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# Public reason and history in contemporary deliberative practice. Legacy and limits of liberal categories in the governance of democratic pluralism

Massimo Caon\*

**Abstract.** Public reason's paradigm, configured by John Rawls in *Political Liberalism* [1<sup>st</sup> Or. ed. 1993, 2005], is increasingly criticised for its limits in regulating a deliberative praxis able to deal with democratic pluralism. In fact, deliberative theorists usually tend to stretch and modify the ideal of a political use of public reason in order to point out the consequences of Rawls' theses in multicultural societies, so that the philosopher's paradigm turns out to be weakened from a normative point of view; this approach paves the way to aporias as the one between cultural minorities' freedom of expression and normativity of communication. In the first section of the present article I begin my analysis from a recent publication by Monique Deveaux [*Deliberative Democracy and Multiculturalism*, 2018] to study an example of public reason's theoretical weakening and its aporetic effects; in the second section new research perspectives are hypothesised in order to offer an alternative proposal to the removal of liberalism's criteria in multicultural democracies. More specifically, I propose the concept of "history" as a point of balance between democratic inclusion and normativity of communication in contemporary liberal democracy.

**Keywords:** Multiculturalism; Deliberative democracy; Public communication; History; Normative comparison.

## Introduction

Deliberative democracy's paradigm is increasingly criticised in the international academic debate on the political future of the West; particularly, the contemporary scenario offers to our sight numerous situations (the governance of multicultural and continental democratic systems, the interconnection of global markets, the climate change emergency, the rupture of geopolitical symmetries which have been dominant throughout the second half of the XX century) the critical points of which [See Latouche 2014; Dryzek & Pickering 2019] highlight the importance of epistemic dimension<sup>1</sup> in the action of major political subjects and their context, on one hand, and the predicament faced by deliberative theory in interpreting contemporary policies' dynamics on the other hand. The question rises then about the possibility that deliberative democracy (after forty years of activity [See Florida 2017]) might still contribute to an institutional foundation aimed at developing democratic systems from an epistemic and normative point of view<sup>2</sup>. Specifically, here I am going to study the confrontation with multiculturalism that deliberative theory has been engaged in for two decades, in order to argue in favour of a different theoretical foundation of multicultural democracies' institutions; until now the problems of democratic multiculturalism have been faced by

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<sup>1</sup> It should be stressed that scientific-technological competences and rational-strategic behaviour have acquired remarkable weight in both national and international governance processes.

<sup>2</sup> See Majone [2005]; as an example, one of the most important themes at the centre of the contemporary debate on EU's governance – a continental, multicultural and historically democratic geopolitical context – is undoubtedly the tension between epistemic competence and democratic legitimacy.

deliberative theory under the influence of two great philosophical paradigms from the '90s – those of Rawls and Habermas<sup>3</sup>, whose works moreover framed some of the most important differences in deliberative theory's field (let's think about the methodological differences between the analytic/descriptive approach and the normative/prescriptive one<sup>4</sup>) -, a fact that can be easily seen by looking at how public reason's problematic definition is still at the centre of multicultural studies:

A much-touted advantage of Habermas's model of discourse ethics over Rawls's conception of political deliberation is that it does not seek to limit the scope of citizens' contributions in advance of actual deliberation. Those liberal theories of justice in which citizens' deliberations figure prominently—including Rawls's later writing—appeal to unrevised norms of impartiality and public reason that arguably pose barriers to the inclusion of cultural minority citizens in political deliberation on terms that are acceptable to them (...).<sup>5</sup>

In light of such considerations the first section (1.) will be devoted to the analysis of Monique Deveaux's reading of the Rawlsian paradigm of public reason: what I intend to highlight is the theoretical aporia - between ethno-cultural minorities' democratic safeguard and the need for a shared normative dimension of political communication – that deliberative theory falls into once it reads public reason as a dominating and asymmetric dialogical criteria. Instead of adopting this approach, here it is argued that a more careful interpretation of *Political Liberalism* suggests that this work configures a paradigm extremely sensitive to multicultural democracies' need for a flexible<sup>6</sup> dialogical standard; it follows then that the political philosophy of the so-called “second Rawls” does not grant any space to universalistic and dominating claims on political communication, but on the contrary it constitutes one of the most remarkable openings that Liberalism has ever made towards the concept of “historical differential”<sup>7</sup> (for example represented by ethnical, cultural and religious differences) through which democratic societies have developed in modern and contemporary eras. In the second section (2.) I argue that the aforementioned aporia, met by deliberative theory considered as a leading research field of contemporary political theory, cannot be solved by weakening further public reason's paradigm, as Deveaux claims, (it should be stressed that in order to preserve deliberative praxis – and its epistemological virtues conceived in opposition to strategic behaviour in politics - some minimal dialogical standards must be held), but by developing the philosophical grounds of deliberative theory – considered in its Rawlsian version – and the idea of “overlapping consensus”. Finally, to support this thesis the concept of “historical differential” will be examined as a largely underestimated theoretical source for democratic theory's predicament; more specifically, I will try to show how the elaboration of such a philosophical category could offer an alternative to the transcendental-normative paradigm which has been at the core of deliberative studies since its was born.

## 1.

In *Deliberative Democracy and Multiculturalism* Monique Deveaux proposes a research path to study a harmonious coexistence and interaction inside multicultural contexts; as the Author underlines at the beginning of her article, object of the inquiry is the efficacy of a certain theoretical approach to democratic communication in pluralistic societies:

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<sup>3</sup> *Between Facts and Norms* [1<sup>st</sup> or. ed. 1992, Eng. tr. 1996] and *Political Liberalism* [2005];

<sup>4</sup> See Florida, 2017, pp. 327-328;

<sup>5</sup> Deveaux, 2018, p. 160;

<sup>6</sup> It has been argued – on good grounds – that what Rawls proposes after *Political Liberalism* is nothing more than a minimal group of norms able to sustain a peaceful life among different social groups [Croce & Salvatore, 2012].

<sup>7</sup> From now on I will use this term to address the amount of differences - historically situated and politically detectable – which make up a pluralistic democracy.

Deliberative democracy is widely associated with a public sphere that is more inclusive of cultural and religious minority groups than that established by a model of politics as interest aggregation. But it has also been criticized for stipulating unjust terms for this political inclusion [...]. This chapter argues that models of public deliberation less beholden to Habermasian discourse ethics are able to offer a more promising response to these multicultural challenges. [...] The advantages of compromise over consensus for deep moral conflicts are obvious: compromise allows citizens with significantly disparate viewpoints or worldviews to reach some form of agreement without resorting to (unjust) coercion. Where processes of moral argumentation and public discourse are expected to culminate in moral consensus, deliberative participants may be pressured to set aside identity-based claims or demands that challenge the political status quo.<sup>8</sup>

The thesis here is that replacing consensus with compromise might allow multicultural societies to meet the needs for fair standards of democratic interaction claimed by their members, and that any deliberative agreement conceived on the grounds of moral consensus could achieve better inclusion of minorities but also annihilate their identity claims and cultural heritage; after mentioning Habermas' approach<sup>9</sup>, Deveaux starts confronting *Political Liberalism* by focusing on its public reason's paradigm:

An adjacent ideal, shared public reason, is, however, still widely endorsed by deliberative democracy theorists. But as with the notion of a common good, this norm may be taken to require that members of cultural minorities treat their identity-related claims as contestable and negotiable in deliberation (thus rendering their claims consistent with commitments to norms of impartiality and shared public reason). This seemingly reasonable norm may therefore unwittingly compound existing colonial structures of power and privilege.<sup>10</sup>

Now, even though public reason's normative *pondus* is certainly an important element of deliberative theory as it has been developed from the '90s (it was at that time that deliberative studies were radically changed by the philosophical foundation – indirect as it may have been<sup>11</sup> - made by Rawls and Habermas' works [*Political Liberalism* and *Between Facts and Norms*]), it might be argued that Deveaux's lines reveal a relevant exegetical error. In fact, scholars now generally agree<sup>12</sup> that what Rawls designed in his 1993 work<sup>13</sup> was a remarkable step back from any form of a priori normative intersection between different comprehensive doctrines (it is surprising then how Deveaux does not consider the better adherence of Rawls' approach – if compared to Habermas' one, which emphasises moral agreement among the subjects of democratic communication - to her argumentation), a gesture that left only liberal, institutional and legal borders to dialogical praxis:

How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines? [...] It is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways. An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.<sup>14</sup>

And still, from *Political Liberalism*'s introduction:

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<sup>8</sup> Deveaux, 2018, p. 156 and 160;

<sup>9</sup> It should be underlined that in the '90s debate between Habermas and Rawls the German thinker strongly supported the idea of "moral consensus" instead of Rawls' conception of the "reasonable" [See Florida, 2017; Rawls, 2005; Habermas, 1998].

<sup>10</sup> Deveaux, 2018, p. 160;

<sup>11</sup> See Florida, 2017;

<sup>12</sup> See Maffettone [2010], Petrucciani [2003, 2014], Florida [2017], Croce & Salvatore [2012].

<sup>13</sup> The present article aims at confronting itself with the general reading of public reason worked out by Deveaux; then, in order to examine the question fully and consider also the evolution of *Political Liberalism*'s theoretical framework, the 2005 edition has been taken as a better textual source than the 1993 version.

<sup>14</sup> Rawls, 2005, Lecture 1, Fundamental Ideas; Lecture 6, §5.

Rather, we formulate a freestanding political conception having its own intrinsic (moral) political ideal expressed by the criterion of reciprocity. We hope in this way that reasonable comprehensive doctrines can endorse for the right reasons that political conception and hence be viewed as belonging to a reasonable overlapping consensus.<sup>15</sup>

It can be argued that what rises from Rawls' work is the concern for designing a political scenario the deliberative criteria of which be formulated with little normative weight, possibly not overstepping the concept of "reciprocity"; in other terms, it might be claimed that the Rawlsian argumentation in favour of an autonomous idea of justice constantly takes into account that concepts as "overlapping consensus" or "public reason" are precarious [See Florida 2017, p. 282]. Therefore, by underlining the potentially dominating texture of public reason, Deveaux seems to ignore the real essence of *Political Liberalism's* notion of justice.

However, the cogency of Deveaux's theses is left untouched if we consider the question from another perspective; indeed, what Rawls cannot avoid in its theoretical framework is conceiving an institutional structure clearly rooted in a specific geo-historical context. As it has been noted, Political Liberalism's proposal is independent from metaphysical, epistemological and moral premises as far as the citizens of whom it narrates recognise themselves in a Constitution and in specific liberal standards, regardless of any extra-political belief [Croce & Salvatore 2012, p. 7]; *quae cum ita sint*, notwithstanding the idea of reciprocity at the ground of Rawls' deliberative-democratic conception, the idea of justice framed in *Political Liberalism* cannot cancel its liberal-democratic essence:

The general idea consists of dividing individuals' morality in two parts. On one side, there would be people's morality in its integrity, which is rooted in solid religious or ethical bases, and can be reconducted to different comprehensive doctrines. On the other side, there would be a more restricted institutional morality which looks at citizens more than people and which is not rooted in everyone's religious or ethical morality, but in their loyalty to the constitutional-political system in which they live their public life.<sup>16</sup>

In light of this brief investigation, it seems possible to argue that on one hand there is an idea of justice - that of Rawls - declined so that it does not impose any normative coercion over citizens' claims, apart from those which do not respect the constitutional framework of their political arena. On the other hand, we can detect a proposal - replacing consensus with compromise as first aim of democratic interaction, brought forth not only by Deveaux and some multicultural theorists - that moves from a specific reading of the works of the second Rawls, i.e. public reason as an ideal that both historically and culturally excludes the expression dynamics of cultural minorities. As aforementioned, even though Deveaux's interpretation might be proved wrong by an exegetical examination, the political vision underneath her exposition is remarkable. Indeed, the Canadian philosopher points out that the constitutional standards that according to *Political Liberalism* should regulate democratic deliberation are not neutral at all, a fact that moreover can be ascertained by observing the demographic changes occurred in western democracies over the last decades. At the same time, however, *Deliberative Democracy and Multiculturalism* seems not to alter the political-philosophical framework of its analysis significantly:

It remains the case, of course, that even accounts of political deliberation that foreground interests, bargaining, and negotiation remain committed to the use of normative reason and the principle of communicative (as opposed to strategic) action in politics. But on the more political conception of deliberative democracy I have outlined here, conflict—including interest-based conflict—is no longer treated as something (necessarily) to be sidestepped, sublimated, or even necessarily transcended. Rather, conflict is seen as part and parcel of an understanding of democracy as a process that includes struggle (Young 2000, 50).<sup>17</sup>

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<sup>15</sup> Rawls, 2005, Introduction;

<sup>16</sup> Maffettone, 2010, p. 113, my translation;

<sup>17</sup> Deveaux, 2018, pp. 164-165;

Hopefully, it is now possible to more deeply appreciate the fundamental aporia of contemporary multicultural-democratic theory: by reading the Rawlsian text as the proponent of a dangerously coercive model of communication in western liberal democracies, it is not possible to understand that the interaction asymmetries detected by multicultural theory are caused by the transcendental and liberal foundations of deliberative theory itself, and not by the Rawlsian declination of dialogical rationality. *Political Liberalism* already constitutes an outstanding expansion of deliberative-liberal classic paradigm and an accurate exegesis shows that it is not possible to weaken public reason's ideal further; if it were deemed necessary and legitimate to overcome the concept of "overlapping consensus", it would be necessary to elaborate the political-philosophical building at the origin of deliberative theory.

## 2.

The radical aporia between freedom of expression and normativity of communication, now more evident due to both deliberative theory's new research approaches (as intercultural-comparative analyses [See Sass 2018]) and democratic pluralism, directly questions liberal tradition's fundamental axioms; indeed, it can be argued that over the last decade these historical and academic factors have brought western thought to more deeply consider the historical nature of the universal criteria that three centuries ago were spread by the Enlightenment and that rapidly imposed themselves as dominating standards of modernity's political project. If we consider the quality of democratic communication, the exercise of reason and the normative implications of any kind of institutional model, it is immediately obvious that today democratic societies do not express anymore a singular version of the factors just mentioned, since they are made of culturally differentiated human groups belonging to numerous historical differentials; hence, democratic theorists point out reasonable questions as they try to find normative intersections between citizens' political interaction and the safeguard of cultural minorities: the more strong standards are built to regulate discursive dynamics in politics, the more it is possible to make space for contexts of dominance over smaller social groups.

Implausible as it may seem to solve such an aporia, it could be a fertile research hypothesis to investigate on its existence conditions, i.e., Enlightenment's heritage and deliberative democracy's philosophical foundations. At a first glance, all classic authors in deliberative tradition belong to liberal thought as long as the focus is put on their efforts to theorise universal communication principles in order to regulate public sphere's discourse<sup>18</sup>; as it was outlined in the previous section, even the original Rawlsian declination of liberal democracy entails necessarily the pursuit of a criteria for the intersection of citizens' consensus. It follows that the aporias pointed out by authors as Deveaux actually mirror the predicament caused by a philosophical perspective – that of liberal democracy – unable to fully read the social texture of contemporary western societies, the pluralistic dimension of which now challenges directly the universal-dialogical principles at the origin of liberal democracy:

Pressed by the radical reaction of both 80's Liberalism and communities-political minorities' ethnical-identity claims not manageable anymore through the State logic which had prevailed until that moment, liberal theory ends up opening to recognition requests put forth by supra-individual communities of various origins and absorbing much part of rival

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<sup>18</sup> If we analyse the proposals put forth by theorists as Manin [1987], Elster [1986], Fishkin [1991], Cohen [2009], Rawls [2005] and Habermas [1996], it is evident that the diversity of their approaches cannot be sufficiently synthesised by this definition. What should be underlined, however, is that even in an extremely open theoretical framework as Manin's one, according to which minorities and majorities are focused on deliberating and modifying their individual preferences without any possibility of reaching unanimous consensus on the common good, discursive rationality has different features from the ones detected by recent scholarship in non-western social deliberation.

traditions' heritage (especially Communitarianism), consequentially recognising the plurality of approaches and world visions, which seem hardly compatible themselves.

What deliberative theory is called to work out then is a new normative foundation of its communication criteria, able to reconduct the tension between freedom and norms to a coherent philosophical framework; moreover, this research project should be led without forgetting deliberative democracy's possible inadequacy to face the transformation of western political contexts. In this section I would like to suggest the possible contribution that an investigation founded on the concept of "history" and sensitive to the philosophy of contemporary Idealism [See Preve 2013] could give to solve the aporia at the centre of the present article. Such a theoretical approach would differ significantly from that of Communitarianism and its critique of liberal thought [See Walzer 1983; Taylor 1985; MacIntyre 1986; Sandel 1982], since a neoidealist study over democratic communication would not limit itself to contemplating a minimal way of coexistence among different social-ethnic spheres and would not separate the concepts of "cultural pluralism" and "community"<sup>19</sup>; on the contrary, this kind of approach would be able to find a political intersection among contrasting social claims by virtue of a focus on the historical genesis of democratic deliberation's criteria and of its own philosophical categories. This configuration of research entails the possibility of formulating judgements on the legitimacy of democratic citizens' normative claims.

The difficulties of the approach that I just hypothesised are immediately evident; formulating value judgements on normative claims means to bring back to the centre of democratic debate a theoretical point of view which would try to reconcile transcendental and historical dimensions in contemporary deliberative praxis<sup>20</sup>. Before describing the essential points of such an approach, it is perhaps better to define its differences from Communitarianism. As an address of contemporary political theory, Communitarianism defined its position in contrast to liberal tradition and John Rawls' philosophical work; although Communitarians diverge significantly, it is possible to assert that their main thesis claims the implausibility of the existence of universal standards by which to formulate judgements on specific communities' practices [See Kukathas & Pettit 1990]; the debate on the "original position" and other Rawlsian concepts, animated by theorists as MacIntyre, Taylor, Sandel and Walzer, can be regarded as extremely clarifying in order to achieve a satisfying definition of the historical-transcendental approach:

As there are many caves but only one sun, so political knowing is particular and pluralist in character, while philosophical knowing is universalist and singular.<sup>21</sup>

We know that our lives are ruled by political performance and not by philosophical promise [...] [this makes the] search for transcultural criteria of justice...philosophically relevant...but politically irrelevant.<sup>22</sup>

Similarly MacIntyre, in his criticism of the liberal failure to provide substantive account of the human good, arrives at this "provisional conclusion" about the good life: "the good life for man is the life spent in seeking for the good life for man, and the virtues necessary for the seeking are those which will enable us to understand what more and what else the good life for man is" [MacIntyre 1986, 204]. Yet this conclusion, particularly in its provisionality, is not so far from the liberal insistence that the good society is one in which individuals are left free to discover what is the good life.<sup>23</sup>

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<sup>19</sup> Kukathas & Pettit, 1990, p. 95;

<sup>20</sup> See Cesarale, 2019, p. II intr. As the author observes, the neoliberal era caused "the end of universalism rooted in the powers of Enlightenment's «European reason», transcendental, dialectical, and its rising – thanks to the globalisation of goods market, of labour-force and of capitals – in a neoliberal frame, as imposition, inside all places of social division of labour, and in the fashion of productivity and behaviour's international standards." [My translation]. It is arguable that at least one of the causes of the difficulty mentioned above lies in European reason's fading as outlined by Cesarale.

<sup>21</sup> Walzer, 1981, p. 393;

<sup>22</sup> Jackson, 1986, p. 164;

<sup>23</sup> Kukathas & Pettit, 1990, p. 117;



If on one side communitarian thought insists on the impossibility of finding justice criteria through philosophical theorisation, by definition universalist and transcultural, and claims that only political knowledge can deem a society just on the grounds of its shared meanings [Walzer 1983, p. 313], on the other side the liberals cannot but detect the uncertainties of Communitarianism when it argues in favour of a normative proposal alternative to their own; from the theory of virtues to the relationship between social coefficients and individual freedom in human beings' development<sup>24</sup>, Rawls' critics do not manage to work out a theoretical position philosophically independent from the liberal, transcendental and illuministic premises at the centre of their own critique. The elaboration of a historical-transcendental approach would try to overcome the theoretical difficulty met by communitarian theory, and it would be articulated in specific lines of argumentation which here are hypothesised in propositions:

- I. Considered how liberal tradition founded its philosophical gesture on a moral theory able to deduce and universally found the political-juridical criteria of the good society, a historical-transcendental approach should necessarily elaborate a theoretical philosophy as the ground of its political and moral judgements on the community;
- II. Liberalism's challenge to its critics historically consists of the predicament met by whoever tries to rationally and morally justify a not completely transcendental political theory<sup>25</sup>; an alternative political-philosophical proposal then would benefit from inscribing in the same framework the historical differential and the transcendental dimension.
- III. The theory of philosophical categories' historical-social genesis, crafted over the last decades by contemporary Neoidealism and Marxism [See Preve 2013; Antonopoulou 2000] represents a possible theoretical foundation of political judgements and a conceptual source able to solve the aporia between freedom of expression and normativity of communication at the centre of the debate on deliberative democracy's destiny.

In the end, a historical-transcendental approach as the one just outlined might give pluralistic democracy's dialogical criteria a more solid normative legitimation, answering multicultural theorists' objections with a philosophical theory which grounds discursive rationality in its geo-historical path; a consequence of this argumentation is that cultural minorities' claims might be judged by western open societies on the basis of their own Constitution and public reason while avoiding any coercive dynamics, since this approach is founded on the connection between deliberative rationality and its historical dimension, with the constant possibility of inclusion guaranteed to minorities by democratic deliberation<sup>26</sup>. If it can be argued that such a perspective differs quite radically from classic Liberalism, it cannot be ignored how liberal theory itself has been posing the basis for a new elaboration of its philosophical texture since the second phase of Rawlsian thought began at the end of XX century; in fact, with *Political Liberalism* Rawls distanced himself from the Kantian liberalism of "rational consensus" [Habermas 1996] in favour of the concept of "reasonable", in order to work out a public use of deliberative reason suitable for the radical pluralism

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<sup>24</sup> Gutmann [1985, p. 317] e Kymlicka [1988, p. 192] have highlighted how Sandel's thesis on the constitution of individuals, considered as only partially defined by their community, make the author of *Liberalism and the Limits of Justice* hardly different from liberal thinkers.

<sup>25</sup> Although this philosophical perspective is not the only one in political Liberalism's field, certainly it can be regarded as one of the most influential and enduring ones in the history of the western canon.

<sup>26</sup> Changes in the social composition of a liberal democracy do not only affect elections, but also political communication; accusations of dominance moved by multicultural theory against rational regulation of deliberative praxis hence can be refuted through a historical-transcendental approach as long as it finds communication's normative legitimacy in the historical path of the political community and in its transcendental sensitivity to justice claims.

of our time [Ferrara 2021, p. 9]. This allows us to hypothesise that a research path of historical-transcendental kind might develop further the unsolved questions inside liberal theory's field, overcoming the aporetic results which even the second Rawls could not work out [See *supra* sect. 1; Deveaux 2018]. To conclude, the perspective here only provisionally outlined - as the premise for a long-term research project – seems to be a promising path towards the solution of the aporia at the centre of contemporary deliberative theory: the friction between freedom of expression and normativity of communication could be overcome if political deliberation's criteria were configured at the same time as 1) rooted in the historical horizon of the society in which they work and 2) transcendental standards that shed light on the historical path of public reason.

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# Conservation, progress, and change. How time affects politics and democracy

Valerio Fabbrizi\*

**Abstract.** The article develops a discussion on how time influences the realm of politics and the structure of democratic constitutionalism. In the first section, a theoretical and political-philosophical of time will be provided; in the second, the attention will be focused on the consequences of time on constitutionalism and democracy. Here, a distinction between the two concepts of *time of politics* and *time of constitutionalism* will be addressed. The theory of time in political-philosophical terms can be defined in multiple directions: firstly, in terms of political and constitutional changes, two different matters will be distinguished: a “conservative” as opposed to a “progressive” approach to politics and constitutionalism. Hence, a twofold definition of constitutionalism can be traced: on the one hand, the idea that a constitution can be considered as the product of the daily political debate and, on the other hand, the idea of a constitution as a *generational product*.

**Keywords:** Politics; Time; Democratic Constitutionalism; People; Consensus; Timing.

## Introduction

This article aims at highlighting how time affects the realm of politics. The argument will be developed as follows: In the first section, a theoretical and political-philosophical definition of time will be provided, while, in the second section, the attention will be focused more specifically on the consequences of time for constitutionalism and democracy. Here, the principle of the so-called *time of constitutionalism* will be illustrated.<sup>1</sup>

Against this background, the essay will show how time affects politics and democracy in many relevant ways. As Jacob Gersen and Eric Posner argue, many aspects concerning both political and constitutional theory are shaped and constrained by matters of time. The two scholars suggest that time strongly influences government action, both on legislative and executive decisions. They point out that one most obvious interpretation of time in politics concerns rules that «explicitly set a date by which an action must be accomplished (...) a date before which an action cannot take place, a period of time that separates different procedures that are necessary to accomplish an action, and so forth» (Gersen-Posner, 2007, p. 545).

Concerning political and constitutional changes, two approaches can be distinguished: on the one hand, it is possible to identify a so-called “conservative” view as opposed to a so-called “progressive” vision. Besides, constitutionalism can be perceived in two distinct ways: on the one hand, it can be considered the product of the daily political debate (in this sense, a specific and determined “time of

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<sup>1</sup> The investigation about time and constitutionalism is partially inspired by Massimo Fichera and his notion of *constitutional time*, although I prefer using the expression *time of constitutionalism*. I share with Fichera the idea that constitutionalism is intrinsically bound with the idea of time and temporality, especially because its promise to regulate and validate society as the rule of law necessarily incorporates the idea of future. See Fichera, 2021, p. 157.

constitutionalism” does not exist, by being replaced by a condition in which the constitution can be amended in any moment, following the will of a transient majority). On the other hand, the constitution might be assumed as a historical product to be developed and implemented through generations (this would mean that the “time of constitutionalism” does not occur daily, but in rare and specific “constitutional moments”).<sup>2</sup>

Hence, a further reflection concerns how time characterizes amendment processes in constitutional and the political evolution of society. The question here is the following: how long does (or should) an amendment or change process take? This issue is very important for constitutional theory, but the responses to this question substantially diverge. For instance, the British unwritten constitution does not establish norms or rules to amend the constitution, leaving to the Parliament the power “to (re)create” the Constitution. By contrast, written constitutions, such as the Italian and the U.S. Constitutions or the German *Grundgesetz*, present institutional mechanisms in order to be amended by also regulating the time and the modalities for such amendments to be validly enacted.

Article V of the U.S. Constitution poses stringent rules to amend the Constitution, by making a very complicated process and a very long time to reform the Fundamental Law.<sup>3</sup> Similarly, Article 138 of the Italian Constitution establishes rules to amend the Constitution, albeit less complicated or demanding than the U.S. one. As we will show later in the article, the amendment process of the Italian Constitution takes much less time than the U.S. Constitution, especially because the procedure is easier, and it requires fewer steps to be completed.<sup>4</sup>

In discussing the relationship between time and politics, this article offers a comparative analysis of the topic, by presenting a wide overview to reflect on how time can strongly and directly influence our conception of politics and democracy.

## 1. Time and Politics. Some General Reflections.

The argument addressed here will try to show that time is one of the greatest topics in philosophical discussion and that its relevance for the theory of politics, society, and democracy is equally great. The influence of time on politics is at the core of the political-philosophical discussion about democracy since its origins. Unsurprisingly, we can find in Aristotle an important use of the concept of time in political terms. The Aristotelian democratic theory entails several considerations about time, which implies the idea that ruling positions should be organized according to a timely planned succession, which means both that rulers should renounce political power at the due time and that power should be ephemeral and transitory, held only once and not more.<sup>5</sup>

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<sup>2</sup> On the idea of the “constitutional moments” see Ackerman 1991.

<sup>3</sup> Article V of the U.S. Constitution declares that «The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.» See [https://constitution.congress.gov/browse/essay/artV-1/ALDE\\_00000368](https://constitution.congress.gov/browse/essay/artV-1/ALDE_00000368).

<sup>4</sup> Article 138 of the Italian Constitution states that «Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less 38 than three months and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members».

See the web site [www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

<sup>5</sup> See Gudelis 2020. On the Aristotelian view of lifetime and human being see also Vähämäki, 2003, p. 193.

As previously stated, the starting point of this article revolves around a fundamental double question: how does time influence politics, and how does it characterize decisions and choices made by political actors and institutional officers? Most generally, time intrinsically and endemically influences our lives, and it regulates human interaction both from social, political, and economic perspectives. As Barbara Adam brilliantly argues, «time is embedded in social interactions, practices, and knowledge» (Adam, 1995, p. 6).

Then, the relationship between time and politics involves a simultaneous process that Mykolas Gudelis has defined as the *temporalization of political power* by the *politicization of time*, namely the idea of shaping and constraining political power under temporal rules that transform the democratic sphere and the relation between “the people” and who holds political power, while, in parallel, time becomes an ever more political issue. In Gudelis’ words, what emerges here is «the power to shape, formulate, and structure symbolic, ideological and institutional representations and interpretations of time, in turn affirming sustaining, and temporally enabling prevailing, dominant political power structures, ideologies, institutions, and practices». <sup>6</sup>

According to a famous quote attributed to many intellectuals and historical figures such as the American theologian and political scientist James Freeman and the Italian political leader and former Prime Minister Alcide De Gasperi, «a politician thinks of the next election, a statesman of the next generation. A politician looks for the success of his party; a statesman for that of his country. The statesman wishes to steer, while the politician is satisfied to drift».

This quote is interesting because it helps to highlight another feature in the political theory of time. Besides distinguishing a “politician” and a “statesman”, a party-man and a leader, it clarifies how a political actor, or a legislator, can follow two different ways: on the one hand, political choices might be fixed on the present, to privilege short-time interests. This approach is mostly targeted to a mere electoral benefit, giving much more relevance to the interest of the electorate rather than the people and the next generations. On the other hand, a statesman generally approves long-time decisions, by choosing to look to the future, instead of short-time partisan decisions. In this case, choices are made to favor the next generations and to ensure a brighter future for them, even if it means paying a cost in terms of electoral consent.

Finally, the good effects of long-time decisions are never immediate but always made “for the future”. It often implies losing votes in a short time, because people are generally considered not to have time to lose waiting for the good effects of such decisions. Then, a politician prefers the easy way of capitalizing the electoral consent, without any interest in what it implies for future and next generations, while a statesman accepts to disregard the expectations of the current electorate to privilege the general benefit of the people and the next generations. Another hint to reason about time and politics can be found in Francis Fukuyama’s *The End of History and the Last Man*, which inspires many considerations on how politics react to temporality. We might then argue about an alleged *end of ideologies* or also on the *end of politics*, or even the *end of democracy* (the latest two theses are more diffused in the current age of populism).<sup>7</sup>

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<sup>6</sup> Gudelis, 2020, pp. 3-4.

<sup>7</sup> The relationship between democracy and populism is highly controversial and it is continuing to inspire a vast literature. It is not possible to develop a complete theory of populism and democracy, but it might be useful to give an overview of such a matter here. As a political issue, populism stimulates an analysis of four aspects: 1. An intrinsic and irreducible conflict between *the elite* and *the people*, with the former seen as the most radical foe of the latter; 2. An illiberal and anti-pluralist definition of democracy, that rejects cosmopolitanism, multiculturalism, and liberal-democratic values; 3. The celebration of leadership and authoritarian decision-making; 4. A nationalistic and conservative impulse, especially within right-wing approaches. Contemporary populism emerges as a form of post-ideological and post-party politics which assumes the defence of “the People”, in its national and ethnic identity, as a primary goal; at the same time, populist leaders look for an enemy, mainly economic or financial elites; minority groups or international institutions. Moreover, the populist upsurge is often associated with deep social and economic crises, that contribute to nourishing a tense and potentially conflictual atmosphere that populists are able to interpret and manipulate.

The idea of the “end of politics” has been advanced by David Held, who adopts, in his masterpiece *Models of Democracy*, the metaphor of the “music of the future” to argue that the future cannot be imagined or composed in advance, but it emerges from the ongoing struggles and movements aimed at changing and ameliorating the existing social and political context. By referring to Marx’s conception of society, Held poses that the end of politics means «the transformations of political life as it has been known in bourgeois societies; that is, the dismantling of politics as an institutionally distinct sphere in society used in perpetuation of class rule» (Held, 2006, p. 110).

Major doubts arise about what we have called the *end of ideologies*. Ideologies rise and fall, and every decade is dominated by different political, social, and economic ideologies. The collapse of the classic totalitarian ideologies, Marxism, and Fascism at first, does not imply that ideologies disappear in time because old ideologies are replaced by new ideologies and in this case, *time*, together with the social and political context, plays a central role in defining when ideologies upsurge and then collapse. Neoliberalism, capitalism, and populism might probably be considered the major ideologies of the current time.

Here, a distinction between *model* and *ideology* arises. It is to argue that the former is an ideal system, a theory of the state and institutions that are valid and reasonably acceptable for all the people. It is often grounded on an idea of politics and democracy that holds a principle of substantial equality by potentially representing a common horizon for all citizens. Then, a political model does not have divisive intentions but, by contrast, it is assumed to be a benchmark. In this sense, every general conception of politics and democracy works as a model: from modern contractarianism to contemporary constitutionalism. Differently, an *ideology* has no unifying intent.

The latter represents instead a partial vision and a partisan definition of the world and society. An ideology is divisive, it distinguishes between “us” and “they”, between friends and enemies, to use a Schmittian vocabulary. Two ideologies are usually incompatible with each other, and their aim is not to create a common ground but only to defend and affirm a partial social, moral, and political view of the world. Populism and liberalism; Marxism and conservatism; monarchism and republicanism are perfect examples of contrasting ideologies.

Against the background of the idea that time always leads to the “end” of something, another question may arise: assuming the validity of the “end of ideologies” or even “the end of history” (as Fukuyama claims), may we theorize a hypothetical, though radical, “end of politics”? Fukuyama’s thesis states that the end of history occurs when economics prevails over politics itself, by subjugating democratic rules to financial markets and capitalist power.<sup>8</sup>

Although the problematic relationship between financial markets, capitalism, and democracy are currently at the core of many important legal and political theorists (Frank Michelman, Luigi Ferrajoli, Alessandro Ferrara to name a few), the theorization of a radical and definitive end of politics *tout court* seems to be highly problematic.<sup>9</sup> From this point of view, the classic Aristotelian definition of the human being as a pure *zoon politikon* for which the political dimension of life remains irrepressible is still undoubtedly valid.<sup>10</sup>

Further and more specific considerations about time and politics will be presented later in the article, particularly focusing on issues such as the idea of collective memory, the concept of social and political progress, and the matter of the constitutional amendment process. As time goes by, to quote a famous movie song, the world changes, and our conceptions of politics, democracy, and ideologies are supposed to change in parallel.

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For a further analysis of these points see Canovan, 1981; Fabbri, 2020; Held, 2006, pp. 108-117; Marchettoni, 2018, p. 110; Panizza, 2005.

<sup>8</sup> To clearly understand the point, see Fukuyama 1992, pp. 44, 125, 205-206, 235.

<sup>9</sup> On the issue of financial markets and democratic institutions see Michelman, 2003, 2015; Ferrajoli, 2013, 2018; Ferrara, 2017.

<sup>10</sup> On the issue of the *zoon politikon* in Aristotle and the idea of the individual participation to political life in the *politeia* I suggest consulting Gudelis, 2020.

### 1.1 How to Deal with Time in Political-Philosophical Terms?

Generally speaking, time plays a central role in politics. Not casually, temporal vocabularies are often used to define politics: it's common to tell and read expressions like a "political era" of a leader, as well as the domination of a party or a coalition can mark an entire political season. Similarly, we are used to judging a political experience in the light of the longevity and the stability of a government: the more time the government stays in office, the more stable and efficient the entire political system is supposed to be.

Commonly, the Italian institutional system during the so-called "First Republic" was supposed to be unstable and feckless because of the short duration of governments, which lasted, on average, one year. For this reason, especially in Italy, the efficiency of a government and its leaders is not only justified by the decision and acts they make but also, and above all, by the time they stay in charge.

To sum up, what remains impressive is not what kind of choices the government and the majority make, but how many times that government and that majority have been able to impose their own political vision over society, for what kind of legacy they leave to their successors and, most relevantly, for how many times they have been able to hold political power. Moreover, "political time" is the time we dedicate to politics and to what Cicero called the *res publica*, as citizens and members of the political society. From this, it follows that both political choices and actions that arise from such an engagement depend on the fusion of two aspects: the time we dedicate to politics and the place in which we are immersed, and live our political life.<sup>11</sup>

When discussing politics in terms of time, memory also plays a pivotal role. Nonetheless, memory is not to be understood as "historical" or "historiographical" memory, but rather as legacy or heritage, in social, political, and cultural terms. Against this background, constitutions can be an example of political memory, or rather a legacy that unifies generations and passes from time to time. Constitutions have the scope to pass on values, principles, and rules to the next generations; likewise, constitutions also possess a historical memory, largely being the result of previous historical, often tragic, events.

In this perspective, every constitution that was born from tragic events, such as a cruel war, the collapse of a totalitarian regime, or a revolution, aims at transmitting to the next generations. The Italian Constitution is a perfect example. It arose from the ashes of the defunct fascist regime, the new Constitution was enacted in 1947 after the approval by the Constituent Assembly, and it still contains the values, principles, and rules that regulate the Italian democratic regime: antifascism, religious neutrality, separation of powers, parliamentary democracy, equality, and liberty.

At the same time, the Italian Constitution is part of a larger set of events and historical steps that form the sociopolitical as well as the historical legacy of Italian democracy: the Resistance and the partisan war, the first post-fascist and democratic government led by the National Liberation Committee (CLN-Comitato di Liberazione Nazionale), the institutional referendum that opposed Monarchic and Republican sides on June 2, 1946.

Memory and legacy and the relationship between the past and the present intensely influence constitutionalism and various contemporary constitutions are the result of historical processes, often tragic, and hold a deep hereditary character (let's think about the U.S. Constitution and the German *Grundgesetz*, for instance). Both the U.S. and the German constitutions take their roots in a strong historical legacy by recalling what Maurice Halbwachs defined as "collective memory".<sup>12</sup> This is

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<sup>11</sup> This relation between time and political life is reconstructed by Elizabeth F. Cohen in her book *The Political Value of Time. Citizenship, Duration, and Democratic Justice*, Cambridge University Press, 2018. See particularly Cohen, 2018, pp. 112-113.

<sup>12</sup> See Halbwachs 1925. This historical memoirist feature of constitutionalism is perfectly pointed out by Harrison, 2004.

testified, within the U.S. Constitution, by the persistent reference to the Founding Fathers and by the idealization of the Declaration of Independence as the cornerstone of American democracy.<sup>13</sup>

Like the Italian Constitution, the German *Grundgesetz* was raised from the ashes of tragic events such as the Second World War and the collapse of the Nazi totalitarian regime. This tragic experience led the German constituent to construct a much rigid and entrenched fundamental law that aims at preventing any attempts to subvert democratic institutions or endanger basic rights, values, and principles of the German democracy. Thus, the *Grundgesetz* presents a list of principles and values that are explicitly entrenched by Article 79 to prevent what previously happened at the collapse of the Weimar Republic and the upsurge of the Nazi regime.<sup>14</sup> From a theoretical perspective, politics affect everything that daily happens in our society; this means that *politics* also involves how we influence our society and our fellow citizens' lives every day and in every moment.

Politics is inevitably and intrinsically connected with the idea of progress and change, most generally. Every political choice made by officials and representatives should be aimed, at least ideally, at preventing what will come later, to face future challenges, anticipating them. Here, the quote from James Freeman Clark comes back to mind, because who is called to govern the *res publica*, the *politeia*, namely the legislator, should always work looking to the future, not only to the present, by making choices that give future generations a quality of life, more well-being, wealth, and prosperity larger and much solid than the previous ones. Thus, time strongly shapes politics, by influencing the kind of decisions that politicians and leaders made, such as short-time decisions, that may give an electoral benefit but leave future generations in trouble, or long-term decisions that may provoke discontent in the electorate but will help to enjoy a better future for all.

Eventually, time can influence politics both in a good and bad way, resolving certain problems such as lack of representativeness and democratic participation, but also creating new ones such as lack of transparency and carelessness. Gersen and Posner suggest that a delayed time in decision-making might ensure interest groups, minorities, and social and political associations participate in the process and have a say to influence or even improve the final decision. Then, a longer process would contribute to ameliorating the whole democratic system; however, it might also manifest flaws and weaknesses, such as the inefficiency of the institutions and their inability to decide about important political matters, as well as the risk of corruption and partial interests.

In the same way, short-time processes have strengths and weaknesses: they would increase efficiency and rapidity in decision-making, transmitting a sense of trust and reliability to citizens. Nevertheless, rapidity would nourish distrust and doubts about the transparency of the entire process, by reducing ways and times for external control and contribution.<sup>15</sup>

## 2. The Influence of Time in Democratic Constitutional Theory

The second section of this article focuses on a more specific aspect of the relationship between time and politics, namely the implications of time for constitutional theory. Accordingly, the concept of the time of constitutionalism will be drawn; it goes hand in hand with the concept of the time of

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<sup>13</sup> On this point see Ackerman 1991. On the reference to the Founders see originalism and foundational theories in Balkin, 2011. For the recalling to the Declaration of Independence see Tushnet, 1999. On originalism and the role of 1954 U.S. Supreme Court sentence *Brown v. Board of Education* in contradicting the originalist vision see Harrison, 2004, p. 1601.

<sup>14</sup> Article 79 of the German *Grundgesetz* declares that «his Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification. Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat. Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible».

<sup>15</sup> This analysis is inspired to what illustrated in Gersen-Posner, 2007, pp. 573-574.



politics, even holding specific peculiarities and features that are specifically “constitutional” rather than “political”.

Generally speaking, from a mainly legal perspective, constitutions contain rules and procedures that constrain and limit legislative power and majoritarian rule; in many cases, these rules explicitly or implicitly regulate the timing of the amendment process or institutional activities. Against the background of the U.S. constitutional order, Gersen and Posner indicate that many articles and clauses of the Constitution give deadlines and timing rules by which actions must be taken, as well as Article V implicitly dictates time rules by which an amendment might be enacted.<sup>16</sup>

The first element that contributes to developing a temporal definition of constitutionalism relates to what we can identify as the “classic liberal-democratic principle”, originated by John Locke, and the idea that the legitimacy of a government should be grounded on the so-called “consent of the governed”. This notion is present in the most important contemporary political philosopher and liberal thinker John Rawls, according to whom «our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason».<sup>17</sup>

In the Rawlsian perspective, considerations from a time-perspective play an essential role and they mainly influence our conception of democracy, so much that stability over time is a fundamental character of any democratic regime and this aspect strongly separates *modus vivendi* from overlapping consensus, where the former is a weak, temporary, and unstable kind of consensus that is characterized by a shallow range of interests and that is subordinated to the precarious balance of forces.

*Modus vivendi* lies on exclusively prudential motivations; it merely focuses on short-time interests and decisions, not on future generations' benefits. Moreover, *modus vivendi* is an unstable consensus that may have extremely short durability, until one of the parts involved considers itself strong enough to break the compromise and impose its own conception of the good.

By contrast, an overlapping consensus is a much deeper, wide, deep, and stable kind of consensus, that is aimed at constructing a just and stable “well-ordered” society based on principles of justice and constitutional essentials. This agreement is based on reasonable presupposes that convince people to set aside their reasonable comprehensive doctrines and to cooperate in a condition of reciprocity to embrace a common point of view and share a common idea of democracy and society. This moral standpoint gives the overlapping consensus and the democratic society stability and durability over time, something that *modus vivendi* is unable to do.<sup>18</sup>

More generally, within the constitutional theory, the concept of time and its definition assume a pivotal function in the debate over liberal-democratic constitutionalism, especially concerning the processes and the ways in which constitutions are amended. Thus, the debate over the so-called time of constitution may follow two directions: I call the first a conservative model, that poses strict limitations to the possibility for constitutions to be amended; while the second, which I indicate as a progressive account, leaves much more room for modifications and it makes the amendment process easier to be settled.

Nonetheless, it does not follow that a constitution remains unamendable because both the conservative and the progressive approaches contain procedures to amend the constitution in a formally correct way. Consequently, as we will show more accurately some lines beyond, the difference lies in the way in which the two models intervene: the conservative one espouses an “aggravated” method that prevents political forces to amend the constitution without following formal rules precisely dictated by the constitution itself. Differently, the progressive standard conceives the

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<sup>16</sup> For a deep analysis of the point see Gersen-Posner, 2007, pp. 549-550.

<sup>17</sup> Rawls, 2005, p. 137.

<sup>18</sup> On *modus vivendi* and *overlapping consensus* see Rawls, 2005, pp. 140-168.

constitution in a flexible way, and it implies the possibility to amend the Supreme Law *as it was* an ordinary law.

Considerations about time and its effects on democracy and constitutionalism are also present in Costantino Mortati's theory of the "material constitution", for which both the rigid and the flexible constitutions miss a stable and durable benchmark; this means that, for Mortati, a material conception of the constitution might merely depend by the historical moment in which the constitution itself is settled. It lies in the fact that, if we consider it possible to amend the constitution in any way, also in the most radical one, the temporal validity of the constitution is limited by its formal rules of revision.<sup>19</sup>

According to the *conservative* account, a constitution is a fundamental text, almost sacred, hierarchically superior to any other legal text, and conceived to be much more difficult to amend. From this conservative perspective, a constitution can be amended only in specific moments and manners, for very specific reasons, and through particular rules that are generally indicated by a precise article of the constitution itself. Here, Rawls comes to help to clarify the point. According to him, an amendment to the constitution is not merely a change but a specific and time-limited intervention that is aimed at adapting basic institutions to new social and political conditions, by correcting the weaknesses of such institutions, and the flaws of formal procedures that emerged in the constitutional and institutional practice during decades, or at reinforcing and widening the conception of fundamental principles and values to give them a stronger and more inclusive definition.

Rawls suggests looking at the history of the U.S. Constitution, in particular the XVI and XXII amendments. These two amendments corrected two major weaknesses in the U.S. constitutional system by meeting precisely what Rawls is suggesting: the first one was enacted in 1913 under Wilson's Presidency to give the government the power to impose an income tax, and the second one was instead approved in 1951 wanted to resolve a flaw made evident by President Roosevelt's four-time re-election, by deciding to limit Presidency to two terms in office.<sup>20</sup>

Against this background, the constitution cannot be amended at any moment to reflect the will of a transient majority. According to the dualist account of democratic constitutionalism, for which we identify two stages of democratic decision-making: the supreme/constitutional and the ordinary/political stages. In this scheme, the constitution is different from ordinary law but hierarchically superior to it. In the Rawlsian framework, the constitutional interpretation is left neither to parliament nor to the Court. The constitution is the higher law, the supreme law, and it is supposed to be much more rigid than ordinary law. However, as Rawls states, «the constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is». Then, as Rawls remarks, both parliamentary and judicial supremacy should be rejected.<sup>21</sup>

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<sup>19</sup> It is not possible to expand here Mortati's theory of the "material constitution", but this theory is one of the most relevant contributions in contemporary theory of law constitutionalism and philosophy of law, especially in the Italian and European context. Mortati distinguishes between a formal and a material account of the constitution: similar to the Kelsenian idea of formal democracy, the former is shaped by the forms and the procedures dictated by the constitution itself. Instead, the latter is conceived by Mortati as the result of the will and the influence of the social context and the will of the political parties. As Alessandro Catelani stresses, this "material" constitution would exist regardless of any formal rules or legal statements. Against this background, the material constitution would incarnate the *real* constitution and it would depend more directly on temporal aspects by binding the meaning of the constitution to the will of the people and the society in the present time. This kind of Constitution would shape society and it would be rooted in it and justified by the society itself. By contrast, the formal constitution would lack this social ground, by being reduced to rigid and abstract set of norms, rules and limits. See Catelani, 2010, and Mortati, 1998.

<sup>20</sup> See Rawls, 2005, pp. 238-239.

<sup>21</sup> Rawls, 2005, p. 237.

Conversely, a so-called “progressive” account of constitutionalism considers a constitution as a “living body”, always and continuously in progress, to be modified and amended at any time, also outside the formal amendment procedures dictated by the constitution itself. Moreover, two further distinctions arise: on the one hand, we might also intend a constitution of the product of the daily political debate within representative institutions, without any legal implications, and on the same stage with the ordinary lawmaking, underpinning the constitution to the majority rule.

Therefore, the constitution loses its “special status” of supreme law, albeit maintaining its place at the top of the legal order. In a nutshell, the constitution becomes amendable without aggravated procedures, as in the case of the ordinary law; the constitution would be now considered to be amendable at any time, by following what the people, or even the electorate, want here and now. Thus, what we called “the time of constitutionalism” would lose its peculiarity and would fail, by being diluted within the more general and less specific *time of politics*. We may define this approach as a “monist” definition of democracy; it can be found in theorists of political constitutionalism *à la* Richard Bellamy and Jeremy Waldron.<sup>22</sup>

On the other hand, dualist theorists defend the double nature of democracy by distinguishing higher from ordinary lawmaking. For this reason, the constitution cannot be amendable as the ordinary law is, otherwise it would not be “the constitution” anymore. Liberal theorists such as John Rawls, Ronald Dworkin, Frank Michelman, and the Italian legal scholar Luigi Ferrajoli share the same common ground, even with differences and disagreements on single points: they agree on the idea that the constitution is a generational product, something that endures for years and passes by generations. This precludes interpreting the constitution from the standpoint of merely political or majoritarian interest; the constitution is not made to give government stability or to follow the will of a transient electorate masked as *we, the People*. The constitution is made to be loyal to democracy and to make it stable for ages because voters pass, and the People stay.<sup>23</sup>

The People are other than the electorate: the former stays almost unaltered, the latter is only a small part, and it is unstable and temporary. Hence, the electorate changes quickly, since the consent around a party or a leader suddenly raises and vanishes, and time influences politics and makes it precarious. Parties and leaders emerge and disappear together with their electorate; sociopolitical and cultural conditions that animate political debates are equally changeable and the popular support that surrounds a political leader is always precarious, and it quickly changes together with public opinion and the political context.<sup>24</sup>

By contrast, the *time of constitutionalism* is much more stable; it does not follow public opinion or the needs of an electorate; the *time of constitutionalism* takes into consideration only *the people* and the generations. It is more extended; it does not change suddenly as in the *time of politics*; it results to be regulated by precise “constitutional moments” that, as Bruce Ackerman teaches us, occur rarely. During the interval between these moments, the People remain silent, since the Constitution stays unamended, and the constitutional debate is interrupted. Here, the U.S. Constitution comes to help again, showing that amendments are very rarely, by being enacted in very long-time intervals;

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<sup>22</sup> To deepen political constitutionalism and monist theories of democracy see Goldoni, 2012; Bellamy, 2007; Waldron, 1999.

<sup>23</sup> On the peculiarities of the “electoral consensus” and the political decisions made to follow voters will see Gibson, 1999, pp. 492-493.

<sup>24</sup> On the difference between “the people” and “the voters” see Ferrara, 2021.

the last valid amendment has been approved, for instance, in 1992, during the first term of Clinton's Presidency.<sup>25</sup>

In contexts of rigid constitutions, such as the German *Grundgesetz*, the Italian, and the U.S. Constitutions, the chance to amend the text and change articles of the Fundamental Law is complicated by specific articles that dictate specific procedures and formal rules that prevent the majoritarian forces in parliament to modify or even overturn the constitution for their own interests. In the German system, Article 79 prohibits any amendment to the fundamental values expressed by Articles 1-21, that result to be explicitly entrenched. Similarly, the Italian Constitution expressly denies any possibility to modify the republican form of the State (Article 139),<sup>26</sup> while the U.S. Constitution imposes the inviolability of the equal suffrage of the States in the Senate (Article V). The fundamental values and principles, albeit non "explicitly" entrenched, are considered to be "implicitly" inviolable due to their relevance to the whole democratic system of these nations.<sup>27</sup>

Article V of the U.S. Constitution prescribes complex and temporally long procedures that entail multiple steps and obstacles, both in Congress and the States, to create the widest and most successful social and political other than constitutional debate in the Nation. The second reason to justify a rigid and complex procedure is to prevent a party or a legislative majority to be able to modify or even subverting the intrinsic spirit of the Constitution by imposing a parochial view of the fundamental values of democracy.

Due to the rigid rules of Article V, the amendment process in the U.S. system has so far taken about eight years on average to be completed.<sup>28</sup> As we have seen, Article V poses that an amendment, before being approved and becoming part of the Constitution, should be proposed by Congress, or by a constitutional Convention called *ad hoc*. After the proposal, an amendment must be voted by the States to be ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof, according to what mode the amendment has been originally proposed.

As we have seen, the amendment process might also be very long, taking many years or decades, as well as centuries (see the XXVII Amendment); generally speaking, it is supposed that the process would occupy two presidential elections from its initial proposal to the final enactment, then eight years.<sup>29</sup> The length and complexity of the amendment process reflect the generational character of the Constitution, which should not reflect the interest and desires of the current electorate, but generate a deep debate for a long time. This is because an amendment is supposed to pass and overcome a precarious and unstable political situation that will inevitably change over eight years, together with the spirit of society and public opinion.

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<sup>25</sup> In this respect, it is interesting to cite a case study published on the following website <https://introductorystats.wordpress.com/2011/02/02/a-statistical-look-at-theammdments-to-the-united-states-constitution>. Here we find an interesting and well-detailed analysis of the duration of amendment process that led to the approval of every 27 amendments of the U.S. Constitution. This analysis takes, for every single amendment, the initial proposal and the final enactment to compare the time every single amendment took to be approved and implemented into the Constitution. We can infer that the latest amendment – the XXVII – has the record for longest amendment-process, by having been firstly proposed on September 25<sup>th</sup>, 1789, and finally approved on May 7<sup>th</sup>, 1992, almost 200 years later.

First ten amendments took two years and three months to be definitively approved (from 1789 to 1791), while the XVI and the XXII took almost four years. In general, any other amendments have been approved in a period from six months (the XII amendment, for instance) and two years (XIV, XVIII, XXIV e XXV amendments).

<sup>26</sup> Article 139 of the Italian Constitution declares that «The form of Republic shall not be a matter for constitutional amendment».

<sup>27</sup> On the issues of entrenchment in the U.S. constitutionalism see Harrison, 2004, pp. 1608-1610.

<sup>28</sup> Here, the case study illustrated on note 13 can clarify the point.

<sup>29</sup> Here, see Ackerman, 1991

## Conclusion

This article has been aimed at showing how strongly and deeply time affects and influences politics, by dictating how it develops and what kind of decisions are made, and how they are made. At the same time, the article has tried to explain how democracy and constitutionalism are specifically determined by considerations about time; it has been specified that democratic politics can privilege two different categories: on the one hand, decisions can be made to satisfy the will of the people (or better, the electorate) in the short time, here and now.

It is to follow a contingent and temporary consensus that may give an immediate but precarious benefit. On the other hand, leaders and democratic officers might decide to sacrifice the easy, fast and attractive profit to protect and advantage next generations to construct a better, stronger, and possibly fairer society. Here the distinction between *the electorate* and *the People* should be called into question to postulate that the former is continuously in change; it is a temporary, precarious, and constitutionally unrepresentative part of the People, that, for their part, can evolve socially, politically, culturally, but it never changes through generations.

It has been also said that constitutions should necessarily be distinguished from ordinary laws and then subjected to a certain form of rigidity that makes it impossible to amend them through ordinary legislative means. Nevertheless, this is not to argue for the unamendability of constitutions *tout court*, since if, on the one hand, a flexible constitution would be the same as an ordinary law, on the other hand, a rigid constitution would be democratic nonsense. It is impossible to prevent generations from adopting or ameliorating their own constitution, so it is impossible to freeze it over time to preserve a “simulacrum”.

Time makes sense, within democratic constitutionalism, if it is continuously moving, and never fixed; to be truly democratic, a constitution should be both protected from manipulations from present transitory majorities and open to generations and future amendments. In this sense, the *time of constitutionalism* makes sense only if constitutions are inherited and also re-interpreted by generations of people, following what Fichera has called “cyclical time” (Fichera, 2021, p. 157).

“Cyclical time” refuses both originalism, according to which constitutions should not deviate from the founders established at the beginning, and the realist conceptions of democracy, that consider constitutions as the reflection of the will of the majority here and now. “Cyclical time” designs a normative constitutional legal system that poses interpretative but not merely transformative rules, looking at the past to protect fundamental values and interpreting the constitution to adapt it to future conditions and resolve institutional weaknesses.

Fichera infers that “cyclical time” is typical of the so-known “legal” variety of constitutionalism (see Ackerman; Dworkin; Rawls), whilst its opposite version, the so-called “political” model, prefers a “linear” approach to time, by which politics and democracy assume a daily character, rather than a future generational perspective. However, both legal and political constitutionalism does not refuse linear and cyclical approaches to time. In legal constitutionalism, the dualist conception of democracy combines the constitutional and supreme stage, where cyclical time dominates, with the ordinary and legislative side, characterized by linear time. Contrariwise, political constitutionalism is more prone to present time rather than future, but cyclical time is present in some sense, albeit subordinated to the interest of the present majority and the majoritarian consensus arising in linear time.<sup>30</sup>

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<sup>30</sup> This point echoes both Rawls, 2005, pp. 238-239, and Fichera, 2021, pp. 160-161 and 172-173.

## Closing notes

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