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A critical approach

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Introduction

In this work I am going to re-examine the tense relationship between constitutionalism and democracy, focusing my attention on the way in which the democratic component of constitutionalism has been weakened over time. I will analyze how the (reasonable) constitutional concern for establishing limits on power ended up (unreasonably) displacing "We the People" from the institutional scene. Mainly, I will be interested in showing how even social scientists concerned with offering responses to the democratic crisis (the so-called "democratic erosion") participate in this problem, which they feed instead of remedying. This is so, in particular, by defending a very limited version of constitutional democracy, where democracy ends up being confined to the three branches of government, where "We the People" becomes a rather marginal spectator of the affairs of government.

The tension between constitutionalism and democracy

The dispute between constitutionalism and democracy emerged with the very birth of our constitutional democracies, more than two hundred years ago. I have dealt with such tensions in other works (Gargarella 2022), so here I will limit myself to reflecting on said tension, according to the ways in which it has developed since the mid-twentieth century. In fact, that dispute acquired a renewed life since the beginning of the 20th century, and in line with the increasing democratization of societies (through the extension of suffrage, public education, etc.) and the consequent growth of popular demands and social conflicts. A particularly significant expression of that renewed dispute appears in the well-known debate between Carl Schmitt and Hans Kelsen, regarding who was the "guardian of the Constitution". That debate reflected, at a very early stage, tensions that are still visible between the two, quite opposite, views: the one that emphasized the importance of establishing limits to the political power" -a view more akin to the one then advanced by Kelsen-, and the other that considered those limitations as impermissible constraints to the sovereign people -a position more akin to the one then advanced by Schmitt. Clearly, at that early moment, the debate between Kelsen and Schmitt acquired forms that were (given the historic circumstances that surrounded that controversy) much more dramatic and extreme than present discussions on the topic -for example, regarding present disagreements about the scope and limits of judicial review. As David Dyzenhaus put it, in his analysis of the Schmitt-Kelsen debate,

> Their concern about sovereignty was, however, much more radical than that of contemporary opponents of judicial review, for example, Jeremy Waldron, who claim that such review undermines parliamentary

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supremacy and thus the authority of the representatives of the people. These rightwing Weimar scholars, notably Carl Schmitt, opposed what they regarded as the pluralistic, party political system of parliamentary democracy, as they thought that that system, like the judicial system, was prey to capture by special interest groups and thus contributed to the problem of fragmentation. On their view, popular sovereignty is national sovereignty, with national sovereignty understood as the sovereignty of a substantively homogeneous people, a power which is outside of legal order and which cannot be constrained by the legal limits that liberals and democrats desire to impose on an authentic sovereign power capable of making the kinds of decisions necessary to solve the fundamental conflicts of a society (Dyzenhaus 2015 340).

The Kelsen-Schmitt debate showed, in a very stark way, the tension between the two worldviews here under analysis, that is to say, the one that insists on constitutional limits, and the one that privileges the (unlimited) ambitions of democratic politics. But there is an additional characteristic that this debate made visible and that I would like to underline, for the purposes of this work. I am referring to the assumption, then expressed by Schmitt, of "We the People" as a unified and undifferentiated whole; and the identification of the political -the realm of politics- with the sovereign decision of the Kaiser.[1]

With the passage of time, the discussion became richer and more sophisticated. Then, democratic politics resulted fundamentally identified with political bodies (Congress in particular), and the "constitutionalist" position emerged more clearly aligned with a view that reserved a (the) crucial institutional role for higher courts. As we shall see, these movements implied -in terms of Mathias Kumm- the passage from the “total state” envisioned by Schmitt to the “total constitution”. [2] In institutional terms, this was the passage from the “legislative parliamentary state” to a “constitutional juristocracy”. [3]

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[1] It is worth noting that such a view was rejected by Kelsen who, in different works had criticized Schmitt’s views about the Parliament and proposed a different approach (related to his understanding of democracy, relativism and the absence of “absolute truths”) according to which the Parliament represented a proper institutional means for the achievement of partial agreements and compromises among different and competing groups (Kelsen 2005).

[2] In Kumm’s words, “If a total state is a state in which everything is up for grabs politically, a total constitution inverts the relationship between law and politics in important respects. If in the total state law is conceived as the continuation of politics by other means, under the total constitution politics is conceived as the continuation of law by other means. The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question. The validity of any and every political decision is subject to potential challenge before a constitutional court that, under the guise of adjudicating constitutional rights provisions, will assess whether such an act is supported by good reasons. The legislative parliamentary state is transformed into a constitutional juristocracy” (Kumm 2006, 343).

[3] As Martin Loughlin put it, “the future…belonged to Kelsen”, even though “Schmitt’s arguments about the role of constitutional courts in the era of the ‘total constitution’ were to prove prescient” (Loughlin 2022, 127). In the same way, for Ran Hirschl, “Kelsen’s case for the court as guardian of the constitution has evidently prevailed, but it succeeds alongside Schmitt’s claim that this must lead to a politicized judiciary exercising a politically contentious constitutional jurisdiction” (Hirschl 2004, 1).

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The crisis of rights and a new legal paradigm: Neutralizing democracy

Possibly, the turning point of the discussion between constitutionalism and democracy or - we can say now, more specifically - between constitutional justice and democratic politics, arrived with the end of the Second World War. This era was marked by the horror of genocide and massive violations of human rights. These were also the years in which fascist and Nazi policies prevailed, carried out in the name of the popular masses, and enforced with the support of thousands or millions of citizens mobilized on the public scene.[4]

This dramatic context generated, in many of those interested in constitutional democracy, a double reaction. On the one hand, the political aberrations committed in the name of "We the People" invigorated the elitist tendencies that were already present in the area, since the very origins of constitutionalism. In this way, the feeling of democratic distrust that was so crucial in the founding moment of constitutionalism was reinforced. On the other hand, the massive violations of rights committed by the different authoritarian regimes generated widespread awareness about the value of fundamental rights and the correlative importance of courts. A new paradigm in constitutional matters was then born - a paradigm that, to a large extent, remains in force to this day. This new paradigm is characterized by an open, legal commitment to fundamental rights, judicially supervised through local and international courts. This constitutes, probably, the best-known face of the new paradigm. However, the other side of that face is at least as important as the former. I am referring to the explicit attempt to deactivate politics, neutralizing democratic participation and preventing the sovereign people to assume an active role in the public sphere. In this way, the balance between constitutionalism and democracy suffered a new and decisive readjustment. The constitutional side of the equation was then reinvigorated, mainly through the presence new or more powerful courts, while "We the People" were definitely expelled from the realm of politics. Since then, politics -and, even more, democratic politics- would be understood as a synonym of professional

[4] Although here I take the Second World War as a "turning point" in this discussion (the issue that forced the protection of rights to be placed at the center of the global discussion), I do not ignore that concern for the situation of minorities finds - before and after the Second War - other fundamental milestones. In the United States, the crisis of rights became especially visible during the political and legal conflict that unfolded concerning the denial of rights to African-Americans. In 1868, after the end of the Civil War (1865) between the North and the South, the Fourteenth Amendment was enacted, containing, in its first section, the Equal Protection Clause. Based on that legal foundation, and especially during the time of the Warren Court (1953-1969), the crisis of rights (of the most disadvantaged groups) took center stage in the law: hundreds of judicial decisions and thousands of legal writings on the subject bear witness to this. In Latin America, the situation of individual and collective rights was a cause for concern during much of the twentieth century, but it reached a crisis point in the final decades of the century – above all during the latest wave of dictatorships that arrived in the region in the 1970s. Argentina, Brazil, Chile, and Guatemala offer heartbreaking examples of the seriousness of that crisis (with disappearances, torture, and executions as the norm). Meanwhile, other countries that did not suffer the scourge of the worst regional dictatorships – like Colombia and Mexico – also showed signs of a serious, far-reaching and profound new crisis of human rights.

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politics, typically exercised by popularly elected and legally constrained political representatives.

A crucial example of these new developments -on the one hand, the coming of the time of fundamental rights and courts; on the other, the popular debasement of democracy- was the adoption of the Universal Declaration of Human Rights, which followed the end of the 2nd World War. The Universal Declaration, drafted by a committee chaired by Eleanor Roosevelt, was adopted by the United Nations General Assembly in 1948, a few years after the end of the War. The Declaration includes 30 articles that define the "basic rights and fundamental freedoms" of every individual, regardless of "nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status".

This new era of rights, which gained expression both at the international and national level, was then followed by the creation or consolidation of higher courts, in charge of protecting those fundamental legal rights (Loughlin 2022, 127-8).[5] Just after the end of the War we find the revitalization of the Austrian Court, in 1945; and then the establishment of a Constitutional Courts in Germany, 1952; Italy, 1955; France; 1958; Spain,1978; and Portugal, 1982. Some years later, the Western World also recognized the emergence of powerful and active courts in countries so diverse as South Africa and India, and a similar movement following the fall of the Berlin Wall in 1989. In Latin America - a region that, since its independence had embraced the US tradition of supreme courts and judicial review- we also find the rise of independent and very active courts, such as the Colombian or the Costa Rica's courts, by the end of the 20th Century -particularly in what regards the protection and enforcement of social and economic rights.

In different ways, these convergent tendencies -a renewed distrust of democracy; a restored confidence in the role of courts- worked together to shape the new institutional order, which would gradually come to be described as a "juristocracy". This new situation implied -according to Ran Hirschl, who popularized this word- the transference of "an unprecedented amount of power from representative institutions to judiciaries" (Hirschl 2004, 1).

Building up a counter-majoritarian system, in the name of protecting rights

The institutional practice that emerged with the end of the Second World War continues to mark, even today, part of our constitutional practices and reflections. In those post-war years, the idea that political majorities tended to act irrationally or blindly, causing serious abuses on the weakest groups, gained wide adherence. From those years also comes the idea that disadvantaged minorities (racial, ethnic, sexual, national, etc.) require special

[5] In Loughlin's words, "At the end of the Second World War, many European countries began the long process of reconstruction by adopting a constitution intended to take effect as fundamental law and which equipped the judiciary with the powers of constitutional review. This was a major institutional innovation. Before the war, other than the exceptional case of the United States, there was only the limited experience of Austria and Czechoslovakia on which to draw" (ibid.).

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constitutional protection; and that the best responses for those purposes include the enactment of charters of fundamental rights (both at the international and local level) and the establishment of courts (both at the international and local level) in charge of protecting those rights.

At this point, let me insist on at least two implications of the previous analysis, related to the way in which the Western world attempted to address the problem of the crisis of rights. First of all, and in relation to the question of judicial review, it is important to note that, first in the United States, and later in Europe and Latin America, judges were authorized to invalidate legal norms. As Alexander Bickel put it, through their power to review the validity of legislation, judges were given the authority to decide "not on behalf of the prevailing majority, but against it" (Bickel 1962, 17). Their capacity to challenge democratic decisions gave rise to controversies about the scope of the powers of the judicial branch, in a democracy: this is what Bickel himself defined as the "counter-majoritarian difficulty" (ibid.). Now, what I want to highlight at this stage is that the problem at stake looks more serious than it appears. The thing is that, very frequently, the defense of the power of judges was based on elitist assumptions (elitist assumptions related to the virtues of judicial reasoning, vis a vis the passions and irrational impulses of majorities) that called into question the very foundations of constitutional democracies. The problem is: if majorities tend to err and act irrationally, but judges do not, why, then, continue to accept the primacy of a democratic system?

It is this type of elitist impulses - finally, the deep democratic distrust that motivated such analyzes - that explain the construction of an entire institutional system aimed at preventing majoritarian excesses. In other words, the problem that was established then was not simply that of the judicial review - the "counter-majoritarian difficulty" - but another more structural and widespread one, related to the creation of a counter-majoritarian institutional system. Within this new institutional structure, the role of "We the People" (finally, democracy) is confined and limited to regular elections, every two or four years. In this sense, Roberto Unger's approach seems perfectly correct, when he refers to a situation of "discomfort with democracy" and mentions the "dirty little secret" of constitutionalism -a "secret" that goes far beyond the problem of "strong courts" or the most extreme forms of judicial review (Unger 1996, 72). Unger describes this discomfort with self-government as manifest in: "the ceaseless identification of restraints on majority rule … as the overriding responsibility of … jurists; … in the effort to obtain from judges … the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room … [and] in the … treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies" (ibid.).

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Probably, the existence of this counter-majoritarian institutional system, based on assumptions of democratic distrust, is what began to generate what, from now on, I will call the "crisis" or "democratic problem" of our time. Of course, this "new" crisis does not replace the "old crisis of rights" referred to above. It is, in any case, the widespread awareness, among activists, politicians and doctrinaires, that the democratic decision-making process is discredited, functioning poorly, and lacks effective social support.

The “democratic problem”: Two different approaches, two different responses

In recent years, in fact, the “democratic problem” became prominent within the academic literature. Just to mention a few examples, I could refer that many of the most notable figures from those disciplines published informed reflections on these occurrences. First-rate constitutional scholars edited thick volumes, uniting the work of distinguished colleagues, on the question of the “fall” of democracy (Graber, Levinson & Tushnet 2018; Sunstein 2018); political scientists Levitsky and Ziblatt published successful books on the “death” of democracy (Levitsky & Ziblatt 2018; Levitsky & Ziblatt 2023). In sum, the crisis was recognized and addressed as such in the social sciences.

In the context of this work, I am not going to deal with what the causes of this phenomenon have been.[6] I am just going to suggest that I personally relate the growing interest and concern with the democratic question with a diversity of issues that range from an increasingly widespread and intense feeling of "democratic empowerment" (civil society assuming as "owner" of political life), accompanied by another parallel, but in the opposite direction: an idea - let's put it that way - of "democratic expropriation" or "political alienation."

Within the social sciences and the legal doctrine, however, the crisis and its causes were the object of very different approaches According to many, the origins of the democratic crisis appeared mainly related to the action of the *political branches*. In particular, those risks to democracy tended to come not only, but mainly, from the Executive Branch, capable of assuming abusive ("populist") behavior. Then, and from this perspective, the main proposed response was to restore the "eroded" system of "checks and balances." This, fundamentally, through a "responsive" exercise of judicial review (according to the title of Rosalind Dixon’s book on the subject).

For some others, instead, the democratic crisis had its origins in *the undue expansion of constitutionalism*. More particularly, they assumed that powerful and active courts, were centrally responsible for the crisis. Therefore, in the face of the crisis, they tended to offer responses that were aimed, more generally, at confronting constitutionalism ("Against constitutionalism", according to the title of Martin Loughlin's book on the subject), or, more specifically, at demanding strong restrictions on the modes of exercise of judicial review. In what follows, let me explore and critically examine both responses.

[6] I tried to advance some reflections regarding this topic, for example, in Gargarella 2022.

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The problem comes from politics? Democratic erosion

While many doctrinaires consider that the crisis of democracy finds its origins in the excessive growth of constitutionalism (its “imperial” character), many others maintain that the cause of that situation of collective anguish has more political overtones. In other words, it is a problem that seems mainly derived, not from the excesses of the judiciary, but rather from the abuses of the political branches (the Executive one, in particular, or what many authors called the phenomenon of “populism”). Those abuses -they claim- have typically included political actions aimed at “eroding democracy”, in general or, more specifically, eroding the functioning of the system of public controls -the system of “checks and balances”.

The idea of a “democratic erosion” has been frequently used by contemporary theory, particularly since the arrival of Donald Trump to power. Through this concept, the current doctrine seeks to characterize a certain form of exercise of the executive function, which is considered distinctive of the North American case, but also present in other relevant cases of the time, such as those of Erdogan in Turkey, Bolsonaro in Brazil and Orban in Hungary. What seems to be common, in all these cases, are situations of attack or colonization of the traditional mechanisms of checks and balances.[7]

In response to those events, important studies on the subject have begun to be produced by both the legal academy and the field of comparative politics. For instance, Adam Przeworski recently wrote about a phenomenon he called “democratic backsliding” (Przeworski 2019); comparativists Tom Ginsburg and Aziz Huq wrote about “democratic erosion” (Ginsburg & Huq 2018); David Van Reybrouck published a pamphlet on “democratic fatigue” (Van Reybrouck 2017).

Now, how did these theorists actually define the idea of “democratic erosion”? For Tom Ginsburg and Aziz Huq -the authors who wrote the most influential book on the subject- the idea of “democratic erosion” alludes to “the risk of a slow, but ultimately substantial unraveling along the margins of rule-of-law, democratic, and liberal rights” (Ginsburg & Huq 2018, 39). For them, “democratic erosion” implies “a process of incremental, but ultimately still substantial, decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law” (Ibid., 43). In these situations, the institutional system appears to be rotting “from within,” dismantled “piece

[7] In the face of these events, both the legal academy and the field of comparative politics produced significant works. For instance, Adam Przeworski wrote about a phenomenon he called “democratic backsliding” (Przeworski 2019); comparativists Tom Ginsburg and Aziz Huq wrote about “democratic erosion” (Ginsburg & Huq 2018); David Van Reybrouck published a pamphlet on “democratic fatigue” (Van Reybrouck 2017); first-rate constitutionalists edited thick volumes on the question of the “fall” of democracy (Graber, Levinson & Tushnet 2018; Sunstein 2018); political scientists Levitsky and Ziblatt published an important book on the “death” of democracy (Levitsky & Ziblatt 2018). In sum, the crisis was recognized and addressed as such in the social sciences. It is worth noting that many of these authors expressly adopt a *Schumpeterian* (or *minimalist*) concept of democracy, which can be described as an institutional arrangement in which people, through political parties, acquire the power to decide, through a competitive voting by citizens.

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by piece" by means of gradual and "lawful" steps. According to this view, the gradual and growing deterioration of the system of "checks and balances" causes a slow erosion of the democratic system, distinct from the "old," more "classic" and sadly swift processes of "abrupt rupture" or fast democratic breakdown, as was the typical case of Latin America's twentieth century *coups d'état.*

The "erosion" or undermining of the democratic system would be the typical product of new unrestrained or "imperial presidencies" (Ackerman 2007, 2010) that seek to unravel the system of checks and balances set up around them. The "unraveling" of these mechanisms of control happens gradually and "lawfully," as public authorities acquire new capabilities or diminish some new controls, leaving themselves in a better position to further their agendas beyond democratic limits.[8]

From the analysis above, one can derive -more or less directly, and more or less explicitly—a series of important recommendations on what to prioritize when trying to evade the current situation of democratic crisis. These recommendations range from proposals meant to restore controls (say, "adjusting" the "nuts and bolts" of the system of checks and balances); to the revitalization of the institutional system; a call for civic engagement and civic political participation; and the removal of the staff responsible for these "erosive" initiatives (through the electoral process, through impeachment, etc.).

Proceduralism and collaboration

Expectedly, the problem of "democratic erosion" (which we can define more specifically, and for the moment, as that of the undermining of the "checks and balances" structure, starting with the executive branch) gained relevance, too, within constitutional theory. In particular, this problem was incorporated into their studies by doctrinaires interested in thinking about constitutional law from a "contextual" approach. They came to tell us, rightly i) that constitutional law cannot be thought simply in the abstract, but must be in dialogue with the problems or "dramas" of its time; and ii) that in the last decades, a particularly relevant problem for constitutionalism is (and should be) that of the breakdown of formal controls "from within" the constitutional system.

This particular "contextualized" re-reading of constitutionalism was especially popular among those who approach the discipline from a "proceduralist" perspective - such as the one made famous, in the 1980s, by John Hart Ely. One of the great merits of Ely's theory was to put "proceduralism" in direct dialogue with the problems of his time, which included, in a special way, certain *political* problems, related the undue weight acquired

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[8] For many of these authors, the situation of "democratic erosion" is produced in a context of citizens' "indifference" or "apathy." Ginsburg and Huq, for example, refer to the grave problems that arise when citizens disengage from politics. They discuss the "decay in popular commitment to democracy" (Ginsburg & Huq 2018, 245); they speak of the importance of cultivating citizen participation (ibid., 203); and they highlight the value of the "political morality," which is indispensable for citizens of a democracy (ibid., 173).

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by interest groups within politics; or the strong discriminatory impulses of legislative majorities, against "discreet and insular" minorities. Nowadays, everyone recognizes that those problems that worried Ely did not disappear completely, but the idea is that other additional problems were added - such as the erosion of "checks and balances" - that also deserve priority attention.

Not surprisingly then, and given the increasing relevance of the problem of "erosion", many authors interested in the "realignment" of Ely's procedural theory, considered that in our time, attention to the context required courts to help confronting the problem of democratic erosion. Two especially salient cases, in this sense, are those of Stephen Gardbaum and Rosalind Dixon - two of the academics who have taken the task of "readapting" Ely's theory to our time more seriously.

From the beginning of his paper on "Comparative Political Process Theory", Gardbaum explicitly makes clear the link that exists between his attempt to rework Ely's theory, and the recent literature on "democratic erosion." For him, the phenomenon of "erosion" is fundamentally related to what many executive authorities did, in recent years, against the main controlling institutions, typically in countries like Turkey, Hungary and the United States. In his terms, the cases of "malfunction" described by Ely "do not exhaust the situations in which failure occurs and courts may be justified in intervening to protect the processes and structures of representative democracy" (Gardbaum 2020, 1434) For Gardbaum, "attempts by incumbents to entrench their power often involve harassing and targeting the speech of opponents and manipulation of electoral mechanisms, as by changing voting rules in their favor and (where possible) partisan gerrymandering. We have seen such actions all too frequently in recent years, in countries ranging from Turkey, to Hungary, to the United States, so that courts and independent electoral commissions certainly have work to do here" (ibid.).[9]

Similarly, in the book *Responsive Judicial Review,* Rosalind Dixon presented her particular approach on how to rethink Ely in our time. Dixon also appeals to examples of "democratic erosion" and refers to cases like that of Trump in the United States.[10] In fact -one could claim- the entire task of a "Responsive Judiciary", for which she advocates, is

[9] Moreover, in his paper on "comparative political process theory" Gardbaum proposes to extend the idea of "malfunctions" in a very significant way, assuming that "Ely's account of erosion or degradation" remains powerful, but also "too narrow in a variety of ways" (ibid., 162). Gardbaum considers that the "political process theory must be broadened, refined, and updated in order to fulfill its potential for relevance and application". This is so until encompassing anomalies such as the following: "(a) Legislative failure to hold the executive accountable;" "(b) Government capture of independent institutions"; "(c) Capture of the political process by special interests"; "(d) Outright dysfunction of the political process"; and "(e) Non-deliberativeness of the legislature".

[10] Dixon recalls, for example, how Trump behaved shortly before losing the election in November 2020, when the then President "attacked federal courts, the media, and the independence of key agencies and fourth branch institutions", Dixon 2023, 55.

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fundamentally aimed at confronting democratic erosion.[11] "Without responsiveness" -she claims- "democracies become vulnerable to a high risk of erosion" (ibid., 91).[12]

The examples that I take from the works of Gardbaum or Dixon illustrates a widespread, very attractive and respectable academic tendency, namely the tendency to think about how to reconstruct constitutionalism (and how to rethink, above all, the judicial function) in light of the new problems of our time - in particular, in light of the problem of "democratic erosion." It is, in fact, a trend in which many of the best constitutionalists of this period participate - a trend within which one can recognize, among many others, authors such as David Landau, Tom Ginsburg, Aziz Huq, Michaela Hailbronner, Samuel Issacharoff, and Richard Pildes.

From a different theoretical perspective, but fundamentally similar assumptions, Aileen Kavanagh reaches partially similar conclusions. Kavanagh also starts from the premise that our constitutional democracies are going through a difficult period, characterized by "democratic decay and constitutional corrosion" (Kavanagh 2023, 414). She also believes that the Executive branch, rather than the Judiciary, is the key element explaining this crisis. However, she does not see the problem as derived from situations of "authoritarianism by an omnipotent Executive" -as it used to be the rule- but rather from "populist regimes which have come to power through the electoral ballot box, not by the authoritarian iron fist" (ibid., 412). Also, in her conclusion, she does not call for the strengthening of democracy, or the restoration of a strong version of democracy, as Loughlin or Hirschl do. Rather, she calls for the strengthening of constitutionalism -as Gardbaum or Dixon do. In this reconstructive task, Kavanagh (like Gardbaum and Dixon, also) believes that the Judiciary has a critical role to play. However, she does not believe that the Judiciary has to have an exclusive or priority role in this reconstructive process. Rather (and this is the central idea of her book) Kavanagh considers that what is required is a "collaborative enterprise between all three branches of government, where each branch has a distinct but complementary role to play whilst working together with the other branches in constitutional partnership" (ibid., 1).

[11] Dixon describes the mission of a "responsive" judiciary, in these terms: "At the heart of a theory of responsive judicial review is a commitment to ensuring democratic responsiveness through: (i) regular, free, and fair multiparty elections; (ii) political rights and freedoms; and (iii) a range of institutional checks and balances as constituting the "minimum core" of democracy.7 And any accumulation of electoral or institutional monopoly power may threaten this commitment to democratic responsiveness. In addition, a responsive approach assumes that democracy should be understood to entail thicker commitments to rights and reasoned deliberation, but in ways informed by democratic majority attitudes and understandings, and both democratic blind spots and burdens of inertia can threaten this thicker form of democratic responsiveness" (Dixon 2023, 2-3).

[12] In order to specify the particular "malfunctioning" she will be considering through the book, Dixon refers to "three distinct forms of democratic dysfunction," namely the risks of: "(1) Antidemocratic monopoly power: political monopoly, in both an electoral and institutional sense; (2) Democratic blind spots: blind spots in the adoption of democratic legislation; and (3) Democratic burdens of inertia: additional blockages in the form of unjustified delay in addressing democratic demands for constitutional change" (ibid., 2-3).

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The problem comes from constitutionalism? Confronting judicial elitism

As we saw in the previous pages, one relevant response, in the face of the democratic crisis, led to pointing out politics (and, in particular, the abuses of the Executive) as responsible for the crisis, and to look for ways to constrain it, especially through the Judicial Branch. The second major line of response, in relation to the democratic crisis, led instead to pointing out constitutionalism in general, and the Judiciary in particular, as responsible for that same crisis.

Within countries organized under the principle of Parliamentary sovereignty, the judiciary has usually been attacked because of its elitist composition, and the threat that such elitist power represented to democracy. In England, that critique comes from very far back, and have very influential, more recent expressions, in books such as *The Politics of the Judiciary*. This book, written in 1977 by John Griffith, presented a harsh criticism of judicial politics in Great Britain. For Griffith, judges were drawn "from the narrowest of social elites" and were "incapable of responding adequately to the challenge of social justice that underpinned the disputes they were being asked to resolve" (Loughlin 2010). In his words,

> judges in the United Kingdom cannot be politically neutral because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determinations of where the public interest lies; that their interpretation of what is in the public interest and therefore politically desirable is determined b the kind of people they are and the position they hold in our society; that this position is a part of established authority and so is necessarily conservative, not liberal. From all this flows that view of the public interest which is shown in political attitudes such as tenderness towards private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, support of governmental secrecy, concern for the preservation of the moral and social behavior to which it is accustomed and the rest (Griffith 1977, 336).[13]

The literature that developed in the UK, criticizing the elitist character of the Judiciary, and in defense of what was called a Political Constitutionalism (which was contrasted with a dominant Legal Constitutionalism) is enormous and very important. It includes works by authors such as Allan (2001), Bellamy (2009), Goldsworthy (2010), Loughlin (1992, 2003), Tomkins (2003), among many others.

In the US, the *Critical Legal Studies* (CLS) movement that appeared during the 1970s, retrieved the critical works that *Legal Realism* had presented, in the 1930s, in order to develop a renewed critique to the role of judges in the review of legislation. Just as the "realists" at the beginning of the century had questioned the impartiality of judicial decisions, the CLS once again showed the links between judicial decision-making processes and politics. Objecting to the claims of objectivity of legal interpretation, they

[13] Disputing, in particular, the idea of judicial neutrality, he added "These judges have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest" (ibid., 295).

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affirmed the idea that "Law is politics" and fought for a different right - a right that would serve the creation of a different, more humane, egalitarian and democratic society (Kennedy & Klare 1984).

Towards the end of the 20th century, this very critical view of constitutionalism, legal interpretation and the actions of the Judiciary began to be part of common sense. It is worth noting, in this regard, the publication of two important books in 1999, which both addressed, in a similar and similarly critical perspective, the problem posed by judicial review in a democracy. In one of those books, namely *Law and Disagreement*, Jeremy Waldron referred to the common practice of judicial review as offensive and insulting; while the second book, written by Tushnet was also dedicated to develop a profound, carefully argued critique of judicial review -also assuming, like Waldron, a democratic and egalitarian perspective, as his standpoint.

In fact, and since the 80s, Waldron began -persuasively- to write about the problem of having a small judicial elite ("five against four") imposing their own vision of the Constitution, in the context of societies marked by (what he called, following John Rawls' references to political pluralism) "the fact of disagreement" (Waldron 1999, 2014). He wondered why, in societies marked so deeply by the fact of reasonable disagreements (about almost all public matters) judges had to remain in charge of pronouncing the "last" institutional word. Waldron considered that the strong versions of judicial review that prevailed in countries like the US could be described as "something of an insult". In his words: "When citizens or their representatives disagree on which rights we have or what those rights entail, it seems something of an insult to say that this is not something they are permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges " (Jeremy Waldron 1999, 15).

Meanwhile, Mark Tushnet published a book holding a similarly harsh position against the extreme versions of judicial review (in his words "strong courts"). The book had, as a title, nothing less than *Taking the Constitution Away from the Court* -in fact, the book was published in 1999, the same year in which Waldron published his *Law and Disagreement* (Tushnet 1999, 2008). Years later, a new legal current began to take shape, namely "popular constitutionalism", which maintained, descriptively, and also valued, normatively, that different groups and social movements, in fact, participated decisively in the task of constitutional interpretation. As Jack Balkin put it, "social, political, and economic forces", more than judges, played a crucial –if not decisive- role in constitutional interpretation (Balkin 2011, 278; Kramer 2004, 2006; Post & Siegel 2007; Tushnet 2006). These were all signs that the old paradigm (the one born from the "crisis of rights") was being replaced by a new one, marked by a main concern: the way in which strong forms of judicial review ended up reducing the space of democratic politics.

Juristocracy

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Many of the authors that work in this area believe that there is a strong connection between the consolidation of the power of judges, and -in general- the crisis of democracy. The growth of constitutionalism is seen as one of the main sources of many present political evils, including, say, the growing power of small elites; the debasement of democratic politics; the decadence and loss of importance of political parties and trade unions; etc.

These authors tend to establish a very close link between the growing and undue weight achieved by constitutionalism -and judicial review in particular- and the narrowing of democracy. They refer, for example (returning to the language of Carl Schmitt) of the passage to a situation of "total constitutionalism", where all relevant public issues came to fall under the power of the judges.

Ran Hirschl, for example, argues that this phenomenon, which he calls "juristocracy," is part of a broader process whereby political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policymaking from the vicissitudes of democratic politics (Hirschl 2004). Matthias Kumm is the one identified this phenomenon as the emergence of the "total constitution": "The total constitution signals the transformation of the legislative state into a juristocracy" (Kumm 2006, 344). He claims,

"Just as Schmitt claimed that the twentieth-century state had become a total state, Kumm argues that in the twenty-first century we enter the era of the total constitution. Whereas in the total state every aspect of social life can be politicized, in the total constitution, every aspect of social life can be constitutionalized. In the total constitution, rights still accord protection against government, but they also provide a way "to constitutionalize all political and legal conflicts" by establishing the general normative standards for the resolution of all legal and political conflicts. The court now acquires the authority to pronounce on "what constitutional justice requires" (ibid., 131).

Similarly, for Martin Loughlin, "the total constitution signals the transformation of the legislative state into a juristocracy. This is a regime in which judges perform the critical role of ensuring that all powers are exercised with due respect for constitutional values" (Loughlin 2022, 131-2). For him, "Democratic politics, executive decision-making, and ordinary judicial decision-making becomes constitutional implementation, subject to the supervision of a constitutional court" (ibid.).

Loughlin finds in this excessive development of constitutionalism a fundamental cause of today's democratic crisis and, even - if not especially- a main "source" in the looming spectrum of ' populism'". He maintains that "populism is undoubtedly a reaction to the impact of deep-seated social and economic changes falling under the umbrella of globalization" (ibid., 199). And he adds that "populism" "can also be seen as the inevitable political response to the reflexive turn taken by contemporary constitutionalism" (ibid.). In his view, "many if not most of these populist movements" have not arisen in opposition to constitutional democracy (democracy) but "to the way it has been reshaped by constitutionalism" (ibid., 200). Quoting the work of Ivan Krastev

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and Stephen Holmes on the growth of illiberal forces, he refers to the case of many Eastern European states where populism can be seen as a reaction to the "humiliations associated with the uphill struggle to become at best an inferior copy of a superior model". Consequently, he suggests that "populism" may be "less a symptom of decline than a sign of the possible renewal of democracy" (ibid.).

How to characterize the present democratic crisis

Despite the differences that separate them, all the doctrines examined up to this point show some important similarities, which I consider valuable and which I am interested in highlighting. Above all, they agree in recognizing that constitutionalism must be thought of in a way that is sensitive to the context. They all see the "democratic crisis" as a fundamental - if not the main - fact to take into account, within their contextualized approach. And they also think it necessary to promote institutional reforms or attitudinal changes in certain public officials, as a way to confront the current crisis. All these coincidences are of enormous relevance, and speak of a valuable paradigm shift, typical of this time. That said, however, in what follows I would like to focus on the problems I encounter in relation to such views. I will present some disagreements I find, towards all those views; and also refer to some particular differences I have, regarding each of the mentioned approaches.

Broadly speaking, I would say that my fundamental disagreements with all those views are twofold, and both have to do with the "democratic crisis". One of the disagreements appears at the *descriptive level,* and has to do with the way in which we characterize the present democratic crisis. The second disagreement appears at the *normative level,* and concerns our different conceptions of democracy or, more precisely, how we think democracy should be or come to be. I shall begin by presenting the disagreement that I find more relevant, which is the first one (related to the characterization of the democratic crisis we are experiencing), and only then - once the weight of this first difference is noted - would I refer to the different way in which we approach the democratic ideal. As I shall say, some of us start from more robust and ambitious approaches to democracy, and others from thinner and more modest views.

Regarding the different way in which we characterize the current democratic crisis, I would begin by mentioning that we disagree regarding the *locus, breadth and depth* of the crisis. Let me present these problems in a nutshell. First of all, in my view, the crisis has mainly to do with the narrow role reserved by current constitutions for "We the People" -the difficulties we find to rule by ourselves, rather than with the malfunction of the system of "check and balances". Second, the problem is not limited to one, two or the three branches -say, it is neither a problem related to authoritarian Executives or Executives that "erode" the system of "checks and balances" (Gardbaum; Dixon; Kavanagh); the "tyranny of majorities" through Congress or juristocracies (Hirschl; Loughlin); nor one related to a conflictive relation between the branches (Kavanagh). Moreover, the problem is structural (as Loughlin properly understands), rather than circumstantial or merely attitudinal (it cannot be solved through judges or public officers

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acting differently, say, in a more "calibrated" or "responsive" or "collaborative" way, as Dixon or Kavanagh seem to assume).

More specifically, in my opinion, the democratic crisis has to do, essentially, with the sense of "political alienation" or disempowerment that affects "We the People." It is a result of this that some authors talk about a widespread state of "democratic fatigue" (Van Reybrouck 2017 refers, in this way, to the fact that fewer and fewer people vote; voters do not express loyalty to the political parties they voted for; membership of political parties fall dramatically, etc.). By "political alienation" I refer to the situation by which the same institutional means and mechanisms that promised and/or came to make collective self-government possible are those that deny or make it impossible (then generating situations of domination). In my view, the current democratic crisis has much more to do with what has been said, than with the presence of authoritarian or corrupt or inefficient leaders. The crisis seems more related to that widespread situation of political disempowerment, than with the "erosion" of democratic controls, or even the fights, conflicts and lack of cooperation between the different branches of government. As I see it, the current democratic crisis has less to do with bureaucracies doing their jobs poorly or governmental authorities misusing or abusing their powers; than with disenchanted or irritated citizens, who despise their leaders, and repudiate the state of their democracies (in other words, they repudiate the way in which they live vis a vis the way in which their leaders live).

For those reasons, the democratic problems in question should not be confused or conflated with the problems of constitutionalism. Regarding the *confusion* between constitutionalism and democracy, it may suffice to say the following: the very idea of "democratic erosion" sounds inaccurate, if we take into account that in such cases one speaks exclusively of the destruction of the mechanisms of checks and balances (i.e., the elimination of control agencies; the colonization of auditing agencies; the takeover of the Judiciary; the reduction of prosecutors; etc.). All these situations refer to situations where the institutions of *constitutionalism,* rather than those of democracy, are affected. Therefore, it is difficult to understand why, in such cases, we continue to speak of "democratic erosion" rather than "constitutional erosion."

Regarding the matter of *conflating* the problems of constitutionalism and democracy, we could say that these two different "causes" are superimposed, as if they necessarily worked together, or as if they ultimately implied one and the same thing. Contrary to that approach -I argue- the difficulties that affect contemporary constitutionalism and those that affect democracy, are of a very different nature and require separate attention. To understand why, imagine this hypothetical situation: if, in a possible future, we suddenly managed to "restore" the system of checks and balances; remedy its failures; reset the control machinery again; then, on that miraculous day, the "democratic problem" would remain completely intact. Indeed, in such a surprising circumstance, people would continue to feel alienated from power and disconnected from democracy. And this would be so because the problems posed by the crisis of constitutionalism differ significantly from those posed by the crisis of democracy. To put it differently: people do not feel

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politically alienated because, say, judges do not control the Executive; legislators are too deferential to the president; or the Executive is not properly controlled. "We the People" feel distanced from politics because, rightly, we recognize that we lack effective possibilities to decide for ourselves on the issues that interest us most.

Expectedly, then, if we do not define well, or directly misdiagnose the democratic problem that (we all recognize) we are facing, then our responses will not be appropriate to solve it. More specifically, the current democratic crisis is not going to be resolved even with a more active Judiciary against the Executives who abuse their power (Gardbaum; Dixon); nor with more concerted and collaborative action between the branches of government (Kavanagh). Similarly, we can say that the current democratic crisis will not be overcome through the intervention of political leaders more attentive to the needs of citizens, or stronger unions and political parties (Loughlin).

Also, considering the depth and breadth of the present crisis, then, it seems an exaggeration, or simply a mistake, to continue focusing on the problem of “juristocracy” (which is actually a relevant problem), as if it were the origin of our main democratic malaises, and its “cure” the proper remedy for those malaises (Hirschl). On the one hand, the problem of "juristocracy" is not so relevant or central to explaining the present democratic crisis. On the other hand, that approach fails to put at the center what seems most relevant, according to our previous analysis, namely the loss of effective power of "We the People”.[14]

Finally, the democratic crisis that we face does not depend on corrupt leaders or temporary abuses of power, but on long-standing structural elements, which I tried to explore in other work (see, in particular, Gargarella 2022). For this reason, one should not expect the crisis to dissolve through circumstantial and attitudinal changes (i.e., a more cooperative disposition among public officials; a more responsive exercise of the judicial function). In sum: if we do not improve our understanding of the democratic

[14] I understand that the concept of “juristocracy” gained particular attraction in the Anglo-American context, and particularly in the United States, given the manifest power of Supreme Court judges, and may influential decisions (from *Lochner* to *Brown* and more recently *Dobbs*), which attracted enormous attention. However, even for that context, the notion seems exaggerated in its ambition. In most of our countries, in fact, the main public decisions (on economic plans, taxes, security, health, education, culture, etc.) continue to have an eminent political character, even though we know of many aberrant and unjustified judicial decisions in cases of public relevance. In this sense, the idea that what we came to have, in many contemporary democracies, is something like the "government of the judges" seems grossly exaggerated. Of course, we may have good reasons to complain about the increased powers of judges, and also reasons to demand a more central role to democratic politics, but not under the assumption that we are living under a “juristocracy.” But, again, the (democratic) problem that we are confronting seems to be much bigger and significant than that, and derives from the virtually null influence that citizens exercise upon government: they lack actual institutional means for controlling, demanding or making their representatives responsible for what they do or not do.

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crisis, its causes, nature, scope and depth, we will continue proposing the wrong remedies for solving it.

How to understand democracy

In the previous pages, I questioned the way in which part of contemporary doctrine has been addressing the present democratic crisis. Although I totally agree with the idea of putting constitutionalism in dialogue with the context in which it develops (say, adjust its aims and means according to the "needs of the time"), I maintained that many doctrinaires are "reading" the present context -a context that is marked by a profound democratic crisis- in the wrong way. This descriptive mistake is thus providing the wrong starting point for their analysis. Having made that point, in what follows I will advance a second critique to contemporary doctrine, which will be not descriptive but rather normative. I think we have additional reasons to object the way in which they propose to reconstruct or readjust constitutionalism, because of the improper (usually, but not always, minimalist) understanding of democracy that they take into account. Some of us approach to democracy from a more minimalist understanding of it (Dahl; Dixon; Ginsburg & Huq; Przeworski); some have a strong (rather "nostalgic", I would say) view about it (Loughlin); some defend a more "collaborative" (Kavanagh) or "dialogic" (Roach, myself) approach.

Typically, and trying to assume a "realist" or "down to earth" view of democracy, they adopt -explicitly or implicitly, consciously or not- a normative standpoint that ends up becoming part of the problem to be remedied. The thing is: they criticize the way in which constitutionalism is presently working, or propose new directions for it, on the basis of implausible theories of democracy. However, modelled according to such (implicit or explicit) normative democratic theories, constitutionalism tends to reproduce or aggravate the problems that are affecting its actual functioning nowadays.

In fact, a failure at this normative level promises to make it even more difficult to avoid, reduce or escape from the crisis. For instance: you may want to be "realistic" rather than "idealistic," and start your analysis from a picture of "the people as they are" (or, better, as you believe they are). Under such a premise, you may assume a minimalist approach to democracy and also that people are or tend to be apathic (Ginsburg & Huq). Similarly, you may make a call to "reality" and claim that we should neither force people to participate in politics nor assume that they will, if we gave them the opportunity to do so. Or you may say, as Gardbaum says, that we should not subscribe a very demanding understanding of democracy -such as a deliberative view- in times like this.

The problem with those views is that they are, at the same time, descriptively wrong and normatively charged, also in the wrong way. Descriptively, some of those views simply attribute to the citizenry political attitudes that it is not clear that they have -say, political apathy. For instance, in many passages of the book, Ginsburg and Huq refer to the importance of having a citizenry that is committed to democracy, and also mention the

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serious problem that emerges when people begin to distance themselves from politics. They write about the "decay in popular commitment to democracy" (Ginsburg & Huq 2018, 245); and also about the importance, in this context of "democratic erosion" of "cultivating" citizens' participation (ibid., 203). Now, it is not only that the picture that they present about people's political attitudes is not obvious (I would suggest it is directly wrong). The problem is that many of those who make such statements do not seem to consider that the attitudes they attribute to the people may be the *endogenous* product of the institutional system in which those individuals live, which provide no incentives for political participation, or simply discourage it.[15] Worse still -one could say- the popular preference for not mobilizing actively, in certain circumstances, may be the product of a political *history* of political repression and strong disincentives to participation.

Normatively, you may say that you do not want to "force" people to do things (that you assume are) against their will. Or you may say that it is wrong to assume that people are interested in assuming demanding tasks, such as those of engaging in "deliberation" or "participation". However, you should be then conscious that in that way -say, by simply assuming political apathy as a fact; or by taking as given that people do not want to participate in politics- you also fail to provide incentives that may be required to avoid or reduce the democratic crisis. In that way, you -as someone interested in issues of institutional design- become responsible for the preservation of that undesirable (in your terms) status quo.

In a similar way, many contemporary authors provide detailed instructions regarding how a "responsive" judiciary should act (Dixon) or "collaborative" branches should cooperate among them (Kavanagh). Unfortunately, however, in such a way they also abandon the "down to earth" approach to contemporary societies, that they wanted to present. In fact -one could ask these authors- *why should we expect public officers (but not the people at large) to engage in behavior they do not have incentives to adopt, or assume attitudes*

[15] For example, in their important book on the matter, Ginsburg & Huq state: "There is no democracy without a decent measure of popular commitment to democracy. Maintaining that commitment depends on what people continue to want in terms of a government, in terms of a country for themselves and their children. *It is a matter of beliefs and preferences, not incentives or stratagems,* which are transmitted within families, schools, churches, mosques, synagogues, workplaces, and social media networks. Without those beliefs, without a simple desire for democracy on the part of the many, the best institutional and constitutional design in the world will likely be for naught" (244, italics added). I find most of these claims deeply problematic. Contrary to what Ginsburg and Huq write, I believe that popular commitment to democracy is much less "a matter of beliefs and preferences" than a product of "incentives or stratagems". To recognize why, we need to first understand how much political apathy is an *endogenous product* of the prevailing institutional system. In the context of the counter-majoritarian institutional systems in which we live, the people's seemingly "passive" attitude towards politics should not anymore be considered the product of their "beliefs and preferences," but rather the consequence of the lack of institutional opportunities that they find (say, the resistance that public authorities establish against their claims; or the level of repression they suffer; etc.).

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they normally don't assume? What is worse, in that way -this is to say, by simply giving instructions regarding how a proper judge or public officer should behave- they do little to confront the democratic crisis that -assumedly- they wanted to confront. Why? Because, in that way, they not only disregard the fact that our institutions provide the wrong incentives (meaning that we have no reasons to expect public officers to act, tendentially, in a responsive or collaborative way, but the contrary), but they also neglect what is actually necessary to overcome the democratic crisis: to re-empower "We the People". I submit: the democratic crisis and its solution depend much less on what judges or politicians do (whether we have active or responsive judges or less corrupt or more efficient politicians), than on what citizens do or can achieve. More specifically, in an institutional context deeply marked by the existence of a "profound gap" between representatives and the people, the chances that people will feel "reconciled" with democracy, because judges become more "responsive" or sensitive to context (Gardbaum, Dixon) or branches assume a more "collaborative" attitude among them (Kavanagh) seem extremely low.

An epistemic approach to democracy

In my view, it is not only that we don't have reasons to expect citizens to get "reconciled" with democracy when some public officers, occasionally, start acting in a different way. The fact is that citizens have good reasons to continue complaining about the state of democracy, or keep feeling "detached" from the institutional system: they have good and serious reasons to demand and expect something different from the institutional system, and also for complaining about its very imperfect functioning. In line with this approach, in what follows I will maintain, first, that we-citizens have good reasons to expect and demand more from democracy (something that academics should not ignore or neglect). Then, I will introduce my own view on democracy, which I will also contrast with prevailing views on the matter.

Reasonable claims and expectations for democratic self-government. Regarding the reasonability of the demands for more democratic inclusion, we can begin by mentioning the following: most constitutions promise that the institutions it establishes are -as Abraham Lincoln put it, in his Gettysburg Address- "of the people, by the people, and for the people". Most constitutions establish, from their very beginning, that they express the will of the sovereign people. In different ways, numerous constitutions establish, from the very first line, that is "We the People" who write the Constitution for the common good. In this sense, the constitutional document is and can reasonably be considered an "egalitarian" document: a document that takes us as "equal", that is written for our own benefit -citizens who are situated in an equal place. In these respects, which are substantive rather than merely formal, people have very good reasons to demand a lot from the constitution, and expect a lot from it, in terms of equality and self-government.

Reasonable complains. In the same way people have reasons to expect and demand a lot from the Constitution, in terms of self-government, they have excellent reasons to

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complain about its very imperfect functioning, in that respect. And this is so -among other reasons- because those original and continuous promises have not been fulfilled. And what is (much) worse: probably, at the beginning, those original promises were done with the certainty that "We the People" would not actually demand much or complain much about their lack of political influence in the daily affairs of their community. In the end, the vast majority of them had no right to vote, nor were considered "citizens" in any relevant sense -they could not participate in elections in any meaningful way. Decades later, when universal suffrage became common in the world, education became also extended, etc., people began to gradually demand for what their authorities -more or less explicitly- had promised them. In this new context, the old constitutions began to appear as a "tight-fitting suit", tailored for a society that is not there anymore. This would help explain the widespread feeling of civic disengagement and discomfort that would be distinctive of our time (Unger 1996). Also, as already mentioned, those original constitutions seemed to be based on "democratic distrust", this is to say, the assumption that the majority of people -given their irrationality, or the passions hat seemed to control their public decisions and actions- were not able to properly participate in politics. A counter-majoritarian institutional system, as such, tend to produce n *democratic dissonance*, a notion that refers to the growing gap between political practices and our expectations of political institutions. In a similar vein, political philosopher Charles Taylor has recently described this situation as "*part of a wider phenomenon of disconnect between the needs and aspirations of ordinary people and our system of representative democracy*" (Taylor et al 2020, 12, italics added).

Justifiable demands for democratic inclusion. I get now to the core of my own conception of democracy, which I will contrast with the views that seem present in the examined doctrinal approaches. Before going into that analysis, however, I want to note the following: my criticisms of those views are fundamentally independent from the "demanding" or "unrealistic" understanding of democracy that I assume in my analysis. I object to those views, in particular, because of the wrong descriptive approach they assume, regarding the present democratic crisis (its locus, depth and breadth), and also because of some of their normative assumptions -in particular, the idea that the solution to our democratic problems have to come, in one way or another, "from above," this is to say from the actions and decisions of established authorities. Contrary to those views, I believe (in descriptive terms) that the democratic crisis has mainly to do with a serious situation of "political alienation" (finally, the "democratic fatigue" and the phenomenon of disconnect about which Van Reybrouck and Charles Taylor were talking about). At the same time, I think that the examined doctrines fail (normatively) in their not focusing their proposals on the role of citizens: those proposals do not come to promote their political inclusion, discussion and participation, or favor their capacity to decide and control their representatives. By contrast, some of those proposals are supposed to address their reason (without discussing with the people themselves about their own reasons, agreements and disagreements, like in Gardbaum or Dixon), while some other proposals

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appeal to the people's will, without ever talking their voices seriously (like in Loughlin's work- I will say something more about this below).

*An epistemic approach to democracy. The "conversation among equals".*The idea of a "conversation between equals" can be understood as another version within the theoretical family of "deliberative democracy" (Habermas 1996, Elster 1998). This is a (modest) epistemic conception of (deliberative) democracy, which takes "conversation between equals" as its regulative model. In this conversation, the different individuals ("all those potentially affected," according to Habermas 1996) talk, as free and equal individuals, about how to solve the problems they face in common. They try to resolve those difficulties through a broadly inclusive, egalitarian and deliberative process. This is based on the assumption that the final decision - to be an impartial and legitimate decision, which everyone has reason to subscribe to - must necessarily be informed by each person's point of view. Which means saying that no one is in a better position than oneself to give an opinion on the merits of the decision or solution at stake: this is where the epistemic value attributed to democratic conversation becomes apparent. Democracy is understood here as the most appropriate means to find (not the "correct answer" to a public problem, but) the most impartial response or capable of properly weighing the different claims and viewpoints of each one.

Obviously, this (modest) epistemic conception rests on assumptions such as those famously defended by John Stuart Mill in his work *On Liberty*. In that work, Mill maintained that "each adult ought to be treated – for the purposes of making decisions – as the proper judge of his or her own interests."[16] This principle, which I will the Millean principle, has been suscribed and developed by other authors, and can be supplemented by other similar theoretical considerations.[17]

Political philosophers like Carlos Nino have also started from that Millean principle, in order to elaborate their own (epistemic) approach to democracy (Nino 1991, 1996). For

[16] Mill justified his affirmation with the argument that no one other than the person in question is more interested in that person's wellbeing (Mill, 2003). He was sensitive to the genuine concern that people feel for the fate of others, to the point of intervening in their affairs, yet, inevitably, they would encounter unsurmountable obstacles when it came to accurately understanding and balancing the interests of the person affected. However hard we try, even when making great effort to identify and respect the points of view of the others, it is often difficult to understand the way others process the circumstances and how much weight they ascribe to the problems they face, to the solutions they see, and to the objectives that drive them.

[17] More recently, Robert Dahl similarly argued that, "in making individual or collective decisions each adult ought to be treated … as the proper judge of his or her own interests" (Dahl 1989, 100). Similarly, see Nino, 1991, 1997. In addition, these views can be supplemented by what Jeremy Waldron presents in an Aristotelian key. In fact, in several recent writings, Waldron has referred to Aristotle's notion of the "wisdom of the crowd" (see, for instance, Waldron 2016). According to this idea, people acting as a "body" are more capable of making better decisions by adding or pooling together their knowledge, experiences, and intuitions, than any of its members can do separately.

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Nino, too, putting ourselves in someone else's position is enormously difficult because it is nearly impossible to properly understand and weigh their interests and needs. Hence the crucial presence of each affected point of view in debates on issues of public or intersubjective morality. The idea is that the effective presence of all interested points of view increases the chances of making a well-informed decision and reduces the risks of partial decisions that are favorable only to some or biased against others, even if it is only biased against one single point of view! In other words, *the effective absence of the point of view of anyone significantly affected maximizes the risk of unduly impartial decisions*. And this occurs, as we saw, not necessarily due to bad faith or lack of empathy, but because of the difficulty indicated, which we all encounter, of understanding and properly processing what others perceive and value. Ultimately, the defense of a radically inclusive discussion is based on *epistemic reasons*: through such discussions we greatly reduce the risks of biased decisions, we increase our awareness of the various aspects and difficulties of what is at stake, and finally we create the necessary conditions for reaching the sought-after impartiality. Therefore, those of us who, like Nino, defend democracy from an argument that starts with John Stuart Mill's assumption, should all agree on the prime importance of having public debates on public issues, based on a broad and inclusive participation of "We the People."

Contemporary constitutional doctrine and the dialogic (epistemic) theory

Having presented my own approach to democracy, let me now show in what ways this approach can be distinguished from alternative approaches, and also suggest why, from this epistemic perspective, the institutional analysis and recommendations coming from alternative approaches can be questioned.

Let me begin this analysis by saying that the (robust and demanding) epistemic conception of democracy, which I defend, contrasts, without a doubt, with the vision of democracy that appears - more explicitly or implicitly - in the authors examined. Some of them, like Loughlin, subscribe - as I do here - to a strong vision of democracy, but it, as I will say, seems to take a (Schmittian) vision of the people as a unit, which is compatible with what is openly rejected here, that is, the concentration of power in the hands of a popular (and "populist") leader. Others, like Dixon or Gardbaum, seem to embrace a rather limited - minimalist - vision of democracy, in the name of a supposed political "realism" (how can we defend, then, such abstract and idealized visions of democracy, such as the one I maintain here? ?). All of them, however, in one way or another, seem to subscribe to what I will here call the "three-branches conception of democracy. For this view, "We the People" appears as a marginal actor, who enters the political scene only occasionally, through their isolated applauses and periodic votes.

Many contemporary authors, in fact, assume such a limited notion of democracy (the "three branches' conception of democracy") as the "natural" expression of collective self-government -a claim that, for several reasons, seems controversial. It is not only that this view accepts what many other authors consider a (or the) fundamental democratic

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problem of our time ("the dirty little secret"). Above all, it is an approach that, by dismissing the dimension or seriousness of the "democratic problem", ends up validating an institutional status quo that is difficult to justify from a democratic perspective (and not only in its most pathological manifestations).

To begin with, I would say that, from the perspective of an epistemic view, "populism" would never be considered good news for democracy (in his words, "less a symptom of decline than a sign of the possible renewal of democracy", Loughlin 2022, 200). The epistemic view would be critical, in this respect, of Martin Loughlin's approach, both because of its commitment to social inclusion and public deliberation. On the one hand, my deliberative view would object to any alternative that proposed to strengthen the powers of the executive branch, because of the socially exclusive character of this solution (the strengthening of the executive branch implies maximizing the concentration of power, rather than democratizing power). On the other hand, the deliberative approach would object any plebiscitary (or "populist"?) alternative, because of the usually anti-deliberative character of this type of solutions (plebiscites -commonly organized by those in power- do not favor deliberation, but usually take the place of such collective discussion). Thus, the first question I would pose to this view, in all cases, would be this: where is "We the People," in this analysis? Is it a single entity, which acts as one and remains silent, acclaiming what the political leaders or their superiors (trade union leaders; political activists) proclaim?

In fact, I suspect that the problem of Loughlin's view about democracy comes from its Schmittian foundations. His approach -like that of Schmitt- seem also to rest "ultimately on an existential entity, the political unity of the people" (ibid., 60). It is only by having that conception in mind -this is to say, by assuming that the people are one, namely a political unity- that one may then derive a defense of a strong, popular, emphatical, benevolent Executive. In other words, only under those conditions -the people as a unity- that the virtuous Executive could properly represent the whole -and could then be consequently defended. However, this defense results impossible when we abandon those old sociological assumptions (and recognize the radical multicultural character of our societies), and/or subscribe a different, more robust understanding of democracy, such as the epistemic view.

Let me now put the epistemic view in dialogue with Stephen Gardbaum's own view on democracy. Some time ago, discussing his work "Comparative Political Process Theory", I made some initial comments regarding our differences on the matter (Gargarella 2020). In that work, I tried to draw his attention to the limited place that his theory reserved for public discussion, and for the citizens' active intervention in the decision of public affairs. In other words, I wanted to tell him that his view was based on a too narrow understanding of democracy -what I am here presenting as a "three-branches-theory of democracy". In his reply, Gardbaum admitted that he defended, in effect, "a thinner conception of

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democracy" -thinner in relation to the "thick" conception that I hold (Gardbaum 2020b, 1509). He immediately added, however, that "in the current recession, even thinner conceptions of democracy are under threat, of being reduced to nothing but pure majoritarianism" and that, therefore, "deliberative democracy may have to wait until the next boom" (ibid.). In my opinion, his response was misguided, because my objections to his position had much less to do with the (let me put it in this way) too high or demanding democratic ideals that I defend, but rather with the too low or narrow democratic assumptions that he maintains. To put it differently: my critique of positions such as those he advocates can be articulated with complete independence of the "democratic-deliberative" ideal I hold. The institutional problems that we face today go far beyond those posed by situations of "constitutional erosion". The most relevant problems that we confront nowadays have to do -I submit- with a citizenry that feels alienated from politics (and have good reasons for it) and have lost allegiance to its public institutions. And we do not need to assume a deliberative theory of democracy in order to recognize this. In these circumstances, even if we had had judges who, say, were well-disposed to restrain Trump in his unbearable excesses (something that did not happen, in the end), we would still have had those crazed hordes seeking to take over Congress, after an electoral defeat; or would have had primary elections infested with candidates invoking ultra-extreme positions. This, among other reasons, because -even with Trump in jail or prevented to participate in politics- the social and institutional conditions of authoritarianism and political violence would continue to exist.[18]

More significantly: the conditions that favor the emergence of authoritarian leaders like Trump have nothing to do with "majoritarianism" -as Stephen Gardbaum seemed to assume. In fact -and contrary to what he suggests- the prevailing institutional system is not -not at all- one of "pure majoritarianism," but rather one that tends to ignore or dismiss the deliberate will of the majority. Far from satisfying the demands of the "majority," the prevalent institutional system tends to operate with complete independence (with indifference or total ignorance) of those demands, and it is an important mistake not to recognize that. It is an institutional system that is very little sensitive (rather than too sensitive) to democratic deliberation and the institutional inclusion of the voice of the majorities. The fact that Gardbaum does not pay attention to that matter, simply ratifies what I am here suggesting: he also subscribes a "three-branches notion of democracy,"

[18] Of course, the question then is what courts could do (or would be justify at doing) regarding the present democratic crisis. In my opinion, courts could do lots of important things, directed at ensuring the basic democratic requirements of social inclusion and collective discussion. They could do lots of things for ensuring that the decision-making process is properly informed by the opinions and judgments of "all those potentially affected" (i.e., through public hearings; through direct consultations to affected groups; through process of "previous and informed consent"; etc.).

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which is focused on what public officers do or omit doing, and at the same ignore or neglect the place of "We the People" in this entire picture.

In her work on *Responsive Judicial Review*, Rosalind Dixon gives an extensive account of the way she understands democracy. She argues, then, that her approach combines "thin" and "thick" conceptions of democracy - the former, related to a Schumpetian idea of competitive democracy; and the second, which appeals to mechanisms such as federalism, bicameralism, and presidentialism, as forms "designed to "slow down" ordinary forms of majoritarian democratic politics" and promote "commitments to minority rights and democratic deliberation" (Dixon 2023, 88). In her words, the "responsive approach"

> aims to take seriously both thin and thick understandings of democracy and to recognize the fact of reasonable disagreement among citizens about what these various understandings of democracy entail. This, in turn, means understanding commitments to democracy as operating at two distinct, if complementary, levels: first, as comprising a commitment to a "democratic minimum core," or a system of free and fair elections among multiple political parties, based on the accompanying protection of political rights and freedoms and a system of checks and balances—or a minimum core set of norms and institutions necessary for electoral and institutional accountability; and second, a commitment to a broader set of rights, freedoms, and institutions aimed at promoting good governance and deliberation—but in a way that recognizes room for reasonable disagreement among citizens about the scope of these rights and commitments to deliberation, and thus the need for responsiveness to democratic majority understandings in relation to these questions" (Dixon 2023, 61).

Regarding Dixon's proposal, in what concerns democratic constitutionalism, my first reaction is "you cannot have it all." Of course, one can see the reasonableness of both approaches to democracy –"thick" and "thin"- but her own view of democracy cannot be supported, at the same time, by one approach and the opposite. Dixon's theory -as everyone's theory- is and can only be "activated" by one approach, regardless of what one declares about it. To affirm, as she does, that what becomes "true in any given case will inevitably be a matter of evaluative judgment", is to say nothing (ibid.., 89). Faced with each legal problem he analyzes, Dixon offers us concrete answers, and those answers are not based on "all theories at the same time." Her responses, in each case, whether she admits it or not, depend on very strong assumptions that she prefers not to make explicit, because she does not want to appear openly committed to a particular reading of democracy - i.e., criticized for subscribing to a minimalist vision, such as Schumpeter's. I understand her ecumenical spirit - her spirit of being open to differences - but I don't see how her position can be based on different foundations, or a pair of assumptions that are in tension one with the other.

For example, in the case of a seriously contaminated river - such as the *Riachuelo River*, in Argentina - how should a "responsive court" react?[19] Should it simply endorse the legislative actions and omissions of the government in power in that matter (thus,

[19] "Mendoza, Beatriz Silvia y otros c / Estado Nacional y otros s / daños y perjuicios (CSJN 20/6/2006. Daños y perjuicios de la contaminación ambiental del Río Matanza-Riachuelo).

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following the demands of a minimalist conception of democracy)? Or should it instead challenge such initiatives, and call for public hearing processes to define active policies on the matter? (thus, following the demands of a deliberative conception of democracy?). And, faced with an economic program of "structural adjustment" defined by a newly elected conservative government, should the court simply accept what was decided by the new administration, or challenge that program, in order to preserve the conditions of democratic debate? Again: those courts may be inclined to adopt one line or solutions or the other, and that will depend on its (explicit or implicit) assumptions about democracy.

Finally, I would also describe Dixon' position as based, ultimately, on a "three-branches approach to democracy." To understand this, it may suffice to take her own description - central in her book- about the different "malfunctions" that would be presently affecting the proper working of the democratic procedures. Dixon summarizes the "malfunctions" of our time, through three situations, namely i) antidemocratic monopoly power; ii) democratic blind spots; and iii) democratic burdens of inertia. For her, "blind spots" and "burdens of inertia" "often...arise simply because of time and capacity constraints on legislators, and the ordinary workings of a well-functioning partybased system of democratic government" (Dixon 2023, 82). In other situations -she adds- "blockages of this kind" emerge or become worse "by public choice dynamics, or the role or special interest groups in democratic politics" (ibid.). In her view, the case of "antidemocratic monopoly power" seems more directly linked to the cases of "democratic erosion" already noted (those "constitutional developments" that took place "over the last decade across Europe, the Middle East, Latin America, Asia, and Africa," ibid., 65), including situations of "abusive constitutionalism" (such as those studied by David Landau, and by Dixon & Landau in other works, Dixon & Landau 2021; Landau 2019).

Let me illustrate what I am saying by the examples of two Latin American countries that are very much present in Dixon's analysis: Colombia and Chile. In my view, the democratic problems that are prevalent in those countries do not seem to be the consequence of, or only of, the presence of autocratic rulers (neither Iván Duque in Colombia nor Sebastián Piñera in Chile were authoritarian presidents, for example), or the product of constitutional systems with an undermined system of controls (both Chile and Colombia, to continue with the example, have relatively independent and well-established courts), or the result of obstacles, delays and omissions typical of the legislative process (blind spots and inertias that undoubtedly exist in these countries). What should a "responsive" Judiciary do, in such contexts, in the face of the democratic crisis? If the Judiciary concentrated its efforts on tasks such as preventing presidential re-election (as in Colombia), or preserving an independent justice system, that Judiciary would be making an undoubtedly important contribution to constitutionalism. However, in such cases, the main sources of the democratic crisis would remain completely untouched.

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In fact, the very serious, often tragic situations of democratic crisis that prevail in Latin America have to do -particularly, I would claim- with a citizenry that feels democratically excluded by an institutional system that systematically denies them (or important sections of society) the robust social and economic rights that it promises to deliver. I am referring to an institutional system in relation to which citizens feel alienated -one that seems under the control of a small elite that a majority of citizens do not know, do not trust and, in many cases, do not respect. In other words, the problems that lead to this crisis are more structural, and "democratic" in its nature (an irremediable crisis of representation; etc).[20]

Does this mean that the Judiciary must take full charge of the colossal structural reforms that our societies should promote (which ones?) in this context of democratic crisis? No, because this task largely transcends the Judiciary. However, the relevance, dimension, and urgency of the tasks we face do not deny, but rather reaffirm the need for the Judiciary to assume its share of responsibility in this undertaking. In the face of those democratic difficulties, judges should act, taking into account the restrictions imposed by its limited democratic legitimacy, and through remedies calibrated according to those possibilities and limits. Finally, we should also recognize that none of the changes that our times are demanding will ever be possible if we do not improve our diagnosis of the crisis -a diagnosis that presently tends to minimize or make invisible the roots and dimensions of the democratic crisis.[21]

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[20] In this sense, for example -and contrary to what Dixon seems to assume- the fact that Congress had difficulties in properly "recognizing" and "processing" the demands of the vast majority of the population, etc., should not be seen as a circumstantial difficulty -say, one (occasional, remediable) anomaly of this time. Rather, it is a problem that has structural roots and that, under current conditions, does not seem remediable or occasional.

[21] Just to briefly refer to a third example, let me mention the case of Michaela Hailbronner, who has also inscribed her recent work on judicial review within the comparative political process theory. Hailbronner recognizes herself less as a critic than as an advocate of judicial intervention in the face of politics; and she warns that the fundamental objective of this intervention is to "resist authoritarian erosion" (Hailbronner 2021, 513). The type of judicial intervention that she defends is aimed at optimizing democracy -and so, in ways that she recognizes as typical of German jurisprudence on the subject, ibid., 506 ff. The renewed judicial task that she presents in her book includes, among others goals, those of protecting fundamental constitutional values (i.e., freedom of assembly); safeguarding the rights of the opposition; establishing equitable forms of "party financing"; and so on. In particular -she maintains- courts should pay special attention to the presence or absence of other institutional actors at work. That is, when some institutional "malfunction" is noticed, but other institutions are taking care of them, then, "the role of courts might accordingly be understood to be more limited" (Hailbronner 2024, 87). The "other" institutions in which she is thinking about include a "specific forth Branch watchdog institutions, such as Electoral Commissions, Public Ombudsmen"; etc.(ibid). Only when these institutions do not function either, her theory would support "judicial intervention, including occasionally in very robust forms" (ibid.). Now, beyond its merits (i.e., paying attention to "new branches of government" that exist, and which extend beyond the three traditional ones), this approach still faces objections similar to those already examined. This is because the democratic problem that we presently face is not -say- "internal" to the constitutional system (say, to the 3 or mor branches of government that in fact exist), but fundamentally "external" to it. It is a (democratic) problem that, in fact, calls into question those "internal" mechanisms (all those branches of government,

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Even more emphatically, Aileen Kavanagh's reading of our constitutional democracies appears openly based on what I called a "three-branches conception of democracy." I mean, when she discusses the virtues and problems of our constitutional democracies, she is thinking about the ways in which the three branches of government relate to each other: Do they check each other? Or are they in permanent conflict with each other? Each branch cooperates or collaborates of government with the other?

Interestingly, this restrictive reading of democracy reappears very explicitly when Kavanagh refers to dialogic conceptions of democracy. There it is noted, once again, that she thinks of the system - in this case, democratic dialogue - as confined to an eventual dialogue between the different branches of power. She says, for example:

> Yet, whilst the metaphor of dialogue usefully highlighted the interaction between the branches, Chapter 2 argues that it lacked the analytical resources to capture the complexity of the constitutional relationships between the branches of government. 11 The malleability of the metaphor meant that it could be applied to any form of inter-institutional interaction, ranging from polite conversations between friends to no-holds-barred shouting matches between enemies locked in combat. For that reason, the idea of dialogue failed to take us beyond the Manichean narrative of 'courts versus legislature' and 'rights versus democracy'. In fact, it resurrected the antagonistic narrative, shifting the debate to which branch should get 'the last word' 12 in the dialogue: the legislature, as 'political constitutionalists' preferred, or the courts, as 'legal constitutionalists' claimed (Kavanagh 2023, 3).

In principle, this reading of both constitutionalism and democracy is understandable and irreproachable (i.e., there are undoubtedly many authors that think about constitutional dialogue in those terms). However, from the point of view of the type of democratic conception that I defend here, such an approach appears deficient: "We the People" are completely absent from that picture. In this way, the possible solutions to the problems of democratic constitutionalism become completely dependent on what those in positions of power can do - that is, dependent on what the same people who have given rise to such problems can do.

Alexy, R. (2002), *A Theory of Constitutional Rights,* Oxford: Oxford University Press.

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old and new), their function and their legitimacy (i.e., how could that system of "internal" controls is going to remedy "problems" that they themselves are creating, and from which they may be benefitting -i.e., corruption in the public administration).

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Alexy, R. (2003), "Balancing, constitutional review, and representation," *Int J Const Law* (2005) 3 (4): 572-581.
Alexy, R. (2010), "The dual nature of law," *Ratio Juris*, vol. 23, n.2, 167-182.

Balkin, J. (2011), *Living Originalism,* Cambridge: Harvard University Press.

Barsotti, V.; Carozza, P.; Cartabia, M.; Simoncini, A. (2016), *Italian Constitutional Justice in Global Context*, Oxford: Oxford University Press.

Bickel, A. (1967), *The Least Dangerous Branch,* New Haven: Yale University Press.

Calamandrei, P. (1955), "Discorso sulla Constituizione," Milano, 26 January 1955, manuscript in file with the author.

Carrió, G. (1965), *Notas sobre derecho y lenguaje,* Buenos Aires: Abeledo Perrot.

Crozier, M., Huntington, S., Watanuki, J. (1975), *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission Paperback*, New York: New York University Press.

Dahl, R. (1956), *A Preface to Democratic Theory,* Chicago: The University of Chicago Press.
Dahl, R. (1991), *Democracy and its Critics,* New Haven: Yale University Press.
Dahl, R. (2001), *How Democratic is the American Constitution?* Conn.: Yale University Press.

Dworkin, R. (1977), *Taking Rights Seriously,* Cambridge: Harvard University Press.

Dworkin, R. (1985), *A Matter of Principle*, Cambridge, Mass.: Harvard University Press.
Dworkin, R. (1986), *Law's Empire,* Cambridge: Harvard University Press.

Dworkin, R. (1990), *A Bill of Rights for Britain*. Ann Arbor, MI: University of Michigan Press.

Dworkin, R. (1996) *Freedom´s Law. The Moral Reading of American Constitution*, Oxford: Oxford University Press.

Dyzenhaus, D. (2015), "Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought," *Theoretical Inquiries in Law* 16.2 (2015), 337-367.

This text is part of a project that has received funding from the European Research Council (ERC) under the European Union's Horizon Europe research and innovation programme (grant agreement No **101096176** - ICDD).Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

Elster, J. (1988), *Ulysses and the Sirens. Studies in Rationality and Irrationality*, Cambridge: Cambridge University Press.
Elster, J. (1998), *Deliberative Democracy,* Cambridge: Cambridge University Press.

Elster, J. (2000), *Ulysses Unbound*, Cambridge: Cambridge University Press.
Ely, J. (1980), *Democracy and Distrust,* Cambridge: Harvard University Press.
Ferrajoli, L. (2008), *Democracia y Garantismo,* Madrid: Trotta.
Fiss, O. (1976), "Groups and the Equal Protection Clause," *Philosophy and Public Affairs,* 5 (2): 107-177.

Fuller, L. (1963), *The Morality of Law,* New Haven: Yale University Press.

Ginsburg, T.; Huq, A. (2018), *How to save a Constitutional Democracy,* Chicago: The University of Chicago Press.

Habermas, J. [1992] (1996), *Between Facts and Norms*, (Original *Faktizität und Geltung*), trans. W. Rehg, MIT Press, Cambridge, MA.

Hart, H. (2012), *The Concept of Law,* Oxford: Oxford University Press.

Hirschl, R. (2004), *Towards Juristocracy: The Origins and Consequences o the New Constitutionalism*, Cambridge: Harvard University Press.

Huntington, S. (1983), *American Politics: The Promise of Disharmony*, Cambridge: Harvard University Press.
Kavanagh, A. (2023), *The Collaborative Constitution,* Cambridge: Cambridge University Press.

Kelsen, H. (2005), *General Theory of Law and State,* London: Transaction Publ.

Kennedy, D. and Klare, K. (1984), "A Bibliography of Critical Legal Studies," *Yale Law Journal,* Vol. 94: 461.

Kramer, L. (2004), "Popular Constitutionalism, Circa 2004, 92 *California Le Review* 959.
Kramer, L. (2005), *The People Themselves. Popular Constitutionalism and Judicial Review*, Oxford: Oxford U.P.

This text is part of a project that has received funding from the European Research Council (ERC) under the European Union's Horizon Europe research and innovation programme (grant agreement No **101096176** - ICDD).Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

Kumm, M. (2006), “Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law,” *German Law Journal* 7: 341-369.

Lechner, N. (1991), "A la búsqueda de la comunidad perdida" in *Revista Internacional de Ciencias Sociales* Nº 129, UNESCO, 8.
Levinson, S. (2008), *Our Undemocratic Constitution,* Oxford: Oxford University Press.
Levitsky, S. (2021-2), “The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It” *Jorde Symposium*, https://www.youtube.com/watch?v=IxQn22J0dMo
Levitsky, S.; Ziblatt, D. (2018), *How Democracies Die*, New York: Crown.
Levitsky, S. Ziblatt, D. (2023), *Tyranny of the Minority,* New York: Viking.
Schumpeter, J. (2008), *Capitalism, Socialism and Democracy,* London: Harper Classics.

Loughlin, M: (2022), *Against Constitutionalism,* Oxford: Oxford University Press.

Nino, C. (1997), *The Constitution of Deliberative Democracy*, New Haven: Yale University Press.

Prieto Sanchís, L. (2003), *Justicia constitucional y derechos fundamentals,* Madrid: Trotta.

Rawls, J. (1991), *Political Liberalism,* New York: Columbia University Press.

Taylor, C. et al (2020), *Reconstructing Democracy,* Cambridge: Harvard University Press.

Tushnet, M. (1999), *Taking the Constitution away from the Courts*, Princeton: Princeton University Press.
Tushnet, M. (2006) "Popular Constitutionalism as Political Law." *Chi.-Kent L. Rev.* 81: 991.

Tushnet, M. (2008), *Weak Courts, Strong Rights,* Princeton: Princeton University Press.

Unger, R. (1996), *What Should Legal Analysis Become?* London: Verso.

Van Reybrouck, D. (2017), *Against Elections: The Case for Democracy,* London: Random House.

Waldron, J. (1999), *Law and Disagreement,* Cambridge: Harvard University Press.

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Waldron, J. (2014), "Five to Four: Why do Bare Majorities Rule on Courts?" *The Yale Law Journal,* vol. 123, n. 6, 1626-2133.

Waldron, J. (2016), *Political Political Theory,* Cambridge: Harvard University Press.

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