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Access to Justice in the Theory of Constitutional Democracy*

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"If you can think about something which is attached to something else without thinking about what it is attached to," the American legal realist Thomas Reed Powell famously declared, "then you have what is called a legal mind."[1] The present gulf between scholarship on the theory of constitutional democracy and scholarship on the practice of access to justice provides a particularly stark example of legal minds at work. Lon Fuller in his classic *The Morality of Law* pointed out that one essential feature of a legal system is "congruence between the rules as announced and their actual administration."[2] A regime meets this standard for being a constitutional democracy only when constitutional and democratic rules as applied and interpreted by the appropriate constitutional and democratic authorities reasonably describe actual practice. The scholarship on constitutional democracy, however, rarely discusses the capacity of persons to identify and litigate what constitutional and democratic rules as interpreted by constitutional and democratic authorities identify as legal wrongs. The scholarship on access to

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[1] T. W. Arnold, *Criminal Attempts – The Rise and Fall of an Abstraction*, in *40 Yale Law Journal,* vol. 53, 58, 1930 (quoting Thomas Reed Powell).

[2] Lon L. Fuller, *The Morality of Law* (revised ed.), New Haven, CT, 1969, p. 39.

justice, in turn, rarely discusses the distinctive constitutional and democratic harms that result when many persons cannot identify and litigate legal wrongs. Scholarly works on constitutional democracy devote considerable time to the U.S. Supreme Court's assertion in *Cooper v. Aaron* that judicial supremacy is a crucial element of constitutional democracy in the United States.[3] Scholarly works in the law and society tradition devote considerable time to civil *Gideon*, the claim that persons should have a right to an attorney in civil cases.[4] Few if any scholarly works devote any time to exploring whether a judiciary can be said to have the final authority to settle civil law controversies when many people lack the capacity to identify and litigate civil wrongs.[5]

Constitutional democracy is committed to constitutional and democratic supremacy. The constitution is supreme. If the national constitution declares that all persons should have access to clean water, then government must adopt policies that provide all persons with access to clean water. People are not governed by constitutional rules to the extent persons do not have access to clean water. They are governed by human fiat when the lack of clean water is a consequence of policy choices inconsistent with constitutional mandates or by natural forces when constitutionally mandated access to clean water cannot be achieved by human means. Within the parameters of the constitution, democracy is supreme. If a law passed

[3] Cooper v. Aaron, 358 U.S. 1 (1958). My Westlaw search on February 9, 2019 found 2,301 law review articles that cited *Cooper v. Aaron*.

[4] My Westlaw search on February 9, 2019 found 637 law review articles that used the phrase "civil Gideon."

[5] My Westlaw search on February 9, 2019 found only three law review articles that use the phrase "civil Gideon" and cite *Cooper v. Aaron*. Only one of those articles discusses how problems with access to justice affect judicial supremacy. See M. Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 13 *New York University Review of Law and Social Change,* 2012 p. 395, 433-39.

by the democratic procedures mandated by the constitution[6] requires landlords to maintain adequate heat in apartments rented by their tenants, then those tenants must be able to obtain redress when the temperature in their unit is too low. People are not governed by democratic rules to the extent landlords who fail to ensure adequate heating are not sanctioned. They are governed by human fiat when landlords who refuse to heat apartments adequately are not sanctioned and by natural forces when landlords lack the capacity to heat apartments adequately. A regime is not a constitutional democracy to the extent constitutional and democratic rules do not describe actual practice. Human fiat or nature rule, rather than the constituent power responsible for the constitution or the constituted power responsible for sub-constitutional legal rules.[7]

Constitutional democracies are committed to some version of institutional supremacy.[8] Constitutional democracies allocate constitutional authority. They have procedures for resolving disputes over the meaning and application of constitutional and democratic rules. A judge may decide what constitutes constitutionally acceptable access to clean water, that decision may be made by the national legislature or the constitutional standards for access to clean water may be determined through the interaction of numerous government actors. The relevant institution or procedure may be charged with resolving particular disputes over the meaning of constitutional and legal rules, such as whether Apartment 2C is

[6] Whether the procedures mandated by the constitution are democratic is a different issue. See S. Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It),* New York, 2006.

[7] For the distinction between constituent power and constituted power, see Y. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea,* in *American Journal of Comparative Law*, 2013, p. 657- 719.

[8] For a more elaborate discussion of institutional supremacy and constitutional authority, see M. A. Graber, *A New Introduction to American Constitutionalism,* New York, 2013, p. 100-139.

adequately heated, or resolving a broader class of disputes, such as what temperature is too low. Debate exists in the theory of constitutional democracy and in many constitutional democracies over what combinations of institutions should have the final say when constitutional disputes arise and whether that final say should be limited to a particular dispute or a broader class of disputes. A regime is a constitutional democracy if the relevant mechanism for resolving disputes is consistent with the theory of constitutional democracy and is consistent with the mechanisms for resolving disputes mandated by the relevant constitutional and democratic rules. Constitutional democracies may choose between legislative supremacy, judicial supremacy and other approaches to allocating constitutional authority. A regime in which disputes over the constitutional status of same-sex marriage are routinely is decided by the military or the largest employer in the community is not a constitutional democracy, unless, perhaps, that arrangement is authorized by the constitution or legislation.

Access to justice problems undermine all schemes for allocating constitutional authority in a constitutional democracy. Judicial supremacy exists in name only in a regime where violence prevents persons of color from litigating claims of race discrimination. Legislative supremacy exists in name only when landlords represented by attorneys are able to evict unrepresented tenants unaware of the legal arguments and facts that establish that they have a legal right to remain in their apartments. Constitutional dialogues between governing institutions are empty words when the largest employer in town is able in practice to fire any worker who asserts a constitutional or legal right against the enterprise.

Problems with access to justice threaten constitutional, democratic and institutional supremacy by introducing randomness and bias into law. First, problems with access to justice randomize the practice of constitutional democracy. The law in books diverges from the law in action in ways that are unpredictable. Some people do not get compensation when their property is taken. Others do. Some

people get compensation even when their property is not actually taken. Second, problems of access to justice bias the practice of constitutional democracy.

Particular, idiosyncratic instances of randomness and bias weaken but do not significantly undermine the rule of law commitments of constitutional democracies. To paraphrase Henry David Thoreau, there is a little "friction" built into any human system.[9] Deviations from constitutional, jurisprudential and democratic practice will inevitably occur as long as the law in books is implemented by imperfect people. A clerical error prevents Mary from getting her unemployment check. An administrator who has always hated John unfairly rules against him when John claims the temperature in his apartment is too law. Nevertheless, where randomness and bias are individual, particular and idiosyncratic, the constitution can be said to be supreme, democracy can be said to govern and the allocation of constitutional authority remains intact in the sense that the law in action sufficiently resembles the law in books so that the vast majority of people can use the law in books to plan their lives,[10] and those that cannot have no identifying feature such that we might describe the law in action has be guided by a different rule that the law in books.

Systemic instances of randomness and bias, by comparison, undermine the logic of constitutional supremacy, democracy supremacy and institutional supremacy. To the extent randomness is systemic, then no rule exists. If, for example, a study demonstrates that cars that are legally parked are as likely to get parking tickets as cars that are illegally parked, then the law made by constitutional framers, national courts or legislatures is not governing. No good reason exists for trying to follow a law that is so randomly enforced.

[9] H. D. Thoreau, *Civil Disobedience,* in Carl Bode (ed) T*he Portable Thoreau*, New York, 1947, p. 119-120.

[10] F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life,* New York, 1991, p. 77-78.

To the extent bias exists, then a different rule exists. The judiciary may declare that all persons must have *Miranda* warnings, but if the police only give *Miranda* warnings to white people, then the real rule is that only white people get *Miranda* warnings. The real rulers are the police and not the national court.

The academic division of labor within law schools and within public law more generally has unfortunately served to obscure these connections between the theory of constitutional democracy and the practice of access to justice. Scholars who study the theory of constitutional democracy, mostly law professors or political scientists with an interest in political theory, tend to be interested in normative questions related to constitutional rules and constitutional decision makers. Their concerns are with constitutional design, constitutional authority and constitutional interpretation. Scholars who study the practice of access to justice, mostly associated with law school clinics or the law and society movement, are concerned with empirical questions related to capacities to identify and challenge legal wrongs. They document existing inequalities in access to legal resources and propose policies that might alleviate these inequalities. Neither group of scholars tread much on the territory occupied by the other. Studies of constitutional democracy that focus on constitution design, authority and interpretation do not tend to consider the processes that determine what legal disputes come before constitutional authorities and interpreters and the legal and factual information constitutional authorities and interpreters rely on when resolving those disputes. Studies of access to justice that focus on how legal disputes come before constitutional decision makers have little to say about constitutional, democratic and institutional supremacy, other than to champion some version of civil *Gideon*.

This brief essay reconnects the theory of constitutional democracy with the practice of access to justice by building on important works that provide frameworks for linking concerns with constitutional, democratic and institutional supremacy with concerns with how persons identify and challenge constitutional and legal

wrongs. The first part examines how Tom Ginsburg and Aziz Huq's acclaimed *How to Save a Constitutional Democracy*[11] provides a framework for constructing a path from the theory of constitutional democracy to the practice of access to justice. Their emphasis on the bureaucratic machinery necessary to realize commitments to the rule of law highlights the importance of institutions in civil society that ensure legal and constitutional decision making is not skewed by differences in capacities to identify and challenge legal wrongs. The second part discusses how Deborah Rhode's equally acclaimed *Access to Justice*[12] provides a framework for constructing a path from the practice of access to justice to the theory of constitutional democracy. Her concern with democratic legitimacy highlights how constitutional supremacy, judicial supremacy and institutional supremacy are undermined when the implementation and interpretation of constitutional and legal rules in practice is often determined by who has the power to identify and challenge possible wrongs rather than the substance of those constitutional and legal rules. The conclusion notes the tensions within constitutional democracy when regimes make self-conscious decisions to pass certain rules declaring legal wrongs, but do not provide the support systems necessary for less fortunate citizens to obtain remedies for those legal wrongs.

Strictly speaking, "access to justice" is limited to legal processes. Access to justice rights include the right to an attorney and other resources necessary to litigate effectively claims of constitutional right, whether in civil or criminal cases. The absence of these rights in a regime weaken claims of judicial supremacy, the claim that the judiciary has the final say over constitutional and legal disputes, but may not weaken constitutional supremacy, democratic supremacy or other forms of institutional supremacy. A regime that has a set of practices in place that enable all persons to know their constitutional

[11] T. Ginsburg and A. Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press: Chicago, IL, 2018).

[12] D. L. Rhode, *Access to Justice,* New York, 2004, p. 3.

and legal rights and to challenge perceived claims of constitutional and legal wrong meets important procedural requirements for a constitutional democracy, even when those practices do not involve lawyers or litigation. In practice, however, particularly practice in the United States, ensuring that citizens have access to lawyers and other resources necessary to litigate effectively is the primary means for enabling persons to learn their legal rights and challenge legal wrongs. Few alternatives exist outside the adversarial process in the United States for identifying and correcting legal wrongs. For these reasons, that state of constitutional democracy in the United States is yoked to the state of access to justice. In the broader sense, all constitutional regimes must have practices that enable citizens to identify and correct legal wrongs if they are to meet the criteria for being constitutional democracies.

1. The Path from Constitutional Democracy to Access to Justice

Tom Ginsburg and Aziz Z. Huq's recent work provides a path for connecting the theory of constitutional democracy with the practice of access to justice. *How to Save a Constitutional Democracy* lists "rule by law" as one of the three core commitments of a constitutional democracy.[13] Explicitly channeling Lon Fuller,[14] Ginsburg and Huq maintain that a constitutional democracy exists only when the law in action bears a close resemblance to the law in books. Rule by law, they write, requires "a bureaucratic machinery that is capable of applying rules in a neutral and consistent fashion over a nation's extended territory."[15] This "bureaucratic machinery" is

[13] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, Chicago, 2018, p. 12.

[14] Idem.

[15] Idem, p. 12-13.

capable of "applying rules in a neutral and consistent fashion over a nation's extended territory" only if the bureaucratic machinery includes a robust support system that ensures official decision makers know about possible rule violations occurring in their jurisdiction or a robust support system exists independently of government. Such support systems, Charles Epp points out, are a vital means for ensuring the bureaucratic machinery for implementing policy and resolving conflicts functions with knowledge of all the relevant evidence and arguments necessary for the "neutral and consistent" application of the legal and constitutional rules and the "neutral and consistent" adjudication of conflicts over these legal and constitutional rules.[16] A regime in which most people do not have the capacity to bring complaints of rule violation to the relevant bureaucracy is not a constitutional democracy by Ginsburg and Huq's standards, even if the bureaucrats are models of legal consistency and probity whenever they apply and implement the rules.

While Ginsburg and Huq provide the intellectual scaffolding for connecting the theory of constitutional democracy with the practice of access to justice, they do not discuss the support systems necessary for ensuring the rule of law in constitutional democracies. They limit their discussion to how government officials implement policy and adjudicate conflicts. *How to Save a Constitutional Democracy* worries about "police harassment or the discriminatory administration of regulatory and tax regimes."[17] Democracy exists when police officers do not harass persons with legal claims against the government or powerful private persons, when administrative agencies apply the rules administrators make consistently, and when courts do not favor any class of litigants when interpreting the law. Ginsburg and Huq focus on what people can legally do, even as they acknowledge that

[16] See C. R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective,* Chicago, IL, 1998.

[17] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, cit, p. 13.

what people can legally do they often cannot do for other reasons.[18] The constitution, democracy and constitutional authorities are supreme as long as government officials do not prevent persons from bringing claims of legal wrong to the relevant authority

The literature on constitutional democracy works within this cribbed understanding of the rule of law that emphasizes how government officials implement legal rules and adjudicate legal conflicts to the exclusion of how government officials obtain the information necessary to implement rules or resolve conflicts. Two famous examples will suffice. Ronald Dworkin vests his Judge Heracles with the superhuman powers necessary to analyze every legal decision and social practice that might bear on the proper interpretation of constitutional provisions.[19] Despite being a judicial superhero, Dworkin's Judge Heracles either lacks the power or refuses to use his power to identify all persons who, under his interpretation of constitutional provisions, are victims of constitutional wrong. If these victims lack the capacity to identify or litigate what Judge Heracles regards as a constitutional wrong, they may not benefit from Judge Heracles's superhuman legal wisdom. Herbert Wechsler's 1959 Holmes Lecture at Harvard Law School asserted, "the main constituent of the judicial process is precisely that it must be genuinely principled, rested with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[20] The reference to "every step that is involved" in the judicial process might suggest a concern with the processes by which legal wrongs are identified and challenged. Nevertheless, although Wechsler's "Neutral Principles" essay is the second most cited law review article in American legal

[18] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, cit., p. 17.

[19] R. Dworkin, *Taking Rights Seriously*, Cambridge, MA, 1978, p. 132.

[20] H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Harvard Law Review*, 1959, p. 1, 15.

history,[21] only one scholar, in a piece that does not exist in the constitutional democracy canon, has made the connection between a legal system's obligation to ensure legal rules are applied consistently and a legal system's obligation to provide support systems for those who have possible claims of legal wrong.[22]

Constitutional democracies requiring support systems that enable all persons to learn that their legal or constitutional rights may have been violated and bring their legal or constitutional claims before the relevant legal or constitutional authority. Good laws and neutral bureaucrats are necessary but not sufficient conditions for constitutional, democratic and institutional supremacy. Consider a constitutional order in which the constitution mandates "All adults shall have the right to vote," judicial decisions interpret that declaration as requiring that government permit absentee voting, national legislation outlaws efforts to use coercion to intimidate voters, courts and other relevant authorities apply the legal rules fairly and make good faith efforts to resolve factual disputes, and police officers ensure that no voter is coerced when entering the voting booth. This regime seems to be a constitutional democracy by the standards laid out by *How to Save a Constitutional Democracy* and other prominent works on that subject. Consider further, however, that in this constitutional order large employers routinely fire any worker who casts a ballot. Some non-voters do not challenge this action because they are unaware that their employer is acting illegally. Others cannot find the legal assistance necessary to file a lawsuit. Still others are dissuaded from filing lawsuits by threats to their family. The few persons who do file lawsuits usually lose because the superior legal talent that represents large employers has the greater resources

[21] See F. R. Shapiro, *The Most-Cited Law Review Articles Revisited*, vol. 71 in *Chicago-Kent Law Review*, 1996, p. 751, 760.

[22] See M. Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 13 in *New York University Review of Law and Social Change, 2012,* p. 395, 433-39.

necessary to make a superior factual presentation that convinces fair-minded tribunals that no threat was actually made or the greater resources necessary to make a superior legal presentation that convinces fair-minded tribunals that whatever threat was made did not violate the elections law. The end result is that hardly any poor person votes. This is not a constitutional democracy even with good laws and neutral bureaucrats. The constitution gives all persons a right to vote that few poor persons can exercise. Democratically elected officials prohibit coercion, but coercion is rampant. The judges who have the final authority to determine whether a person has been denied the right to vote decide solely on the basis of the evidence and arguments before them, but that evidence and those arguments are badly skewed because of resource inequalities in civil society.

The Supreme Court of the United States exhibits a similar myopia when asserting judicial supremacy. *Cooper v, Aaron* asserted, "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[23] This rule of law principle was directed at other governing officials. *Cooper* maintained, "(n)o state legislator or executive or judicial officer" could defy a judicial order or ignore judicial decisions interpreting the constitutional without directly attacking constitutional democracy in the United States.[24] The justices were able to make that claim only because John Aaron had the support necessary to bring his claim that Arkansas was violating the constitutional right of his children to racially desegregated schools. Nowhere in *Cooper* did the justices acknowledge that government officials have historically ignored judicial decisions with impunity when the victims of their

[23] Cooper v. Aaron, 358 U.S. 1 (1958), at 18.
[24] Idem.

constitutional wrongs have not had the knowledge or support necessary to litigate their claims.

Access to justice problems devastate standard claims about judicial supremacy in the United States.[25] Both proponents and opponents of judicial supremacy claim that federal courts, for better or worse, have a near "monopoly"[26] on constitutional authority. Professor Larry Kramer complains that "everyone nowadays seems willing to accept the [Supreme] Court's word as final ... regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion."[27] Dworkin maintains that "practice has now settled" that "courts should take final authority to interpret the Constitution."[28] Neither scholar acknowledges that the Supreme Court does not have the final say when parties do not litigate claims of constitutional wrong, because they do not know they are victims of a constitutional wrong, lack the resources to litigate a constitutional wrong, or fear reprisals if they litigate the constitutional wrong. In these circumstances, constitutional authority flows from courts to those parties who have the resources to make or deny claims of constitutional wrong, litigate claims of constitutional wrong, and prevent reprisals when they litigate constitutional wrongs.

American history highlights how in the absence of a strong support system for litigation, the Supreme Court rarely has the final say on constitutional matters. Before Congress provided funds for the Legal Services Program, state and local officials established the

[25] The next three paragraphs are a light edited version of M. A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice,* 58 in *William and Mary Law Review, 2017* p. 1549, 1551, 1595-1598.

[26] L. D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 in *California Law Review, 2004, p.* 959, 960.

[27] L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* New York, 2004, p. 228.

[28] R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* Cambridge, MA, 1996, p. 12.

constitutional rules regulating state welfare policies without much federal judicial input.[29] In the absence of litigants of color with substantial litigation resources, southern states and private mobs determined the constitutional status of Jim Crow. The Supreme Court had few opportunities to protect the rights of persons of color until the National Association for the Advancement of Colored People (NAACP) began sponsoring constitutional attacks on long-standing government practices.[30] The NAACP tended to bring lawsuits only in such border states as Kansas and Maryland, because Klan activity and other mob violence in the Deep South suppressed litigation by persons of color.[31]

The ways in which controversies over the rights of African-Americans were settled at the turn of the twentieth century illustrate how access to justice supports and belies textbook accounts of the allocation of constitutional authority in the United States. An African-American community fully capable of recognizing and litigating plausible claims of constitutional wrong would not have converted the Waite, Fuller, and White Courts into the Warren Court. The Supreme Court in *Plessy v. Ferguson* sustained racial segregation even though the African-American community in New Orleans was aware of potential constitutional problems with racial segregation, fully litigated those constitutional claims, and did not fear reprisals from that litigation effort.[32] Nevertheless, the Waite Court's willingness to protect voting rights in *Ex parte Yarbrough*[33] and *Ex parte Siebold*[34] suggests that far more African-American claims of race

[29] See S. E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making,* Princeton, NJ, 1990.

[30] Epp, *The Rights Revolution*, p. 44-70.

[31] M. J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality,* New York, 2004.

[32] See C. A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation,* New York, 1987.

[33] 110 U.S. 651 (1884).

[34] 100 US 371 (1879).

discrimination in the voting process would have been resolved favorably had all African-Americans had the capacity to engage in the litigation necessary to give the Supreme Court of the United States the final say over whether they were unconstitutionally denied the right to vote.[35] Federal and state courts, however racist, were far more inclined to protect the rights of those more numerous African-Americans whose constitutional claims were finally settled by lynch mobs.

Ginsburg and Huq remind scholars that constitutional democracy's commitment to the rule of law requires that the law in action bear a close resemblance to the law in books. Students of constitutional democracy have waxed eloquent on how the persons who interpret and implement constitutional and legal rules ought to be selected and how they ought to interpret the rules. They have too often, however, been silent on how those constitutional decision makers learn about constitutional disputes and what they learn about constitutional disputes. The example of the American South highlights how even a judiciary committed to the best method of constitutional interpretation cannot implement the rule of law in a regime with severe access to justice problems.

2. The Path from Access to Justice to Constitutional Democracy

Deborah Rhode's work provides a path for connecting the practice of access with the theory of constitutional democracy. *Access to Justice* waxes eloquent on the injustices caused by how legal services are distributed in the United States. Rhode points out Millions of Americans lack any access to justice, let alone equal access. According to most estimates, about four-fifths of the civil legal needs

[35] For a good survey of Waite Court decisions on race discrimination, see P. Brandwein, *Rethinking the Judicial Settlement of Reconstruction,* New York, 2011.

of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Government legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low-income litigants.[36]

"In most jurisdictions," She observes, "it is safer to be rich and guilty than poor and innocent."[37] Rhode insists such denials of access to justice violate a core commitment of constitutional democracy. She asserts that a "commitment to equal justice is central to the legitimacy of democratic processes,"[38] John Marshall expressed related sentiments in *Marbury v. Madison.* After noting, "The Government of the United States has been emphatically termed a government of laws, and not of men," Marshall continued, "It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." The laws do not offer a remedy, Rhode might continue, when many people cannot in practice obtain remedies for violations of vested legal rights. Regime commitments to democratic processes or the rule or law, for these reasons, depend on the extent to which legal wrongs are actually remedied.

Access to Justice charges the provision of legal services in the United States with a wide litany of sins. Rhode speaks of "inaccessible rights and remedies,"[39] worries about "the fairness and justice of the legal system,"[40] and the way "these biases in the criminal justice system cannot help but erode its credibility."[41] She complains that "(d)enying an adequate defense to those who cannot afford it compromises our most fundamental constitutional commitments,"[42] and leaves "individuals who are unjustly accused or denied their

[36] D. L. Rhode, *Access to Justice,* New York, 2004, p. 3.
[37] Idem, p. 122.
[38] Idem, p. 3.
[39] Idem, p. 5.
[40] Idem, p. 122 – 123.
[41] Idem, p. 123.
[42] Idem, p. 142.

constitutional rights . . . without effective remedies."[43] Rhode insists "(p)roviding representation necessary to make (fundamental) rights meaningful fosters values central to the rule of law and social justice,"[44] maintains that "access to legal services . . . affirms a respect for human dignity and procedural fairness that are core democratic ideals"[45] and can be "an essential deterrent against future abuse."[46]

While, as is the case with Ginsburg and Huq, Rhode offers a framework for connecting access to justice with constitutional democracy, the connections she draws are incomplete. Rhode maintains that legal systems have two "core values." "One is consistency; similar cases should yield similar results. A second is the opportunity to be heard and to obtain some measure of individualized treatment."[47] These values are not distinctive to constitutional democracy. Authoritarian legal systems should also strive to achieve consistency and give persons with claims of legal wrong an opportunity to be heard. Dictators inherit and make ordinary laws that structure people's lives. In an important sense, tenants evicted from their apartments in violation of the legal rules should have the same right to be heard in a constitutional democracy as in any other regime. Rhode makes no connection between voting, a central characteristic of a constitutional democracy, and access to justice. Rather, *Access to Justice* seems to adopt a Dworkinian conception of democracy that consists of political, procedural and substantive rights.[48] Rhode explains why problems with access to justice are inconsistent with the procedural and substantive rights of

[43] Idem, p. 123.

[44] Idem, p. 9. See D. L. Rhode, *Access to Justice,* New York, 2004, p. 185 ("rule of law").

[45] D. L. Rhode, cit., p. 9.

[46] D. L. Rhode, *cit.,* p. 11. See D. L. Rhode, *Access to Justice,* cit., p. 185 ("procedural justice").

[47] D. L. Rhode, *cit.,* p. 39.

[48] See R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate,* Princeton, NJ, 2006, p. 143-147.

constitutional democracy, but not why such failings implicate the political rights of constitutional democracy

Marbury v. Madison suggests a stronger connection between access to justice and constitutional democracy. Marshall begins his analysis of the judicial power to declare laws unconstitutional by noting, "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which they whole American fabric has been erected." Popular sovereignty, the distinctive characteristic of constitutional democracy, has two functions. First, constitutional rules, as Marshall notes, have their source in the people exercising their constitutive power. The ban on ex post factor laws is authoritative because that provision was ratified by the American people. Second, other legal rules have their source in the people exercising their constituted power. The law of landlord and tenant is authoritative because that law was made by the people's elected representatives or their delegates and made according to the provisions set out in the Constitution. To the extent rights exist without remedies, the people's exercise of their constitutive or constituted power has been frustrated. Instead, the allocation of rights is being determined by extra-legal authorities. Constitution making, voting and law-making are pointless exercises if the rules the people or the people's legitimate representatives make cannot be implemented because too many people lack the capacity to make claims of constitutional or legal wrong.

The Supreme Court overlooked this connection between access to justice and constitutional democracy in *Mathews v. Eldridge*.[49] Justice Lewis Powell's majority opinion maintained that when determining the level of procedure necessary to determine whether persons had been deprived of a statutory right, the justices would consider three factors.

[49] I am indebted to Michael Millemann for the insights in this paragraph.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[50]

Powell conceived of procedural justice as a balance between the individual's interest in obtaining the benefits of a legal or constitutional right and the public interest in efficient and inexpensive processes. The theory of constitutional democracy defines the public interest more broadly. The public has an interest in ensuring that persons are not deprived of constitutional or statutory rights because the public, exercising their constituency power, has declared that persons have certain constitutional rights, or exercising their constitutive power through their representatives, has declared that persons have certain statutory rights. The principles of popular sovereignty underlying constitutional and democratic supremacy are vitiated when by adopting procedures that deny certain individuals full and fair hearings, government officials inhibit persons from obtaining benefits or exercising rights that the people acting constitutionally or democratically had deemed they should have.

These observations suggest expanding David Gray's important claim that the Fourth Amendment protects community rights[51] to all of constitutional criminal procedure. Constitutional criminal procedure rights are community rights for at least two reasons. First, they reflect a communal decision that these are the procedures that should be used when persons are accused of crime. Following these procedures honors the public commitment to constitutional supremacy. Second, these procedures are the means by which

[50] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[51] D. Gray, *The Fourth Amendment in an Age of Surveillance,* New York, 2017

community decisions as to what behavior should be criminal and what behavior should be legal are implemented. Following these procedures honors the public commitment to the rule of law. When persons lack access to justice, for these reasons, the harm is to the communal rights at the core of constitutional democracy and not just to the individual unable to assert constitutional or legal rights.

3. Conclusion

The Constitution of the United States declares, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Neither the persons responsible for that text nor any of their descendants thought the text identical to one proclaiming, "No State shall . . . deny to any person within its jurisdiction, who understands the equal protection clause, has the resources necessary to litigate equal protection claims and the support necessary to avoid reprisals for such litigation, the equal protection of the laws." The second text is in practice identical to the first text. The equal protection clause protects only persons who can identify and litigate equal protection wrongs. This is a truism. More important, throughout American history, a sharp divergence has existed between the persons protected in theory by the equal protection clause and the persons protected in practice by the equal protection clause. White terrorist supremacy has competed, often successfully, with constitutional and democratic supremacy as the central principle of the American regime.

Less stark problems with access to justice haunt constitutional democracy in the United States and, I suspect, other regimes. Poorer citizens often do not know when their legal rights have been violated. When they know their rights are violated, they often lack the resources to litigate. When they have the resources to litigate, they often cannot do so because they fear reprisals. When they do litigate, the other party often has counsel with superior resources to make evidentiary and legal presentations. These failings cause individual

and communal harms. Individuals are obviously harmed when they cannot assert legal and constitutional rights. Communities are also harmed when the rule of law is replaced by the rule of superior knowledge and resources because constitutional democracy exists only when what the people acting constitutionally or democratically enact as the law in books bears a close resemblance to the law in action.

One possible reaction to these claims is that the law in books in most constitutional democracies does resemble the law in action when the law in books is described correctly. The law in books is identical to law in action because either that is what the people acting constitutionally or democratically have willed or what the people acting constitutionally or democratically could change. Americans have made a constitutional choice not to pass a constitutional amendment mandating civil *Gideon*. Democratically elected officials during the late nineteenth century made the choice not to provide the national government with the funds necessary to reduce significantly white supremacist terrorism. We might not like those constitutional choices, but the practice of access to justice in a regime may be as much a constitutional or democratic decision as the substantive rules of that regime. Justice William Rehnquist insisted, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[52]

The view that persons "must take the bitter with the sweet" suffers from many difficulties. The first is that constitutional and statutory rights provisions express no such limitation. The equal protection clause does not condition equality rights on access to justice. The provisions on habitability in the housing code do not condition tenant rights on their capacity of have a lawyer of equal skill to the lawyer representing the apartment owner. Laws and legal

[52] Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.).

regimes routinely promise "equal justice under law," not justice contingent on knowledge, resources and the ability to avoid reprisals. Second, when problems with the practice of access to justice have legal foundations, those legal foundations are often inferior in the legal hierarchy to the legal foundations of the rights in question. The Constitution of the United States mandates equal protection. The level of funding for legal services is set by legislators or administrators who have an obligation to implement without randomness or bias the constitutional commitment to equal protection of the law, but no constitutional obligation to save money. Third, legal practices that weaken access to justice are rarely based on self-conscious, publicly made claims about the consequences of those practices. The reasonable doubt rule in criminal law is based on a self-conscious, public choice that the criminal process shall be biased towards finding suspected criminals not guilty. States whose funding for public defenders cause inexperienced public defenders to handle capital punishment cases without the substantial resources necessary for the defense have not made a self-conscious, public choice that the capital punishment trials of poorer persons should be biased toward executing them.

We might nevertheless imagine a constitution that declared, "No State shall deny to any person within its jurisdiction, who understands the equal protection clause, has the resources necessary to litigate equal protection claims and the support necessary to avoid reprisals for such litigation, the equal protection of the laws." The legislature in such a regime might pass laws declaring that "all tenants who can afford a lawyer have the right to an adequately heated apartment" and that "all citizens who do not fear private coercion have the right to vote." Such rules reflect self-conscious, public choices by the people and their representatives when granted a specific right that the right be limited to particular persons when not implemented randomly. A fair case can be made that such a regime is committed to some version of the rule of law. A much weaker case can be made that such a regime is a constitutional democracy.

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Abstract: The article reconnects the theory of constitutional democracy with the practice of access to justice by building on important works that provide frameworks for linking concerns with constitutional, democratic and institutional supremacy with concerns with how persons identify and challenge constitutional and legal wrongs. The first part examines how Tom Ginsburg and Aziz Huq's acclaimed *How to Save a Constitutional Democracy* provides a framework for constructing a path from the theory of constitutional democracy to the practice of access to justice. The second part discusses how Deborah Rhode's equally acclaimed *Access to Justice* provides a framework for constructing a path from the practice of access to justice to the theory of constitutional democracy. The conclusion notes the tensions within constitutional democracy when regimes make self-conscious decisions to pass certain rules declaring legal wrongs, but do not provide the support systems necessary for less fortunate citizens to obtain remedies for those legal wrongs.

Keywords: constitutional democracy, access to justice, constitutional rights.

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