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"200 anos do Constitucionalismo Latino Americano: um Balance Crítico"

Latin American Constitutionalism: "Democratic Erosion" or "Conversation Among Equals"

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Introduction

In this paper, I reflect on the current democratic crisis, a crisis which seems to have spread throughout a large portion of the world, and which in recent months has caused dramatic changes. As I write these words, we are facing serious social "outbursts" causing deaths, injuries, and detentions in Spain, Chile, Ecuador, Bolivia, and many other countries. Venezuela is experiencing an extreme crisis in political legitimacy, and social exhaustion with its institutions. And what can be said, meanwhile, about cases like those of Donald Trump in the United States, Jair Bolsonaro in Brazil, Daniel Ortega in Nicaragua, Viktor Orban in Hungary, and Recep Erdogan in Turkey? Examples such as these, as will be discussed in this paper, have become paradigmatic of situations of "democratic erosion" (citizens' weariness with democracy, in the context of an institutional system that appears to be rotting "from within," dismantled "piece by piece" by means of gradual and "lawful" steps). As I will argue, the situation seems to have reached a peak of seriousness in the past months but, at the same time, and on the flipside, here and there new and interesting opportunities for citizen participation and civic activism are emerging. I focus in particular on recent experiments in "inclusive debate"—public discussions concerning topics of shared interest, conducted through deliberate and socially inclusive procedures. These experiments show us that even today, or perhaps especially today, it is possible to organize such debates in a way that allows for listening and processing the diverse viewpoints of the many members of our multicultural societies. In other words, because of or in spite of the crisis in democracy, the "conversation among equals" is shown to be possible and attractive.

In this paper, I will first examine the phenomenon of "democratic erosion." I will disagree with the manner in which the issue has been considered in the academy and, above all, I

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will critique the way in which the academy superimposes and conflates problems of constitutionalism and problems of democracy (something that leads the academy to think that, by attacking problems of constitutionalism, it is attending to and can resolve problems of democracy). Finally, and contrary to those doctrinal developments, I will reflect on what we can learn from new experiments in democratic conversation that have occurred in recent months, and that show another side of the worrisome situation of democratic crisis that we are living today.

From the Crisis of Rights to the Crisis in Democracy

Much of the twentieth century appears to have been dominated by a serious "crisis of rights." The two World Wars represent extreme examples of massive violations of individual and group rights. World War II in particular represented "the nightmare of humanity," expressed in experiences of Nazism, fascism, or genocide. The international community was gravely injured, and still has not recovered from those harms. The legal academy dedicated enormous energy to reflecting on such situations, and a good portion of the writing that we still teach in our law schools appears to be marked by these lessons: how do we protect rights? what commitments should we include in our declarations of rights? how do we litigate rights? how do we interpret them? what role should judges play in the protection of those rights?

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.

Of course, my objective is not to indicate that these crises have been overcome, nor to suggest that the current problems of human rights violations are not as serious as they have been in the past. Instead, I aim to highlight how the "democratic crisis" has reached extraordinary and notorious levels in recent years. Cases such as those mentioned above—of presidents who led efforts to undermine checks and balances, or of citizens

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standing up to voice their frustration with systems of government and their representatives—help to confirm this "experience of crisis."

In response to these events, extremely important studies on the subject have begun to be produced by both the legal academy and the field of comparative politics. Many of the most notable figures from those disciplines published informed reflections on these occurrences. 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"; first-rate constitutionalists 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 a successful book on the "death" of democracy (Levitsky & Ziblatt 2018). In sum, the crisis was recognized and addressed as such in the social sciences.

As a counterpoint to this situation of "democratic frustration," in these difficult years we have also witnessed the birth of fascinating experiments in grassroots participation like never before: everyday citizens who demand to be included, heard, and considered in official decision-making processes. Additionally, and in a perhaps unexpected manner, the appearance of vital, horizontal, robust, public debates (i.e., in Ireland and in Argentina, concerning abortion); or the many new "citizen assemblies" (assemblies composed, in some cases, exclusively of citizens, sometimes chosen at random) meant to debate and to propose solutions to issues of public interest: Australia in 1998; British Columbia and Ontario, since 2005; the Netherlands in 2006; Iceland in 2009; Ireland in 2012 and 2016; or the constitutive process that began in Chile during Michelle Bachelet's final term. I will discuss the two sides of this phenomenon (democratic crisis and new citizen assemblies) in the pages that follow.

The Case of "Democratic Erosion"

I begin by analyzing the problem of "democratic erosion," followed by a critique of the way in which this worrisome phenomenon has been discussed in contemporary scholarship. I take as a starting point a definition that appears in what to this day appears to be the most influential work on this subject: Tom Ginsburg and Aziz Huq's book *How to Save a Constitutional Democracy*. Ginsburg and Huq allude 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). "Democratic erosion" implies, they add, "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).

Most relevant to this paper, the "erosion" or undermining of the democratic system is the typical product of new "imperial presidencies" (Ackerman 2007, 2010), or "unrestrained" presidencies (as in the paradigmatic examples of Trump, Erdogan, and Orban) that seek

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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. This gradual and growing deterioration of the system of checks and balances provokes 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.

This situation of "democratic erosion" is also produced—at least, according to some of the main authors writing on this topic—in a context of citizens' "indifference" or "apathy." Ginsburg and Huq, for example, refer to the importance of citizens' engagement with democracy, as well as mention the grave problems that arise when citizens disengage from politics. They refer to a "decay in popular commitment to democracy" (ibid., 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).

In Ginsburg y Huq's analysis, the implications of the lack of "political morality" on the part of the citizenry has considerable significance. It is so central to democracy that they go so far as to assert that, in the absence of political morality, none of the tools available to those who design constitutions can save current democracies: institutional design alone, they say, can only go so far without citizens' civic engagement. In an even more emphatic manner, and in one of the most renowned paragraphs of book, they say:

> 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 (ibid.., 245).

Their argument appears to be based on a narrow approach to democracy. Authors like Ginsburg or Huq expressly adopt a *Schumpeterian* concept of democracy, which they describe—in accordance with Schumpeter's thinking—as an institutional arrangement in which people, through political parties, acquire the power to decide, through a competitive voting by citizens. Other authors, like Adam Przeworski, ground their arguments instead in a *minimalist* approach to democracy, more along the lines of Robert Dahl's early writings on the subject. Additionally, this conception of democracy often appears to be include guarantees of at least certain classic, liberal rights (free speech, free association, etc.). As I understand it, this restricted view of democracy aims to allow comparisons across a wider range of diverse countries, without excluding from the analysis relevant cases, but referring to less developed or robust institutional systems.

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Finally, I would note that from on 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, "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.).

Critiques of the "erosion" approach

In my view, there are many serious problems inherent to the "democratic erosion" approach that—in various forms—has been gaining strength in the face of the crisis in our systems of governance. Since I view these somewhat flawed analyses as exacerbating the problems we face today (as opposed to resolving them), in this section I present my objections to them. I begin by putting forward three critiques of the dominant approach.

i) First, it is very important to think about the types of problems we are facing, *independently of people and circumstances*, that is to say, with the awareness that we face challenges that are *structural* (even when they appear to have been unleashed in an instant by a particular crisis; or provoked by one leader's individual excesses). I focus here on the jurisdictional-institutional aspect of the structural character of such phenomena, instead of other equally or similarly relevant factors (economic issues, cultural issues, etc.). I want to emphasize, however, that I do not intend to overestimate the importance of the legal issues, and much less do I assume that general problems and problems that go far beyond law can be resolved through changes to the law. I do want to note, however, that the importance of the legal issues (in the potential explanation or resolution of this kind of challenge) should not be underestimated, much less neglected, as they often are.

ii) Second, approaches like those described above *conflate problems of constitutionalism with problems of democracy*. The democratic exhaustion these approaches observe; the protests against governments; the dissatisfaction with legislatures; the lack of legitimacy of the justice system—issues that the literature I cite intends to address in its analyses—are serious problems, but they are also problems that go far beyond constitutionalism. They deal with the emptying of meaning from our systems of governance. They address problems that are not resolved by the appointment of more independent judges; or by a new crop of legislators, or by the impeachment of Trump or Bolsonaro (as desirable and necessary as all these are). In short, they deal with problems that are not solved with a few adjustments to the "loose screws" in the constitutional structure. The problems they address are, essentially, democratic.

iii) Third, it is wrong to look accusingly at citizens, assuming their its "apathy"; blaming them for their inability to control those in power (or for their consenting to something that turns out to be politically unacceptable); and challenging them to commit to a type of

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civic activism in which they do not currently engage. Such a stance, in my opinion, fails on all points: in what it assumes, in what it demands, in what it suggests. First of all, the levels of civic mobilization that are currently being observed across the world (from the Middle East to Spain, Bolivia, or Chile) are extraordinary and unprecedented in the history of humanity. While we can disagree as to how to evaluate this mobilization, it is clear that *we cannot continue to assume "political apathy" as an undisputed fact, or a "firm assumption"* as the social sciences have done for a long time. It is of no use to speak of apathy when encountering the mobilization of thousands of citizens before the election of Barack Obama; nor should apathy be assumed when facing the heroism shown in the Middle East, in the time of the Arab Spring. Nor are the countries of Latin America in situations of "apathy" when there are citizens willing to sacrifice everything they have in the name of their political beliefs. We can differ in how we evaluate these events, but we cannot continue resting simply on the idea of "political apathy" as a given. Instead, we must emphasize time and time again that personal conduct is, in large part, a result of (or a response to) the institutional system in which it occurs.

My point is that *individual and collective behaviors are in large part a product endogenous to the institutional system*, as opposed to an exogenous product, external to the system. Often citizens do not participate actively in politics not because they do not want to but because the institutional system discourages them: sometimes not incentivizing them to participate, other times sanctioning them for doing so or showing them that their participation is futile.[1] When, in the second half of the twentieth century (at least), the political rule in Colombia seemed to be that mobilization by leftist parties meant death, it was obvious that a good portion of the citizenry was going to think twice about deciding to become politically engaged. When, in Argentina in 2001, and after months of unprecedented civic activism (massive numbers of people in the streets every day demanding "that everyone leave office"), citizens saw that basically nothing was changing (all members of the political class had stayed in the same place where they were), then, it is to be expected that people would begin to think twice about how to continue with their activism. When, in Chile in 2019, citizens mobilized day after day, in

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[1] For that reason, theories like Bruce Ackerman's "constitutional moments" are so attractive. His theory helps us and invites us to take seriously—in their constitutional implications—citizens' mobilizations over time. At the same time, however, his theory is questionable in that it takes as a "fact"—and, more importantly, as an "autonomous decision"—the moments of "normal politics" in which the citizenry seems uninterested in politics. Ackerman's approach, in that sense, ends up attributing value and weight to behavior that, in large part, is a product of an institutional system that tends to discourage or hinder civic activism (Ackerman 1991).

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spite of police violence, they did so while expressing the exhaustion (the "democratic fatigue") provoked by a closed institutional system, due to the difficulty of changing the constitution after Pinochet. The citizens in all of these cases continued to mobilize in spite of the institutional obstacles and discouragement they faced. They did so not thanks to the institutional system but against it and in spite of it.

"Democratic dissonance," and a 200-year-old institutional problem

One additional problem, observed in the study of "democratic erosion," that I would like to examine more closely, is related to its constitutional origins and sources. For example, in their main work, Ginsburg and Huq make an enormous effort to clarify that they intend to study the issue of "erosion" beyond the bounds parochialism, and they expressly reject in the very introduction to the book any approach that considers the topic from some a perspective of "American exceptionalism" (Ginsburg & Huq 2018, 4, 234). Although they quickly distance themselves from and reject those approaches, they seem to fall prisoner to them. As I will discuss, the current crisis did not originate with Trump, Orban, or Erdogan, nor are they a product of this era. These difficulties have been with us for a long time—not merely for dozens of years (from the time in which political scientists like O'Donnell spoke of the "slow death" of democracy, for example, O'Donnell 2010), but at least since the beginning of constitutionalism. It was then that the foundations of an institutional system that discourages civic participation and favors concentrated power, were laid.

We know well at this point that these problems have an added dimension—exaggerated or disproportionate—in Latin America, particularly since the pact between elites that was produced in the mid-nineteenth century, and when they established the foundations of the institutional order that persists basically untouched in the region. This institutional order included the construction of an exclusive "engine room," kept for a select few; a system of checks and balances modeled on that of the United States; and an organization of the Presidency based (like Juan Bautista Alberdi argued, using the model of Chile's 1833 constitution) on a scheme that would allow the executive to assume the faculties of "a king" when faced with situations of "anarchy" (Alberdi 1852, cap. 25). The institutional situation that we observe today in all of Latin America is not far from that original design. We continue to find ourselves currently with citizens who have trouble choosing and controlling their representatives and who are discouraged from political participation, as well as with a president who, from "minute one," is incentivized and able gradually to seize—to "colonize"—more power. In other words, in the mid-nineteenth century Latin American countries chose to design an "unbalanced system of checks and balances" that placed at risk the whole mechanism of controls from the moment it was put in place: from the beginning, the president was going to rely on institutional and extra-institutional, as well as formal and informal, measures to threaten, sanction, or reward officials who got in their way to try to block their agenda (powers of coercion, budgetary manipulation,

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control of para-police forces as well as funds for para-state forces, administrative positions to award, etc.).

That said, this specifically Latin American "institutional pathology" does not contradict nor should it obscure that the evil at hand is, in various ways, the result of Western constitutionalism and has been from the beginning. All of it appears to have been designed based on shared assumptions about "concentration of power, and restrictions on citizens' participation," making room for the kind of "frustrations" that we observe today (summarized in executive excesses; and in the difficulties citizens face when reproaching or reorienting the actions of political authorities). The serious problem that I have been calling "democratic dissonance" thus emerged and developed in this way from the beginning.

To synthesize: by *democratic dissonance*, I mean the disconnect between, on the one hand, the promises with which the institutional system sought to legitimize itself to the citizenry from the beginning, and the expectations that it reasonably generated in the citizenry; and, on the other hand, the limitations that the same system imposes on civic engagement. This problem is currently "exploding" because it was designed based on restrictive and *elitist* assumptions, but must operate today in a very different framework, defined not only by a very different society from that which existed 200 years ago but also and more importantly by a *democratically empowered* society that makes demands and expects responses from institutions that the institutions are prepared to deny. The institutional framework seems thus like a *straight jacket* that citizens today struggle with at every possible opportunity.

I will draw on two main issues when summarizing the problem at hand: i) the imperfect political sociology on which the institutional system was constructed; and, more importantly, ii) the (elitist) principle of "distrust" of citizens' political participation, which guided the design of the institutional system. The general idea is that i) social changes produced since then as well as ii) the sense of protagonism and democratic empowerment of our time have "broken" the link between citizens and institutions, leaving institutions "disconnected" from the plans and expectations of citizens.

An imperfect political sociology. First, constitutionalism as we know it (particularly but not exclusively in the United States) originated with the purpose of "institutionally redressing" a society that conceived of itself as "simple," divided into few groups with an internally homogenous composition and composed of self-interested individuals. In the words of James Madison, in The Federalist No. 10, society was seen as fundamentally divided in two groups: "majority" and "minority"; "debtors" and "creditors"; those without property and those with. These groups were recognized as internally homogenous, and their members were taken to be "selfish" subjects (fundamentally motivated by passion or by interest, as taught by David Hume). From there, one could conclude that all of society could be fully represented by ensuring the presence of some

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representatives of each group in the institutional scheme.[2] The whole system of checks and balances appears to have been constructed on the basis of this reasoning, that is, of ensuring the power of each group in order to avoid "mutual oppressions." As Alexander Hamilton said in one of his main presentations at the Federal Convention: "[G]ive all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself against the other" (Farrand, 1937, vol. 3, 288). Hamilton summarizes the whole idea, talking about two main groups made up of self-interested people who are ready to confront and destroy the opposing group if that seems to be an institutionally conceivable possibility—and the solution to this problem is giving each group equal institutional power (a questionable solution, in democratic terms).

After more than 200 years, those original assumptions (that, in my understanding, were not clearly correct even in the moment when they were adopted) do not describe modern-day society. Instead, unlike the picture painted by the U.S. Founding Fathers, we find ourselves in *multicultural* societies defined (as John Rawls said) by the *fact of pluralism*; with hundreds of groups, internally heterogeneous and made up of people motivated by diverse issues (people who, in addition, appear to be "many people at the same time": no one can currently be described purely or exclusively by the fact of being a worker, landholder, homosexual, vegetarian, or rightsholder). In conclusion, it is currently not at all probable that this institutional system accommodates all of society, fully, like it was expected to do in the past. Not even when the system is functioning "at its full capacity" and with representatives acting in good faith, could one expect that society would be adequately involved in decision-making processes. The institutional "straightjacket" is extraordinarily "rigid" today, and everywhere society struggles against it radically.

A principle of "democratic distrust." The other fundamental assumption on which the today's institutional system is based has to do with what is called a principle of "democratic distrust" (distrust in the face of what Madison, in his most important work, described as "majoritarian factions"). This assumption is observed in a clear, unobscured way in almost any of the grand founding documents of constitutionalism, and is linked with what Brazilian jurist Roberto Mangabeira Unger called the "dirty little secret" of our political-legal life: the "discomfort with democracy" (Unger 1996). On this point, I note i) that such elitist assumptions are clearly present from the beginning of constitutionalism; and ii) that these assumptions were not just expressions of mere political rhetoric but were instead "translated" into concrete institutions. This strengthens my conclusion that iii) these original assumptions do not suit current political sociology or today's shared democratic ideology.

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[2] This aim for "full representation" was conceivable, above all, through use of methods like direct and indirect elections; or the demand for certain requirements for representation, in terms of property, wealth, or education.

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On the first point (i), I will simply say that authors like James Madison (to take into account the opinions of only one of the great thinkers of modern constitutionalism) left unequivocal and repeated evidence of his ultimately elitist thinking on the subject (I offer dozens of similar examples from Latin American constitutionalism in Gargarella 2010, 2013). For example, in The Federalist No. 63, Madison admitted that the representative system he had helped to create was based on "the total exclusion of the people, in their collective capacity." In The Federalist No. 48, he described democracy as "a multitude of people" made vulnerable "by their incapacity for regular deliberation and concerted measures." In the Federalist No. 55, he argued—as though it were a scientific principle—that, unfailingly, in "numerous assemblies . . . passion never fails to wrest the scepter from reason." In the Federalist No. 10, his most important work, Madison described democracy (referring as he did so to "Greek democracies" but with an underlying criticism of the forms of assembly that had taken place in that country) in the harshest terms imaginable. He referred to them as systems that "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths."

Second (ii), such assumptions were translated into concrete institutional tools. In fact, one could say that each of the mechanisms of the constitutional system designed at the time ended up reflecting those elitist assumptions. Very briefly, and as we already know, the *representative system* was constructed on the basis of the idea of "separation" between citizens and representatives (in which the representatives were "free" from the "oppressive" demands and pressures of their electors); the system of *popular controls* was diluted, leaving only the periodic vote, and replaced with another system of *internal controls* (of each branch of power over the others), as a way of distancing citizens from politics; the system of *checks and balances* was organized in order to guarantee political stability and to prevent oppression but at the cost of undermining democracy;[3] the idea of *rights* (initially restricted to liberal or classic rights) was based on the concept of *natural* rights, which meant understanding them as separate from, independent of, and resistant toward any collective process of democratic construction (as in Ronald Dworkin's notion of the trump card, or Luigi Ferrajoli's approach to the "sphere of rights" as separate from the "sphere of democracy"); the idea of *minorities* (to be protected) at the time had to do, especially, with the minority of property-holders (the select few), as opposed to the meanings of minority we tend to use today (e.g., minorities as in disadvantaged groups, or strictly numerical minorities); *judicial review* was conceived of in terms that today—classically, and at least since Alexander Bickel's description of it—we define as "counter-majoritarian" (Bickel 1962); the executive was designed as a "unitary" position that has the capacity to impose its will on the majority (i.e., through veto powers, similar to those

[3] This was clear in Hamilton's proposal, cited above, which gave equal power to majorities and minorities in such a way as to allow each group to defend itself from the other's attacks.

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possessed by royalty in their time), with the understanding that majorities are a "threat" and breed "chaos" (in the words of Hamilton in The Federalist No. 76: "A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body"). In short, we can disagree about the specifics of the design, its purposes, and effective implications, but the general point, I hope, is clear: the whole institutional system has a "common thread," running from that assumption of "distrust" to the actions of the "factious" majorities.

Finally (iii), I want to examine the "disconnect" that, over the course of time, has emerged between institutions that have been preserved basically untouched for over 200 years (which once were called the "engine room" of the Constitution), and the promises and expectations they generated. Currently, and growing out of an expanded awareness of their rights and abilities (a "democratic empowerment" that could be characterized as *the fact of democracy*, unique to our time), citizens demand from institutions responses or results that the institutions do not give, nor do they help citizens to obtain; if anything they directly prevent citizens from obtaining them. In short, that old institutional scheme, conceived of in the late eighteenth and mid-nineteenth centuries, today governs completely different societies (and completely different problems or "dramas"; and different challenges); and, moreover, is carried out in the framework of a citizenry that sees itself as the protagonist of its destiny, and as having the right to express and to carry out its demands on all matters that concern it. This is what I mean when I talk about the problem of *democratic dissonance*.

From "Democratic Erosion" to "Inclusive Debate"

In my view, the academic literature that explores of the problem of "democratic erosion," concentrated as it is on the study of the "imbalances" presented by the system of checks and balances (which in turn is focused on the study of the problems of constitutionalism), is not well prepared nor inclined to deal with the problems of democratic "frustration" or "fatigue" that define our time ("democratic" problems that such studies also want to address, and that in a certain way are the motivation behind those very studies).[4] For that reason, and contrary to those doctrinal developments, in this section I examine different limitations and challenges inherent in the constitutional system that I believe have greater power to explain the current situation of "democratic exhaustion." My aim continues to be demonstrating that the protests against authorities and constituted governments; the distrust of representatives; the loss of credibility of the courts; and the sense of "alienation" in the face of the institutional framework that surrounds us, transcend the specific circumstances of one moment and the individual excesses of specific leaders. I am referring, then, to certain constitutive characteristics of constitutional design still in

[4] This is not true in all of the cases. Mark Tushnet and de Van Reybrouck's studies, for example, very open to new experiments in greater civic engagement, like the ones examined here.

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force (a design that is "hostile to democracy") that I hope allows us to understand better the type of "democratic frustration" that we see around us today.

By beginning with the different assumptions in the dominant literature, I believe we not only can better explain the crisis that surrounds us, but that we can also be left in better conditions to recognize the worth of the new experiments in "inclusive deliberation" that are also results of this era. In effect, for those who begin with an assumption of democratic *trust*, as opposed to democratic distrust, and who see democracy not in its strict (minimalist) sense but instead in relation to an ideal of collective deliberation (like the one from the *deliberative democracy* school of thought, Nino 1997, Habermas 1996), the new participative experiments of our time seem to be notable and hopeful alternatives in a distressing institutional context.

The "inclusive deliberation" alternatives that I will examine show, from the start, some very interesting characteristics. All of them: i) begin with the recognition of the existence of serious political-institutional problems; ii) recognize the essentially "democratic" nature of those problems; iii) call for responses that attack the "democratic" (as opposed to constitutional) root of the problem that they face; and iv) approach the democratic problem from a perspective that is concerned with the two distinct pillars of "deliberative" approaches to democracy: "social inclusion" and "public debate."

Among the experiments in "inclusive deliberation" that I would like to highlight from recent years I will mention, briefly, the following:

*One of the first attempts occurred in Australia in 1998, with a constitutional assembly that for the first time was composed in equal parts of ordinary citizens and professional politicians. The assembly, which was tasked with determining whether Australia would become a republic, gained broad international recognition for its good performance.

* After a few years, two crucial milestones were reached in the development of inclusive deliberation: the two first Citizens' Assemblies created in Canada—in British Columbia in 2005 and in Ontario shortly after, in 2006. These experiments—which lasted several weeks—introduced three key variations on the Australian model. First, the assemblies were made up exclusively of citizens; second, their members were chosen at random; and third, the procedure of the conventions was very different from that followed in Australia. Notably, both assemblies were convened to reform a complex, technical subject—the electoral system—that was difficult to change when those in charge of carrying out the reform were the very ones who could be hurt by the eventual changes (politicians). Both reform processes were followed (as in the Australian case) by a general referendum on the topic, meant to allow for the direct participation of the rest of the citizenry.

* Later in 2006 the Dutch Forum was created, which took the Canadian assemblies as its model but made two significant changes. First, the Forum was national instead of local in scope. Second, in the Netherlands, the recommendations of the assembly were presented

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to the legislature, which made the final decision on the issue, instead of being subjected to a popular referendum.

* Later, there was an exceptional process of constitutional reform in Iceland (2009-2013) that was born, as in the other examples mentioned, out of a severe political and economic crisis. In this case, and after various preparatory steps, an informative assembly was organized of 950 citizens who were charged with determining the topics to be addressed in the constitutional reform. That assembly was followed by another, charged specifically with the reform. This second assembly was also made up of citizens, chosen through a lottery system that controlled for certain characteristics to ensure the participation of various demographics (i.e., members coming from different areas of the country, gender equity, etc.). The process was especially notable for its crowdsourcing method—debates on the reform were constantly informed by the demands and proposals submitted by the citizenry. The final product of the deliberations was also later subjected to a referendum.

*Finally, it is worth mentioning Ireland's experiments: the 2012 constitutional convention and the 2016 assembly. In these cases, the debates were organized differently from the others in the role given to experts and professional legislators. Here, ordinary citizens (two thirds of the assembly) debated together with traditional politicians (the remaining third) in processes that were informed by experts, but where the final word was always given to ordinary citizens and elected officials. In addition, in both cases, the assemblies were organized in such a way as to receive all points of view and criticisms from citizens organized in assemblies across the country. Although Ireland is a majority Catholic country, the first assembly concluded with a referendum that approved marriage equality while the second concluded with a referendum that approved the adoption of a more liberal stance on abortion legislation.

* I also would like to highlight that Latin America has recently had many experiments that fit within the parameters outlined above (recognition of the democratic problem; "inclusive" forms of response; etc.). They range from the *participative budget* implemented in Porto Alegre (Río Grande do Sul, Brazil); to the *public hearings* organized by high courts (Colombia, Brazil) and legislatures (Argentina); to the experiments with the tool of *prior consultation* of indigenous communities (born out of the implementation of ILO Convention 169); to the *constitutional assemblies* in Chile (after the 2011 student protests and as a result of the "mark your vote" initiative that accompanied the 2013 election, which ended up having more than 200,000 people participate in different deliberative forums). In the case of Argentina, which is the one I know best, I want particularly to highlight the debates on abortion that took place in 2018. Those debates followed an election (in October 2017) in which no party (except the Socialist Workers' Party) had even mentioned the issue of abortion. A few weeks later, however (and set in motion first by the international *Me Too* movement, against sexual assault; and then by the *Ni una menos* movement in Argentina, against gender-based

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violence), the debate about abortion seemed to take center stage in the public discourse.[5] The debates on abortion—and the demand for the immediate approval of "liberal" bill on abortion—gained extraordinary force in a matter of days, involving experts and ordinary people; children and adults; lawyers and young people who had had traumatic experiences related to abortion. After a short while, and following more than a decade of favorable initiatives for legislation on this topic, the Voluntary Termination of Pregnancy Bill began to be debated by the Chamber of Deputies in April 2017. The legislative chambers then organized extensive debates that lasted more than two months and involved thousands of diverse voices. In the end, the Congress, by a margin of only a few votes, voted against the bill.[6]

Evaluating New Experiments in "Inclusive Deliberation"

In an unsurprising way, the authors who work with the hypothesis of "democratic erosion" do not seem particularly enthusiastic about the new experiments in inclusive deliberation. For example, in their book *How to Save a Constitutional Democracy*, Ginsburg and Huq ask defenders of inclusive deliberation to demonstrate that these assemblies can be scaled up (Ginsburg & Huq 2017, 203-4). Taking (once again, and in line with the exceptionalism that they repudiate) the experience of the United States as the metric against which all else must be measured, they assert that "we have no evidence yet that mechanisms of sortition or citizen-led deliberation can work on the scale of a large country like the United States" (ibid., 204).

Here, on the other hand, from a perspective that is not miminalist but that is instead more demanding of democracy—democracy as a "conversation among equals"—I approach such innovative practices in a much more trusting and hopeful way. In my view, *in what they have already done*, these experiments offer a rich history from which we can learn important lessons. A few of these are:

1) First of all, cases like those cited above help us to do away with many common prejudices against new assembly initiatives. a) First, the assemblies were not exclusively carried out in small, homogenous countries (Iceland), but also in large, multicultural countries (Australia, Canada). b) Second, they did not deal solely with topics that were abstract and unrelated to the interests of the majority (monarchy-republic); they were also

[5] Although diverse groups had pushed for change on this issue for decades, its arrival at the center stage of public debate was abrupt. In particular, the National Campaign for the Legal, Safe and Free Abortion Bill (Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito Proyecto) had put forth a Voluntary Termination of Pregnancy Law in 2006. This piece of legislation was presented for consideration by the National Congress for the first time in 2007. Later, it was presented seven more times, until in 2018 the bill was discussed for the first time.

[6] The Chamber of Deputies approved the bill with 129 votes in favor, 125 against, and 1 abstention. The Senate, however, rejected the bill after a vote of 38 senators against, 2 abstentions, 1 absent, and 31 in favor. The influence of the more conservative provinces in the north of the country tilted the decision against approval of the initiative—even so, by only a handful of votes.

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capable of dealing with more troublesome and socially divisive topics (abortion, marriage equality). c) Third, specialists and experts were not the only ones to participate in these debates; instead, the majority of participants were people without higher education or professional qualifications.

2) In line with the first point, I want to emphasize the way in which the functioning of these processes of inclusive debate disproved, or at least unsettled, some of the social sciences' assumptions about the limits of collective participation and deliberation.

2a) Reason and technical knowledge. One of the most extraordinary achievements of these processes was demonstrating the way in which the deliberative assemblies—in all the cases, and after a process of learning and collective debate—had *ordinary people become experts* in issues in the public interest, sometimes complex technical matters. The instruction that these practices provide is very important, when it has become so typical to resist—more or less openly—the participation of the electorate in the debate about public matters, alleging (for example, and as the academy has done) their *rational ignorance*, as the public choice school has done (Buchanan 2000; Pincione & Tesón 2006; Tullock et al 2002). The example of the Canadian deliberative assemblies is pretty extraordinary in this area: they dealt with nothing more and nothing less than "electoral systems," perhaps the most difficult, technical, and complex topic in all of political science. Nevertheless, and after only a short while, ordinary people who did not have an interest in the outcome and who were far from specialized in this area, became experts on the issue: all that was needed was a well-organized process conducted in an open, deliberative, and inclusive manner.

2b) Motivation. The assemblies also helped to disprove a long-standing assumption in contemporary social science: that the majority of people are apathetic and little motivated to become involved with complex political issues. Instead, I would suggest that people distrust political parties and resist participating actively in politics when it seems their voices or contributions will not be taken seriously, or when they see that their contributions will be considered only as a support for what has already been decided by others. W*hen citizens see that their opinions can be taken into account (or anticipate that they will be) in a decision on issues that interest them, they seek to make themselves heard and are motivated to do so*.

2c) Deliberation and transformation of preferences. The assemblies also confirmed the value of collective deliberation. i) First of all, some social scientists have been skeptical of the value of deliberation for years: "Why debate," they asked, "when nobody changes their mind?" They looked at public life from the point of view of seated *interests* and so, from there, minimized the meaning of deliberation and resisted the idea so many other authors began to promote: *deliberation is an appropriate measure to encourage a change in preferences* (Elster 1983, 1986). ii) Much more than that, I would add, *processes of inclusive deliberation like those examined here additionally demonstrate that it is not true*

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that in the face of issues that involve one's own identity or profound beliefs or in which changing one's mind implies confronting powerful institutions (like the Church) that people cannot change their opinions after confronting the opinions of others. Even in highly religious countries, with the enormous weight of the Church and other "traditional" institutions, as well as rural population and low or middling levels of education, have people who change their positions or introduce nuance into their opinions without grater difficulty after processes of broad public debate. We saw this, for example, in debates about abortion in Ireland and Argentina, both Catholic countries. iii) Furthermore, these processes allow us to understand that even—or rather especially—in situations of crisis and political division (profound conflicts between factions, or extreme political "rifts"), it makes sense to continue debating, and supporting the exchange of ideas.

3) In light of what has been discussed thus far in this section, I want to highlight the way in which all of the assemblies mentioned, by functioning as they did, can be contrasted with two more common models of collective decision-making: the *elitist deliberation model*, in which great social "experts"—judges, scientists, etc.—decide in the name of and without consulting the citizenry; and the *participation without dialogue model*—a model that is increasingly common in Latin American—in which issues of public interest are abruptly pushed on citizens who must vote yes or no, completely neglecting any prior process of debate and mutual clarification. We already saw, in this last respect, the unfortunate trajectory of the *plebiscite alternative*, as a model of "participation without dialogue," which the inclusive assemblies challenge.

4) I would also emphasize a fundamental and extraordinary lesson from these assemblies, related to the way in which they *contribute to the critical rethinking of the relationship between democracy and rights*. I am thinking, particularly, about the issue that we have seen reiterated many times over the course of this book of the separation between the "sphere of rights" and the "sphere of democracy" that some academics and jurists propose, as though they were talking about two distant and untouched spheres (Ferrajoli 2008). Debates like the ones that took place in Ireland around abortion and marriage equality help us to think about these issues and, again, unsettle some dogmatic, hasty, or unduly conservative assertions. The fact is that *citizens can debate perfectly well on basic issues of fundamental rights; and can do so thoughtfully and logically, without causing a crisis in the structure of rights*. Simply, citizens have the capacity to do so (again *the process* that is organized for the debate is very important) and not only that, they have the right to do so.

5) Additionally, and in relation also to issues of institutional design, assemblies like those seen here offer some very important suggestions at the same time as they give us clues for how to avoid some of the "bigger problems," in institutional terms, of our time. Three interesting proposals can be derived from the paper up until this point. i) First, and taking as an example the Canadian assemblies, is the decisive recognition of the problem, in this case the *problem that the officials with personal interests in certain public issues were in*

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charge of making the final decisions on those issues (Ferejohn 2008). From there the wisdom of favoring—as happened in Ontario and British Columbia—the intervention of citizens in deciding such issues. ii) Second is the lesson that such experiments with inclusive assemblies leaves us concerning the importance of another topic we have already seen: the politics of *presence*. That "presence," we know today, may not guarantee adequate representation of the demands of the "represented" groups, but it is also true, or it seems very clear, that the "absence" of those points of view greatly increases the possibility that the interests at play (of women or of indigenous communities, for example) will be left unattended, misunderstood, or distorted (Phillips 1995, Kymlicka 1995). iii) Third is the value of using "lotteries" in politics as a way of selecting representatives. Particularly when such lotteries were refined with methods destined to make them more sensitive to issues of geographic, gender, or racial equality, the lotteries appeared to be recognizably just and efficient mechanisms for the selection of representatives.

Conclusion

In this paper, I attempted to tackle the most frustrating problem of our time, related (not exclusively or principally to the "crisis of rights" but) to the "crisis of democracy." After briefly describing the crisis—which lately has "exploded" in an extremely worrisome way—I examined the ways in which the social sciences have addressed this issue. I critically analyzed, in particular, some well-known and influential approaches to the issue (growing out of the theory of "democratic erosion"). I showed the problems inherent in the dominant literature (in particular, the difficulties it has in distinguishing problems of constitutionalism from problems of democracy), and I laid the groundwork for an alternative theoretical approach. I suggested that this theoretical alternative—set forth under the name of "democratic dissonance"—not only left us in a better position to understand the current crisis, but that it also positioned us better in the face of new developments of "inclusive deliberation" that have appeared in recent years as a response to the crisis of the old democratic model. There, in those illuminating responses, seems to reside the only effective hope of breathing life and meaning back into our exhausted democracies.

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