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## Introduction

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### I. A Guide to this Book

In many<sup>1</sup> democracies, significant constitutional questions – for instance, those about secession, devolution, or joining supranational bodies like the European Union – must be put to a referendum. One reason referendums are used for significant constitutional questions is that democratic constitutions tend to distinguish between those decisions which may be made by politicians, and those which must be made by the people.<sup>2</sup> This distinction between fundamental constitutional decisions, which must be made by the people, and ordinary decisions, which may be made by their representatives (in most cases, elected politicians), is so influential that Tuck argues it is the ‘basic fact of modern politics.’<sup>3</sup> The aims of this book are threefold. First, to demonstrate that Tuck is right. This division of labour between people and politicians is the basic fact of modern constitutional law and politics. Second, to provide support for those challenging the helpfulness of this basic fact. Third, to offer an alternative role for referendums in answering fundamental constitutional questions. Referendums are not ways for voters rather than their representatives to make higher-order decisions. They are better understood as exercises in representative democracy.

While most terms will be defined below, one clarification is required up front: what amounts to a ‘significant’ or ‘fundamental’ constitutional question? This category is contested and will be explained and interrogated in section IV, but the idea is that some fundamental constitutional questions are ‘constitutive’ of constitutions. Galligan, for instance, says constitutive constitutional questions ‘expres[s] democratic sovereignty.’<sup>4</sup> Similarly, Tierney says constitutive constitutional questions

<sup>1</sup> Although, as discussed in section II, not all democracies. Referendums are not part of the amending formulas in, among other places, Belgium, Canada (at the federal level), Indonesia, Malaysia, and the United States of America (at the federal level). Even in these jurisdictions, though, this book will show that referendums have still played influential roles in processes of constitutional change.

<sup>2</sup> This idea can be traced even prior to Roman times. The Romans adapted it from Germanic tribes, and it has persisted even today. M Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave 2014) 3–4.

<sup>3</sup> R Tuck, ‘Democratic Sovereignty and Democratic Government’ in R Bourke and Q Skinner (eds), *Popular Sovereignty in Historical Perspective* (Cambridge University Press 2016) 141.

<sup>4</sup> B Galligan, ‘Amending Constitutions through the Referendum Device’ in M Mendelsohn and A Parkin (eds), *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (Palgrave 2001) 109.

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are those which ‘amend sovereign relations.’<sup>5</sup> These constitutive questions are considered then different because they concern the people’s capacity to create constitutions in the first place. Decisions concern the allocation of authority in a democracy, so, the argument goes, those decisions cannot be made by representatives. The claim is that representatives cannot decide, for instance, to secede from a state or join the European Union. That would be *ultra vires* because representatives never had that power in the first place. Bogdanor explains the *ultra vires* argument by saying: ‘The electorate, it might be said, entrust their MPs as agents with legislative power; but they give them no authority to transfer this power. Such authority, it is natural to suggest, can be obtained only through a specific mandate, that is, a referendum.’<sup>6</sup> This book challenges this argument and does not accept the existence of a category of ‘constitutive’ constitutional question and uses the terms ‘significant’ and ‘fundamental’ interchangeably instead.

To be clear: this book is not arguing for or against the use of referendums. It is only arguing against one reason for holding a referendum on a fundamental constitutional question. The claim that some decisions *must* be made by voters because they cannot be made by representatives is the wrong kind of reason to hold a referendum. There are all kinds of good reasons to hold referendums on important constitutional questions. When decisions are being deeply entrenched, for instance, democracies should do everything they can to get them right. The idea that some decisions *must* be made by the people through referendums, however, is not the right kind of reason to hold a referendum. This book offers an alternative account of the role for referendums in constitutional democracy. On this alternative view, even on the most fundamental questions, the purpose of referendums is to help provide direction to representatives.

This introduction is a reader’s guide to this book. Section II demonstrates that the distinction between decisions that may be made by politicians, and those that must be made by the people, is the ‘basic fact’ of contemporary constitutional law and politics. Section III explains the challenge this book offers to this basic fact. It does so by (i) offering a broad overview of the book; (ii) providing a chapter-by-chapter breakdown of the book’s arguments; and (iii) clarifying the book’s contribution to the literature. Section IV confronts the tricky question of how to define a referendum, and section V explains the book’s scope and methodology. Section V clarifies the terms and conditions of this book: what the book is, and is not, arguing. Finally, section VI situates this research in a global context. It explains the difference this argument makes in constitutional law and practice around the world, and how changing the reasons why referendums are used will improve their use.

<sup>5</sup> S Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’ (2009) 72 MLR 360, 361.

<sup>6</sup> V Bogdanor, *The People and the Party System* (Cambridge University Press 1981) 76–77.

## II. The 'Basic Fact' of Modern Politics

This book is a response to the claim that there are some decisions in democracies which must be made by voters. If voters are the ultimate source of authority in a democracy, so the argument goes, it is conceptually necessary that there are some kinds of decisions they *must* make, instead of these decisions being made by their representatives. This distinction between 'normal' politics and 'constitutional politics',<sup>7</sup> which distinguishes 'the Will of We the People from the act of We the Politician[s]',<sup>8</sup> was not always the central feature of constitutions,<sup>9</sup> but became the dominant approach after the American and French revolutions.<sup>10</sup> The distinction between decisions that legislators can make and decisions that the people must make has been carved up in a range of ways,<sup>11</sup> including<sup>12</sup> by Lawson,<sup>13</sup> Schmitt,<sup>14</sup> and most famously by Locke and Sieyès.

For Locke, the idea motivating this distinction is the idea that the people's ultimate authority is a 'trust that cannot be delegated'.<sup>15</sup> Locke says that '[t]he

<sup>7</sup> 'Constitutional moments differ from ordinary politics both in terms of their significance but also in the way they change how ordinary politics is thereafter conducted.' Tierney (n 5), citing B Ackerman, *We the People, Volume 1: Foundations* (Belknap Press 1993).

<sup>8</sup> '... We need to distinguish constitutional politics from normal politics: "the will of We the People from the act of We the Politician." The two are quite different.' Galligan (n 4) 111.

<sup>9</sup> 'The language of *pouvoir constituant* demands that we distinguish between an older meaning of constitution, as the sum total of political circumstances and the new, revolutionary meaning of constitution as a written text that lays out the competences of government organs and can be changed at will ... distinguishing norm-setting competences from norm-exciting or judicative competences, and extraordinary powers from normal government authorisations.' P Niesen, 'Extinguishing the Burning Embers: Rubinelli on Sieyès' *Verfassungsblog* (19 December 2020), [verfassungsblog.de/extinguishing-the-burning-embers-rubinelli-on-sieyes](https://verfassungsblog.de/extinguishing-the-burning-embers-rubinelli-on-sieyes), accessed 20 January 2021.

<sup>10</sup> 'Constituent power is a modern concept. Its source can certainly be traced to debates in medieval political thought, but it emerges in a distinct form only with the establishment of modern institutions of the state. The concept is a product of the secularizing and rationalizing movement of late eighteenth century European thought known as the Enlightenment and it comes to occupy a central place in constitutional thought only after the late eighteenth century American and French Revolutions.' M Loughlin, 'On Constituent Power' in M Dowdle and M Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017) 151.

<sup>11</sup> Another version of this distinction is the difference between the exercise of sovereignty and the exercise of government. Tuck (n 3) 115. Note too that some scholars such as Rubinelli are sometimes concerned about the conflation of sovereignty and constituent power, but Rubinelli is clear that the version of the distinction drawn by Tuck here does broadly correspond to Sieyès's distinction between constitutive and constituted power. 'The distinction between [constituted and constitutive powers and sovereignty and government] thus enshrines the distinction between political acts establishing the foundations of the state and ordinary legislation.' L Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020) 227.

<sup>12</sup> There is deep disagreement in the literature about how broadly this distinction can be attributed. Lee, for instance, also explores the significance of this kind of distinction to the work of Montesquieu, Madison, and Rousseau. D Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2016) 1.

<sup>13</sup> G Lawson, *Politica Sacra et Civilis* [1660] (ed C Condren, Cambridge University Press 1992) 47.

<sup>14</sup> A democratic constitution, Schmitt says, is the result of the exercise of constituent power by a politically united people. C Schmitt, *Constitutional Theory* [1928] (J Seitzer trs, Duke University Press 2008) 75–85.

<sup>15</sup> J Lenowitz, 'A Trust That Cannot Be Delegated': The Invention of Ratification Referenda' (2015) 109 *American Political Science Review* 803, 806.

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legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.<sup>16</sup> It would therefore be *ultra vires* for representatives to make decisions about the ultimate allocation of authority in a democracy. Representatives never had this power in the first place. Similarly,<sup>17</sup> Sieyès distinguishes between *pouvoir constituant* and *pouvoir constitué*; constitutive and constituted powers, which operate on two levels. The first level is the level of constitutive power, and this first level exists prior to everything and is above the law. On the second level of constituted power, legislatures can act only within the limits laid down by constitutive powers through the constitution.<sup>18</sup> So influential is the approach taken by Sieyès, Tuck argues, that it has become the ‘default constitution’ and ‘basic fact’ of modern politics.<sup>19</sup> Tuck says that in contemporary constitutions: ‘Fundamental laws are prescribed through plebiscites or referendums rather than through representative bodies, and ... the distinction between a sovereign democratic legislator and a representative government is a basic fact of modern politics.’<sup>20</sup>

As a matter of constitutional law, Tuck’s view that the distinction between sovereign democratic legislator and representative bodies is the ‘default constitution’ or ‘basic fact’ of modern politics overstates the point a little. There are some jurisdictions which do not structure their constitutions this way. Referendums are also not required for constitutional change in Belgium<sup>21</sup> or Indonesia,<sup>22</sup> and are not part of the text of any of Canada’s Constitutional amending formulas,<sup>23</sup> but provinces have nevertheless said they would use them in playing their role in changing the constitution.<sup>24</sup> In Canada, referendums have clearly been influential

<sup>16</sup> J Locke, *The Second Treatise of Government* [1689] (Hackett 1980) 141 (emphasis in original).

<sup>17</sup> ‘No type of delegated power can modify the conditions of its delegation.’ E Sieyès, *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (M Sonenscher ed, Hackett 2003) 136.

<sup>18</sup> ‘Sieyès’s idea of constituent power not only refers to a specific way of conceiving popular power but also underpins a precisely defined political project – one in which popular authority is restrictively defined as an authorising power, exercised in two moments. The first is the moment of foundation. It enshrines the authority of the people to create the political order and express itself in the ex ante authorisation of a constitutional text written by extra-ordinary elected representatives. The second corresponds to moments of ordinary politics and reduces popular power to the elections of ordinary representatives authority to act within the limits set by the constitution.’ Rubinelli (n 11) 73.

<sup>19</sup> Tuck (n 3).

<sup>20</sup> *ibid.*

<sup>21</sup> ‘In Belgium, there is no constitutional or even legislative basis for a referendum and a decision-making (legally binding) referendum is considered unconstitutional. A consultative referendum – the constitutionality of which has been strongly disputed – was organised in 1950 further to a specific decision of parliament.’ Venice Commission, ‘Referendums in Europe – An Analysis of the Legal Rules in European States’ (2005) 287/2004, 15, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)034-e), accessed 5 August 2023.

<sup>22</sup> Provisions for national referendums were repealed in Indonesia in 1999. Electoral Knowledge Network, ‘Indonesia’, [aceproject.org/regions-en/countries-and-territories/ID/default?set\\_language=en](http://aceproject.org/regions-en/countries-and-territories/ID/default?set_language=en), accessed 26 October 2023.

<sup>23</sup> ‘The Constitution Act 1982 instituted a new amending formula. It was complex, with five sub-formulae applicable to different matters.’ J Webber, *The Constitution of Canada: A Contextual Analysis* (Hart 2021) 43.

<sup>24</sup> ‘Some provinces adopted statutes requiring referenda prior to their ratification of any constitutional amendments.’ *ibid.* 49.

in the way Tuck outlines: they have become associated with higher-order decisions by the people about fundamental constitutional questions.<sup>25</sup> While the idea that some decisions must be made by representatives is of enormous constitutional importance in the United States, referendums are not required as part of the federal amending formula,<sup>26</sup> although they are employed by more than half of American states.<sup>27</sup> The idea that the 'we the people' are the foundation of the Constitution, however, is enormously influential in the United States,<sup>28</sup> and is incredibly influential throughout the world.<sup>29</sup> This claim that some decisions must be made by voters is thought to follow inexorably from the idea that the people are the ultimate source of authority in a democracy.<sup>30</sup> While Griffiths himself dismissed the helpfulness of the distinction, he argued that this 'nonsense' was clear in the constitutions 'as varied as [those of] China, the Soviet Union and the United States'.<sup>31</sup> Finally, and at a macro-level, the distinction between constitutive and constituted powers has been essential in establishing the general principle of self-determination in international law.<sup>32</sup> It has been used as the standard of success in the context of the European Union law, in trying to find a stronger democratic footing for the supranational body.<sup>33</sup>

This distinction between decisions which may be taken by voters, and those which may be taken by politicians, tracks the distinction between constitutional and ordinary politics. This distinction between constitutional and ordinary

<sup>25</sup> 'In the Charlottetown [constitutional amendment] process ... the federal government agreed to submit the proposal to referenda across the country. These referenda would have no formal role; amendments would still have to be passed by the legislatures, as the constitutional amending formula required. But the principle that the public had to be involved was widely accepted.' *ibid*.

<sup>26</sup> The American Constitution outlines two methods of amendment. Amendments may be proposed either by the Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress after applications from two-thirds of the state legislatures. Constitution of the United States of America, Article V (1787).

<sup>27</sup> National Conference of State Legislatures, 'Initiative and Referendum Processes' (2022), [www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes](http://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes), accessed 22 August 2023.

<sup>28</sup> 'We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.' Constitution of the United States of America (n 26).

<sup>29</sup> L Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 *International Journal of Constitutional Law* 714, 714.

<sup>30</sup> As Loughlin argues in Loughlin (n 10) 151, and is both explained and interrogated in ch 2 of this book.

<sup>31</sup> 'In [the United Kingdom] we have stayed clear of one bit of nonsense which is commonly advanced in countries as diverse as the Chinese People's Republic, the Soviet Union, and the United States of America. I mean the view that sovereignty resides in the people who delegate it to their politicians who hold it in trust for them. I suppose John Locke is to blame for offering this particular cover-up for authoritarianism.' JAG Griffith, 'The Political Constitution\*' (1979) 42 *Modern Law Review* 1, 3.

<sup>32</sup> R Miller, 'Self-Determination in International Law and the Demise of Democracy' (2003) 41 *Columbia Journal of Transnational Law* 601, 605.

<sup>33</sup> 'Citizens [in the European Union] are mostly relegated to the role of passive observers. To capture the legitimacy gap that opens up here, I have proposed an understanding of constituent power as political autonomy at the level of constitutional politics.' M Patberg, *Constituent Power in the European Union* (Oxford University Press 2020) 215 and discussed at S Verdugo, 'Is it Time to Abandon the Theory of Constituent Power?' (2003) 21 *International Journal of Constitutional Law* 14, 15.

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politics itself tracks the deeper distinction between direct and representative democracy.<sup>34</sup> Those who argue that some decisions must be made by the people argue that those kinds of referendums are instances of direct democracy.<sup>35</sup> They must be direct because some kinds of decisions cannot be made by representatives. The idea behind referendums as representative democracy is that no decisions, no matter how fundamental, can ever be made by voters *directly*, *instead* of by representatives.

This is all to say: the distinction between decisions which must be made by voters, and those which must be made by politicians, comes in different forms, but it is enormously influential both in theory and in law all over the world. This distinction between decisions made by the people and decisions made by politicians tracks other distinctions between constitutional and ordinary politics, and direct and representative democracy. This book argues, however, that it can *both* be the case that the people are the ultimate source of authority in a democracy and that there is no clear division of labour between decisions the people must make, and decisions representatives may make. The book supports accounts of democracy on which the decision-making processes of voters and representatives are inseparable, even on fundamental constitutional questions.

### III. An Alternative: Referendums as Representative Democracy

This book puts forward an alternative conception of referendums. This section introduces this alternative conception of referendums, and its normative rationale, in three steps. First, it offers an overview of the arguments made in this book and anticipates some concerns with the approach the book takes. Second, it outlines a chapter by-chapter breakdown of how the book is developed. Third, it clarifies the contribution this book is making to the literature.

#### A. Referendums as Representative Democracy: An Overview

This book has two parts. The first part of the book makes negative arguments. It argues that the way that referendums are currently understood in contemporary constitutional law, as exercises in direct democracy, is misleading. The second,

<sup>34</sup> 'At the first-order level of ordinary legislation, politicians and political institutions represent the people functionally in terms of will-formation and expression. And at the constitutional level ... the institutions of the constitution come to represent the people in acts of will-formation and expression when the constitution is amended by institutions in place of and in the name of the people.' Tierney (n 5) 367.

<sup>35</sup> 'This supplanting of representative constitutionalism is a very different function from that performed by ordinary referendums.' *ibid* 361.

positive part of the book puts forward an alternative conception of referendums as exercises in representative democracy. The book concludes by demonstrating how the arguments made in this book matter, and why they can make a difference to the use of referendums around the world.

Two broad concerns might be raised with the thrust of this book. First, that it takes the status quo too literally. The claim that decisions are made by voters rather than by representatives, it might be argued, is a figurative claim, not a literal one. It is a useful, or perhaps rhetorical, fiction which is used to justify democracies.<sup>36</sup> While it is certainly true that the claim might be mythical or normative, the aim of this book is to argue that the myth that decisions are made by voters rather than by representatives is misleading as well. The claim that democracy has two tracks – one for voters on higher-order decisions and one for politicians on quotidian questions – is not a helpful idea around which to orient constitutions. Constitutions are weaker for adopting this approach. This response connects to the second possible worry regarding the thrust of this book: what does it mean to make a constitution stronger? Crucially, this book is not arguing that constitutions are stronger when voters are less involved. The point of this book is not to argue against referendums, or public participation in constitution-making. The point of the book is also emphatically not to constrain the disruptive power voters may have when they participate in constitution-making. Rather, the point of this book is that while it may appear superficially emancipatory to say fundamental constitutional decisions must be made by voters through referendums, this appearance is misleading. The ‘basic fact’ or ‘default approach’ to constitutions instead constricts voters, limiting the influence over constitutions to exceptional constitutional moments. The point of advocating referendums as representative democracy is to demonstrate the many ways voters shape their constitutions.

## B. Chapter Summaries

Chapter two explains why distinguishing between decisions which must be made by voters, and those which may be made by politicians, is an unnecessary and unhelpful false choice for democracies to make. It labels this approach ‘two-track democracy’ and argues that this unhelpful approach follows from three deeper misunderstandings about democratic constitutionalism. First, two-track democracy treats constitutions as principally textual, suggesting that authority can be clearly delineated in democracies. Second, the division of labour between people and politicians rests on a view of legitimate authority grounded in the social contract, where voters delegate some powers to representatives on a limited basis but reserve others. Third and finally, two-track democracy rests on an agential

<sup>36</sup> Verdugo (n 33) 15.



approach to constitutional authorship, and the chapter puts forward the counter-argument that the idea of constitutional authorship is itself unhelpful.

Chapter three then shifts the book's focus away from democracy in general to referendums. The chapter shows why, even if democracy did require decisions to be made by voters instead of representatives, referendums could not play such a role. It breaks down the claim that in democracies voters must make decisions instead of representatives into parts: *the people* in a democracy, *come together to make decisions, instead of representatives* and challenges each part of the claim in turn. It argues that the people are not the right kind of group, and voting not the right kind of practice, where voters, rather than representatives, can make decisions. The chapter focuses particularly on the relationship between decisions and choices, showing that voting is at most a choice that voters make, but decisions require actions taken by representatives. In this way, actions to create, amend, and transform constitutions are multi-stage processes which necessarily engage both voters and their representatives.

Chapter four kicks off the second, positive part of the book. It offers a positive alternative view of referendums as representative democracy. It explains the claims and commitments of the idea that referendums are instances of representative democracy. The most controversial of these claims are that (i) referendums are not distinct from elections, (ii) they are not overriding and are instead (iii) processes of negotiation with representatives. The chapter also demonstrates the benefits of understanding referendums as representative democracy, both normatively and practically, and how these normative and practical differences make an impact on the law.

Since the purpose of this book is to argue against elections being held for the wrong kinds of reasons, chapter four explains what are the right kind of reasons to hold referendums. It argues that the reasons to hold referendums are issue and jurisdiction-dependent but identifies three broad reasons why referendums might be held: (i) outcomes are being entrenched; (ii) the divisiveness of questions; and (iii) issues arising between elections. Chapter four also clarifies further wrong reasons to hold referendums. It argues that voter ignorance, or the claim that political choices cannot be binary, are unhelpful reasons to hold referendums. Indeed, when referendums are understood to be exercises in representative democracy it is possible to respond to a range of arguments against their use, and to integrate both their liberal and their populist tendencies.

Chapter five begins to put the ideas advocated here into practice. It outlines what the principles are for the use of referendums in practice. It emphasises the importance of, *inter alia*, supermajority requirements, referendums as approving rather than initiating constitutional change, and engaging voters in referendums beyond the voting stage(s). The aim of these principles is to understand referendums as ongoing stages of contestation and negotiation with representatives of all kinds, both elected and in citizens' assemblies. These principles will have different applications in different contexts, and they are illustrative rather than exhaustive, but they do establish a general framework for what it means to use referendums

successfully in a constitutional context. Chapter five also argues for two, minimal success conditions for referendums. First, referendums must help to address disagreement. Second, they should provide those who do not support the substance of the outcome a reason to nevertheless accept it. Chapter six argues for the value of the principles outlined in chapter five through three case studies: the referendum in the United Kingdom on whether to leave the European Union (Brexit), the referendum in Northern Ireland on whether to support the Belfast/Good Friday Agreement, and the referendum in Chile on the constitutional process of reform. These case studies demonstrate how the principles outlined in chapter six improve the use of referendums in practice.

The final chapter, chapter seven, situates the arguments made here in contemporary and global context, particularly debates about liberalism and populism. It argues that referendums are not going away, and neither is representative democracy, and so it is necessary to find a way to reconcile the use of referendums with other principles of representative democracy. Crucially, democracy requires heeding both counter-majoritarian and majoritarian considerations. The alternative view of referendums put forward here is about integrating both the counter-majoritarian and majoritarian parts of democracy into their use. This integration both strengthens the normative case for the use of referendums and improves their use in practice.

## C. Contribution to the Literature

To clarify this book's contribution to the literature is, this section will first clarify what the book's contribution to the literature is not. This is not the first book to argue that referendums are not directly democratic. This argument was made, for instance, by Schmitt who argued that the agenda-setting power of elites was inescapable.<sup>37</sup> Normatively, Dicey argued that referendums are used to best effect when understood as 'the people's veto' and so he did not suggest a role for referendums as bypassing representatives.<sup>38</sup> In addition to these influential texts, there is also a growing contemporary literature challenging the plausibility of the term 'direct' democracy,<sup>39</sup> and Altman has long argued persuasively that the distinction

<sup>37</sup> 'The question [in a referendum] can only be posed from above; the answer only comes from below.' C Schmitt, *Legality and Legitimacy* [1932] (J Seitzer trs, Duke University Press 2004) 90.

<sup>38</sup> Dicey argued that the United Kingdom should introduce the referendum to prevent the government from instructing a majority in Parliament to push through changes that '[did] not command the sanction of electors'. AV Dicey, *Introduction to the Study of the Law of the Constitution* [1915] (RE Michener ed, 8th rev edn, Liberty Fund 1982) cix.

<sup>39</sup> R Van Crombrugge, 'Are Referendums Necessarily Populist? Countering the Populist Interpretation of Referendums through Institutional Design' (2020) 56 *Representation* 109 and A el-Wakil and S McKay, 'Disentangling Referendums and Direct Democracy: A Defence of the Systemic Approach to Popular Vote Processes' (2020) 56 *Representation* 449.

between representative and direct democracy is oversimplistic.<sup>40</sup> This book is also not novel in arguing that democracy is inherently representative. This book builds on work by Urbinati,<sup>41</sup> Plotke,<sup>42</sup> and Young<sup>43</sup> who all (to different degrees) make this kind of claim. All this literature is significant, and the book draws on it extensively.

While this book draws on a familiar dissatisfaction with the term ‘direct democracy’, it nevertheless makes a distinct contribution to literature. The contribution here is distinct in two ways. First, the focus here is on referendums on fundamental constitutional issues. These referendums, which are argued to be held because certain decisions cannot be made by representatives, present distinct questions about direct democracy. These claims have existential implications for democratic constitutions. Second, the focus of this book is normative rather than descriptive. The aim is to argue why, as a normative matter, it is better to understand referendums on constitutional issues as exercises in representative democracy, and to understand the implications of this shift for constitutional democracy. The idea that some decisions must be made by the people instead of representatives is fundamental to contemporary democracy, and letting it go has significant implications for constitutional law and theory.

This book is also not alone in challenging the conceptual necessity for referendums in processes of constitutional change. Lenowitz rightly argues that ratification is not required for constitutional change although, as seen in chapter four, both his reasoning and conclusions are very different from those in this book.<sup>44</sup> This book is also not the only work to challenge the helpfulness of distinguishing between constitutive and constituted powers. While his focus is on constituent power itself, Verdugo effectively and persuasively challenges the idea of constituent power<sup>45</sup> and offers a useful survey of many other challenges to the concept as well.<sup>46</sup> Finally, there is a general liberal challenge to the helpfulness of referendums on the basis that they undermine representative democracy.<sup>47</sup> This book draws on some of this reasoning but does not accept the conclusion that referendums are undemocratic or illiberal. It also does not accept that all the populist tendencies of referendums

<sup>40</sup> This is the argument across D Altman, *Direct Democracy Worldwide* (Cambridge University Press 2011) and D Altman, *Citizenship and Contemporary Direct Democracy* (Cambridge University Press 2018).

<sup>41</sup> ‘My intention is not to put into question the normative value of direct participation but to argue for the relevance of representation.’ N Urbinati, ‘Representation as Advocacy: A Study of Democratic Deliberation’ (2000) 28 *Political Theory* 758, 759.

<sup>42</sup> ‘Democratic politics is *constituted* partly through representation.’ D Plotke, ‘Representation Is Democracy’ (1997) 4 *Constellations* 31 (emphasis in original).

<sup>43</sup> ‘Political representation is both necessary and desirable.’ IM Young, ‘Deferring Group Representation’ (1997) 39 *Nomos* 349–76.

<sup>44</sup> J Lenowitz, *Constitutional Ratification Without Reason* (Oxford University Press 2022).

<sup>45</sup> Verdugo (n 33) 20.

<sup>46</sup> Citing Kelsen, Arendt, Dyzenhaus, Jackson, Vinx, Comella, Landau, Hasebe, and Duke. *ibid* 18.

<sup>47</sup> J Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Perseus 2000).

are unwelcome. The book aims to offer a theory of referendums that even liberals who are sceptical of their use can accept, by arguing that the purpose of referendums can never be to get representatives out of the way.

#### IV. What is a Referendum?

This section defines the term ‘referendum’ for purposes of this argument. A referendum is defined by Setälä as ‘a vote by the public on a matter of policy.’<sup>48</sup> This is a broad and popular approach, but it is not universally accepted, and is not consistently used in the literature.<sup>49</sup> Popular votes on matters of policy vary so enormously that it is not always clear what counts as a referendum and what does not. There is, as Suksi rightly says, no universal referendum terminology.<sup>50</sup> It is not clear in the law or literature, for instance, how referendums should be distinguished from plebiscites, which may be undemocratic or have a narrower focus,<sup>51</sup> or from initiatives. Setälä and Qvortrup both take initiatives to be ‘popular votes on laws proposed by citizens,’<sup>52</sup> as opposed to referendums that are proposed by legislatures.<sup>53</sup> Indeed, so inconsistent is the use of the term referendum that Gallagher and Uleri argue it is used to refer to a wide variety of phenomena which bear very little if no resemblance to each other.<sup>54</sup> Similarly, Smith worries that referendums are such a varied phenomenon and that nothing can really be said about referendums in general, and so that no general definition is possible.<sup>55</sup>

To respond to the wide range of ways in which referendums can be used, most books about referendums begin with taxonomies. These taxonomies try to pin down some of these differences between popular votes to bring order to the chaos. Some theorists distinguish, for instance, between law initiating and law controlling

<sup>48</sup> M Setälä, *Referendums and Democratic Government* (Macmillan 1999) 4.

<sup>49</sup> As Altman argues, the confusion is profound. The terms referendums, initiatives, and plebiscites have been used synonymously even within the same piece of legislation. Altman, *Citizenship and Contemporary Direct Democracy* (n 40) 6.

<sup>50</sup> M Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Cambridge University Press 1993) 10.

<sup>51</sup> Setälä (n 48) 3–4; And sometimes the term plebiscite is used to refer to votes just about territorial boundaries: ‘The term plebiscite ... is probably the oldest of the three terms ... general agreement on the distinction between plebiscite and referendum is lacking ... the term plebiscite has been used, – particularly after World War I – to denote popular votes held to solve sovereignty conflicts over territories and boundaries ... However in some countries, the term still has a negative connotation: it generally means something that is not democratic.’ M Gallagher and P Uleri (eds), *The Referendum Experience in Europe* (Macmillan 1996) 3.

<sup>52</sup> Setälä (n 48) 3–4; Qvortrup (n 2) 1.

<sup>53</sup> Qvortrup (n 2) 2.

<sup>54</sup> ‘Referendums “fail to fit any clear universal pattern”’: Gallagher and Uleri (n 51) 2, citing A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries* (Yale University Press 1984) 206.

<sup>55</sup> G Smith, ‘The Functional Properties of the Referendum’ (1976) 4 *European Journal of Political Research* 1.

referendums<sup>56</sup> and (or) constitutional and ordinary referendums.<sup>57</sup> Theorists also distinguish different constitutional roles for referendums: Hollander's recent taxonomy, for example, distinguishes five different ways that referendums are triggered.<sup>58</sup> These distinctions and taxonomies are important and make a difference for evaluating referendums both conceptually and practically. Taxonomies draw attention to differences in the relationships (especially the textual constitutional relationships) between referendums and other democratic processes and institutions. The focus on taxonomies is strength of the literature on referendums and is helpful for identifying and comparing the salient differences between the use of referendums in different jurisdictions.

This book adopts Setälä's definition of a referendum, while taking seriously the limitations flagged by the literature. It treats a referendum as a popular vote on a matter of policy without regard for its subject matter, democratic credentials, or how it is triggered. Setälä's broad approach is taken because, while these distinctions between types of popular votes matter for all kinds of reasons in specific jurisdictions, this book is concerned with the broad justification for holding these kinds of votes. The book will argue that there are features of the relationship between votes and representatives that hold in general, namely that votes cannot be held without mediating processes of representation, and so general claims can be made about referendums as well. This does not mean these taxonomies are irrelevant or unimportant, only that they do not bear on the feature of referendums at issue here. The book also embraces the complexity this sceptical literature emphasises about referendums. This book is not arguing that a general, exhaustive theory of referendums is possible, even for referendums on fundamental constitutional questions. Indeed, the argument here is that the reasons to hold referendum on fundamental constitutional questions cannot be stipulated in general terms. The reasons to hold referendums on fundamental constitutional questions will depend on the context.

One final clarification about the meaning of referendums is required. This book is concerned with one reason to hold one kind of referendum: a referendum on a fundamental constitutional issue. This kind of referendum is conventionally called a 'constitutional' referendum, as opposed to an ordinary referendum. This book does not adopt the terminology of 'constitutional referendum' because the purpose of this book to challenge this concept. The book uses the term 'referendum' interchangeably with 'constitutional referendum' because it argues that there can be no clear category of constitutional referendums distinct from ordinary

<sup>56</sup> Gallagher and Uleri (n 51) 11.

<sup>57</sup> Tierney (n 5) 360; Galligan (n 4) 109.

<sup>58</sup> "This book distinguishes five types of referendums based on who triggers the vote, since this ultimately determines *who controls the referendum process*: (1) legislative majority referendums ... (2) presidential referendums, (3) legislative minority referendums (4) citizen-initiated referendums ... and (5) mandatory referendums (triggered by the constitution)." S Hollander, *The Politics of Referendum Use in European Democracies* (Palgrave Macmillan 2019) 8 (emphasis in original).

referendums. Similarly, this book does not adopt the language of constitutive constitutional questions, or constitutive constitutional referendums, because the whole point of the book is to challenge the existence of this category. It instead uses the terms ‘fundamental’, ‘significant’, or ‘important’ when referring to constitutional matters, precisely because these terms are vague. The objective of chapter two is to demonstrate that it is neither helpful nor possible to carve out a category of decision as ‘constitutive’ decisions that democracy conceptually requires must be made by representatives.

## V. Scope and Methodology

This section outlines the book’s terms and conditions, explaining what it is and is not arguing. It clarifies the tools that will be used to answer questions in this book, and what kinds of questions it seeks to answer in the first place. The primary message of this section is that this is a book in constitutional theory. This is because the book makes normative claims about constitutions. Its focus is on the reasons to hold referendums on fundamental constitutional questions, and the impacts of these reasons on constitutions.

### A. Methodology

While this book seeks to make a constitution to constitutional theory, it draws on many other bodies of literature to do so. Chapters two, three, four, and five invoke ideas from legal and political theory about the nature of democracy, authority, representation, and legal systems. Further, chapters six and seven draw on comparative constitutional law to put forward an account for how referendums should work in practice. In describing how referendums work, chapters two, four, five, and six draw on literature from politics and political science. In chapter three, the book also invokes social choice theory when discussing the nature of voting. Across the book, however, the purpose of invoking this literature is to make a theoretical claim about what kinds of reasons can justify the use of referendums.

### B. Scope

In some ways, the aim of this book is incredibly broad. It makes claims about all referendums on constitutional questions in all jurisdictions, irrespective of constitutional history or what the law says about referendums. It takes this approach even though, plainly, constitutional history and what the law says about referendums make an enormous difference to how referendums are used in different

jurisdictions. This book emphasises that while context makes a huge difference in the reasons to hold referendum, this book argues the idea that some decisions must be made by the people rather than representatives is *always* the wrong kind of reason to hold a referendum. In this way, the arguments made in this book are incredibly narrow. The core thesis is just about one kind of reason to hold one kind of referendum and why that reason conceptually fails and in practice is misleading. Irrespective of jurisdiction, referendums are not exceptional, overriding ways of making decisions. When used that way, they will undermine representative democracy. There is another path forward, where voters constantly control their constitutions, and referendums are part of the picture. That picture plays out differently across jurisdictions, as the case studies in chapter six demonstrate. This book explains the context-dependency of reasons to hold referendums, but also argues in chapters four and five that there are motifs and themes that emerge around the world as well.

### C. A Note about Citizens' Assemblies

In thinking about ways for voters to make decisions instead of representatives doing so, the other clear candidate apart from a referendum is a citizens' assembly.<sup>59</sup> This book is not about citizens' assemblies because, while they are on the rise,<sup>60</sup> they have not become as deeply enshrined in constitutional law and thought as referendums. Many of the arguments made here about how referendums rely on, and cannot be separated from, a broader environment of elected representatives apply to citizens' assemblies as well, but unpacking this is beyond the scope of this book. Some theorists, Sieyès<sup>61</sup> in a classical context and King in a contemporary context,<sup>62</sup> do think that voters' ultimate authority in a democracy can be exercised through constituent assemblies. This book does not attempt to weigh in on that question. It only seeks to show that (i) it is neither possible nor helpful to distinguish between decisions which must be made by voters and those which may be made by representatives; and (ii) that a referendum cannot be a way for voters to make decisions instead of representatives doing so.

<sup>59</sup> Indeed, for Sieyès, this is the appropriate method for the expression of constituent power. Crucially, such a body is not composed of ordinary elected representatives. Rubinelli (n 11).

<sup>60</sup> OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave' (2021), [www.oecd.org/gov/open-government/oecd-deliberative-wave-database-update.pdf](http://www.oecd.org/gov/open-government/oecd-deliberative-wave-database-update.pdf), accessed 25 August 2023.

<sup>61</sup> For Sieyès, 'the people, as holders of constituent power, do not create the constitution themselves but delegate the writing process to extraordinary elected representatives'. Rubinelli (n 11) 57.

<sup>62</sup> 'A constituent assembly is a body – a type of constitutional convention – convened for the particular purpose of drafting or revising a constitution, and which, crucially, has its own legislative authority. Constituent assemblies are there to constitute, not only to deliberate and report.' J King, 'The Democratic Case for a Written Constitution' (2019) 72 *Current Legal Problems* 1, 27.



## VI. Referendums in a Global Context

Referendums are essential legal and political processes. They have been central to three of the most significant legal and political endeavours across the world in the last century: the project of self-determination;<sup>63</sup> the collapse of the Soviet Union;<sup>64</sup> and European integration.<sup>65</sup> Referendums have also been used to ask an enormous range of important questions including questions about conscription,<sup>66</sup> electoral reform,<sup>67</sup> the acceptability of economic bailouts,<sup>68</sup> migration,<sup>69</sup> pension reform,<sup>70</sup> abortion,<sup>71</sup> term limits,<sup>72</sup> annexation of territory,<sup>73</sup> the use of nuclear power,<sup>74</sup> and extradition.<sup>75</sup> Referendums have been used to approve new constitutions, both successfully<sup>76</sup> and unsuccessfully.<sup>77</sup> They have permanently changed voters' expectations about participation in the approval of new or revised constitutions.<sup>78</sup>

Despite this ubiquity, this book argues that referendums have been fundamentally misunderstood in constitutional theory and law. They have been treated as exercises in direct democracy – in other words, ways of taking decisions away from representatives – rather than as ways of supporting decision-making by representatives. The consequences for democracies are significant, and referendums have come to be attached to the worst impulses of populism because of this misunderstanding<sup>79</sup> – homogenising 'the people' to get representatives out of the way.<sup>80</sup> A different way forward is possible where referendums are part of representative

<sup>63</sup> Miller (n 32).

<sup>64</sup> S White and RJ Hill, 'Russia, the Former Soviet Union and Eastern Europe: The Referendum as a Flexible Political Instrument' in M Gallagher and P Uleri (eds), *The Referendum Experience in Europe* (Palgrave 1996).

<sup>65</sup> Hollander (n 58).

<sup>66</sup> Australia 1916 and 1917, Canada 1942.

<sup>67</sup> United Kingdom 2022.

<sup>68</sup> Greece 2015.

<sup>69</sup> Hungary 2016.

<sup>70</sup> Russia 2000.

<sup>71</sup> Ireland 2018.

<sup>72</sup> Central African Republic 2023.

<sup>73</sup> Crimea 2014.

<sup>74</sup> Sweden 1980.

<sup>75</sup> Ecuador 2023.

<sup>76</sup> Kenya 2010.

<sup>77</sup> Chile 2022.

<sup>78</sup> 'Public participation in constitution-making is now both an established international norm and a widespread practice.' H Landemore, 'When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process' (2020) 18 *International Journal of Constitutional Law* 179, 179.

<sup>79</sup> 'While populists often call for referenda, such exercises are ... not about democratic will formation among citizens. Populists simply wish to be confirmed in what they have already determined the will of the real people to be. Populism is not a path to more participation in politics.' JW Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 102.

<sup>80</sup> Mehmet Ucum, judicial consultant to President Erdogan, said that the aim of these constitutional amendments was to 'strengthen the ordinary citizen's relationship with the state' and for President Erdogan, as with many dictators, he is the state. Ucum has also said that 'any attempt to form an institutional control over the people's will is against democracy'. B Bora, 'Turkey's Constitutional Reform'



democracy; where referendums improve both decision-making and offer voters meaningful opportunities for participation. What this looks like will vary from jurisdiction to jurisdiction, but it never looks – literally or metaphorically – like replacing representatives.

Further, by thinking about referendums differently, a stronger version of democratic constitutionalism is possible. A vision of democratic constitutionalism where voters do not merely weigh in occasionally through exceptional constitutional moments, but rather see themselves as constantly in charge of their democracies. Constitutions cannot be controlled or created – still less through referendums. Constitutions, however, can and do change. Voters have the ultimate authority to create, change, and challenge their constitutions, not limited to occasionally in exceptional constitutional moments where referendums replace representatives.

## VII. Conclusion

The idea that democracy has two tracks, and that fundamental decisions must be made by representatives, is inextricably connected to the claim that people are born free and equal.<sup>81</sup> The commitment to the freedom and equality of people is an enormous and enormously significant historical development. It is a triumph of enlightenment thinking. This book will argue, however, that it does not follow from the truth that all people are born free and equal that they must author the texts of their constitutions through processes such as referendums.<sup>82</sup> Further, the idea that constitutions can and must be authored by the people through constitutions undermines the emancipatory ideas of freedom and equality.

The idea of exceptional constitutional authorship through referendums is limiting because constitutions cannot be directly controlled, still less through referendums. Constitutions are in a constant state of flux, shaped by protests and public opinion, and significant constitutional changes may happen gradually and by accident. The picture of voters controlling constitutions through referendums appears to prioritise their role, but instead limits it by holding that they can only change constitutions occasionally through exceptional constitutional moments where they create or amend texts. Constitutions are not just constituted in moments, and they are not just constituted in texts. They are ongoing processes of constitution and re-constitution; they are continually in flux. Referendums are more useful when they are seen as part of this ongoing process of negotiation, rather than as one-off moments on a higher democratic plane. It is tempting

*Aljazeera* (17 January 2017), [www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html](http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html), accessed 28 February 2017.

<sup>81</sup> As discussed in greater detail in ch 7, section I.

<sup>82</sup> Or indeed citizens' assemblies although, as stated in section V, that is beyond the scope of this book.

in constitutional law, as it is in all parts of life, to think we are in control of our circumstances, and that there is a clear, direct connection between our actions and the results of those actions. This idea of control has the greatest appeal where it is the least helpful: on fundamental constitutional questions. Constitutions cannot and should not be authored in a singular or static way, still less by referendums. Democracy will work better if this reality is confronted directly, and referendums – even on fundamental constitutional questions – are understood as exercises in representative democracy.