supra* note 18, at 27 (“[I]nteraction among institutions itself creates a system at the second level, one which may have very different properties than the institutions that compose it. Hence constitutionalism is a system of systems.”).

end, this can lead to the need of following the rules of the game and of a much greater debate over the so-desired changes, which, in turn, would exactly correspond to what is expected, at a constitutional level, for a constitutional amendment.<sup>289</sup> A similar analogy can be drawn from the other popular protests discussed above, and in fact some of the so-expected changes that have become reality might have stemmed from a greater coordination of plural interests. Interactions, some controversial at the individual level, may yield coherence and consistency at the institutional level, whose interactions can or cannot bring about similar effects at the constitutional level.<sup>290</sup>

This argument leads us to the conclusion that what is at stake is the very paradoxical nature of the negotiation between constitutionalism and democracy, and how pluralism plays a special role in paving the ground for strengthening constitutionalism and its institutions. Those movements such as the Brazilian mass protests of June 2013, the demonstrations of May 1968 in France, Occupy Wall Street in New York in 2011, the “*Indignados*” in Spain in 2011, can be a clear sign of this increasing pluralism that might engender, in the long term, unpredictable results. For the way interactions will take place varies constantly, and the results, if apparently frustrating at first sight, might engender positive outcomes in a broader dimension of systemic analysis. The constitution, as a form of precommitment, will be followed and changed by distinct prosaic factors, many of them stemming from strategic behavior of the elites and other social groups but also from other forms of interactions taking place at the institutional level. Therefore, people and institutions will work well together, bringing forth the positive effect of the learning curve of democratic life, as long as pluralism at all levels is kept alive. Those protests might not have immediately brought about effective changes in constitutionalism and political institutions. And, as such, they might not be regarded as constitutional moments. Still this argument may give just one side of the story.

*C. The Other Side of the Story: The Matter of Legitimacy and the Matter of Institutional Dialogue with the Citizenry*

If we shift focus, maybe we can tell the other side of the story. True, most of the frustrating outcomes of those social uprisings stem from the

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289. See Albert, *supra* note 165.

290. See VERMEULE, *supra* note 18, at 27.

strategic behavior of political elites. Particularly regarding those Brazilian popular demonstrations of June 2013, the political inertia, especially by congress, was a consequence of a direct strategic intervention of the elites.<sup>291</sup> This is particularly evident when they exploded in an unfocused, leaderless, and generalized way.<sup>292</sup> One could also argue that the disappointing results were also a symptom of a series of factors, such as the contradictory left-wing policy under influence of neoliberalism,<sup>293</sup> the influence of the right-wing media, the unfulfilled expectations even after years of economic growth,<sup>294</sup> and the “atrophy of traditional forms of social representation.”<sup>295</sup> Many of these arguments would validate the idea that those mass protests of June 2013, like the others discussed above, were not constitutional moments at all.<sup>296</sup>

However, if we examine those protests in a systemic and prosaic perspective, the other side of the story emerges. As previously mentioned, during those mass protests of June 2013, there was a huge popular pressure for change, and particularly change in the political system, which is now supported by the government.<sup>297</sup> On the other hand, congress has since then been relatively divided on how these changes should come about.<sup>298</sup> If they support some changes, possibly there are many controversies on how to promote them. For example, the idea of making the change through a sort of “fast track” procedure of constitutional amendment, as the government indicated, has naturally many supporters in congress and in the streets, but as history shows, this might be more difficult than planned.<sup>299</sup> In the end, this pluralistic conflict of opinions might bring about a change in the political system as a result of a stronger dialogue.

Furthermore, those protests, even though not immediately yielding the so-desired outcomes, have naturally showcased how fundamental aspects of democracy, such as freedom of speech and political

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291. See Saad-Filho, *supra* note 286, at 657, 661.

292. See *id.* at 659; Alfredo Saad-Filho *The Mass Protests in Brazil in June-July 2013*, SOCIALIST PROJECT (July 13, 2014), <http://www.globalresearch.ca/the-mass-protests-in-brazil-in-june-july-2013/5342736> [<https://perma.cc/L8FP-BDT8>].

293. See Saad-Filho, *supra* note 286, at 664.

294. See *id.* at 657.

295. See *id.*

296. See *supra* Part III.B.

297. See *supra* Part III.B.

298. See *supra* Part III.B.

299. Benvindo, *supra* note 6.

expression, are vital to the integrity of institutions. They might also have proved that the constitution can serve as a tool for, or impediment to, political change. In other words, they might have revealed the pedagogical value of democracy and constitutionalism, how institutions and individuals behave during periods of crisis, and how history—indeed, constitutional history—is elevated during those moments. These aspects cause effective impacts on how the interactions at all levels take place and can enhance this “performative meaning” constitutional democracy yields over time.

The results of all those protests are obviously unpredictable, for constitutional democracies are continuously challenged and put at risk. Yet, the fact that the matter of legitimacy and the matter of the institutional dialogue with the citizenry has already bore good fruits in Brazil, the odds are that, after those protests, some important changes can happen despite the rigid procedural rules for constitutional amendment. Good signs of this are already visible, such as an increase in policy monitoring mechanisms and accountability and, possibly, the strengthening of the culture of popular mobilization for change.<sup>300</sup> In addition, the Brazilian Supreme Court has also promoted a more active control—sometimes controversially—of political activities, thereby increasing the mechanisms of institutional constraint.<sup>301</sup> Therefore, in such a controversial territory, the results might be a greater level of pluralistic interactions among the distinct institutions and individuals,<sup>302</sup> reinforcing, ultimately, the Brazilian constitutional democracy and strengthening its endurance to face such challenges. Although the elites have somehow seized control of the movement, especially when the diffuse and general agenda gained momentum, and the immediate outcomes were rather frustrating, there were relevant gains and benefits

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300. See generally *id.*

301. See BENVINDO, *supra* note 135, at 83–160; Juliano Zaiden Benvindo, *A “Última Palavra,” o Poder e a História: O Supremo Tribunal Federal e o Discurso de Supremacia no Constitucionalismo Brasileiro* [The “Last Word,” the Power and the History: The Brazilian Supreme Court and the Supremacy Discourse in Brazilian Constitutionalism], 201 REVISTA DE INFORMAÇÃO LEGISLATIVA 71 (2014); Conrado Hübner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT’L L. 449 (2005); Virgílio Afonso da Silva, *Deciding Without Deliberating*, 11 INT’L J. CONST. L. 557 (2013); see also Juliano Zaiden Benvindo, *Institutions Matter: The Brazilian Supreme Court’s Decision on Impeachment*, INT’L CONST. L. BLOG (Dec. 31, 2015), <http://www.iconnectblog.com/2015/12/institutions-matter-the-brazilian-supreme-courts-decisi-on-on-impeachment/> [https://perma.cc/82TQ-VMSL].

302. See VERMEULE, *supra* note 18, at 14–37.

for Brazilian constitutional democracy in a broader perspective. Those mass protests, in many different ways, might have enhanced pluralism in the way interactions take place at all levels.

This is why, if it is to interpret those protests as constitutional moments, they should somehow refine Ackerman's celebratory conception of constitution moments. Those normative criteria do not seem to fully gather the complexities that are usually involved in this equation. In fact, those mass protests of June 2013 as well as the other examples discussed here show the increasing curve of democratic living and captures the "performative meaning" their constitutional histories have provided. In contrast to the argument that they were not constitutional moments because they could not further structural changes in constitutionalism, the opposite conclusion is more likely. In many of them, certainly political bargains kept untouched privileges and interests of the elites and weakened political representation as a clear example of a conservative backlash that contradicts many of their claims. Still, in a systemic analysis, when this characteristic is combined with the increasing democratic curve of popular mobilization and rising pluralism while constitutional democracy has consolidated itself, the outcome can be more democracy and not the other way around.<sup>303</sup> Therefore, those popular protests—and many other moments in-between—are part of a greater process of constitution-making and constitutional living. They are part of this constitutional moment we are still living.

#### IV. CONCLUSION

Bruce Ackerman's theory of constitutional moments, despite its brilliance and impact, misses a deeper appreciation of the nature of mass protests that, while not regarded as the core of a constitutional moment, may serve as a different inflection point for a constitutional democracy. Although being strongly American and based on American history, his theory has transcended that reality. Since its inception, his theory has grown wings and the distinct interpretations the constitutional literature has promoted of his normative criteria have become the paramount to evaluate the occurrence of constitutional moments in distinct realities around the world. Particularly intriguing, though, is that, while evaluating distinct realities as if they could comply with the normative criteria for being qualified as constitutional moments, the constitutional

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303. *Id.*

literature has continuously overlooked the effects and the impacts of mass protests and popular uprisings to the very structure of the concept of constitutional moments.

When those moments are prosaically interpreted and their central arguments are demystified, new perspectives to examine how constitutional reality evolves arise. After all, the “performative meaning” indicates that, albeit the unsurmountable risks of disruption democracies bear, facts of social life like those mass protests may represent an increasing curve of constitutional living and constitutional learning, providing, in the long run, more stability and predictability. Despite their paradoxical outcomes, in a clear opposition to many of their claims, in the long run, perhaps democracy emerges stronger. A possible increase in the capacity of resisting to some threats of disruption and to learn from such challenges can bring about new horizons of how to dialogue with the society and to enhance pluralism.

This is particularly true when we examine the Brazilian case. Those mass protests are nothing other than the consequence of this “performative meaning” that gained vitality over the years of democratic life. The rising pluralism Brazil has experienced since the movements in the late ‘70s against the civil-military dictatorship, and which has echoed in the Constituent Assembly of 1987–1988, in the Constitution, and in popular movements such as those of June 2013, has increasingly reached the institutional level. On the one hand, people are more actively involved in the destiny of Brazil and naturally more conscious of their rights and the mechanisms to protect them. The matter of legitimacy and the matter of institutional dialogue with the citizenry have become, while working well together, the main reason for this constitutional endurance Brazil now achieved. From a learning process that yielded some “empowerment at the grass-roots level” to the “pluralistic distribution of political power,”<sup>304</sup> Brazil, while still much remains to be done, seems to be heading towards a new future.

This may sound overly optimistic. After all, future is uncertain, and changes can rapidly occur in a direction that undermines constitutional democracy and many of those achievements. Perhaps in a few months or years, these achievements may suffer some regression. There is no guarantee here or turnkey solution, and many of our assurances may fall short when push comes to shove. Even so, when we interpret this history by focusing on this prosaic way of political life, by seeing the different

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304. ACEMOGLU & ROBINSON, *supra* note 155, at 460.



moments as relevant but simple moments that cannot hold our future, we do more justice to the complexities and dilemmas of constitutional democracy. If we interpret those moments by looking at those interactions among individuals and among institutions, we can better understand why and how virtuous and self-enhancing practices yield those results that are now challenging our future. The fragility of constitutional democracy is counterbalanced by actions and interactions of individuals and institutions that can generate this “performative meaning” of the constitution that, over time, promotes some stability. With this paradox of fragility and stability of democracy and constitutionalism, history is unveiled and, along with it, its promises, its failures, and its achievements.

Those mass protests are, with this new perspective, constitutional moments, but now prosaically construed. They are the consequence of a much broader phenomenon, which is the very constitutionalism. They derive from a much greater conjunction of different factors that, little by little, strengthened pluralism. They certainly elevate history and made us have “faith in the constitutional project, which is also a faith in its redemption throughout history.”<sup>305</sup> Those mass protests are somehow the continuation of this constitutional project, bringing new challenges and new achievements with the risks therein involved. Still, these are just moments, like any constitutional moment and, as such, full of history, violence, and faith, whereby people build their lives, institutions strengthen their designs, and constitutional democracy faces its inherent paradoxes and dilemmas.

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305. BALKIN, *supra* note 52, at 74.