The Rule of the People: Deliberative Democracy and Constitutional Interpretation

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ABSTRACT

The dissertation champions popular constitutionalism. That is, that it should be the people themselves, and not judges, the ones entrusted with the final word in constitutional interpretation. It surveys the literature and claims that popular constitutionalism lacks adequate normative foundations and institutional proposals. To fill those gaps, the dissertation rejects judicial supremacy and suggests that a better institutional approach towards constitutional interpretation is found in deliberative democracy. This case is made through three groups of arguments. First, it claims that deliberative democracy safeguards the republican liberty and political equality of individuals. Second, the dissertation shows different instrumental, normative, and conceptual ways in which political and jurisprudential defences of judicial supremacy are flawed. Third, it shows that there are reasons internal to deliberative democratic theory to reject the idea that courts are deliberative exemplars. In view of these arguments, the dissertation proposes republican, deliberative and egalitarian institutional alternatives that would turn popular constitutionalism into something feasible.

For Elena and Paula

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INTRODUCTION

1. The problem

This dissertation advocates for the theory of popular constitutionalism, which encompasses two broad claims. On the one hand, that the people themselves can and are entitled to be the final interpreters of their constitution.[1] On the other, it entails the rejection of judicial supremacy. That is, a practical and theoretical state of affairs in virtue of which the final word in the determination of what a constitution means is entrusted to the judiciary. These pages thus put *the people* and judges on a scale, measure their normative and institutional weight with regard to the question *who should be the final constitutional interpreter*, and offer concrete mechanisms for turning popular constitutionalism into something feasible.

It should quickly become clear to my reader that the problem of the final word in constitutional interpretation is related to the long-standing issue of judicial review of legislation and its legitimacy.[2] It is related, but it is not just or exactly that problem. Rather, the debates around judicial review of legislation are in the background of a more concrete discussion: the legitimacy and desirability of either *popular constitutionalism or judicial supremacy.*

The difference between judicial review and judicial supremacy merits examination. Chapter II will elaborate more extensively on the specific traits of each category, but some words at this stage are necessary to give context to the issue here explored.

Judicial review can be defined as the authority of a court of law "to refuse to give force to an act of another governmental institution on the grounds that such act is contrary to the requirements of the constitution" (Whittington 2007, 6). Judicial supremacy, on the other hand incorporates additional traits, for it does not only refer to the aforementioned features, but to the obligation of other officials and citizens to follow the judges' reasonings and interpretations of what a constitution means, towards the future. It means, to put it in the way authors usually portray it, to give the judiciary the final word in the interpretation of the constitution.

[1] The term *the people themselves* is taken from Madison 2006.

[2] The amount of literature on the topic of judicial review is staggering. A few examples are Lambert 1921; Dahl 1957; Van Alstyne 1969; Cappelleti 1970; Ely 1980; Gargarella 1997; Harrison 1998; Atria 2000; Ginsburg 2003; 2008; Waldron 2006; Whittington 2007; Bilder 2008; Helmholz 2009; Harel & Kahana 2010; Doherty & Pevnick 2013; Corwin 2014; Harel 2014.

This difference and the emphasis placed on interpretation as a normative category is one of the main features giving value to popular constitutionalism. Its endorsers have rightly underscored the importance that interpretive practices have for decision-making processes at the constitutional level, and pointed to the consequences brought about by granting the final word in constitutional interpretation to one institution or another. These are valuable, distinctive questions worthy of academic scrutiny.

Yet, popular constitutionalists have not managed to offer strong, coherent justifications for their main claims. Nor they have been able to propose well-grounded institutional alternatives to judicial supremacy. As a result, there is ample room for developing the theory and this dissertation is a step in that direction.

2. Structure

The nine chapters in this dissertation answer two major questions: Can/should the people themselves be final constitutional interpreters? Can/should judges be final constitutional interpreters?

These two questions are generalisations of the research agenda set in chapter I. This part analyses what popular constitutionalism is, its shortcomings, why those shortfalls matter, and what can overcome them. It surveys how popular constitutionalists have understood the theory in an effort to spot the gaps in that literature. In turn, those gaps provide reasons for the elaboration of the subsequent chapters. The chapter thus shows that the value of popular constitutionalism lies more in its normative, theoretical and institutional possibilities, than in the ways it is currently portrayed and championed.

The chapter then delves into the limitations faced by the theory, which represent the springboard for the developments elaborated in the rest of this dissertation. I will of course expound on those shortcomings, but it is helpful to at least mention them in this introduction.

First, popular constitutionalism is weak in its normative foundations. To give one example of this theoretical feebleness, the most influential account advancing the popular constitutionalists' case is Larry Kramer's. His *The People Themselves: Popular Constitutionalism and Judicial Review* can be considered the most important book on

popular constitutionalism,[3] and yet, as I show in different parts of this dissertation,[4] it suffers from non-negligible limitations in normative terms, as his approach is mostly an historical one, focused specifically on the history of the United States.

Second, the popular constitutionalist's literature is overly provincial, as most of its proponents reflect on it having the United States constitutional practice as a background (Bellamy 2007, 136). This has limited the scope of the theoretical reflection around the theory.

Third, apart from the normative foundations for the project, the claim that judicial supremacy is to be avoided has also frail foundations.

Fourth, with few exceptions, the theory lacks proposals that could make it institutionally feasible.

Hence, this dissertation is an attempt to fill those gaps, and its structure is partially determined by them. The issue of provincialism is not tackled in a specific chapter. Rather, different chapters consider different polities when the specific arguments that are being advanced can be supported by commenting on features of the constitutional practices of these different countries. The remaining questions are tackled by the subsequent chapters as follows.

Chapter II provides a normative, philosophical justification for popular constitutionalism. It asks whether the people themselves should be final constitutional interpreters and answers in the affirmative. The chapter claims that popular constitutionalism guarantees the freedom of individuals in a republican sense, to the extent that appropriate deliberative democratic and egalitarian means are put into place for these individuals to express and justify their preferences, letting themselves be convinced by the unforced force of the better argument.

This chapter starts justifying why republican theory would represent an attractive theoretical tool to ground popular constitutionalism. It suggests that one way of approaching this problem is by scrutinising what conceptions of constitutionalism sustain the traditional role given to judges in constitutional law. That traditional role, advocated

[3] As affirmed by a commentator, Kramer's book struck a nerve. It was reviewed in almost every major law review, and in most newspapers in the United States: "*The People Themselves* has generated intense discussion concerning the rise of judicial power in the United States and the role of popular politics in retraining, or failing to restrain, that power of the course of American history" (D. W. Hamilton 2006, 809). To name a few publications commenting on *The People Themselves:* Chemerinsky, 2004; Post and Siegel 2004; Carney 2005, 493; Braveman 2005.

[4] Particularly in chapters I and VII.

by theorists broadly falling under the umbrella label of "liberals",[5] is anchored in a distrust towards democracy understood as government by majority.

Underpinning these accounts lies a conception of freedom that shelters individuals from external impositions of power, a sort of liberty for whose guarantee the judiciary, the "least dangerous branch" (Hamilton 1948; 396; Bickel 1986) is instrumental. Consequently, courts, in this tradition, operate as institutional mechanisms available for individuals in cases where their liberties have been impinged upon.

This relationship culminates in a tension between democracy and constitutionalism, where the constitution becomes the instrument of limitation of democratic government *par excellence.* Chapter II thus claims that one way out of that tension is by reflecting on the conception of freedom that is pervasive in liberal constitutionalism, namely, a negative conception of liberty or freedom as absence of interference.

This is where republican freedom enters the picture. The rebirth of liberty as non-domination by Cambridge historians and by authors like Phillip Pettit, John McCormick and others, constitutes a useful tool to advance my case in favour of popular constitutionalism. The gist of the argument is that the safeguarding of the liberties of individuals in a republican sense finds an ideal institutional framework in one particular conception of democracy, namely, deliberative democracy.

Furthermore, the chapter claims that this republican deliberative democracy is underpinned by an egalitarian principle I call Equality of Access and Deliberation. This is a complex principle of political equality that demands the provision for all citizens of equal access to deliberate on the collective norms of their community. Hence, a republican democracy is egalitarian to the extent that it does not treat some members of a political community as privileged citizens. Instead, it emphasises the deliberative nature of the political process where inclusion, participation and justification in non-elitist fashions are essential.

This egalitarian principle has consequences for the adoption, here and in chapter VI, of a systemic perspective in deliberative democracy. As I will explain, one of the most distinctive features of current systemic accounts in deliberative democracy is the acceptance of different, more ample forms of speech as potential resources for discursive justification. This standpoint, inspired by Mansbridge's notion of *everyday talk* (1999)

[5] I acknowledge in chapter I that this is, indeed, a very large umbrella. I do not discuss that problem in this introduction.

and Habermas' idea of a *two-track* democracy (1996, 305-314), is congruent with the rejection of elitism emerging from my egalitarian principle of Equality of Access and Deliberation.

The competing alternative to these normative desiderata is the status quo, namely, judicial supremacy. This is why Chapter III argues against judicial supremacy in constitutional interpretation in a normative, political, sense. It claims that those who, either implicitly or explicitly, give the judiciary a privileged role in the determination of what a constitution means, hold conceptions of interpretation that neglect citizens as constitutional interpreters. As the chapter shows, some scholars do this implicitly, directing their efforts to understanding the ways judges interpret the law and how judges should do so. Others do this explicitly, consciously reflecting on the virtues of giving judges a privileged role in the determination of constitutional meaning, as well as on the instrumental and normative inconveniences of granting that power to the citizenry or to their representatives. The chapter criticises these explicit views by targeting some aspects of the work of Ronald Dworkin and Alon Harel.

I use Dworkin's work to reject instrumental, outcome-oriented judicial-supremacist positions. Then, the chapter discusses Alon Harel's work as an example of a normative explicit account putting forward a case for a privileged role of the judiciary in the interpretation of a constitution. The chapter brackets some aspects of these scholars' account with the purpose of rejecting a supremacist view. In sum, chapter III provides philosophical normative arguments for rejecting accounts that put the judiciary in a position where the courtroom is seen as an ideal instantiation of a constitutional interpreter.

But judicial supremacy may also be championed on additional grounds. In this vein, chapter IV tackles these arguments from a conceptual point of view. It argues that the features of the practice of constitutional interpretation, namely, its collective effects and the linguistic and normative indeterminacy of its object, make it reasonable to think about the authoritative imposition of meaning to a constitution as a problem for democratic theory rather than just a matter for judicial practice. It thus contributes to the popular constitutionalist project by giving conceptual and institutional reasons for a change of perspective from a legal theory centred in courts, to democratic theory and, in particular, to deliberative democracy.

Chapter IV represents a response to both questions with which I started this section. In the first place, it says no to the question *should judges be final constitutional*

interpreters on the grounds that there is nothing in the concept of interpretation in law and in constitutional interpretation that would lead us to answer in the affirmative. By contrast, it answers yes to the question *should the people themselves be final constitutional interpreters.* The answer results from the application of two criteria: first, the normative strength of the source of law being interpreted and, second, the number of potentially affected persons by the authoritative imposition of meaning on those sources. In a nutshell, the determination of collective effects of higher sources of law – of which the constitution is the highest – should be undertaken by those persons potentially affected by that authoritative determination of meaning.

Taking stock, at this point the dissertation will have shown that there are normative reasons to put the people themselves as final constitutional interpreters (chapter II), that there are normative reasons for removing that faculty from the judiciary (chapter III), and that there are conceptual reasons to make both moves, as well as to relate the practice of imposing constitutional meaning to a constitution through deliberative procedures (chapter IV). It will have also shown that deliberative democracy is the path to institutionalise popular constitutionalism.

But, normative considerations aside, my version of popular constitutionalism also needs to answer whether the people and/or judges *can* deliberate on the meaning of the constitution. Chapter V tackles this question through an institutional analysis of the empirical literature on deliberative democracy.

The word "institutional" is important, for this dissertation renounces to undertaking empirical analyses of concrete cases that would lead me to say: "look, here the people/judges performed well/badly as deliberators, and this supports the people/judges as final constitutional interpreters". When rejecting judicial supremacy in chapter III, I argue against the outcome-related arguments endorsed by Dworkin. The same applies for my own problem; I can't have it both ways.

I thus reject the view that choosing institutions, at least in this particular context, is largely an empirical matter depending on the chances that one institution may reach *better* outcomes than any other according to what they have decided in the past. Courts have performed well in many occasions, securing and expanding the scope of individual

rights in different polities.[6] But they have also performed horribly.[7] On the part of *the people*, representative institutions and deliberative experiments have produced results in both directions as well.[8] Those results do not represent a decisive advantage for any institution.

Hence, my approach focuses on institutional capacities for deliberation and on the ways we have to test whether deliberation is possible to happen in those fora. Chapter V thus examines whether we are indeed capable of determining how ordinary citizens and judges can deliberate. Deliberative democrats are adamant that deliberation produces beneficial outcomes of different practical, moral, theoretical, and epistemic sorts.[9] In this vein, the question this chapters asks is, how do we know that this is the case?

The conclusions of this part of the dissertation are, prima facie, not very encouraging. The instruments used by social scientists to determine deliberative quality are deficient in their theoretical foundations and in their understanding of and consideration for important theoretical aspects of deliberative democracy, such as participation, equality, and sincerity or truthfulness. The chapter makes those shortfalls visible through a critical analysis of the literature.

Notwithstanding, the chapter also makes a comparison between *popular* and *judicial* instruments of deliberation measurement, and this contrast gives way to a more optimistic conclusion in terms of institutional choices: despite our limited capacity to determine how ordinary citizens deliberate, the settings in which they do so have structural advantages over courtrooms. Unlike deliberative settings where ordinary citizens may participate, the very structure of judicial procedures impedes us from testing whether, how, and to what degree judges engage in deliberation. To the extent that one gives value to deliberative democracy and that one sees this theory as a regulative ideal and an ongoing work in progress, this comparative advantage on the side of non-judicial institutions contributes to the conclusion that the people themselves can and should be final constitutional interpreters. This, again, from the perspective of deliberative democracy.

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[6] One example I take as correct by any moral standard is *R v.R* (1991) where the House of Lords declared that a marital rape exemption was not part of the English law, and that therefore, under English Criminal Law it is possible for a husband to rape his wife – to commit the crime, that is.

[7] Consider R v Miller (1954), where the House of Lords held that a petition for divorce did not revoke marital consent to sexual intercourse.

[8] The recent referendum on Brexit and the referendum on the ratification of the peace agreements in Colombia come to mind.

[9] Nino 1996; Cohen 1997; Gutmann & Thompson 2004; Martí 2006, 191-228.

Considering that both normative and institutional deliberative considerations tilt the scale towards the people themselves as final constitutional interpreters, we are left with two questions. The first: what is the role the judiciary should have in a deliberative democracy? The second, what kind of institutional setting would allow the people themselves take the position of final constitutional interpreters.

The first question is addressed in chapter VI. It examines the praising opinions that some prominent scholars who reflect on deliberative democracy, concretely Rawls, Eisgruber, Habermas, and Alexy, have held concerning the deliberative capacities of judges. By contrast, I argue that current trends in deliberative democracy, represented by the idea of deliberative systems, entail a rejection of a privileged treatment of judges in terms of their deliberative capacities. Consequently, the effects of their decisions should be limited to the concrete case brought before them. They should not produce *erga omnes* effects. I adopt this systemic perspective for it is the theoretical standpoint that squares better with my principle of Equality of Access and Deliberation, championed in chapter II. Moreover, systemic approaches represent the state of the art in current deliberative democratic theory.

The chapter concludes that judicial supremacy should be rejected and courts reconsidered as one element among others forming a system of deliberation. To reach this conclusion, I abstract elements common to systemic approaches in deliberative democracy and see how they account for the role of the judiciary. These elements are: an extensive conception of deliberation, an interaction-dependent understanding of legitimacy and a holistic orientation in terms of the evaluation of the system. The examination shows that deliberative democrats' current endorsement of systemic approaches entails the expansion of conceptualisations of deliberation to include what Mansbridge called "everyday" talk, which anchors "one end of a spectrum at whose other end lies the public decision-making assembly" (1999, 212). This idea, chapter VI argues, is incompatible with any supremacist image of judges.

Additionally, the division of labour between agents and institutions in a deliberative system is more complex than what Rawls' et al.'s accounts suggest. The judiciary is one among a myriad of agents and groups welcome to give inputs, arguments and solutions to collective problems in different ways, with different degrees of expertise.

Moreover, systemic approaches take what I call a "holistic orientation". Holism in this context means that the criteria by which the achievement of the goals of the system are measured is determined by the system's performance, in spite of the fact that some of

its parts show deficiencies in deliberative terms. As the chapter makes explicit, there are good reasons for questioning such position.

Within the context of criticising the holistic orientation of current systemic approaches, the chapter argues that courts may gain importance in view of their capacity to hear and adjudicate individual cases. They may help detect deliberative failures at the individual level, and frame those grievances in the language of legality. Courts could thus contribute to the enhancement of the deliberative capacity of individuals by counteracting potentially negative effects of a holistic perspective, giving citizens the chance to participate in an institution oriented to hear individual grievances and to provide a hearing for their discussion.

The final question this dissertation tackles is: what institutional devices would instantiate popular constitutionalism? Chapter VII answers these question in three main steps. First, it recapitulates the principles defended in chapter II. I do this to remind readers that my understanding of popular constitutionalism requires a republican, deliberative and egalitarian combination of institutional conditions and mechanisms.

The chapter then moves to its second part, namely a critical analysis of measures proposed by scholars to translate popular constitutionalism into actual institutions. The analysis shows that such proposals fall short of giving the final word in constitutional interpretation to the people themselves. Those flaws are both internal to each account, as well as related to the principles I endorse.

Thirdly, the chapter elaborates my own proposals. The institutional arrangements I suggest consist in a combination of four institutional devices that reject judicial supremacy and give the final word in constitutional interpretation to the people themselves. These devices are: contestation without *erga omnes* effects, commonwealth-constitutionalism's judicial review, parliamentary deliberation and justification or *legisprudence*, and an interpretive constitutional *mini-public*.

The proposal is a progressive implementation of institutional measures, starting from republican contestation, on the one hand, to a more collective form of decision-making that I conceive of in the form of an interpretive constitutional mini-public. It moves from the highly structured form of discourse present in judicial procedures, to a more informal discursive setting represented by mini-publics. This structure is coherent with the value my account sees in the judiciary as an institution that permits individuals to air their grievances within a limited context and with *inter pares* effects.

Commonwealth-constitutionalism's judicial review takes one step further in valuing the role of courts in this deliberative project. It does so by suggesting that, in this scheme, courts may also review legislation. Yet, they must do so in a more limited way. Commonwealth models generate spaces for dialogues between the judiciary and the elected branches without putting the first in the position of a supreme constitutional interpreter. As I also suggest in chapter VI, two institutional innovations are presented as examples of this model: Canada's constitution notwithstanding clause, and the UK Supreme Court's power to issue declarations of incompatibility.

Yet, even though commonwealth models represent innovations compatible with the project of this dissertation, their use in practice has shown that, even under those limited forms, judicial review gives incentives to elected institutions to defer issues of constitutional salience to courts. Hence, additional measures are required to give the citizenry the final word in the determination of constitutional meaning.

Consequently, the third measure I propose imposes duties on legislators to deliberate and justify their normative production in accordance to the constitution. Constitutional deliberation and justification are usually absent in the legislative arena. However, there are good reasons for demanding this from our representatives. Accordingly, the chapter relies on theories of *legisprudence* and representation and shows that, although popular constitutionalism insists that it is the people themselves the ones entitled to have the final say, the deliberative and, therefore, justificatory aspects of my own understanding of the theory give formal representative institutions in general and parliament in particular, an important place in the overall project.

But popular constitutionalism is first and foremost about how citizens can establish the meaning of their own constitutions. Therefore, the *legisprudential* proposal has to be complemented with some device allowing for the expression, transformation, and justification of the interpretive preferences of ordinary citizens. It must also be permeable to those preferences and deliberations about what a constitution means.

In view of these requirements, I submit that the *legisprudential* and representative deliberative and justificatory setting I propose entails a certain communication between the informal and the formal public sphere, echoing Habermas' idea of a *two-track* democracy. For this I rely on Boswell et al.'s (2016) notion of transmission, as they show concrete ways through which both tracks can communicate in practice. Implementing these mechanisms of transmission is fundamental for the inclusion of the citizenry in deliberative decision-making processes.

But representative institutions need to justify their constitutional interpretations on the bases of the citizens' deliberated, considered, and *expressed* preferences. These views must find an adequate institutional environment steered by citizens, in ways that they are dispositive in the determination of constitutional meaning. The final part in this four-tiered proposal thus reflects on the operationalisation of his dialogical setting through what I call a *constitutional mini-public*.

Mini-publics are deliberative democratic innovations providing occasions for citizens to debate political issues, sometimes affecting formal decision-making processes.

There are myriad definitions of mini-publics in the literature (Ryan and Smith 2014). They range from the more expansive definition offered by Fung (2003), which is inclusive of experiments as varied as the *British Columbia Citizens' Assembly,* planning cells, citizens' juries, consensus conferences, participatory budgeting, community policing, etc. to the more restrictive one offered by Fishkin, which limits *mini-publics* to deliberative polls. That is, to the random selection of 250-500 citizens brought together to deliberate in small groups,[10] measuring preference transformation using pre- and post-opinion surveys. Intermediate definitions (Goodin & Dryzek 2006; Smith 2009) are more flexible with regard to selection methods.

Any of these definitions would include my own design, as it is inspired by Fishkin's deliberative polls. The elaboration of this constitutional mini-public considers three aspects: its selection method, its procedures, and it effects. Regarding selection methods, I advocate for random selection of citizens, as it is well established in the literature that it is the most egalitarian mechanism available. Furthermore, the republicanism underpinning my proposals justifies mandatory participation once individuals are selected, without excluding that some stakeholders or interested parties may be admitted in such capacity in the same way that some judicial procedures include interventions or briefings by amicus curiae.

These chapters contribute to the literature not only by justifying why the people themselves should be final constitutional interpreters, but also by answering whether they can, and how those desiderata may be put into practical effect.

[10] Ryan & Smith do not include plenary sessions in their description (2014, 12). Yet, this is a feature that is present in deliberative polling.

3. Methodological considerations

3.1. Law or Politics

This is an interdisciplinary thesis. It relies on legal theory, especially philosophy of constitutional law, and political philosophy, political theory and political science. I cannot offer a full account of this issue here, but the dissertation assumes that, as a general matter, legal theory is a parcel of political theory. Put differently, "it is appropriate to remind ourselves that legal philosophies often gain their significance and import from their place within wider political theories" (Campbell 1998, 65). Likewise, legal theory may raise problems and questions for political theorists and philosophers. This is not to deny that legal theory has increasingly acquired disciplinary autonomy and a high level of complexity. Yet, legal theories delve into issues that are also part of the agenda of political theory (Habermas 1988, 45). In Waldron's wording, "an issue in jurisprudence cannot be evaluated without paying attention to matters outside jurisprudence in the narrowest sense" (2004, 357)

There is indeed a certain impulse in jurisprudence to insist on the specificity and on the autonomy of the discipline, something for which contemporary analytical legal positivists carry much of the fault. But, I agree with Campbell when he affirms that

> in contemporary legal philosophy the increasing importance of what we may call political philosophies of law follows on a decline in respect for purely analytical approaches to legal concepts, uncritical empiricist studies of law, and closed-circuit doctrinal exposition. The topical question in legal theory at the end of the millennium is not so much "what is law" as "what sort of law do we want and why" (1998, 65)

I could press the point a bit more. Even those prima facie purely analytical approaches to legal concepts Campbell refers to cannot escape questions that belong to the moral and/or political realm. Take, as an example, Kelsen's positions on to the question of the ultimate foundation of the legal system. His initial view on the subject matter involved the idea that legal systems were dynamic entities, self-validated by recourse to a higher norm within the system. In the first edition of his *Pure Theory of Law*, he argued that the ultimate foundation of the legal system falls on the *Grundnorm*, a transcendental hypothetical logical precondition giving unity, existence, and validity to the rest of norms of the system. In his wording,

> More than twenty years ago I undertook to develop a pure theory of law, that is, a legal theory purified of all political ideology and every element of the natural sciences, a theory conscious, so to speak, of the autonomy of the object of its enquiry and thereby conscious of its unique character. Jurisprudence had been almost completely reduced – openly or covertly – to deliberations of legal policy, and my aim from the beginning was to raise it to the level of a genuine science, a human science. The idea

> was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude (1992, 1).

But Kelsen the legal theorist, could not escape Kelsen the political philosopher. Apart from his political activism and his writings on democratic theory (2013), his legal theory became more permeable to *extra-legal* considerations, as it were. Concretely, the formalism that characterised the first edition of the *Pure Theory of Law*, gave way in the second edition to the introduction of the concept of efficacy to ground legal systems as a whole *and* as groups of individual norms (1992, 62). Moreover, the late Kelsen went as far as to assume that that no 'ought' emerged without an act of the will (*Kein sollen ohne wollen*) (1991, 156-157).

This is also the case with Anglo-Saxon legal positivism. This intellectual tradition, which stems from the work of Jeremy Bentham, lends support to a theory of law linked to democratic government,

> for it could be naturally be supposed that the greatest number had an interest in the greatest happiness of the greatest number. It was therefore in the interest of the effective power in a democracy, the majority, to be enlightened as to what ought to happen, that is about what would lead to the greatest happiness of the greatest number. [This thought] … leads inexorably to the democratic thought, the works written in favour of an extended suffrage and secret ballot, of the later Bentham (R. Harrison 1988, xxiii)

Hart, possibly the most prominent legal positivist in the 20th century, was also aware of these linkages. In spite of his efforts to give distinctiveness to jurisprudence and to the very existence of a legal system regardless of the moral and political evaluation one could make of it, Hart conceded that:

> [i]n an extreme case the internal point of view with its characteristic normative use of legal language ("This is a valid rule") might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house (2012, 117)

As Delacroix describes it, Hart's worry entails two theses. The first states that one of the defining features of legal systems is that they can be sustained on the bases of official acceptance alone. The second thesis is that because of its structure, "it may well be the case that an established legal system (as opposed to a simpler regime of primary rules) is particularly conducive to a society that is "deplorably sheeplike" (2017, 2).

It may be the case that, as Hart insists, even in the extreme case of legal system guiding the conduct of a sheeplike society, "there is little reason for thinking that it could not exist or for denying it the title of a legal system" (2012, 117). That is true. But he left

the meaning of *acceptance* as a ground for social rules open for discussion. He averred that his account

> treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude I have called "acceptance". This consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity (2012, 255)

This normative attitude, Hart tells us, is different depending on whether we position ourselves in the perspective of the participant of that practice, or in the position of the observer. The acceptance of a participant is normative because she "accepts the rules as guides to conduct and as standards of criticism" (2012, 255). The normativity of observers, however, is different. They observe the practice but do not take rules as guides to conduct or standards of criticism. Take for example, the game of chess. Observers of the practice may analyse the match and notice that the rook moves any number of squares without leaping over other pieces. But suddenly, at some point during the match, the king moves two squares along the rank toward the rook, which is then placed on the last square the king just crossed. Participants of the rules of chess know that what just happened is called *castling*, and that it can happen under certain conditions, in the absence of which, players would not be playing chess at all. Yet, under Hart's logic, the observers could perfectly make the following statements: "the rook can leap over the king every X moves"; "the rook has a free move when the king moves in X way"; "the rook can leap over any piece, but the player just did it now, and forgone to use that move before", etc.[11]

But calling the observer's attitude "normative" seems like an overstatement. As it happens, Hart's own view of what is a law-subject supports a reading that is more open to a more normative acceptance on behalf of the observers/law-subjects than the image of a sheeplike society suggests. In his view, legal systems exist under two conditions:

> rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and … its rules of recognition specifying the criteria of legal validity and it rules of change and adjudication must be effectively accepted as common standards of official behaviour by its officials (2012, 116)

Also, Hart averred that

> To speak of the popular "accepting" these rules, in the same way as the members of some small tribe might accept the rule giving authority to its successive chiefs, would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have. We would only require such an understanding of

[11] I thank Natalia Scavuzzo for this example.

> the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he want to know what it is (2012, 60)

I am aware that this idea requires more reflection than the one I can offer here, but it seems to me that there is little in Hart's account that would lead us to simply accept that only officials of the legal system may count as participants of the practice of law or, in Adler's terminology, that only legal officials may form part of the "recognitional community" (2006, 726). I believe that Gardner is right in suggesting that the general obedience demanded from subjects cannot merely consist of patterns of action compatible with legal requirements even if these subjects do not realise that they act in conformity with the law. In his view,

> even for Hart, it can't be sheer coincidence that the general population in question stays, by and large, on the right side of the law. Some explanatory link between their conformity and the legal rules is required. Those who hold themselves out to be the officials of the legal system must be able to affect non-official behaviour by changing or applying the rules, or else they are not officials of the legal system (2012, 284)

The link between the actions of officials and a general population who has to stay by and large on the right side of the law cannot simply be accounted for as the result of mere coincidence or as the expression of a mere unreflective habit. By contrast, the attitude of a population following the imperatives of a legal system requires explanations in normative terms. The problem for purely analytical legal theorists is that the explanation may not look too much like legal theory, at least in the way they understand the discipline. It may actually look a lot like political theory, for there are good reasons for accounting for the role of citizens as something more than sheep who may end up in the slaughter-house.

3.2.Comparing institutions

The recognition that legal theory is pervaded by politics leads to considerations weighing the merits of different institutions. Whether we need judicial supremacy is a theoretical problem that calls for institutional and not just normative considerations. The problem in that case at hand, however, is that there is a need for more balanced theories accounting for the need to have strong judiciaries.

Some legal scholars commit the nirvana fallacy when painting rosy pictures of courts without taking the effort to imagine an equally idealised version of popular (representative or non-representative) institutions and/or agents. Although writing in the context of the value of legislation as a legal source and its effects on the debates on judicial review, Waldron portrays this rather unfair contrast as follows:

> Not only do we not have the normative or aspirational models of legislation that we need, but our jurisprudence is pervaded by imagery that presents ordinary legislative activity as deal-making, horse trading, log-rolling, interest-pandering, and pork-barrelling – as anything, indeed, except principled political decision-making. And there is a reason for this. We paint legislation up in these lurid shades in order to lend credibility to the idea of judicial review (i.e. judicial review of legislation under the authority of a Bill of Rights), and to silence what would otherwise be our embarrassment about the democratic or 'counter-majoritarian' difficulties that judicial review is sometimes thought to involve (1999, 2).

For methodological reasons, one must avoid contrasts of this sort. A fairer institutional comparison must take into account the virtues and shortcomings of both agents being assessed. Hence, the structure of this dissertation is framed to reach a balanced approach and a reasonable answer to the question should the people themselves or judges be the final constitutional interpreters. It makes the effort not just to justify why non-judicial agents should hold the final word in constitutional interpretation, but also why judges should not, as there may be countervailing reasons against popular constitutionalism. Reasons for preferring institutional settings do not have lexical priority.

Moreover, the balance needed to avoid the nirvana fallacy may be reached by following three alternative paths. Following Nozick's methodological considerations in *Anarchy, State and Utopia* (1974, 4-6), we could adopt either a "minimax" criterion, a "maximax" criterion, or a criterion somewhere in the middle. It is convenient to explain what he meant by this.

Nozick claims that the fundamental question of political philosophy, "one that precedes questions about how the state should be organized" is whether "there should be any state at all. Why not anarchy?" (1974, 4). He argues that the most promising way of addressing the question is by focusing on a fundamental abstract description of the category that is being advocated for, in his case, anarchy, and that "[w]ere this description awful enough, the state would come as a preferred alternative, viewed as affectionately as a trip to the dentist" (1974, 4). Nozick thinks, however, that generalising traits of an abstract description of anarchism in such a pessimist way would not be convincing, "especially since the argument [for anarchism] depends upon *not* making *such* pessimistic assumptions about how the *state* operates" (1974, 4. Emphasis in the original). The comparison must be balanced.

Hence, Nozick avers that caution might suggest the use of a "minimax" criterion for describing the nonstate situation: "the state would be compared with the most pessimistically described Hobbesian state of nature". The "maximax" criterion, on the other hand, "would proceed on the most optimistic assumptions about how things would

work out – Godwin, if you like that sort of thing". Nozick discards this criterion as well, for "no proposed decision criterion for choice under uncertainty carries conviction here, nor does maximizing expected utility on the basis of such frail probabilities" (1974, 5).

Here is where Nozick makes the methodological remark I am most interested in:

> More to the point, especially for deciding what goals one should try to achieve would be to focus upon a nonstate situation in which people generally satisfy moral constraints and generally act as they ought. Such an assumption is not wildly optimistic; it does not assume that all people act exactly as they should. Yet, this state-of-nature situation is the best anarchic situation one reasonably could hope for. Hence, investigating its nature and defects is of crucial importance to deciding whether there should be a state rather than anarchy. If one could show that the state would be superior even to this most favoured situation of anarchy, the best that realistically can be hoped for, or would arise by a process involving no morally impermissible steps, or would be an improvement if it arose, this would provide a rationale for the state's existence; it would justify the state (1974. 5)

This dissertation is pervaded by methodological considerations of this sort. Hence, in providing arguments for changing the status quo, i.e. judicial supremacy, I could indeed adopt a "minimax" criterion and compare the worst version of popular constitutionalism and judicial supremacy, or a "maximax" standard, comparing the best popular constitutionalist and judicial supremacist worlds. But, like Nozick, I believe that my conception of popular constitutionalism should neither be overly idealised nor overly pessimistic.

This commitment to balance is shown in this dissertation in different ways. First, by considering not just the arguments in favour of popular constitutionalism, but the reasons why judicial supremacy ought to be rejected. Second, the balance is present in the way I use the expression *the people themselves.* The thesis gradually moves from a description of popular constitutionalism as a theory that advocates for the involvement of actual ordinary citizens in the ongoing process of providing meaning to a constitution with final effects to one where representative institutions *and* the judiciary also important roles.

Chapter I portrays popular constitutionalism as it has been championed in the literature. Some descriptions underscore that individuals themselves are entitled and able to shape the meaning of a constitution through popular manifestations, mobs, etc. Notwithstanding, the chapter remains silent as to whether that is the appropriate way to describe the theory and focuses, instead, on building the research agenda undertaken in the subsequent chapters. At this early stage, the dissertation commits itself to two broad propositions: that it is the people themselves the ones entitled and capable of providing meaning to a constitution and that judicial supremacy should be abandoned. But this

admits several forms and institutional devices. By itself, the term *the people themselves* says nothing about the place given to current representative institutions.

The balance sought leads me to give content to the term against the background of the institutions present in most western democracies, which includes representative institutions. In this vein, the institutional proposals offered, particularly in chapter VII, take this into account by suggesting different measures in virtue of which popular constitutionalism may be instantiated, not only by giving the people the final say they are entitled to, but by operationalising that right within the larger network of institutions they would be part of, particularly with those that in principle are in charge of producing general norms binding on every citizen, namely parliaments. The specific ways in which representation and direct democracy are not mutually exclusive are argued in chapter VII as well. For now, it is enough to say that a claim to direct democracy of the type that intuitively gives content to the expression the people themselves can be and, for good reasons, should be theorised within the context of representative institutions. Balance is, as it happens, one of those reasons.

CHAPTER I

POPULAR CONSTITUTIONALISM: CHALLENGES AND OPPORTUNITIES

1. Introduction

These pages provide an outline of popular constitutionalism and highlight its potentialities and limitations. The importance of this endeavour is twofold: on the one hand, the key contention shared by every popular constitutionalist, that it should be the people themselves, and not judges, the ones entitled to have the final word in the *interpretation* of a constitution, is a valuable distinct claim worthy of explanation and justification. On the other, because, in spite of the importance of that claim, the theory has experienced a decline in terms of the interest that scholars show towards it (Knowles & Toia, Forthcoming). Although the causes explaining this decline are reasonable, popular constitutionalism is still a valuable enterprise. This chapter thus represents a springboard for positive developments which would rekindle academic interest in the theory. Additionally, by pointing at different aspects in which popular constitutionalism is in need of further development, it provides a justification for the research undertaken in the subsequent chapters of this dissertation.

The chapter runs as follows. Section 2 surveys accounts of popular constitutionalism and offers a taxonomy of its different strands. It distinguishes descriptive and normative accounts according to whether they claim that the people themselves are final constitutional interpreters as a matter of fact or as a matter of right. In turn, normative accounts are further divided into robust popular constitutionalism, modest popular constitutionalism, and departmentalism, in accordance to the strength with which the normative claim is put forward.

Section 3 shows the limitations faced by current accounts of popular constitutionalism. These limitations are, first, that the theory is weak in terms of normative foundations. Second, that it is unnecessarily provincial, as most of the literature is built around problems of the United States constitutional practice, by American constitutional lawyers. Third, the theory is deficient in justifications for the claim that judicial supremacy has to be avoided. Fourth, and with few exceptions, it lacks institutional proposals that would turn the ideal of having the people themselves as final constitutional interpreters into something feasible.

Section 4 concludes that the overview of the literature shows that, in its current

state, the theory does not provide a concept of popular constitutionalism that every scholar can agree on. There are disagreements regarding fundamental aspects of the theory that require justificatory strategies and institutional proposals that popular constitutionalism does not currently offer. Nonetheless, popular constitutionalism is still a worthy enterprise. The shortcomings exhibited by the theory and criticised in this chapter open the door for further theoretical developments. Hence, the chapter finishes by highlighting which aspects of the theory makes it attractive and worthy of further exploration. Those aspects justify a research agenda, which is undertaken in the upcoming chapters.

2. Popular constitutionalism: an overview

This section defines popular constitutionalism and provides an overview of its main scholarly accounts.

Popular constitutionalism is a theory mostly developed in the United States, by American scholars, who avow that it should be the people themselves the ones who should have the final word in constitutional interpretation. The expression, taken from Madison (2006), means that citizens have the right to be final authorities in imposing meaning on their constitution.[12] This broad definition encompasses two claims common to all its proponents. First, that traditionally, and increasingly, the task of giving authoritative and final interpretations to the constitution is given to the judiciary.[13] Second, that this power could and should belong to a different agent. Authors generally understand the people themselves to be actual citizens, persons who should be given the chance to have a say and steer the ongoing political process of giving meaning to the constitution.[14] In Kramer's wording, in a world of popular constitutionalism

> [p]roblems of fundamental law – what we would call questions of constitutional interpretation – [are] thought as … problems that could be authoritatively settled only by 'the people' expressing themselves through [established] popular devices (2004, 31).

[12] For example, Levinson 2000; Balkin 2003; Kramer 2007.
[13] Also, see, Dworkin 1992, 383; Ackerman 1997; Shapiro & Stone Sweet 2002; Tushnet 2003, 453; Hirschl 2004; Gargarella 2006, 15; Alexander & Solum 2005, 1597; Kramer 2007, 697; Ginsburg 2008; Donnelly 2009, 958; Niembro 2013, 195; McConnell 2015; 1783; Mac Amhlaigh 2016, 175-176.
[14] Tushnet 1999, x, 108; Kramer 2004b, 959, 973, 980; 2005, 1344; Donnelly 2009, 957.

These contentions have been advanced in different ways by different scholars. Hence, in what follows, I provide a taxonomy of those claims. Building on the work of Pozen (2010) and Alexander & Solum (2005), I distinguish between descriptive and normative accounts of popular constitutionalism. In turn, normative accounts are divided into modest, robust, and departmentalism.

2.1. Descriptive accounts

Some authors have approached popular constitutionalism from a descriptive stance. That is, they argue that the people themselves have, as a matter of fact, the final authority in the constitutional interpretation. They question "that the judiciary ever had the option to monopolize or fully control the resolution of constitutional disagreement" (Kramer 2004b, 967). In this conception, constitutional decision-making is a process of reciprocal influence among branches of government where the judiciary plays a significant, yet not exclusive role. Griffin, for example, argues that "the meaning of most of the constitution is determined through ordinary politics", where judicial interpretation and action would be but a fraction of the complete process of defining constitutional norms (1996, 45). These descriptions portray judicial interpretation as elucidating only a fraction of constitutional meaning, suggesting that such meaning is constructed through a process in which the courts only occasionally participate (Goldsmith & Levinson 2009, 1813). In support of this idea, Kramer cites cases where popular actions and decisions have proven to be as durable as or even more stable than judicial precedents. These include the creation of organic political structures, the distribution of important political powers, the definition of certain individual or collective rights, the structure of politics, the allocation and exercise of legislative jurisdiction, and numerous issues of international governance (2004, 968).[15]

However, these accounts face the presence of counterexamples. Indeed, the US Supreme Court and Federal Courts have struck down statutes with no opposition from the other branches of government, directly undermining the case for this descriptive model unless an explanation is provided for this inaction on behalf of representative institutions.

In view of this, some authors have concluded that this attitude can be explained as the result of instrumental reasons such as enforcement of the federal system against constitutional outliers, overcoming gridlocks like presidential vetoes or lack of

[15] See also the cases cited by Pettys 2008, 315.

congressional support to presidential proposals that might prevent them from advancing political agendas, among others that have encouraged elected institutions to defer their interpretive authority to the judiciary (Whittington 2007, 103-160). Likewise, Dahl argued that "views of the court will never be out of line for very long with the policy views dominant among the law-making majorities of the United States" (1967, 155). Others affirm that in the American political system the executive and legislative branches necessarily share with the judiciary a major role in interpreting the constitution, and that judicial rulings have rested undisturbed for as long as Congress, the President and the general public have not shown opposition to them (Fisher 1988, 244; Kramer 2004, 970).

Yet, these considerations ignore the real influence of the judiciary in the political process. Although it may be true that the courts' decisions are relatively streamlined and statistically aligned with other institutions, judges still have the power to nudge matters in one direction or another when public opinion is uncertain or divided. That judges refrain from doing this in practice says nothing about whether the limits that constrain the court and maintain it aligned with public opinion are democratically imposed by elected institutions, or if they are the result of the court's self – understanding of its institutional role and duty. In Kramer's wording, the determination and definition of where judicial competence ends "is entirely in the court`s own hands, leaving judges alone to decide where the proper boundary lies between the adjudicated and the unadjudicated constitution" (2005, 1346).

2.2. Normative accounts

One way out of this descriptivism is to rely on normative considerations. In this vein, some argue in favour of the right of citizens and electoral branches to interpret the constitution with final binding effects against judicial interpretations when there is a conflict between them.

The starting point for these scholarship is the troublesome – legal/political - nature of constitutional law and its relation with society and culture in general. Endorsers of this position aver that constitutional law regulates the framework of politics by reducing the number of alternatives available for political discussion, ruling out those that failed to convince the framers of the Constitution. In other words, the multiplicity of political views in society is usually reduced by constitutions for the sake of normative settlement, creating a tension between democracy and constitutional law (Holmes 1988; Habermas 2001). For popular constitutionalists, it should be the people themselves or

their elected representatives the ones that must have the final call on the issues, ideas and visions that should survive as constitutional text and as constitutional norms. As to those ideas, values, visions, etc., that fail to survive democratic debate, they would contend that it should also be the people's competence to determine the point up to which those ideas influence constitutional meaning.

Within this context, normative popular constitutionalists have argued against constitutional theories such as David Strauss', who sees the influence of constitutional text in the determination of constitutional meaning as merely nominal and considers that such meaning is what judges have made of it through the reading of the text and the incorporation in their decisions of other elements like, for example, social mobilisations and culture. For him, even amendments would be at most a minor part of the process of constitutional change "which is controlled by judges employing a conventional mode of common law adjudication". "Courts", in Strauss' description,

> do respond to evolving social understandings … but these understandings are not shaped in any special way by written law, and the court's response to them is likewise not affected by the existence or nonexistence of a snippet of constitutional text (2001, 1465).

Adopting a normative perspective, Kramer (2004, 982) and Post & Siegel (2003, 33), consider that Strauss fails to notice the role of the text of the constitution in forming new cultural understandings. They denounce the reductionism to which this is conducive

> by depicting a process of generating constitutional meaning that has broad normative implications, for it makes the text relevant as a reference point and inspiration for a larger constitutional culture, most of which is located outside the courthouse (Kramer 2004b, 982).

The shift is important, for now the focus is not exclusively on stripping the court of its faculties, but on the mediation between constitutional law and culture as a guarantee that the spirit of the constitution will remain consonant with the society it is supposed to govern. The accent is now on popular control over the decisions adopted by the courts so they may be aligned the with views expressed by majorities, not because this is the way things are, but because it is how things should be.

Accordingly, in what follows I classify normative accounts in accordance with the degree of intensity with which popular constitutionalists advance these normative claims. More precisely, the criteria of distinction are first, how easy or difficult it ought to be for extrajudicial actors to overthrow judicial interpretations and, second, which actors ought to play the lead role in so doing so. This results in a taxonomy that

distinguishes between a *robust* and a *modest* form of normative popular constitutionalism on the one hand, and *departmentalism,* on the other (Pozen 2010, 2060).

2.2.1.Robust Popular Constitutionalism

Robust popular constitutionalism shrinks the domain of binding judicial interpretations and sees the people as sufficiently ready and willing to use their power as sovereigns, assigning lexical priority to their views whenever they choose to do so.

Some scholars ask how this can be translated into feasible alternatives and working institutions. Provided that there are more accountable and responsible institutions than the judiciary, the people would usually have to "act through mediating institutions such as civic organizations, political parties and the elected branches of government" (Pozen 2010, 2062).

Commenting on Kramer's work, Alexander & Solum reject robust popular constitutionalism. They argue that "Kramer repeatedly refers to popular assemblies, such as mobs, but noninstitutional popular assemblies cannot do the job required by robust popular constitution" (2005, 1622). The reason is

> simple and quite modest. The people themselves cannot act with legal authority in a corporate capacity without institutions. But when it comes to constitutional interpretation and enforcement, assigning authority to institutions is *not* robust interpretive constitutionalism. So [this] form [of popular constitutionalism] is just plain impossible, given the world as it is (2005, 1623).

2.2.2. Modest Popular Constitutionalism

Modest popular constitutionalists generally "reject the notion that the people or their representatives can ignore a judicial ruling because they disagree with it", accepting judicial decisions as final and authoritative (Pozen 2010, 2060). However, to make sure that the people or their representatives still have some degree of influence in shaping constitutional understandings, they insist that extrajudicial actors and agencies play an active and self-conscious role in the articulation of constitutional meaning. This version of popular constitutionalism is modest because it still gives considerable room to the judiciary, and it is popular because it sees the political engagement and participation of citizens as valuable, endorsing a commitment to some form of civic engagement.

With the sole exception of David Franklin, Pozen does not offer examples of authors who fit within this category. Regarding this point, he follows Alexander & Solum's classification, lumping into *modest w*hat these authors break into *modest* (in sensu stricto)*, trivial* and *expressive* popular constitutionalism (Alexander & Solum 2005,

1623-1626).

Modest popular constitutionalism (in sensu stricto) assumes that the condition for popular constitutionalism to get off the ground is that the issue about which the people deliberate must be one upon which a very high degree of social consensus may be obtained. Additionally, the answer to such problem should be definite enough as to avoid ambiguity or vagueness. This idea rests on three assumptions:

> The first is that judicial decisions rest within a range of acceptability to a majority of the people. The second assumption is that even when the public disagrees with some decisions, it nonetheless supports the practice of judicial review. The third is that if the people were discontent with judicial review and its outputs, they could take action (Friedman 2003, 2606)

Such conditions entail that the only type of constitutional question that meet those requirements is one that calls for a "clear yes-or-no answer" and that the constitutional violation under examination should constitute a blatant usurpation of constitutional authority to the people (Alexander & Solum 2005, 1623). It remains unclear how these popular denounces could be translated into a constitutional rules that capture the people's preferences. All in all, it becomes difficult to see "how anything that can meaningfully be called popular constitutionalism can accomplish more that popular rebellion against blatantly unconstitutional actions" (Alexander & Solum 2005, 1624).

Second, *trivial interpretive popular constitutionalism* sees the popular acceptance of current constitutional practices as a "tacit endorsement" of a constitutional order. In turn, this endorsement can be understood in two different ways, either as the social fact that the people recognise that certain social practices have the status of law, or as a social ratification of constitutional practices consistent with the reading of the constitution that ordinary citizens believe to be correct.

Objections to this strand are well expressed by its label. Its triviality affects both previous senses of "tacit endorsement". The first does not represent a proposal that would actually change the present state of affairs in constitutional interpretation. It amounts to saying that the people are the ultimate interpreters of the constitution by not directly challenging the court's decisions. In turn, the second conception of endorsement is false, because the fact that citizens do not revolt against a constitutional order, does not necessarily mean that they accept it. The citizens' silence regarding certain constitutional conventions and interpretations could be mostly due to their ignorance about the existence of such conventions and interpretations and to the presence of psychological adjustments (e.g. adaptive preferences). There are too many and too complex constitutional decisions

that impede individuals from having a full understanding of the norms that affect them and that they approve or reject. Moreover, the costs of a revolution against a constitutional order are

> frequently downright dangerous. So citizens who object to a constitutional interpretation – either by the Supreme Court or by one of the political branches – may choose to acquiesce to interpretations they think are wrong (Alexander & Solum 2005, 1625)

Third, *expressive popular constitutionalism* emphasises the idea that public opinion can, does and should play a role in a complex, interactive process of determining constitutional meaning in a more realistic fashion. According to this version

> popular constitutionalism might be the view that regular folks ought to pay attention to the Supreme Court, to criticize the Court when it strays from the Constitution's text, structure, and history, and to vote for Presidents and Senators who will hold the court accountable (Alexander & Solum 2005, 1626).

2.2.3. Departmentalism

The main premise of this variety of popular constitutionalism is that the interpretive authority must be shared among all branches of government. Yet, its nature not clear. It is sometimes described as something scholars sympathetic to popular constitutionalism might be willing to embrace. Others, however, see it as something clearly different from popular constitutionalism. For example, Alexander & Solum describe it as one of popular constitutionalism's competing alternatives (2005, 1609), whereas Kramer sees it as a way of understanding popular constitutionalism (2004, 201; 2007, 743).

The case for departmentalism was advanced by Madison and Jefferson. It is also supported by cases in which the US presidency challenged judicial supremacy in constitutional interpretation. This includes, for instance, the 1789 debates over the President's removal power. In this occasion, Madison granted the basic argument for judicial review when he said that "I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolved upon the judicial". It did not follow from this, however, that judicial decisions acquired any special status compared with decisions adopted by other organs of government. So, Madison asked

> upon what principle it can be contented that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government: it specifies certain powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see any one of these independent departments has more right than another to

> declare their sentiments on that point (1789).[16]

Jefferson expressed the idea more succinctly in a letter to Spencer Roane by saying that "each of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question". In the same letter, he also claimed that

> [t]he question whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the constitution which has given that power to them more than to the executive or legislative branches … And in general, that branch, which is to act ultimately, and whit-out appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities (2008, 134-135).

In departmentalism, interpretive authority can be divided in two ways.[17] One is by assigning quotas of power to the three branches of government. The other is sharing authority on the same constitutional issues among them. Alexander & Solum name the first "divided departmentalism" and "overlapping departmentalism" to the second (2005, 1610).

In *divided departmentalism,* each branch of government retains interpretive authority over its own sphere of action so that no branch may invade the interpretive domain of the others. There are problems, however, with this idea. First, there must be standards by which one can determine the competence for each branch of government. Provided that the interpretation of the limits themselves is in the hands of those who will be affected by the boundaries resulting from the decisions, these agents find themselves in a *iudex in sua causa* position. The constitution would then lose its capacity to serve as a regulatory instrument, bringing about instability and

> undermining its ability to serve the rule-of-law functions of enabling peaceful dispute resolution, enhancing stability and providing predictability. Even worse … such conflicts might degenerate into naked power struggles, raising the Hobbesian spectre of social chaos (Alexander & Solum 2005, 1611).

On the other hand, overlapping departmentalism contends that each branch of government has final authority over all constitutional questions decided "irrespective of which branch those constitutional questions concern" (Alexander & Solum 2005, 1613). The underlying logic is that each branch owes fidelity to the constitution and not to others' interpretations of the constitution.

[16] The idea is reaffirmed in Helvidius I (August 24, 1793).
[17] For an alternative classification, see Pozen 2010, 2064.

2.3. Shared features

The classification sheds light on the definition of popular constitutionalism. But more precision is needed. Building on Pozen (2010), an abstraction of the ideal features advocated by popular constitutionalist would identify the theory with the following group of propositions:

a) "[We] now live in an age of judicial supremacy, in which the people have largely abdicated their collective authority to determine constitutional meaning" (Pozen 2010, 2054). Citizens and politicians generally seem to accept the US Supreme Court's claim that the judiciary "is supreme in the exposition of the law of the Constitution" (Cooper v. Aaron 1958). Popular constitutionalists claim that judicial supremacy became the norm despite the fact that "this modern understanding is … of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history" (Kramer 2004, 8). Moreover, at the beginnings of the American republic the final interpretive authority rested with the people themselves and courts no less than elected representatives were subordinate to their judgements. This emphasis on interpretation is what gives the theory its distinctiveness.

b) Judicial supremacy is the enemy. Constitutional law has become *juricentric,* conceptualised and defined with reference to the judgements of a Supreme Court that sees the constitution as a document that speaks only to courts (Post & Siegel 2003).

Judicial supremacy "has been a peculiarly debilitating force in American public life" (Pozen 2010, 2057). For supporters of judicial supremacy, however, this is a controversial thing to say. Consider, for example, landmark decisions like *Brown v. Board of Education* (1954) on race discrimination, *Griswold v. Conneticut* (1965) on birth control, *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992) on abortion, on the right to have an attorney and law enforcement, etc. These are all cases where the Supreme Court actually expanded the scope of rights and liberties of American citizens. They are often invoked in favour of the belief that rights are better protected if the courts prevent majorities from abridging the constitution.

For popular constitutionalists, however, the weakening of public life is the result of the lack of formal spaces in which citizens can give their own opinions and ideas about the meaning of constitutional clauses or about matters with constitutional salience. The people, "the community at large has no formal authority to interpret" (Kramer 2007, 698). This proposition is supported by Post & Siegel:

> Even if the people retain the last word on the meaning of the constitution, which they undoubtedly will, they may be nevertheless no longer feel entitled to disagree with the opinions of the court and hence lose vital motivation and will for civic participation (2004, 1042-43).[18]

c) "We ought to rectify judicial supremacy by empowering the people in their corporate capacity and as individuals, to reclaim the constitution" (Pozen 2010, 2058). This should not be done exclusively through amendments to the document, but in ways that would permit ordinary citizens feel that the constitution is theirs through an accessible political process.

This does not mean that popular constitutionalists do not show a commitment to the rule of law. They are, after and overall, constitutionalists. Popular constitutionalism is not an invitation to undermine constitutional law, but to change the forum where constitutional decisions are ultimately shaped, and to enhance and broaden the scope of arguments with which representatives and citizens engage in political and legal discussions. For popular constitutionalists, "legal norms would continue to constrain the exercise of contemporary preferences in their ideal world" (Pozen 2010, 2058).

d) The preceding propositions imply that popular constitutionalists mostly share "a progressive faith in the capacity of lay persons to interpret and implement the constitution in a principled fashion" (Pettys 2008, 341). Pettys, for example, affirms that "popular constitutionalists share a deep faith in citizens' ability to constrain themselves and their elected officials in the kinds of desirable ways that lead us to value the constitution in the first place" (2008, 341).

e) A fifth proposition rejects a sharp distinction between constitutional law and constitutional culture. For popular constitutionalists, ordinary politics, the process of everyday decision-making is also part of a broader culture that defines the meaning of the constitution. Legal theorists, however, have traditionally sketched a more accentuated distinction between both notions, leaving constitutional law to courts. Ordinary politics, everyday legislation and their execution, on the other hand, are lodged in the other branches of government.[19]

Popular constitutionalists argue against this idea because many "authoritative norms arise outside the judiciary through an essentially political process of constitutional construction" (Pozen 2010, 2059). The key point is that citizens should be able to honour

[18] See also, Waldron 2006, 1376-1395.
[19] This division of labour has been famously defended by Dworkin. See, for example Dworkin 1981, 1990 and 2010. More on this in chapter III, section 3.

the precommitments adopted during constitutional moments (Ackerman 1991). Of course, this raises the problem of "how – definitionally – can we distinguish between the legal and the political components of constitutional law?" (Tushnet 2006, 998). Yet, it is still worth highlighting that popular constitutionalism urges to rethink the commitment to judicial supremacy by giving reasons to consider that if the ultimate power to interpret the constitution were shifted from the courts to other fora, the people would prove themselves able and willing to distinguish between their long-term fundamental commitments and their short-term political preferences. Kramer, for example, avers that making a shift toward popular constitutionalism would not entail

> major changes in the day-to-day business of deciding cases. What presumptively would change is the Justice`s attitudes and self-conception as they went about in their routine. In effect (…) Supreme Court Justices would come to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions – an actual authority, too, not some abstract "people" who spoke once, two hundred years ago, and then disappeared (2004, 253).

One notorious aspect of the five propositions commented, is that popular constitutionalism has been mostly developed in the United States, as a distinctive part of the debates on the legitimacy of judicial review of legislation.[20] Its proponents have reshaped those debates by putting the accent on the idea that a true commitment to the rule of law and to democracy requires taking the interpretation of constitution away from the courts (Tushnet 1999; 2008). More precisely, it involves stripping courts of the possibility of assigning meaning to constitutional clauses with final authority.

There are a number of aspects, however, that have not always been defended by popular constitutionalists as a single body of scholarship. For instance, the intensity with which popular constitutionalists oppose courts varies (Pozen 2010, 2056). As it happens, getting rid of judicial supremacy does not necessarily mean getting rid of judicial review (Whittington 2007, 5-6). The key point where they converge is that although judges have a role in the articulation and application of constitutional principles, their view just "have no normative priority in the conversation" (Tushnet 2006, 996).

In addition, some scholars consider that the aforementioned features do not

[20] As said in the introduction, I enter in those debates to the extent that they touch upon matters of popular constitutionalism. For a recent overview of the history of judicial review in the United States, see Bilder 2008. For an overview of the practice in other countries see, for example, Cappelleti 1970, and Ginsburg 2003.

suffice to give conceptual clarity to the theory.[21] Consider, for example, Alexander & Solum's opinion: "[s]o what is 'popular constitutionalism'? We think that it is a bundle of ideas and that … the phrase has several meanings" (2005, 1616).

I agree. This is not to deny that there is value in conceptualising popular constitutionalism in an ambiguous way as, for example, Tushnet does (2006, 996). Fuzzy terms can be helpful to accommodate complex phenomena. The issue with popular constitutionalism is not, however, its fuzziness, but its normative and institutional imprecision. This is a problem that does not find a solution in the current state of the art.

Yet, additional precision can be achieved by working on the deficiencies of the theory as well as by providing more accurate descriptions of the different claims advanced by popular constitutionalists.

3. The shortcomings of Popular Constitutionalism: bases for a research agenda

The preceding discussions show that the literature remains highly abstract and deficient in specific proposals that can give shape to the claim of stripping the courts of their faculty of interpreting the constitution with final authority. However, this needs not to lead us to tag popular constitutionalism as a mere pamphlet. Rather, its limitations open the possibility for the development of further research. The emphasis that popular constitutionalists put on which agent gets to determine the authoritative final meaning of a constitution, is valuable to the extent that the theory's shortcomings are tackled.

This section reflects on the deficiencies exhibited by popular constitutionalism. It scrutinises four domains in which the theory is deficient. First, regarding normative justifications. Popular constitutionalists have generally neglected reflections on the philosophical foundations underpinning the desideratum that the people themselves must be the final interpreters of the constitution. Second, almost the entire theory is built upon problems concerning the US constitutional tradition and practices. It is, thus, unnecessarily provincial. Third, it lacks a justification, not just for the suggestion that it the people themselves should be the final constitutional interpreters, but also for the claim that judicial supremacy is to be avoided. This latter claim calls for independent examinations. Fourth, it is deficient in terms of actual institutional proposals that would turn normative claims into something institutionally feasible.

These areas represent paths for a research agenda that is undertaken in the upcoming chapters of this dissertation.

[21] Donnelly 2012, 239; Alexander & Solum 2005, 1618; Pettys 2008, 339.

3.1. Normative Foundations

Probably the most important challenge for popular constitutionalism is to converge on a certain group of justificatory principles. Normative justifications are central, not only in theoretical terms, but also for institutional considerations. Concrete institutional proposals shall make sense insofar as they can be justified against some principle or group of them that provide the theory with internal and external coherence.

The importance of providing normative justifications for popular constitutionalism cannot be overstated. As it happens, some unfortunate discussions within the theory derive from its deficiency in normative groundings.

Consider, for example, the question of the compatibility of popular constitutionalism with a certain idea of progressive politics or with conservatism. Popular constitutionalism seems to favour a *living* constitution, time evolving and responsive to current societal challenges. In Kramer`s words, "popular constitutionalism provides the inspiration for reshaping the constitution so as to keep it fresh and current with society" (2004, 970). Yet, the weak normative foundations on which the theory rests, have resulted in debates, for example, on whether the Tea Party constitutes an example of popular constitutionalism. This certainly represents a challenge to those who equate popular constitutionalism with a progressive reading of the constitution (Schwartzberg 2011; Post & Siegel 2009, 31). If the main target of popular constitutionalists is to strip the courts of having the final word in determining constitutional meaning, if judicial supremacy is the enemy, it is because it has acted as a debilitating force in the life of citizens. Consequently, it advocates for empowering the people, trusting in their capacity to interpret and implement the constitution in a principled fashion, keeping the charter *up to date* with their current preferences.

Yet, the Tea Party is a conservative social movement seeking to participate in the shaping of constitutional meaning outside the court (Zietlow 2012, 484), claiming that the correct interpretation of the document comes from the commitment to some original meaning anchored in the founding generation. Ironically, Kramer's vision of American constitutional law lends support to this perspective. He often argues that political movements have frequently succeeded in changing constitutional law without amending the constitution. If, as he declares, the way in which the constitution should be read is in accordance with its original understanding (2004, 9-34) – popular or populist as that understanding might have been - then the Tea Party is very much a popular

constitutionalist movement. So, according to this reading, progressive and conservative constitutionalism are prima facie compatible with popular constitutionalism. In Schmidt's words, "the Tea Party is a quintessential example of popular constitutionalism, as that concept has been developed in the scholarly literature in recent years" (2011b, 7).[22]

Another manifestation of this compatibility between conservatism and popular constitutionalism is found in originalism.[23] The intuition is that originalism and popular constitutionalism are incompatible, mostly because of the commitment of the first to preserve the *dead hand of the past* as a criterion to interpret the constitution (Zietlow 2012, 485-486). Since the constitution is in many cases a very old document, it is naturally a conservative document, conservative in the sense used to describe the position of individuals in American political life reluctant to socio-economical experimentation, linked to certain racial practices, in favour of a balanced budget and a strong dollar, etc. (Bickel 1986, 78). So, provided that both popular constitutionalists and originalists appeal to democracy to justify their theories, one must wonder if there is a way of being both, or if embracing one depends on implicitly accepting the other (Siegel 2008). For instance, Strang thinks there is no necessary connection or disjunction between the two theories. For him, the distance depends on the concept of originalism one embraces — in some conceptions the differences and incompatibilities are very large, whereas with others, similarities emerge, concluding that the convergence is contingent on the form of originalism one considers (2011, 254).

However, Schwartzberg asks the opposite question: should progressive constitutionalism endorse popular constitutionalism? She avers that progressive and popular constitutionalism can be reconciled. The inner logic of both categories, she argues, makes them share a deep commitment to autonomy, a respect for the capacity of individuals to work out fundamental problems for themselves in a democratic fashion (2011, 1296). Furthermore, she invites to change the target of the theory, to forget about judicial supremacy and judicial review of legislation and focus on the mechanisms that representative institutions could have in order to interpret the constitution having as a primary goal to leave aside the obsession with courts and put efforts on a more important objective: "the extraordinarily strenuous supermajoritarian limits on amendment through article V" (2011, 1298).

[22] Likewise, Somin 2011, 302.
[23] For a review of the different strands of originalism *see* Berger 1977; Kay 2009; Colby & Smith 2009; Whittington 2010.

This divergence on normative, definitional and institutional matters, proves the necessity to continue developing the theory. The differences on the nature of the claims that seem to fall into the label *popular constitutionalism* are too great as to accept it as a guidance, let alone endorse it, in its current state.

3.2. Provincialism

Popular constitutionalists have almost entirely focused on the United States constitutional practice. This is not a problem *per se*, and it is understandable that American scholars write about their own country. Yet, it certainly limits the scope of concerns to which the theoretical model is applied.

Perhaps the most notorious effect of this provincialism is that the most successful strategy justifying popular constitutionalism, Kramer's 2004 book, is really an interpretation of the history of the practice of judicial review in the US. Popular constitutionalists, to be precise, have been concerned with taking the constitution away from the United States courts (Tushnet 1999), or with offering positive alternatives to judicial supremacy by either using or changing article V of the US constitution (Levinson 2000; Schwartzberg 2011). Yet, nothing prevents the theory from being exported, as it were, to other countries and traditions where authoritative constitutional interpretation has been consistently transferred to the judiciary.[24] As it happens, some literature has been generated in Latin America that deals with problems specific to the region, seeking to develop institutional arrangements that promote new forms of institutional dialogue.[25] Despite this exception, the fact to the matter is that popular constitutionalism has been pretty much a body of literature developed in and for the United States, by American scholars.

3.3. Judicial Supremacy

The third shortcoming experienced by popular constitutionalism has to do with its enemy, judicial supremacy and the reasons one may have to avoid the supremacy of courts in the interpretation of the constitution. This is not solved solely by finding normative and empirical justifications for the claim that the people themselves can and should be final and authoritative interpreters. The judicial side of the dispute is not to be

[24] See, for example, Hirschl 2004. A more detailed account of this tendency is provided in chapter III.
[25] Alterio & Niembro Ortega 2013; Gargarella 2013; Rodríguez Garavito 2013; Linares 2013; Tushnet 2013; Hogg & Bushell 2013; Lorenzetti 2013.

discarded. On the contrary, it has to be addressed. One must take the reasons that may tilt the scale towards the judiciary as a final constitutional interpreter seriously. Consequently, the popular constitutionalist agenda should also include a comparative strategy, pondering the merits and limitations of both agents from a normative, but also from an institutional perspective.

This institutional dimension is of course linked to the normative path ultimately adopted. The normative foundations I propose for popular constitutionalism lead to frame the institutional question in terms of the capacity of judges to secure the freedom of individuals, to deliberate and to guarantee certain egalitarian conditions in the interpretive process. Some of the upcoming chapters thus ask which of the actors competing to be the final authoritative constitutional interpreters is better suited to deliberate about what the constitution means. It may be the case that the charitable image that is usually promoted of the judiciary in relation to the judges' capacity to discuss their cases is confirmed, but that conclusion has to derive from academic scrutiny. Such examination is, however, absent in the current literature on popular constitutionalism.

3.4. Institutional Proposals

Popular constitutionalism is deficient in terms of actual institutional proposals. Generally, there is an absence of concrete mechanisms answering just how can the people engage in this process of interpreting the constitution (Strang 2011, 254). Pozen, for example, observes a sharp contrast in the literature when comparing the normative claims that popular constitutionalism entail, with the notorious lack of proposals that could put those demands into working institutions (2010, 2053-2064). In the same vein, Franklin argues that

> the scholarship is heavily normative but rarely pragmatic. Those who have championed popular constitutionalism … have said very little about the particular institutional mechanisms that would make their vision a reality in today's world (2006, 1069).

This weakness in positive contributions is probably one of the main reasons why popular constitutionalism has lost the thrust it gained thanks to Kramer's book in 2004. Chapter VII will discuss the specific ways in which such deficiency manifests itself. For now, it suffices to say that a number of popular constitutionalists have made attempts to operationalise the theory. These attempts, however, fall short of reaching their objective.

Kramer himself only gave hints of the sort of reforms that should be made to the

American constitutional practice. Proposals like judicial impeachments, budget cuts, changes in the attitude of the Presidency towards to the courts, stripping the court of jurisdiction, among others (Kramer 2004a, 249), are only mentioned without giving details as to exactly this would promote, let alone secure, the goal of giving the people themselves the final word in the interpretation of their constitution. Others do make more positive contributions, which either fall short of rejecting judicial supremacy (Pozen 2010; Donnelly 2012), or fail to meet deliberative normative standards that would permit that the voice of the people may be properly expressed (Kramer 2007, 750; Schwartzberg 2011), or make their suggestions within the limits of American constitutional law (Kramer 2007; Schwartzberg 2011; Donnelly 2012).

These shortcomings are a consequence of the normative imprecision of the theory. Institutional proposals must be evaluated against the background of some normative guidance. But if that compass is incoherent, vague, or inexistent, it is only natural that difficulties arise in taken steps in the direction of turning legal and political theories into something feasible that may operate in practice. This is precisely the case with popular constitutionalism.

4. Conclusions

This chapter has done three things. First, it provided an outline of accounts of popular constitutionalism. It showed that popular constitutionalists generally agree on two claims: that constitutional theory and practice give the judiciary the final word in constitutional interpretation and that such privilege should belong to the people themselves. Secondly, after offering a taxonomy of accounts advancing the popular constitutionalists's project, I commented on a more detailed description of the claims allegedly shared by its champions. Thirdly, the chapter spotted gaps and shortcomings in the theory.

One conclusion that follows from the first two tasks, is that it is very unlikely that one can provide a single concept that includes all popular constitutionalists. There are divisions regarding the normative or descriptive nature of the theory. There are also differences as to whether more radical or moderate versions of theory should be endorsed, whether taking the constitution away from the courts would mean giving final authoritative interpretive authority to a branch of government other than the judiciary, or if it would mean giving it to the actual citizenry. Solutions for these discussions would require different justificatory strategies and institutional frameworks. Yet, as I have

insisted in this chapter, those strategies and frameworks are either weak, incoherent or lacking in the current state of the art.

This chapter has been negative and critical, and has painted a gloomy picture of popular constitutionalism. Nevertheless, the theory is still attractive. It has the merit of challenging one of the most settled beliefs in constitutional law: that because constitutions are legal documents, they should be interpreted by professional judges. However, it cannot be considered as a feasible alternative until it answers the questions posed in these pages: What are the normative arguments in favour of popular interpretations of the constitution? Is it truly desirable that the people themselves have the final word in constitutional interpretation? *Can* citizens produce principled interpretations of the constitution? Is it possible to design an institutional framework that can make popular constitutionalism work? All these queries require careful examination on different areas of legal and political theory, and this is what the upcoming chapters do.

For a start, the next chapter tackles popular constitutionalism's normative problem: Do we have normative reasons to reject judicial supremacy? If so, why, and what sort of theory would be the best justification for the claim that it should be the people themselves the final authorities in constitutional interpretation?

CHAPTER II

REPUBLICANISM, DELIBERATIVE DEMOCRACY, AND EQUALITY OF ACCESS AND DELIBERATION: A NORMATIVE JUSTIFICATION FOR POPULAR CONSTITUTIONALISM

1. Introduction

Popular constitutionalism is deficient in its normative foundations. Consequently, this chapter does two things. First, it proposes republicanism, deliberative democracy and political equality as candidates for justifying the position of *the people* as final constitutional interpreters. Republicanism entails a conception of freedom that places a duty on individuals to be active sentinels of their own liberty. In turn, that active disposition finds adequate institutional expressions in deliberative settings allowing for the autonomous formation, transformation and justifications of the citizens' preferences regarding constitutional matters. Moreover, republican liberty and its operationalisation through deliberative democracy hinges on a principle of political equality I call *Equality of Access and Deliberation* (EAD).

The implications for popular constitutionalism are the following: individuals who are given the chance to participate actively and in an autonomous fashion in the deliberative process leading to a given constitutional interpretation with final *erga omnes* effects, do not see themselves subject to the arbitrary will of others. Contrariwise, to the extent that judges hold the final word in constitutional interpretation, their decisions impinge upon the republican liberty of those who receive the effects of their decisions and did not have a chance to have a say in the decision-making process.

Second, the chapter contributes to the aforementioned bodies of literature by showing how they link to each other. Republican theory, deliberative democracy, and political equality are related in ways that have not been expounded by scholars in the past. In making those connections, I argue three things. First, it shows that republicanism and deliberative democracy are linked in mutually beneficial ways, makes those relations explicit, and deals with potential objections against them. Second, it elaborates EAD. That is, an egalitarian principle common to both republican and deliberative democratic theory that is capable of dealing with criticisms wielded against other egalitarian distribuands. Finally, it reviews and advances the literature on these bodies of scholarship, and shows different ways in which scholars would benefit from paying attention to the connections expounded.

The final part takes stock, and concludes that popular constitutionalism gains traction by endorsing the normative justification here provided. It finishes by anticipating the arguments made in chapter III.

The chapter is structured as follows. Section 2 contextualises the strategy adopted in this chapter and claims that republican freedom, deliberative democracy and political equality serve the purpose of justifying popular constitutionalism.

Section 3 links republicanism and deliberative democracy by reflecting on the concepts of liberty and civic virtue. Both notions, I argue, are compatible with principles championed by deliberative democrats, in particular, autonomy, inclusion and political participation. I thus argue that a republican deliberative democracy secures liberty by including all those persons potentially affected by a decision, allowing the access to the fora where collective decisions are adopted in considered, autonomous, and non-elitist fashions.

In subsection 3.2., I tackle a potential objection against my account derived from its commitment to political participation. To do so, I reject Pettit's reasons for separating his republican theory from deliberative democracy, as they are based on a narrow understanding of deliberative democratic theory.

Section 4 develops EAD, which comprises two sub-principles. First, *equality of access* means that all potentially affected by collective decisions must have the equal opportunity of entering the fora where those decisions are adopted. Second, *equality in deliberation* requires that decision-making processes be sensitive enough as to be able to capture, make visible, and consider the claims of all the participants in the debate in non-dominating manners. In this section, I also deal with some criticisms directed against other egalitarian standards and show why EAD does not fall prey to those objections.

Section 5 points at gaps in the literature and argues that some political theorists have largely overlooked the linkages here elaborated. These scholars would benefit from endorsing republicanism and/or deliberative democracy for the reasons explained, but also because it would clarify the language they use to address their own theoretical concerns; they would see their theories improved by the conceptual apparatus of republican and deliberative democratic theory.

Section 6 takes stock on how this theoretical framework justifies popular constitutionalism and introduces the next chapter.

2. Freedom, Deliberation, Equality, and Popular Constitutionalism

Why should the people themselves, and not judges, be final authorities in the determination of constitutional meaning? One way of approaching this question is by examining what conception of constitutionalism underpins the traditional role given to judges in constitutional law. Consider Mill and Hamilton, for example. The first argued that

> [t]he will of the people … practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much need against this as against any other abuse of power (1989, 8. Emphasis in the original)

In turn, Hamilton claimed that

> [t]his independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill-humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberative reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community (1948, 400)

In Hamilton's view, an independent judiciary is one of those *precautions* Mill saw as necessary for the maintenance of the liberty of individuals. Underpinning these accounts lies a conception of liberty that shelters the individual from majoritarian arbitrary impositions of power, a principle for which the judiciary is instrumental.

This relationships between individual liberty and the role given to the judiciary as a constitutional safeguard has increasingly pervaded contemporary constitutional law and resulted in an incremental transfer of powers to the courts, either through their own self-understanding as last bastions of the constitution,[26] through the disposition of other branches of government to consider the judiciary as embodiments of constitutional reasoning (Alexander 1998 11-12), or through a doctrinal inclination to theorise legal and constitutional theory from the judges' perspective (Dworkin 1986, 90).[27] Hamilton's contention that the judiciary is "the least dangerous [branch] to the political right of the

[26] Leaving aside discussions about Marshall's original intention (Kramer 2004a, 225), *Marbury v. Madison* is the best-known example of this self-understanding. See also the decision by the German *Reichsgericht* in a judgement of 4 November 1925: "Since the national Constitution itself contains no provisions according to which the decision of the constitutionality of national statutes has been taken away from the courts … the right and obligation of the judge to examine the constitutionality of statutes must be recognised" (1925). Moreover, Perry argues that "since World War II, … Americans have succeeded in exporting our practice of judicial supremacy to many parts of the world" (1998, 122). See also Beatty 1994 and Hirschl 2004.

[27] See chapter III, section 2, and chapter IV.

constitution" (1948, 396) finds clear echoes in a large portion of contemporary constitutional theory (Posner 1998 1; Whittington 2002, 23).[28]

As a result, courts stand as institutional devices available for individuals when they consider their liberties have been abridged, restoring the law's empire even against the view of a majority of citizens. In Dworkin's formulation, in court, individuals can wield their constitutional rights as trumps (1978, xi, xv; 1984, 156).

These remarks point to a long-standing discussion on the relationship between constitutionalism, democracy and to the role of the courts in that interaction (Holmes 1988, 196, Habermas 2001), where constitutionalists are suspicious of democracy and majorities, and democrats are suspicious of constitutionalism and its judges (Bellamy 2007, 99). One classic formulation of these tripartite relation is Justice Jackson's pronouncement:

> The very purpose of a Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections (West Virginia State Board of Education v. Barnette 1943).

One way out of this problem is by reflecting on the conceptions of liberty and democracy underpinning this apparently oxymoronic relationship.[29] On the *conceptions-of-liberty* side of the argument, neo-republican or neo-roman writers have challenged the theoretical prominence of the negative version of the concept of freedom,[30] traditionally associated with the liberal tradition, broadly understood (Smith 2013, 136).[31] This conception, famously put forward by Hobbes (1968, 261-274), and present throughout modern and contemporary political thought, is usually defined as absence of interference.

The history of negative freedom is not uniform, however. Hobbes, for example, limited freedom to absence of *external* impediments to actions. As a result, for him there are only free actions, not free wills (1968, 127, 261-263). This is something that liberals

[28] See chapter III for a more detailed exposition of this claim.
[29] And indeed, is one way out. By no means I suggest that no other argumentative strategy may be available. For example, see Ackerman 1991.
[30] Skinner prefers the term "neo-roman". He does acknowledge, however, that the label "neo-republican" is used extensively in the literature. See Skinner 1998, 11; 2008a, ix, 174-176; 2008b, 83. I use both terms indistinctively.
[31] And broadly is perhaps the best way to portray it, as the history of liberalism is the history of its ambiguitiy (Dworkin 1985, 181; Waldron 1987, 127; Shklar 1989, 149; Ryan 2012, 359; Bell 2014). Notwithstanding, there is, to put it in Waldron's Wittgensteinian terms, a family resemblance among "liberals" emanating from the value they give to individual freedom (1987, 127)

like Locke and Mill disagreed with. Locke, for example asked the following rhetorical question in paragraph 176 of the Second Treatise: "Should a Robber break into my House and with a Dagger at my Throat, make me seal Deeds to convey my Estate to him, would this give him any title? (2012, 385). Locke here admits that coercion or interference can be exerted on the will. For Hobbes, however, "Feare and Liberty are consistent". Hobbes' answer to Locke's example would then be the same as with his own example of the man who "throweth his goods into the Sea for *feare* the ship would sink": "he doth it neverthelessese very willingly" (1968, 262).

Likewise, in chapter three of *On Liberty*, Mill insists on the importance of the exercise on the individual's rational capacity "to use and interpret experience in his way" (1989, 58). He who lets other think for himself, who "lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation" (1989, 59). Hence, interferences can also be internal to the individual.

The most influential contemporary writer on these issues, Berlin, championed a conception of liberty along these latter lines, when he claimed that liberty results from "a maximum degree of non-interference compatible with the minimum demands for social life" (1971, 161).

Leaving aside these internal disputes among liberals, the question that arises for our purposes here is what is the role of the constitution in their scheme. Put simply, it represents an instrument for the limitation of unwanted social meddling in individuals' lives. Being democracy the highest expression of that social interference, the constitution becomes an instrument for the protection of the negative freedoms of individuals against the democratic process.

The following sections give a detailed account of the republican alternative to this liberal story. For now it suffices to say that republican authors have shed light on the "fiercely polemical character of Hobbes' analysis" (Skinner 2002, 23) and on the existence of an alternative conception of freedom whose intellectual influence was clouded by the emergence of the former understanding of what liberty is.

Habermas describes the two sides of the dispute as follows:

> Liberalism and republicanism disagree on whether the "liberty of the moderns" or the "liberty of the ancients" should enjoy priority in the order of justification…
> The one side insists that in basic rights, the private autonomy of citizens assumes a form that – "unchangeable" in its essential content – guarantees the anonymous rule of law. According to the other side, the political autonomy of citizens is embodied I the self-organization of a community that freely makes its own laws (2001, 767)

In this chapter and throughout this dissertation, I subscribe to "the other side" in Habermas' description. This republican conception of liberty allows us to understand the value of constitutionalism in a more charitable way than by endorsing a negative version of liberty, with which democracy is portrayed as incompatible. I show that the safeguarding of individuals' liberties in a republican sense finds an ideal institutional framework in one particular conception of democracy, namely, deliberative democracy. Additionally, deliberative democracy gains normative value when considered as a tool for preventing domination. Both bodies of literature complement each other in ways that give value to collective decisions adopted in democratic settings without having to categorise those decisions as a loss of individual freedom. As a result, the claim that the meaning of a constitution should be determined by the people themselves finds a justification in republicanism and deliberative democracy.

The following sections show how republicanism and deliberative democracy can be understood in this mutually beneficial way to the extent that certain egalitarian conditions obtain. A final section reflects on how the resulting framework serves as a normative argument for giving the people themselves the final word in constitutional interpretation.

3. Republicanism and deliberative democracy

This section argues for an instrumental linkage between republican theory and deliberative democracy. Present-day republican theory can benefit from deliberative democracy, and deliberative democracy can profit from republican theory for its own justification.

I understand republicanism as a theory constituted by two principles: liberty as non-domination and civic virtue. Other principles may be part of the republican ideal, but I assume these two are at the core of any republican account.

The most characteristic feature of republicanism is its conception of freedom as non-domination or as a structural independence from the will of another.[32] Domination arises when individuals are in positions where others can interfere with their life in ways that may be guided by interests or ideas they do not share at any level (Pettit 1997, 146).

Republican liberty has been defined in contrast to a conception of liberty according to which an individual is free insofar as she does not face unwanted

[32] For definitions of republican liberty, see Sydney 1698, 17; Pettit 1997, 51-79; 2002, 339-342; 2012, 7-8, 26-74; Skinner 1998, 70; 2002, 247; 2008, x; Larmore 2001, 229-230; McCormick 2011, 145; Lovett 2014.

interferences (Skinner 2002, 237-243; Pettit 2012, 8-11).[33] Republicans, on the other hand, affirm that the mere awareness of living in a state of dependence on the goodwill of another is itself a limitation of individual freedom, even in the absence of actual threats or physical coercion. The upshot is that not all interferences in an individual's course of action constitute limitations of her liberty. Likewise, not every limitation of an individual's liberty is produced by interference (Pettit 1997, 41).

The second fundamental principle is civic virtue. In the republican tradition, the interactions between citizens and between citizens and the state are complex in the sense that republican citizenship does not only provide individuals with entitlements, but also presupposes certain duties and commitments that reach beyond the respect for the negative liberties of others.[34]

Republican laws must then be supported by habits of virtue or good citizenship if the republic has any chance of prospering (Pettit 1997, 245-270). This demand for public commitment appeals, therefore, to the idea that citizens should be concerned not only with their private matters, but with the preferences of other citizens as well (Sunstein 1988, 1539).

3.1. Theoretical and institutional linkages

I submit that these notions of liberty and virtue point at deliberative democracy as the best institutional means to prevent domination. In my view, there are links between both traditions in need of exploration. Those links are not obvious, however, and reasons must be provided to justify them.

As it happens, there is disagreement among contemporary theorists as to whether republicanism is necessarily or contingently related to democracy more generally.[35] Some argue that democrats should worry when philosophers begin to speak the language of republicanism (McCormick 2013, 89), express concerns about participatory approaches, branding them as romantic and demoralizing (Pettit 2012, 226-227), and affirm that democratic procedures are often conducive to domination (Harel 2014, 152).

Others, however, argue for a closer relationship between democracy or participation and republicanism.[36] I support this latter position.

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[33] There is disagreement, however, with respect to whether republican freedom encompasses freedom as absence of interference. See, Pettit 2002.

[34] Cicero 1998, 17, 19; Rousseau 1997b, 113; Skinner 1981, 53; 1984, 242; Burt 1990, 23; Rawls 1996, 205-206.

[35] Bellamy 2008, 159; McCormick 2011, 16, 298; Balot & Trochimchuk 2012, 560; Niederberger & Schink 2013, 1.

[36] Geuna 2013, 11; Bellamy 2007, 80-83; 2012, 3; 2013, 253-275; Benarieh Ruffer 2013, 233

Being free in a republican sense implies the desideratum that individuals are, to the greatest possible extent, participants in the process by which they give norms to themselves and to each other. It also implies that the preferences manifested in the decision-making process should be the highest possible expression of autonomous reasoning and not of others' imposed preferences.

These features are advocated by deliberative democrats.[37] They generally support the participation of all potentially affected by a decision or their representatives, as well as collective decision-making by means of arguments offered by and to participants who are committed to the values of rationality and impartiality.[38] Inclusion decreases the risk of arbitrary imposition of norms insofar as those affected by those norms are able to participate in their production as equals. Of course, more guarantees must be in place other than inclusion if domination is to be avoided during a decision-making process. Yet, it is a necessary condition for freedom to obtain.

Conversely, a process of decision-making that excludes some of those potentially affected by its outcomes, results in the application of norms on people who are mere subjects of decisions adopted by others with whom they may disagree. Moreover, inclusion helps to avoid the danger of domination insofar as it secures equal treatment between individuals before they enter the process.

Autonomy in the process of reasoning is also a concern republicans and deliberative democrats share. It implies that the preferences and actions of an agent are determined by herself to the greatest possible extent, and not by her circumstances or by others' imposition (Bohman 1997, 326; Christman 2015). This is a fundamental element for republican liberty to obtain, as avoiding being subject to the will of others presupposes that individuals must be as autonomous as possible to determine their own preferences without potential external interference.

The same applies to deliberative democrats. As Joshua Cohen has argued, the ideal deliberative scheme indicates the importance of autonomy in a deliberative democracy. In Cohen's view, the ideal deliberative procedure should be responsive to the two sorts of threats I have mentioned above. In his words, "actions fail to be autonomous if the preferences on which an agent acts are, roughly, given by the circumstances, and not determined by the agent" (2009, 350). The first kind correspond to adaptive preferences, i.e., individuals' adjustments of their aspirations to their circumstances

[37] Manin 1987, 352; Habermas 1996, 107; Bohman 1998, 402; Cohen 2009, 247-249.
[38] Elster 1998, 8; Bohman 1998, 408-410; Martí 2006, 24.

(Elster 1983, 109), and the second to accomodationist preferences, that is, "psychological adjustments to conditions of subordination in which individuals are not recognized as having the capacity for self-government" (Cohen 2009, 78). Deliberative procedures should thus be responsive to the fact that certain groups and individuals manifest acquiescence with situations where they have been excluded, exploited or discriminated against, which reflects that their preferences could have been moulded within oppressive and arbitrary contexts. This exhibits the necessity to determine the circumstances in which those contexts exist and correct unjust institutional systems or conditions such as lack of information, illegitimate disenfranchisement or exploitation, which distort the range of an individual's available choices.[39] The deliberative process is an instrument for controlling the influence of such distorted preferences.

This can indeed be phrased in the language of republican theory: deliberative democracy strives to reduce the extent to which circumstances and individuals may be dominating. As Sunstein has argued regarding the influence of factions and interest groups, "factional domination effectively deprives other groups of the opportunity to assert their views. If it were permitted to occur, the political process would be undermined and freedom would be at risk" (1985, 33).

The democratic inference I draw from this is that the recognition of distorted or fully informed preferences ought to be the result of a process undertaken by the affected themselves to the greatest possible extent. In the absence of conditions for this self-determination to obtain, means should be adopted for those individuals to acquire the resources necessary for the development of their autonomy, so they may be capable of distinguishing fully informed preferences from those resulting from circumstances conducive to domination.

This should not be entrusted to elites. For the same reasons that oppressed individuals are subject to cognitive dissonances and biases, adaptive and accomodationist preferences, individuals who are well-off and part of an elite are likely to ignore the preferences of those to whose reality they have no access. This problem worsens when gaps between the well-off and the worst-off increase, as individuals adjust their worldviews and expectations downwardly when in poverty and upwardly when in wealth (Elster 1983, 109; 1997, 10; G. Cohen 2011c, 74).

[39] Sunstein 1988, 1544; Habermas 1994, 110, 117; Cohen 1997, 78; Elster 1997, 10; 1998. This is shared also by some moral philosophers, particularly theorists of feminism. See for example, Code 1996, 6 and Hutchings 2013, 16.

In conclusion, absence of domination calls for an institutional framework where citizens are able to enter the process by which they give norms to themselves and to each other, and where they are capable of reflection as authors and subjects of those norms. Additionally, freedom is not something achievable by a single individual, for an isolated individual will always be vulnerable to the power of others. It follows that securing freedom requires an institutional setting defined by everyone because it affects everyone. Hence, for republicans, liberty should be linked to the active exercise of citizenship by individuals capable of determining their own rules, enjoying an equal share of power, exercised in an inclusive forum. Such requirements are consistent with the normative tenets of deliberative democracy.

This leads us to republican virtue and its potential connections with deliberative democratic theory. I submit that a republican conception of democracy should encourage inclusive deliberation and participation, not as a matter of prioritising a substantive conception of public over private life, but because one is instrumental to the other. In this respect, republicans can also rely on deliberative democracy.

Deliberative democracy is instrumental for the virtuous sort of citizenship republicanism relies on. This is due to the centrality deliberative democrats give to two aspects of participation that are consistent with republican virtue and with avoidance of domination: the inclusion of all potentially affected by decisions on the one hand, and the demand for a intersubjective justification of those decisions, on the other. Making this connection allows us to adjust the requirements of virtue in its classical sense to present-day polities, which can no longer demand the kind of sacrifice classical republicanism demanded from their citizens (e.g. military service), at least not with the same degree of legitimacy.

Both elements can be linked to republican virtue. The risk of domination is reduced insofar as citizens are provided with the tools for accessing the fora where collective decisions are taken, and to the extent those decisions take their viewpoints and preferences into account through the justifications of the decisions adopted. But this requires that individuals have the actual possibility of accessing those fora and engaging in the creation of those norms, so that institutions may be receptive to their preferences.

This calls for the formal and material possibility of "being present" and having a voice. It also entails that preferences are formed and are, to the greatest possible extent, the result of the individuals' own wills and not of the constraints imposed by their circumstances and/or by other individuals. Hence, individuals need autonomy and access

to an inclusive hearing where those preferences and arguments can be aired and attended to. How to ensure presence may admit different institutional mechanisms.

Finally, a deliberative process capable of including all the potentially affected while being sensitive to everyone's preferences, not only enhances the chances of being heard and considered. It reduces the possibilities of domination by imposing restrictions on speakers who wish to pursue their own interests without consideration for others (Elster 1998, 104).

These restrictions are, however, not enough if the recipients of those self-interested discourses do not have the intellectual and material resources necessary for evaluating their content, engaging in discussion, and offering their own alternatives. In the absence of those conditions, hypocritical discourses may actually produce ideological domination or deliberative pathologies that would likely reproduce power differences and engender inequality (Przeworski 1998, 145-146; Stokes 1998, 124). I will come back on these issues in section 4.

3.2. An Objection

My emphasis on participation raises the objection that it seems naïve and/or inefficient to design political institutions under the assumption that citizens will be willing to engage in politics. Individuals face trade-offs between the amount of time they are willing to spend in public affairs and their private matters (Christiano 1996, 40; Larmore 2001, 233; Pettit 2012, 226-227), and they will most likely choose the latter over the former. It seems more reasonable to design political institutions under the assumption that self-interested rather than altruistic and participatory behaviours are the general rule.[40]

This argument is exemplified in Pettit's rejection of deliberative democracy. In *On the People's Terms* he explores the possible relations between republican theory, deliberation and participation, and elaborates a democratic theory that expresses the republican ideals of liberty as non-domination and civic virtue. He identifies the latter with what the term *contestatory citizenry*, i.e, citizens' disposition to contest public policies in order to prevent domination both in its private and public sphere. This model gives citizens influence over the decision-making process, and requires the use of such influence to impose a direction on government (2012, 153). That influence has to be individualised, unconditioned, and efficacious (2012, 153, 167-179), and this in turn requires equality and equal respect in public public contestation and debate.

[40] See, for example, Machavelli 2003, 45, 84; Skinner 1981, 57; Buchanan & Tullock 2004 26.

This looks a lot like deliberative democracy, as Pettit acknowledges (2012, 253-255, 267). He claims, however, that there are important differences at the foundational and operational level of both theories.

At the foundational level, his approach is inspired by the republican insight that "people must share equally in their control of government if they are to avoid domination, and not by a foundational commitment to the value of deliberation as such" (Pettit 2012, 267). At the operational level, he claims his account is "organized around the idea that it is the deliberative regulation of public businesses – that is, regulation by deliberatively tested norms – that is essential, not the deliberative conduct of decision-making at every site and on every occasion" (2012, 268). These differences warrant attention, as a close inspection shows that Pettit does not properly justify his departure from deliberative democracy.

First, at the foundational level, Pettit depicts deliberative democracy too narrowly. He discusses Cohen, Elster and Habermas' accounts, but he sidesteps other scholars and approaches to deliberative democracy. In particular, he takes consensus-oriented approaches as common to all deliberative democrats: "the difference of perspective and practice between the two approaches shows up in the fact that whereas *dissensus always represents a second-best* for deliberative democrats, it is entirely acceptable, even desirable, within the present approach" (2012, 268. My emphasis).[41]

This is an overstatement, as deliberative democracy does not require consensus. It is true that, as Dryzek points out, consensus "was once thought of as the gold standard of political legitimacy in deliberative democracy" (2010, 15). Yet, this is no longer the case. It was not the case either by the time Pettit was writing *On the People's Terms.* Even those who contend that deliberative norms tend towards consensus, consider that "participants also need to try to discover and probe one another's interests as they appear at any given time", and that "[t]oo great an emphasis on forging common interests generates unrealistic expectations and obfuscates real conflict" (Karpowitz & Mansbridge 2005, 348). More significantly, deliberativists need not value dissensus as a second-best, but as an actual condition for deliberation. Dissensus is a fundamental and desirable part of any deliberative process, and discussion is essential even when agreements are unlikely to be achieved (George 1999, 188), something which unfortunately for Pettit's anti-

[41] My emphasis. Likewise, Waldron 1999, 91-92. Notwithstanding, see Waldron 1999, 93.

Rousseauian guiding principles, was in fact promoted by Rousseau himself (Rousseau 1997b, 60).

Consider, for example, Mansbridge's critique of Cohen's consensus-based approach:

> [Consensus] is not … an appropriate criterion for legitimate deliberation. Even at the formal assembly level, normatively legitimate deliberation should aim not only at consensus but also at clarifying conflict, sharpening that conflict if necessary (1999, 226).

In the same vein, Dryzek and Niemeyer argue that "deliberation can thrive on the ineliminable pluralism of viewpoints, perspectives, values, judgments, and (especially) discourses that among other things provide the grist for [democratic legitimacy and discursive representation]" (2010, 86). In conclusion, at this foundational level, there are good reasons to question Pettit's departure from deliberative democracy.

Pettit's departure at the operational level is also questionable. This is because he is wary of relying too strongly on the value of participation. He showed this reluctance when he claimed that the republican tradition

> points us towards the ideal of a democracy based, not on the alleged consent of the people, but rather on the contestability by the people of everything that government does: the important thing to ensure is that governmental doings are fit to survive popular contestation, not that they are the products of popular will (1997, 277).

Elsewhere, he decided not to follow the Rousseauian republican tradition because of its implications with a "rather romantic picture of the tirelessly engaged public figure" (2012, 18). He claimed that the kind of political activism his theory envisages

> reject[s] the romantic idea of each citizen's exercising a panoramic, altruistic form of oversight … [as well as] the equally romantic idea of participatory, Rousseauian engagement [because it is] so other-worldly that it is likely to demoralize activists, not inspire them" (2012, 227).

These concerns with feasibility are to him "good reasons to economize on virtue" (2012, 248). Regarding deliberative democracy, Pettit affirms that ideal members of a group of deliberative democrats conduct all their business in explicit exercises of deliberation, and must be aware of the deliberative regulation under which they operate at every moment of the deliberative process (2012, 268). In his view, such commitment is unfeasible.

Again, his understanding of deliberative democracy is too narrow. A number of empirical studies on deliberative democracy and actual deliberative processes successfully undertaken around the world, suggest that those concerns with feasibility are overstated.[42] Moreover, no deliberative democrat calls for a system where individuals engage in deliberation, are political activists and vote every day and every week on a regular basis. Consider, for example the commitment expected from participants in deliberative experiments at the empirical level. Some experiments include economic incentives for participants (Ackerman & Fishkin 2004, 3; Fishkin & Farrar 2005, 74). In others, self-selection is rejected because it may raise problems of partisanship and representation (Ryan & Smith 2014, 16-19). Some provide individuals with information on the subject matter so they are not initially required to have extensive knowledge (Ackerman & Fishkin 2004, 4). They often have access to experts (Ackerman & Fishkin 2004, 4), and the time required to participate has nothing to do with the image of a political addict (Ackerman & Fishkin 2004, 17; Ryan & Smith 2014, 12). The experiments take into account that individuals face trade-offs between their private and public affairs (Christiano 1996, 40; Larmore 2001, 233), that they may be rationally ignorant (Ackerman & Fishkin 2004, 8), and that they may need help to understand the issues presented to them (Landwehr 2014). This is incompatible with any image of a tirelessly engaged public figure, and suggest that had Pettit depicted deliberative democracy in a less narrow manner, he would have been more sympathetic to it.

These responses argue against Pettit's reasons for dismissing deliberative democracy as an attractive theoretical and practical instrument for the republican cause. In reality, his account is not incompatible with deliberative democracy.

There is an additional consequence following from my responses: unlike Pettit does (1997, ix, 12, 62, 63, 172, 176, 183-200, 277-280; 2012, 293; 2013; Larmore 2001, 233), it is not necessary to limit virtue in a republican democracy to contestation. Present-day societies generally provide their citizens with means of contestation like judicial and administrative procedures, falling short, however, of means where individuals can participate and program political power by themselves. It is true that Pettit would like to see more effective means than the ones people currently have access to (2012, 239), but

[42] See Fishkin 1997; Fung 2003; Goodin & Dryzek 2006, the works included in Gastil & Levine 2005 and Grönlund, Bächtiger, & Setälä 2014, and the many case-studies available in participedia.net (Fung & Warren 2011)

we need to ask why limiting those means to contestatory ones. I thus do not agree with him that theories encouraging direct participation are romantic and demoralising.

4. Republican Democracy and Equality of Access and Deliberation

Democracy is about freedom and popular participation, but also about political equality. In consequence, the account I have elaborated in the preceding section includes an egalitarian principle (Christiano 1996, 18). I call this principle Equality of Access and Deliberation (EAD).

EAD is a complex principle of political equality that demands the provision for all citizens of equal access to deliberate on the collective norms of their community. It claims that a republican democracy is egalitarian insofar as it does not establish any criterion that could count as decisive for treating some members of a polity as privileged citizens. Instead, it puts a premium on the deliberative nature of a political process where inclusion, justification and reason giving are essential (Bohman 2009, 28).

EAD's relation with republicanism and deliberative democracy is intrinsic. That is to say, that eliminating or reducing the domination of some individuals, groups, elites, or institutions over others, is necessarily linked to the guarantee of the equal possibility of having a say, justifying one's preferences and considering those of others.

EAD comprises two sub-principles: equality of access, and equality in deliberation. Equality of access means that all potentially affected by collective decisions must have the equal opportunity of entering the fora where those decisions are adopted. Equality of deliberation requires that decision-making processes be sensitive enough as to be able to capture, make visible, and consider the claims of all the participants in the debate in non-dominating manners.

4.1. Equality of Access

Equality of access has a formal and a material dimension. In its formal dimension, it establishes a duty for individuals and for the state to refrain from obstructing others from participating in the political process. The instruments needed to fulfil these duties may vary across different polities but, as a minimum, traditional political constitutional guarantees like freedom of speech, freedom of movement, freedom of association, voting rights, and so on, must be recognised and entrenched. More positively, the principle orients the political process towards inclusion and participation in its constitutional design, and understands government as a public entity at the service of all citizens of the

territory over which it exercises power, and the constitution as more than an instrument conceived to limit democratic government (Elster 1988, 2-4; Nino 1998, 3). As an example, consider the sort of duties imposed on the state included in Chapter 3 of Title I of the Spanish constitution, that are conducive to secure adequate living standards and political participation. In particular, but not exclusively, consider sections 40 (redistribution of income and full employment), 41 (maintenance of a public Social Security), 43 (right to health protection), 47 (right to the enjoyment of decent and adequate housing), and 48 (promotion of conditions for free and effective participation of young people in political, social, economic and cultural development) of that section.

Equality of access has also a material dimension. Individuals should enjoy a minimum of living standards and political capacity that guarantee their presence and voice in the decision-making process. This is not a requirement of entrance imposed on individuals, but a duty placed on the state so individuals don't run the risk of being dominated once they enter the deliberative process. It entails equality in the provision of the means, resources and opportunities to make politics a part of one's life. The tradeoffs between public and private life affect only those whose resources and capabilities are below a minimum that would allow them not to take politics as a luxury (Bohman 1997, 332). For those with enough monetary, social and cultural capital, politics becomes an attractive avenue in spite of their relative success in the private sphere, because better positions in politics helps them to secure their private positions (McCormick 2011, 12-13).

Equality of access thus sets a minimum that allow citizens to make politics and deliberation an option for them. This partly makes it a sufficientarian account. It is, however, ultimately egalitarian, provided that it is meant to facilitate individuals the entrance to the deliberative forum on an equal footing with the rest of their fellow citizens. The benchmark of equality of access is interpersonal — no citizen should have an amount of political resources that would permit her to voice her preferences without concern for the preferences of the rest of individuals. In republican terms: no citizen should be in a position to dominate others. The threshold is relative to others, and is thus, egalitarian.

A further question at the level of material access is what is it that must be distributed (G. Cohen 2011a, 3). The literature on the "equality of what" debate has generated myriad answers such as equality of resources (Dworkin 2000; Christiano 1990, 176; 2004, 274-275; 1996, 47-101; 2013, 370), primary social goods (Rawls 2005, 54-114), basic capability (Sen 1979, 217-220), availability of political influence (Brighouse

1996), access to advantage (Cohen G. 2011a, 14, 19, 35; 2011b, 60), opportunity for welfare (Arneson 1989), and others (Anderson 1999, 289-295; Gosepath 2014). I submit that, individually considered, none of these alternatives meet the requirements of equality of access because, as Anderson has argued, they are "too narrowly focused on the distribution of divisible, privately appropriated goods, such as income or resources, or privately enjoyed goods, such as welfare" (1999, 288). At the poles of the continuum of egalitarian metrics, equality of resources makes the assumption that everyone is capable of making effective use of them (Sen 1979, 218; Bohman 1997, 333; Cohen G. 2011b, 49), and equality of welfare degenerates in the problem of counting all preferences as equal (Bohman 1997, 329-330; Gosepath 2014, 27-28).

Anderson's critique also shows that these sorts of egalitarian theories fail to meet a test of equal respect and concern for all citizens because some of them exclude citizens from enjoying the social conditions of freedom on the ground that it is their fault for losing them, and that they escape from this at the cost of paternalism. Moreover, she shows that the distribution of whatever distribuand these accounts favour, is made according to the fact that some are inferior to others in the worth of their lives, talents and personal qualities. Finally, she shows that in attempting to make people responsible for their choices, they "make demeaning and intrusive judgements of people's capacities to exercise responsibility and effectively dictates to them the appropriate uses of their freedom" (1999, 289).

Equality of access does not fall prey to these objections. The reason is that it does not share the assumption that preferences are always traceable to choices. As I have argued, preferences can be the result of oppression, exploitation and lack of information. In such cases, preferences are not fully determined by individuals' choices. In fact, the premise of equality of access is precisely the opposite: some people lack freedom because their preferences are not really the result of the exercise of their autonomous will (Locke 1988, 385; 2008, 171). Equality of access is meant to guarantee such enjoyment, and to prevent that domination.

An additional problem is that the aforementioned distribuands are presented as "holistic" (Carter 2001, 88). They are championed in ways that their selection excludes other options as proper understandings of what the ideal distribuand should be. This is not correct. Some egalitarian standards can be implemented jointly without contradiction. Different political communities face different challenges, so there is not only one plausible metric applicable to all of them. Hence, an egalitarian account must be

necessarily context-dependent, in the sense that the distribuand must be determined in accordance with the conditions and necessities of each polity, individually considered. In G.A. Cohen's wording, egalitarian accounts must be presented as standards saying that individuals should be as equal as possible in some dimension "but subject to whatever limitations need to be imposed in deference to other values" (2011a, 5).

These limitations are not specified by the claim in question. For equality of access, the distribuands are to be determined by the specific challenges different polities and individuals face in accomplishing republican freedom. Some of them will require resources, other with enough resources will require equalising political influence, others increasing the basic capabilities of their citizens, and so on.

4.2. Equality in Deliberation

I now turn to equality in deliberation, which is EAD's operational principle. It regulates the deliberative process once individuals have entered it.

Equality in deliberation dictates that participation in the process of decision-making should be made in terms that the procedure can be sensitive enough as to be able to capture, make visible, and facilitate the consideration of the claims of all the participants in the debate.

Equal access to having a say and to be offered reasons are aspects warranting attention. Both have been widely elaborated by deliberative democrats who underscore the importance of conceiving democracy as a method for forming opinions and judgements and not merely as a system of aggregation of preferences.[43]

In this vein, for equality in deliberation, political systems ought to grant individuals the opportunity to reflect on common problems and offer their own solutions in spite of the asymmetrical access to expertise and the limited problem-solving capacities of laypersons. The reason is that "even [if] the public consists of laypersons and communicates with ordinary language, this does not necessarily imply an inability to differentiate the essential questions and reasons for decisions" (Habermas 1996, 373). Not doing so undermines the morality underpinning citizenship that is based on the idea of being considered as an equal just because of being a citizen (Rousseau 1997b, 53), and can serve as a pretext for a technocratic incapacitation and "de-skilling" of the citizenry (Öffe & Preuss 1991, 169), as a form of state paternalism over the public sphere

[43] Sunstein 1986, 896; Cohen 1986, 34; Manin 1987, 347, 349, 350; Nino 1998, 69; Elster 1998, 11; Martí 2006, 91.

(Habermas 1996, 317-318), and/or as an incentive for citizens and representatives to take their deliberative responsibilities less seriously (Mansbridge et al., 2012, 3).

From this it follows that EAD admittedly welcomes lower levels of technicisms and expertise in public debate. It lowers the entrance barriers for individuals and groups, forcing those "who know" to translate their opinions and knowledge to those who lack the opportunity to form their opinions and preferences about collective matters in more educated terms. This "translation" to ordinary language affects the kind of reasoning employed to justify collective decisions, increases the number of inputs entered in the process, and has consequences regarding the nature of the forum where deliberation occurs. It implies that the justifications for the decisions adopted should express the understanding of the principle(s) upon which the decision(s) is (are) based. Equality emerges when those decisions are the result of the understanding citizens have of what their collective problems are, gathered through a process of deliberation between the people themselves, channelled through a framework of institutions capable of transforming those opinions, preferences and deliberations into administrative power.

EAD is thus built on the simple – not trivial – fact that the needs, lacks of resources, deficiencies in capabilities and advantages, as well as shortages in welfare, are not uniform and demand processes of communication between individuals with different cognitive and epistemic competences. Those processes are less restricted the more those channels are sensitive to every possible input.

My conception is inspired by Mansbridge's notion of *everyday talk*. This approach allows different forms of non-coercive sorts of justification and argument, including rhetoric, bargaining and emotions. It includes "talk among both formal and informal representatives in politically oriented organisations, talk in the media, talk among political activists, and everyday talk in formally private spaces about things the public ought to discuss" (1999, 211).[44]

No elitist forum or individual has a privileged position here. Even if one showed that some individuals are better deliberators than ordinary people, better educated and with higher capabilities to reason on moral and/or political issues, the democratic egalitarian and freedom-preserving conclusion that should be drawn is not giving these individuals higher privileges, but reforming the political system in order to provide individuals with the intellectual, moral and material resources that would allow them to

[44] In the same vein, Dryzek 2000, 1-2; Chambers 2012, 68-69; Bohman 2012, 79; Christiano 2012, 30; Parkinson 2012, 151; Mansbridge et al. 2012, 2; Owen & Smith 2015, 215.

form their own judgements and reasons, and justify their own claims when those judgements, reasons and claims have bearings on collective issues.[45]

This alternative rejects elitism and puts the people themselves as the guardians of their own liberties (Machiavelli 2003, 31-33; Madison 2006). It rejects Burkean versions of democracy (Burke 1854), where participation is limited to the selection of individuals who "know better" and have more time and experience than the ordinary, ignorant and non-virtuous citizens. For the elitist alternative, there are roughly two kinds of citizens: virtuous ones, with civic disposition and knowledge – the expert politician, the judge, the public officer, etc. - and the rest, uninformed and indifferent to public life.[46] The election of representatives allows non-virtuous individuals to select virtuous representatives, who are in turn controlled through the publicity of their campaigns and the evaluation of the accomplishments made during their incumbency. If they deviated from the citizens' preferences, then the public would manifest by replacing those in power in a non-violent way (Popper 1943, 110).

I disagree. The argument fails to see that citizens accept or reject their representatives by voting in favour or against them, which implies at least some degree of conformity or disapproval with those policies that are allegedly incomprehensible for them. Moreover, empirical studies show, not only that laypersons are able to understand complex political processes and their consequences, but that under certain institutional conditions, they are willing to give up their time to participate in them (Fishkin 2011).[47]

There is one additional question: does EAD guarantee that deliberative egalitarian procedures will not themselves dominate individuals, for example, those in the minority? My response is that such infringement goes against the premises of my theory. Put differently, bad results can be generated by any institution, working under any design, and we should find the means to minimise them and their impact. A theory must aim at not being a justificatory device for those bad results, even knowing that they may occur. In the case of the principles I here advocate, the hypothetical domination of some groups over minorities could not be accounted for as a result of the application of EAD. Its aim is to safeguard liberty, autonomy, inclusion and equality in debate, where those who lose may find comfort in the fact that their preferences where taken into account and considered in the final decision. Losing a democratic discussion does necessarily imply

[45] In the same vein, Brighouse & Fleurbaey 2008, 146, 149.
[46] See, for example, Downs 1997, 36; Schumpeter 2003, 269; Hardin 2009, 231-246.
[47] See also footnote 42.

an infringement on someone's rights. As Waldron puts it, "provided that the opinion that is acted upon takes my interests properly into account along with everyone else's, the fact that my opinion did not prevail is not itself a threat to my rights, or to my freedom, or to my well-being" (2006, 1398). Also, the question seems to suggest that outcome-based procedures produce better results overall in comparison to procedural ones. This is wrong for two reasons. First, outcome-based arguments are only a part of the full justification for institutions and principles, and do not establish decisive advantages in favour of any of them (Waldron 2015, 444). Second, there are inherent difficulties in anticipating the effects produced by public policies over the long term. Given the limitations of our social sciences to predict those outcomes, we should choose institutions which are perceived as just rather than efficient in the long-term (Elster 1987, 715-720).

5. Republican Deliberative Democracy and Equality of Access and Deliberation: Contributions to Scholarly Debate

Some theorists have previously touched on these issues but have not made explicit or sufficiently elaborated the interplay between freedom, deliberative democracy and equality.

James Bohman links deliberative democracy, freedom and equality. When discussing the relationships between capabilities, poverty and democratic deliberation, he claims that

> [o]ne lesson we can draw may be that citizenship and public life are too minimal in [cases of disease, hunger and early mortality] to ensure effective freedom … One of the main roles of institutions is to correct for … shortfalls of social agency and public uptake …The wider one's agency freedom, the more one may be assured of influence in deliberation (1997, 334)

Also, when discussing representation in deliberative systems, he claims that one of its main roles is to "provide a means by which actors are able to introduce communicative freedom into the deliberative system; as such, it has to also be a location in which issues of political exclusion are thematized and worked out" (2012, 76). Furthermore, he claims that "[d]eliberation, representation, and non-domination are key features of democratization" (2012, 84).

Yet, Bohman's conception of effective social freedom is not freedom as non-domination. In spite of the relationships he establishes between public life and effective freedom, and freedom and influence in deliberation, he does not make those links explicit even if he refers to that lack of freedom as domination. This is not merely a terminological issue. Names matter, and naming lack of freedom domination commits Bohman to the

premises of the republican theory of freedom. Yet, he nowhere makes that commitment explicit, or elaborates those connections.

Joshua Cohen's account of deliberative democracy combines elements such as the importance of the voting process for judgement formation (1986, 34), and the recognition of every person's capacity to discuss and reach reasonable decisions (1997, 73). Additionally, he writes about the liberty gained by citizens in an ideal deliberative process (1997, 74). However, he does not qualify the sort of freedom he is discussing. As with Bohman, this is not only a problem of labels. Debates on republican conceptions of liberty are not something new or marginal in political theory and uses of this concept should pay attention to those discussions.

Cristina Lafont has argued for a participatory approach in deliberative democracy, briefly relying on Pettit's description of freedom as non-domination as a sample of the potential achievements of embracing mutual justification as a criterion for democratic legitimacy. As the preceding sections show, I agree with her that there are indeed potential benefits from such endorsement. She does not, however, elaborate this claim any further (2015, 45, 54).

Jane Mansbridge's definition of *the political* relates equality, deliberation and non-domination (1999, 214). In her words:

> Large numbers of mutually interacting individual choices, weighed unequally through patterns of domination and subordination, chance, and other justifiable and unjustifiable inequalities, together create a host of collective choices … To 'politicize' one of these collective choices – to make it 'political' – is to draw the attention of the public, as something the public should discuss as a collectivity with a view to possible change (1999, 214-215)

This has important consequences for Mansbridge's recent work on deliberative systems. Like Bohman, Cohen and Lafont, however, she does not specify the extent to which, if at all, she is relying on a republican conception of liberty.

Additionally, given the importance for her of *everyday talk*, she would benefit from endorsing republican theory, as it would give language to some of the potential benefits of such notion. Mansbridge could claim that *everyday talk* is a criterion that safeguards the liberty of individuals and maintain deliberation as its central criterion.

Thomas Christiano combines his principle of equality of resources with equal consideration of interests and deliberation. Nonetheless, he rejects freedom-based arguments as foundations for democracy. According to him, liberty-based arguments "fail

to explain why democratic participation is necessary to freedom since it is clear that one can be free in many ways, including just minding one's own business [and because] they fail to show how democracy is simply incompatible with self-government" (1996, 43). He also affirms that equality of participation in public deliberation is one of the main conditions for making decisions in deliberative settings (1997, 253). But again, liberty is not part of his justification for democracy.

Christiano would profit from adopting a republican perspective. Since his rejection of freedom-based foundations for democracy hinges upon an understanding of liberty as self-government, the problems arising from that conception would diminish if freedom was understood as non-domination. As I have argued, being free in a republican sense involves considering other's interests and not just "their own will as a rule" (1996, 21). Unlike Christiano's depiction of self-government, republican freedom can justify democratic rule.

Harry Brighouse's principle of equal availability of political influence is framed strictly in terms of the relationship between equality and the distribution of the resources necessary for accomplishing that ideal (1996). The principle is achieved when the means necessary to affect the collective conditions of the shared life of individuals are equally available to each citizen. Freedom, however, does not play an explicit role in this account. Elsewhere (2008, 6), Brighouse and Fleurbary proposed replacing the traditional democratic egalitarian concern with a principle of proportionality according to which power must be distributed in proportion to people's stakes in the decisions. Nevertheless, the foundations for this principle – equal respect, autonomy and outcomes – include neither non-domination or freedom more generally, nor deliberation. Reflecting on republican terms may strengthen the proportionality principle, as it could be framed in terms of the lack of liberty a person suffers when power is not distributed according to her stakes in the matter.

José Martí, Félix Ovejero and Roberto Gargarella relate republican liberty and deliberation more explicitly, as part of a critique of liberalism (Ovejero 2002; 2008), and in the context of reflecting on current tendencies in current republican theory (Ovejero, Martí & Gargarella 2004). However, they do not specify the kind of equality those approaches require. Elsewhere, Martí describes how deliberative democrats have depicted equality, but this overview is limited to its general description as a structural principle of the deliberative process (2006a, 94-95). As discussed, liberty-based

arguments for democracy entail egalitarian principles, and these authors fail to provide a full-fledged account of the kind of equality their theories need.

Elizabeth Anderson understands her principle of "democratic equality" as "collective self-determination by means of open discussion among equals, in accordance with rules acceptable to all". In her view,

> [t]o stand up as an equal before others in discussion means that one is entitled to participate, that others recognize an obligation to listen respectfully and respond to one's arguments, that no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard (1999, 313).[48]

The links here between equality and deliberation are explicit. The passage also identifies equality with something akin to republican freedom: being equal entails eliminating the need of bowing and scraping before others. This is compatible with Pettit's "eyeball test", which implies that individuals "can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in regard with the best" (2012, 84).

However, the eyeball test emanates from liberty as non-domination, rather than from an egalitarian perspective. It is a *condition* of equality in Pettit's account (2012, 87). In this regard, Pettit follows a capability approach, and claims the state should entrench people's fundamental liberties "to the point where each is able to pass the eyeball test in relation to others" (2012, 87). Here the connections are more subtle, but they show that, as a minimum, Anderson's account of equality has a certain Pettitian republican connotation that could provide a firmer basis for her position.

In conclusion, these accounts either relate two of the three principles I have entwined here, or when they have linked the three of them, they do not explicitly acknowledge it is a republican or deliberative idea they have in mind when they talk of, exchange of arguments, oppression, domination, and so forth. They thus fail to see the three of them as interrelated and mutually beneficial. Martí comes closer to the sort of account I here favour. He also fails however, to provide us with a full-fledged account of equality.

[48] See also, Anderson 1995.

6. Taking Stock: Republicanism, Deliberation and Political Equality as Justifications for Popular Constitutionalism

This chapter made two arguments. First, it claimed that the tense relationship between constitutionalism and democracy can be explained by liberal constitutionalism's negative idea of freedom, which is in tension with democracy. Hence, by putting that conception of liberty into question, republican theory opens a door for a different understanding of the relationship between constitutionalism and democracy. Second, it made explicit just how republicanism and deliberative democracy stand together in a mutually beneficial relationship.

So, coming back to the initial question of this chapter: why should the people themselves, and not judges, be final authorities in the determination of constitutional meaning? In a nutshell, because their inclusion and participation in an egalitarian deliberative process by which constitutional norms are authoritatively interpreted, prevents individuals from being at the mercy of the arbitrary will of others. In short, egalitarian deliberative procedures secure their freedom as non-domination.

This conclusion fills a gap in popular constitutionalism by giving a justification to one of its two main claims, that the people themselves are the ones entitled to interpret their constitutions. Filling that gap matters, as it gives foundations to a project whose provincialism and insufficient normative reflection deviated scholarly attention from the idea that there is something in interpretation and in the collective effects produced by its authoritative exercise, that makes popular constitutionalism a worthy enterprise. The claim that giving this faculty to the citizens deliberating in egalitarian settings enhances their freedom is a reason to advocate for popular constitutionalism.

And yet, this conclusion is not enough. In normative terms, it provides, it is true, a reasonable argument for popular constitutionalism. However, one must pay attention to the reasons there may be to accept the judiciary as the final constitutional interpreter as well. As I said earlier, the tendency of considering judges and the courtroom as ideal instantiations of constitutional interpretation is a strong one, not only in the literature, but in actual constitutional practices too. Such tendency must be taken seriously. After all, if research showed that a *juristocracy* (Hirschl 2004) is the best of all possible free, deliberative and egalitarian constitutional worlds, the popular constitutionalist project would be at risk, for good reasons.

Thus, in my view, the following questions must be answered. First, are there good reasons to support judicial supremacy? What are the reasons behind the scholars'

rosy picture of judicial capacities? Second, popular constitutionalists' emphasis on interpretation and my own emphasis on deliberation raises the question: what is the relationship between interpretation and deliberation, particularly at the constitutional level? What sort of popular institutional mechanisms allow for the determination of constitutional meaning? Third, assuming that there is a relationship between constitutional interpretation and deliberative democracy, how can we be sure that *the people* can deliberate? Can judges? Fourth, if the people are entitled, as I show in this chapter, and can, as further chapters argue, deliberate about interpretive matters, what is the role that is left for the judiciary? Finally, what institutional alternatives are available for the people to turn popular constitutionalism into something empirically feasible?

The next chapter tackles the first of these questions. It surveys the reasons that allegedly support judicial supremacy and, after careful examination, rejects them.

CHAPTER III

AGAINST JUDICIAL SUPREMACY IN CONSTITUTIONAL INTERPRETATION

1. Introduction

This chapter argues against judicial supremacy, defined as a state of affairs where the final word in providing meaning to a constitution is entrusted to the judiciary. Judicial supremacy, so conceived, encompasses two related things. First, that, as any other institution, judges interpret the constitution to decide their cases and, second, the more problematic fact that the reasonings and interpretations underlying and justifying those judicial interpretations are followed and uncontested by other institutions and by citizens, placing judicial reasoning regarding constitutional affairs in a privileged position compared to that of the rest of the agents of a polity, particularly representative institutions and/or the citizens themselves.[49]

Judicial supremacy is the result of two independent but often concurrent features: first, that several legal systems and actual practices increasingly transfer political power to their courts in matters of constitutional interpretation and second, that some legal scholars consider the judiciary as the ideal repository of constitutional interpretation. The upshot of these features is a model of what has come to be labelled as *juristocracy* (Hirschl 2004), a theory that, to put it in Adam Tomkins' words, 'culminates in the extreme position that (a) there is no constitutional problem that cannot be solved by the courts and (b) no constitutional problem is truly solved until is solved by a court' (2010, 3). My concern is thus with scholars and legal practices that exhibit these features.

Hence, the claim I am interested in providing reasons for affirms that the legal theorists I here consider hold conceptions of interpretation that exclude citizens from interpreting the constitution. In most cases this exclusion is implicit and is the result of a long-lasting tradition in jurisprudence to direct its efforts to understanding the way judges perform their duties and how judges should do so — I label these accounts as 'implicit'. In other cases, the preference for the courtroom as the ideal forum to interpret the constitution, and the rejection of the capability of other agents to do so – particularly those broadly falling under the category of *majorities* - is the result of a conscious reflection

[49] I will use expressions like having the *final/last word, privileged position* of judges, among others of the sort to refer to this state of affairs.

about the nature of countermajoritarian institutions — I label this second sort of accounts as *explicit*.

Implicit accounts are addressed in section 2. Its proponents see constitutional interpretation as if it was a technical activity by which judges, depending on their choice, can discover and construct constitutional meaning when the constitution is ambiguous, vague or silent. Their technique consists in the application of a group of methods and rules to cases where the law does not provide a clear answer to a concrete judicial dispute.

Section 3 addresses explicit accounts, namely, arguments championing straightforwardly the claim that constitutional interpretation is a matter for the courts and not for legislatures or citizens. Those who embrace this view consider that the last word in the interpretation of the constitution should not be assigned to majorities or citizens, not because majorities cannot, or because such possibility is not considered by them, but because of a series of instrumental as well as normative arguments that speak against the convenience of having these fora deciding what the constitution ultimately means. For the purpose of examining those arguments, I consider Ronald Dworkin's response to his 'majoritarian premise' as representative of an instrumental explicit account defending judicial supremacy, and Alon Harel's work as an example of a normative explicit account where a case for a privileged role of the judiciary in the interpretation of the constitution is put forward.

The study of these sets of arguments shows that the scholars here considered have a special concern with how to interpret and what is being interpreted rather than with who will be affected by the interpretation — my assessment is thus normative in a political sense. This is especially true in the case of the arguments considered in section 2, as the jurists embracing them see constitutional interpretation as a technical procedure whose execution needs specific mechanisms and experts, implicitly excluding laypersons from interpreting the constitution with final effect by limiting constitutional reasoning to legal and judicial mechanisms. In the case of those arguments considered in section 3, I argue that the confidence on the judiciary is the result of instrumentalist philosophical assumptions regarding the capacity of majorities to interpret the constitution, as well as regarding the consideration that majorities are inherently oppressive. I show these arguments are wrong.

Section 4 recapitulates these arguments, and introduces the fourth chapter.

2. Implicit accounts

Constitutional law often puzzles us with cases where "a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance" (Dworkin 2010, 81). These cases consist in disputes where the parties involved claim that the constitution of a country grants them rights or liberties, which are not always compatible with the exercise of rights of their counterparts or of other individuals. All parties invoke the constitution as a support, but the constitution itself does not seem to provide an answer. These cases thus appear there where a dispute "cannot be resolved by staring harder at the ten words of [a] clause" (Post 1990, 14). The most difficult part, is that such disagreements are discrepancies among reasonable and informed people, where they are forced to choose between two or more fairly reasonable readings of the constitutional text.

The problem that established rules of law cannot always provide conclusive answers and about which people can reasonably disagree, has been widely discussed and remains a pressing issue nowadays (Atria 1999, 537). Because constitutions have become legally binding documents, the ambiguous and vague character of their provisions has increasingly forced judges to find methods to turn those rules into working norms that can solve actual cases, sometimes against the opinion of other branches of government, as evinced by the increasing transfer of powers to the judiciary in different parts of the world.[50]

Roughly speaking, when judges decide cases, they resort to interpretation (Lovett 2015, 4) — to the use of a group of rules or rhetorical techniques frequently employed by judges in order to find the meaning of a word, a clause or a norm. Those techniques are instruments or tools used by judges to choose between conflicting alternatives in a case, just as Dworkin criticises

[50]The American case is known for its constitutional review post *Marbury v. Madison* (Lambert 1921; Kramer 2004a). In Europe, it's a post-World War II phenomenon. After the war, constitutional courts were established in Austria (1945), Italy (1948), the Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and, after 1989, in the Post-Communist Czech Republic, Hungary, Poland, Rumania, Russia, Slovakia, the Baltics, and in several states of the former Yugoslavia (Stone Sweet, 2000, 31). In Latin America, Guatemala was the first country to establish a Constitutional Court à la Kelsen (1965), followed by Chile (1971), Perú (1979), Colombia (1979), Ecuador (1996), and Bolivia (1994). Other countries, most notably the United Kingdom, have historically not embraced an American-style constitutional review. However, recent reforms have granted increasing amounts of power to its courts, the enactment of the Human Rights Act in 1998 being the most distinctive case of this evolution. New Zealand, which until recently was considered to be 'one of the last bastion of Westminster system of government', introduced the New Zealand Bill of Rights Act which, according to Ran Hirschl marked 'an abrupt change in the balance of power among the judicial, legislative, and executive branches of government' (2004, 24).

> [Legal theorists] are used to saying that law is a matter of interpretation; but only, perhaps, because they understand interpretation in a certain way. When a statute (or the Constitution) is unclear on some point, because some crucial term is vague or because a sentence is ambiguous, lawyers say that the statute must be interpreted, and they apply what they call 'techniques of statutory construction' (1982, 181)

There exist, in fact, many examples of techniques of construction, but their selection by judges hinges on a previous and perhaps more important choice, namely the choice of an *approach* to constitutional interpretation, an archetype of the kind of arguments judges use as sources of constitutional meaning. Given that these are the kind of arguments constitutional interpretation is usually associated with, I will briefly analyse them.

Probably the best known typology of approaches or "modalities" in constitutional interpretation is that of Phillip Bobbit.[51] Bobbit is committed to the view that constitutional arguments are conventions adopted as part of a shared legal grammar directed to provide judges with compelling reasons to motivate their decisions. That is why his typology includes arguments "one finds in judicial opinions, in hearings, and in briefs" (1982, 6) and not other kinds alien to a judicial style of reasoning. These are the "historical argument", the "textual argument", the "doctrinal argument", the "prudential argument", and the "structural argument".[52]

Historical argument is the argument that

> marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution. Such argument begins with assertions about the controversies, the attitudes, and decisions of the period during which the particular constitutional provision to be construed was proposed and ratified (Bobbit 1982, 7).

The historical argument finds its most developed form in what is famously known as originalists theories of interpretation, nowadays specially after their rebirth thanks to authors like Jack Balkin, Keith Witthington and Antonin Scalia.[53] The basic idea implies that when judges approach cases in which an interpretation of a given constitutional provision is at stake, they should search for the reasons that motivated its

[51] In favour of this assertion see Barber and Fleming 2007, 67; Law 2010, 42; Jefferson Powell 2008, 133; Whittington 2011, 77; Bradley & Siegel 2014, 25 and McConnell 2015, 1747. Other typologies are available in Jakab 2013.

[52] Bobbit discusses separately a sixth type of constitutional argument he names *ethical* (1982, 93-120). I will not analyse this class of argument for my interest in Bobbit's classification is merely to discuss interpretive methodologies which few would deny. *Ethical* arguments, on the other side, constitute a more controversial class of approach, as Bobbit himself affirms (Bobbit 1982, 93).

[53] For a lengthy discussion on originalism and its *second wave* see Scalia 1997 and Whittington 2004. For critiques see Colby and Smith 2009; Berman 2009 and Fallon 2010.

enactment in the first place. A prominent originalist, Raoul Berger, stressed that historical rules provided a "fixed standard" for interpretation, without which a "fixed constitution" would be forever unfixed. For him, the constitution was written against a background of interpretive presuppositions "that assured the Framers their designed would be effectuated" (1977, 366).

As for *textual arguments*, these are "drawn from a consideration of the present sense of the words of the provision" (Bobbit 1982, 7). Textualists draw meaning from the constitutional document in two similar, however, sometimes divergent ways — the meaning can spring either by consulting the *plain words* of the constitution, or by consulting a *current social consensus* on what the words of the document mean (Barber and Fleming 2007, 68). One can readily see that each of these versions of the textualist approach can lead to different outcomes and that they require different justifications and deal with different critiques, for the *plain words* version of the textual argument faces the problem that the very reason why interpretation becomes necessary is because we do not agree on the meaning of the words that constitute the constitutional provision(s) under examination. The problem is precisely that we lack clarity as to their meaning and applicative extension, either because of ambiguity or vagueness.

As for the *consensual* version, it faces the problem that its proponents cannot commit to the main premise of the argument, namely the unconditional respect for the *text* as the source of constitutional meaning. Given that the type of words that constitutions generally employ refer to controversial moral and political concepts, it becomes difficult to figure how a consensus on their meaning can be anything different than the choice of a political or moral position on the subject-matter. This is why Barber and Fleming think of this version of the textual approach as equivalent to what they call a philosophical approach – i.e., Dworkin's fusion of moral philosophy and constitutional law –. The soundness of this accounts may be sustained, but not through an exclusive commitment to text (Barber and Fleming 2007, 77).

The third main type of constitutional argument is the *doctrinal argument*. It "asserts principles derived from precedent or from judicial or academic commentary on precedent" (Bobbit 1982, 7).[54] In turn, a precedent is the decision of a court that has a

[54] Arguments from precedent are more central to a common-law legal system such as those in England and the United States. However, they also exercise a degree of influence in civil-law systems, especially in lower courts, because although they are not conclusive, they provide arguments to motivate decisions and help to maintain uniformity in the judicial application of the law.

special legal significance in both theoretical and practical terms. A decision has theoretical authority if the circumstances under which it was adopted provide good reasons for believing the decision to be correct in law, e.g. the identity of the decision-makers, the arguments and the people involved in the case, the availability of evidence, etc. (Lamond 2014). But more importantly, precedents also have practical authority because they are regarded - formally – as partly constituting the law. From a legal point of view, an important consequence of this feature of judicial decisions is that "since courts are bound to apply the law, and since earlier decisions have practical authority over the content of the law (…) later courts are bound to follow the decisions of earlier cases" (Lamond 2014). The practical authority of precedents in these sense is what is usually known as the doctrine of *stare decisis*.

Doctrinal arguments, as said, derive from precedents. They impose the duty on other *courts* to follow the reasonings adopted in earlier cases by other courts. This means that the doctrine of *stare decisis* is meant to guide the reasoning of judges, limiting their authority out of respect for a number of principles like equality in the application of the law, separation of powers, hierarchy, etc. However, its implications for other bodies of government are more vexed and I consider them in this research as further discussions on the difference between judicial review and judicial supremacy will show.

Bobbit considers a fourth type of constitutional argument he calls *prudential*, namely the "constitutional argument which is actuated by the political and economic circumstances surrounding the decision". "Thus" – he continues – "prudentialists generally hold that in times of national emergency even the plainest of constitutional limitation can be ignored" (1982, 60). This kind of argument is self- conscious to the reviewing institution, and "need not treat the merits of the particular controversy (…), instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way" (1982, 7). In sum, the factors that influence the decision when a prudential approach is taken are based on variables not internal to the judicial process or even to the case *sub lite*, but on elements external to the law or to the interests of the parties in the case, such as the economic consequences of the decision, efficiency of governmental operations, response to political pressure, etc.

An example of the prudential argument is what is known as the "Brandeis Brief", a 113 pages written argument presented in *Muller v. Oregon* (1908) by the attorney and social activist Louis Brandeis, built upon facts and social studies, supporting the constitutionality of an Oregon statute that limited the hours per day that women could

work in laundries and other industries (Johnson 2005, 100). Brandeis hoped the brief would persuade the Court by providing "hundreds of studies and reports from many different states — and even from other democratic nations — regarding the health and safety dangers long hours presented to woman workers" (Bartrum 2011). This approach was consonant with the "fact-oriented, sociological jurisprudence" of the American Progressive era and "it forced the Court to consider data that state legislators employed in drafting reform laws" (Johnson 2005, 100).

Fifth, *structural arguments* are "claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments" (Bobbit 1982, 7); they are "inferences from the existence of constitutional structures and the relationship which the Constitution ordains among these structures" (Bobbit 1982, 74). In order to draw meaning from open-ended provisions, the interpreter must pay attention and consider the institutional relationships established by the document and not merely consider its provisions in an isolated fashion. That implies to examine the words of each particular provision as part of a statute or constitution and with reference to other provisions so that if there is a norm whose language is ambiguous or vague, "the structuralist will look to other uses of the word in the provision and in other laws in order to ascertain a coherent and consistent definition" (Hunter 2005, 79)

One of the best known structuralist accounts Ely's. According to him, the purpose of the constitution is to reinforce the processes of representative democracy, and under his scheme, the proper role of the Court when interpreting the constitution is that of a referee serving two functions: first, to police the process of representation and second, to facilitate the representation of minorities, echoing the rhetoric of the footnote four of the *Caroline Products* case (1980, 75-76) where the court considered both criteria as defensible grounds for judicial intervention.

Ely attempted to minimise the risks and burdens of deciding which rights were entitled to judicial protection by deriving rights from the Constitution's democratic structure. However, he failed to show his account of democracy is better than other conceptions of the constitution that emphasise substantive rights limiting what majorities could do to individuals and minorities, even when the democratic process is working

properly.[55] Critiques by Koffler (1981), Tribe (1988b, 28), Holmes (1993, 198, footnote 9), Gargarella (1996, 154—57), and Posner (2005, 233), point precisely in that direction.

As it can be noted, there is a good variety of arguments available for interpreters when deciding constitutional cases. Now, a prominent feature of these archetypes is that they are directed to aid *a* particular kind of interpreter – judges – and justify *a* class of decision —judicial decisions. It is symptomatic of the influence of the role of courts in constitutional interpretation, the fact that Bobbit construes his typology within the context of the debates on the legitimacy of judicial review, noticing that the central issue in the constitutional debate in the United States hitherto the time he wrote this work has been the legitimacy for judicial review of constitutional questions (1982, 3).[56] This, the fact that a book on constitutional interpretation deals with issues of political legitimacy is, I claim, no coincidence, but instead the consequence of a widespread attitude on behalf of legal theorists of confining constitutional interpretation to the judicial sphere. It is ultimately the consequence of deeming interpretation as "purely judicial in character" (Pound 1907, 381)

These approaches to interpretation favour a privileged position of the judiciary in the determination of constitutional meaning and the further construction of constitutional rules. There is no question that different persons, agencies and state organs interpret the constitution, but certainly the judiciary is given a better place to do so (Waldron 1999b, 5; McConnell 2015, 1751). It cannot be denied that on a daily basis, constitutional interpretation is the result of collective work, because the everyday business of politics and legislation demands legislators and administrations to interpret the constitution, and this creates and settles constitutional practices and understandings of the way liberties and fundamental rights are conceived and applied (McConnell 2015 1751-1752). But in a world where judges hold the capacity to modify those commitments, overrule them, reshape them and nullify them whenever their interpretation of the constitution diverges from the rest of the constitutional actors, constitutional meaning is subjected to the will of an organ in whose selection and functioning, citizens have limited

[55] For substantive conceptions of democracy see Garzón Valdes 1993; Jones 1994; Dworkin 1996; (although without embracing those views) Bellamy 2007, 92-107; Ferrajoli 2008.

[56] As I have said before, I have described Bobbit's typology because of its prominence among scholars. However, the association between constitutional interpretation and its judicial nature also affects other scholars who categorise constitutional archetypes or describe constitutional interpretation having the same assumption in mind. See, for example, Fallon Jr. 1987; Tribe 1988a; Bakan 1989, 123-27; Post 1990; Schauer 2004; Contreras Matus 2005, 320; García Toma 2005, 189; Bustamante Bohórquez 2006; Papaspyrou 2008, 8-9; Jakab 2013.

influence. Even if citizens do influence the courts to some extent (Dahl 1967, 155; Marmor 1992, 121; Kramer 2004, 970), the fact remains, that their influence is not dispositive, but dependent on the willingness of judges to accommodate their views to that of the majorities (Marmor 1992, 173; Segal & Spaeth 2002, 5).

The reasons for the association between constitutional interpretation and the judiciary are diverse. Perhaps the most obvious one is that interpretation of a norm is seldom exercised for the sake of pure philosophical meditation — it often takes place in the context of reaching a decision. Different people as well as different levels of government invoke the constitution for different reasons, but despite this variety of interpreters "it is common to focus on judges who need to decide whether a given state action is constitutional" (Sinnot-Armstrong and Brison 1993, 2).

The relations between courts and other agents in determining constitutional meaning via interpretation can be captured by the distinction between judicial review and judicial supremacy. I understand *judicial review* to be a process in which courts refuse to apply or give force to an act of another agent on the basis that it is contrary to their interpretation of the constitution. Instead, the model of *judicial supremacy* posits that courts do not limit themselves to imposing meaning on a constitutional norm in a specific case, and that the meaning that they give to constitutional provisions which decide disputes authoritatively binds other agents in the future.[57]

In the model of judicial supremacy, judicial decisions generate obligations for other institutions which are not derived from concrete cases, but from abstract and general considerations imposing meaning on constitutional clauses. This extrinsic element of judicial supremacy expresses the unique position of courts in interpreting the constitution.

This model raises problems in terms of the capacity of courts to determine constitutional meaning *vis-à-vis* other agents. Hence, the distinction does not operate as an argument against *stare decisis* or other principles that regulate internal relations between different courts, which are in need of these sorts of hierarchical elements for the sake of settlement and uniformity in the application of law in concrete cases. What is problematic, instead, is the extension of this hierarchical relation to non-judicial domains. The judicial case-by-case application of law would not be *atomised*, as it were, by the rejection of judicial supremacy. Such rejection is compatible with the nomophilactic function of higher courts of securing uniformity of interpretation of law *amongst courts*,

[57] Similarly, Whittington 2007, 7.

as well as with an institutional redefinition in terms of who is to be in charge of providing definite normative settlement (Kramer 2004a, 253).

This conception shares elements of Waldron's definitions of strong judicial review and judicial supremacy, but it also differs from them to some extent. In his view, in systems of strong judicial review, courts have the authority to decline to apply a statute in particular cases, or to modify its effects, or to declare its inapplicability (a). An even stronger form of judicial review "would empower the courts to actually strike a piece of legislation out of the statute book altogether" (b) (2006, 1354).

For Waldron, the distinction between weak and strong judicial review is, however, separate from the question of judicial supremacy. The latter he understands to be a condition in which courts settle important questions for the whole political system (c), where those settlements are treated as absolutely binding on all other actors (d), and where courts defer neither to the positions taken on these matters in other branches nor to those taken by themselves in the past (e) (2006, 1354).

However, Waldron's distinction between the two categories seems unnecessary. In fact, because strong judicial review is implied by judicial supremacy, the latter emerges as the appropriate target to argue against. First, (b), (c), (d) and (e) imply (a). Also, (b) requires the sort of authority that (c), (d) and (e) grant to courts, as striking down a piece of legislation entails an exercise of authority by a court with enough power to bind other agents of the political system (otherwise, these other agents would be in a position to continue applying the statute in spite of the opinion of the court). This is why, as I stated in the introduction, I prefer to conceive of judicial supremacy as the view that courts can resolve any problem that they are confronted with, and that there is no conclusively solved constitutional problem until a court has settled it. This conception applies to both theoretical accounts and actual constitutional practices.

Someone could raise the objection that my analysis conflates the determination of meaning with the application of that meaning — it would thus mix up interpretation and construction. In fact, it has been argued that the distinction is necessary to mark a difference in two different stages of legal reasoning (Solum 2011; Dickson 2014; Barnett 2011), so in order to dispel this objection, I will stop for a second and clarify some things about legal reasoning, interpretation, and construction.

By legal reasoning I mean three distinct things that represent different moments, i.e., the process of establishing sources of law, determining their content, and applying that content to particular cases (Dickson 2014). Interpretation is present in the entire *iter*

from the determination of the sources of law to their application (Schauer 1993, 41), and each of these moments is an interpretive moment. Due to its dualistic nature — its both backward-looking conserving aspect and its forward-looking creative one — interpretation has a role to play in legal reasoning in the sense of establishing the existent content of the law on a given issue, and in the sense of reasoning from the established content of the law to the decision which a court should reach in a case involving that issue that comes before it (Dickson 2014).

Solum and Barnett, for example, make a sharp distinction between interpretation and construction, and reduce interpretation to the determination of the linguistic content of the law. After that, – after interpretation- these authors claim, the legal effect is a matter of construction (Solum 2011, 102; Barnett 2011, 66). But they are wrong Granting the argument would imply missing the normative value that every interpretive endeavour has, as if the meaning of a provision – or for that matter, of any text – was something which pre-exists independently from the interpreter's own valuations and intentions. Judicial interpretations are not made for the sake of pure linguistic determination, especially when they are made in the context of reviewing acts of other branches of government, for courts expect that the meaning they give to constitutional provisions will limit the scope of action of the legislature and /or the executive, who in turn expect to follow the meaning provided by courts.

Moreover, even if one distinguished interpretation and construction, and accepted that interpretation is value-neutral or only "thinly normative" (Solum 2011, 104), and that the correctness of an interpretation does not depend on our normative theories about how the law *should* be, the distinction would still not affect my argument about judicial supremacy. This unless the distinction is so sharp as to render the determination of linguistic meaning irrelevant to construction. But judicial supremacy speaks against this because, as I have defined it, it implies the obligation on other actors to follow the courts as authorities on the meaning of the constitution. In a world of judicial supremacy, the determinations of meaning made by courts are uttered with the intention that others (do not) do something; they limit the scope of permissible decisions of other actors and their competence to decide, for judicial interpretations are made in a context in which the court's authority as constitutional interpreter is final.

This, however, does not explain why courts are held in such high regard. Perhaps the attention on the judiciary as the final repository of constitutional interpretation can be explained because the day-to-day business of courts of applying the law is always a matter

of interpretation of norms of different sort, so it seems natural that the courtroom is the ideal place to also interpret the constitution (Harel & Kahana 2010, 258; Harel 2014, 157). It could be also because constitutional interpretation presupposes the existence of second-order reasons and courts are better at maintaining the respect for these kinds of justifications.[58] Or maybe because judges have a special capacity to engage in moral discourse, or simply because others are not good at it.[59] According to these claims, the work of a judge does not have to do with the imposition of her own political morality or philosophical understanding of what would be the best solution to a dispute from a pure moral or political point of view, but with the best *reading* of a legal document. Legal theorists provide arguments of the class we have seen before precisely to avoid personal preferences dominating the reasoning of those in charge of settling a conflict. Unfortunately, we are still left with the additional problem of finding reasons to choose one approach or another. Why is it better or more suited to opt for any of the methods described above? Is there any hierarchy of arguments? Does the (say) doctrinal argument have any special quality over the structuralist argument?

There are reasons for choosing any of those methods, but they are hardly strictly judicial in nature. No justification of a judicial nature can be provided for choosing between an originalist, or responsive or doctrinal, or pragmatist, or purposive approach, etc., other than the judge's own preference, because, as Kelsen recognised, there is no universal rule pre-ordaining the manner in which the constitution should be interpreted:

> From a point of view directed at positive law, there is no criterion by which one possibility within the frame is preferable to another. There is simply no method (that can be characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the only "correct" one – provided, of course that several interpretations are available (2005, 352)

This is at the core of the problem here discussed, because choosing among these different possible interpretations when the constitution is the norm under examination is tantamount to deciding how to distribute political power (Sinnot-Armstrong and Brison 1993, 3). Different interpretations, for instance, of the right to life, of the meaning of political equality, of affirmative action, of the role of the state in the economy and of a number of other controversial issues mirror not only legal conceptions, but moral and political ones as well.

[58] This possibility is suggested by Schauer 1993, 32 and Bellamy 2007, 28.
[59] This is considered, though not embraced, by Waldron in 2009a and 2009b and 2011.

Consequently, the reasons for opting between constitutional approaches are not strictly *judicial in character*. Instead, and to various degrees, those arguments can operate as covers for philosophical, moral or political preferences of the judges and this can happen in different levels or using different kinds of subterfuges.[60] From this it follows that the alleged judicial nature of the methods of interpretation is no longer a reason to support their final position as constitutional interpreters. We are thus left with a quandary: if constitutional interpretation ultimately appeals to reasons which are not exclusively of a judicial kind, why shouldn't other organs of the state interpret the constitution with final authority when the nature of interpretation is part of the domain of politics and morality as well as part of the domain of law? My preliminary conclusion is that there are no sufficient reasons to support the exclusivity, let alone the superiority of judges in constitutional interpretation.

The legal theorists and legal systems I discuss have not embraced this view. Indeed, many books about constitutional law, for example, in the American tradition, are not about what the constitution itself means, but about the "different and competing things that the Supreme Court has said about the Constitution over more than two hundred years of adjudication" (Barber & Fleming 2007, 4; Tocqueville 2003, 315). In the same vein, Hunter writes that "interpretation of law is fundamental to the democratic system and the Rule of Law (…)", that "the interpretation of the law falls within the function of the judiciary" and that "the primary role of the judiciary is to interpret the law by utilising many tools available" (2005, 79). Also Bobbit straightforwardly names judges as "the artists of our field" (1982, 94). Tate and Torbjörn have found that judges have taken for themselves prerogatives which have typically been reserved to elected representatives in a large number of countries: among others, Australia, France, Germany, Malta and Russia (1995). In Italy, Ferrajoli has argued that interpretative decisions, those which determine the meaning of the laws and the constitution belong to the sphere of the judiciary (2006, 96) and Ran Hirschl also claims – without endorsing such view – that "an adversarial American-Style rights discourse has becomes a dominant form of political discourse in [Canada, New Zealand, South Africa and Israel] ... [which] has been accompanied and reinforced by an almost unequivocal endorsement of the notion of constitutionalism and

[60] For a description of the different levels in which judges engage in subterfuge to achieve goals, see Goldsworthy 2011, 309-310. Additionaly, the literature on originalism in the United States has questioned if this approach to the text of the constitution is a principled method or a masquerade for conservatism (Whittington 2010; Fallon, 2010). Some literature on *Bush v. Gore* is in the same vein, for example Balkin 2001. In the UK, see Griffiths' classic criticism to what he calls "the myth of judicial neutrality" (1977)

judicial review by scholars, jurists, and activists alike" (Hirschl 2004, 1). Also, constitutions like those in force in Chile, Colombia, and Spain grant their Constitutional Courts great powers to decide what the constitution means. According to Chilean constitutional charter and the law regulating the Constitutional Court, bills on subject-matters declared to be "organic"or "interpretive"of the constitution are to be sent automatically to the Constitutional Court for review (Couso 2004, 72-73). Article 241 of the Colombian Constitutional refers to the Constitutional Court as the guardian of the integrity and supremacy of the Charter and article 1 of the Spanish law regulating the Constitutional Court refers to this tribunal as the "supreme interpreter of the Constitution". Moreover, recent publications by normative legal and political theorists on judicial review and the nature of constitutionalism evince this tendency towards a judicialisation of politics.[61]

By limiting their focus to the judiciary, these accounts and regulations implicitly neglect other arenas where constitutional meaning could be shaped, contributing to an impoverished image of majorities and legislatures (Waldron 1999b).

This idealised picture of the judiciary and the discredited image of other fora is also the result of the paradigmatic understanding legal theorists hold of their discipline. Jurists work with the law, and they think of the law as a dogma, a tool with which they can solve cases, but not something they are entitled to change or modify. There is a general understanding that an interpreter, especially a judge, who reads a norm and changes its meaning under the pretext of interpreting, is transgressing the boundaries of her profession (Hodder-Williams 1996, 124). In that sense, if the law of a community prescribes that judges have the final authority of determining constitutional meaning, then no discussion of the legitimacy of this practice can be raised. Legitimacy, in that sense, is not really a problem at all for judges, who are more concerned with the search for methods to find constitutional meaning than with criticising the institutional structure in which they are placed. Jen Rubenfeld sums up this traditional view: "never mind legitimacy; leave that to politicians and political theorists. All a constitutional judge needs to know is how to interpret the law" (1998, 205).

[61] See, for example, Waldron 1999, and Hodder-Williams 1996, 38-44; Macedo 1999, 6; Bellamy 2011; Bellamy & Parau 2013, 256.

3. Explicit Accounts

Section 2 suggested that the view that identifies constitutional interpretation with judicial interpretation is sustained implicitly; that judge-made-law and the juristocrat regime resulting from it are taken as given, and that they remain uncriticised insofar as the constitutional order is valid, validity measured by the legal system's own standards. All jurists – and judges – can do according to this traditional view, is to limit the scope of interpretation by designing constitutional approaches which limit judges to justify their decisions on legal and not subjective basis — to simply read and apply the constitution without modifying it.

However, this conceals the fact that when constitutional *interpretation* is performed by courts in a context of judicial supremacy, its outputs are not different from constitutional *decisions*, and therefore, from the constitution itself

Whoever studies constitutional interpretation cannot avoid asking whether there is some specificity or feature that distinguishes it from other objects of forms of legal interpretation. In that vein, it has been claimed that, whichever theory of interpretation one subscribes to "constitutional interpretation is a species of the genus 'legal interpretation'" (Troper 2006, 35). The accounts described in section 2 mirror this understanding. However, when it comes to constitutional interpretation, its most distinctive feature lies in the nature of what it produces, and what it produces is the constitution itself. In short, there is no such thing as a constitution which is different from its interpretation.

Interpretation in constitutional law is not just only a cognitive activity, that is to say. That is, interpretation is not solely a function of knowledge. Legal systems empower certain authorities to produce interpretations of a text, and these authorities become its "authentic" interpreters and therefore the text acquires no meaning of its own prior to the interpretation. We could then say that interpreters in constitutional law exercise an act of the will among several meanings or within a framework that have been discovered by an act of knowledge (Troper 2006, 36). Hence, the ambiguity and vagueness with which constitutions are written put great power in the hands of their interpreters when they are treated as final. Indeed, this is why Kelsen was a critic of preambles and vague constitutional provisions which left too much room to those in charge of interpreting them. This is why he recommended drafters of constitutions not to draw the constitutional standards that tribunals would apply in the future in too general terms such as "freedom", "equality", "justice", etc., as there might be a risk that power transfers – not contemplated

by the constitution and politically undesirable – to external bodies which could be the expression of political forces substantially different from those represented in Parliament (2015; Troper 2006, 36). So Kelsen, the founder of the continental-European model of judicial review was also concerned with the political consequences of giving the faculty of interpreting the constitution to other bodies different from Parliament.

Hence, a necessary corollary for this section is that the text of the constitution does not constitute a norm by itself. Constitutional provisions acquire normative force once they have been given content — once they *mean* something. A constitutional norm is the interpretation of its text. In that sense, the meaning given to the constitution *is* the constitution.

Now, is there a necessary connexion between this corollary and the institutional role assigned to judges as final interpreters of the constitution? From a strictly legal perspective, the answer varies depending on the country one focuses on. For example, in the United Kingdom, the idea of judicial supremacy is not as pressing as it is in countries like the United States, France, Spain or Italy, whose constitutional practices give courts a prominent role as final interpreters.[62]

From a political perspective, the authority of judges to interpret the constitution having the final word raises questions regarding the legitimacy of their authority to do so. Hence, in what follows I will deal with two accounts which explicitly argue for a privileged role of judges in the interpretation of the constitution. I will do so considering instrumental and normative justifications.

As a representative of the instrumental justification, I deal with Ronald Dworkin's account because it expressly considers democratic and majoritarian arguments against the supremacy of courts. [63] Then, more extensively, I address Alon Harel's normative defence of the privileged role of judges in interpreting the constitution as it is probably the most novel view in defence of the interpretive privileges of judges. I reject the arguments made by both scholars and finish the chapter with conclusions.

3.1. Dworkin's instrumental justification

Dworkin argues that judges must develop a theory of law that allows them to identify rules, principles and policies, and apply them in ways whose standards show the

[62] For an outline of the positions on the judicialisation of politics provoked by the enactment of the Human Rights Act in the United Kingdom, see Bellamy 2011.
[63] Likewise, Towsend Kronman 1985, 1576; Bickel 1986, 33; Raz 2009, 364.

legal practice of a community in its best light. Legal practices are "chain enterprises", where interpretation is embedded in an institutional history of "innumerable decisions, structures, conventions and practices" (1982, 193; Fish 1982, 202).

Why *judges*? What makes courts the *forum of principle* (Dworkin, 1981), and, thus, the ideal arena of interpretation of law? Can't non-judicial institutions meet the requirements of law, such as integrity, and interpret the constitution themselves on principled grounds? One way of assessing these questions is by examining Dworkin's depiction of what he calls *the majoritarian premise* and its rejection through a contrast with his own view, the *constitutional conception of democracy*.

I do not claim that the only way that Dworkin champions courts is by rejecting the majoritarian premise, or that this is the most salient of these justifications or, even, that instrumentalist strategies are the only ones available to him. Rather, I want to bracket, as it were, Dworkin's discussion against the majoritarian premise in order to provide an illustration of the sort of reasoning employed when jurists debate about which institutions are fit for respecting constitutional limits. The tendency is to reject majoritarian institutions, assuming that outcome-based reasons are available to judges, but not so much to majorities, and Dworkin's contrast between the *majoritarian premise* and the *constitutional conception of democracy* is pervaded by these assumptions.

Dworkin's statement of the *majoritarian premise* is the following:

> [The majoritarian premise] is a thesis about the fair outcomes of a political process: it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors. The premise supposes … that it is *always* unfair when a political majority is not allowed to have its way, so even when there are strong enough countervailing reasons to justify this, the unfairness remains (1996, 16-17).

Against this, Dworkin defends an instrumentalist account – the *constitutional conception of democracy*. This account

> takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, compositions, and practices treat all members of the community, as individuals, with equal concern and respect (1996, 17).

Accordingly, democracy is government subject to conditions of equal status and concern for all citizens, so when majoritarian institutions respect these constraints, individuals have good reasons to accept and follow their verdicts. However, instrumentally, when these institutions are defective, or when the democratic conditions

are not met, "there can be no objection, in the name of democracy, to other procedures that protect and respect them better" (1996, 17).

Dworkin, however, is not completely fair in his description of the *majoritarian premise* and its contrast with the *constitutional conception of democracy*. Both the depiction and the comparison are overly narrow. The *majoritarian premise* leaves out accounts which not only reject countermajoritarian checks, but also and equally embrace constitutionalism. That is, placing majorities at the top of the political and legal system does not imply undermining or not embracing constitutionalism. This is, however, what the majoritarian premise entails when Dworkin says that the this thesis champions the view that it is *always* unfair when a majority is not allowed to have its way, even when there are enough objections against it. This depiction is misleading in suggesting that majoritarian democratic theories *must* claim that any deviation from the will of the people is unfair or involves a moral cost of some kind (Bassham 2014, 1267) and, in fact, Dworkin does not quote any scholar who would embrace this populist version of the majoritarian premise.

The contrast proposed by Dworkin is also a false one. There is no reason to think that we must choose between a purely statistical conception of democracy, such as the one entailed by the majoritarian premise, or a communal one, such as the *constitutional conception of democracy* (Bassham 2014, 1267).

Dworkin's way of framing the discussion is, I believe, symptomatic of a trend in constitutional theory that distrusts majoritarian institutions on the basis of the results that they are likely to produce and on how such results would jeopardise constitutional precommitments,[64] in spite of the fact that instrumentalist strategies may also pull in the opposite direction. These sorts of reasons are only a part of the full justification for institutions and principles, and do not themselves establish decisive advantages in favour of any of them.[65]

One may object that Dworkin also claims that "[d]emocracy does not insist on judges having the last word, but it does not insist that they must not have it" (1996, 7). His view seems compatible with arrangements that give the final word to non-judicial institutions. This interpretation is at odds, however, with Dworkin's adamant defence of the courtroom as the forum of principle and of majorities as the place for policies and

[64] For example, Hamilton 1948; Garzón Valdes 1993; Jones 1994; Dworkin 1996; Bellamy 2007, 92-107 (although without embracing these views); Ferrajoli 2008.
[65] Waldron 2006, 1372, 1379-86; 2015, 444; Bellamy 2007, 27, 164-5; Mac Amhlaigh 2016, 180.

collective objectives, not only in the sense that judges ought not be policy-makers, but also in the sense that majorities are not as fit for respecting principles (1978, 82; 1981, 517-18). It is neither compatible with the static features of integrity in legislation (2003, 373), nor with his view of the court as the capital of law's empire, with judges as its princes (1990, 407). Finally, it is not compatible with his neglect of suggesting – let alone elaborating – other institutional arrangements compatible with the moral reading that does not give particular interpretive powers to the judiciary.

So, the question that now becomes relevant to our analysis of the instrumental justification of judicial supremacy is: can the conditions required by the *constitutional conception of democracy* be met by some institutional arrangement that does not include judicial supremacy as part of its framework? If what matters is that these conditions are met, and courts are instrumental in achieving these ends – that is, their interpretive privileges are justified insofar as they ensure respect for constitutional conditions — then it follows that there is conceptual room for an institutional framework without judicial supremacy as long as it respects the constitutional conditions of democracy. In consequence, when faced with the question of why majoritarian institutions ought to be distrusted regarding the protection of the constitutional conditions of democracy, Dworkin's is not a complete answer. By depicting the *majoritarian premise* too narrowly in the context of the contraposition of this premise to the *constitutional conception of democracy*, Dworkin overlooks one side of the reasons that could be given to justify majoritarian political procedures and institutions (1996, 34). This leads him to omit plausible theories of democracy that put control over policy-making in the hands of majorities while respecting constitutionalism without relying on a Herculean judiciary.

Normative considerations are, thus, essential to settle who is to determine the meaning of a constitution, that is to say, accounts that do not emphasise outcomes over process-related reasons (Waldron 2015, 444). As I indicated in the introduction, I will focus on Harel's normative account.

3.2. Harel's normative justification

Alon Harel has elaborated a normative defence of the privileged role of the judiciary in constitutional interpretation (2014, 191, 199). Under his proposal, "judicial review is designed to provide individuals with a right to a hearing or to raise a grievance".

"More particularly", he adds,

> judicial review is indispensable because it grants individuals opportunities to challenge decisions that impinge (or may have impinged) upon their rights, to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation.

The justification of judicial review is based on

> procedural features that are essential characteristics of judicial institutions per se … [,] in the fundamental duty of the state to consult its citizens on matters of rights, and to consult those who complain (justifiably or unjustifiably) that their rights have been violated (2014, 192).

There is a standoff from instrumentalist strategies, given that, for Harel, the right to a hearing is a constitutive element of the adjudicative process. Adjudication is, in reality, a realisation or manifestation of this right. The relationship between the two categories is intrinsic, not contingent or instrumental.

Also important for Harel is the relationship between his idea of rights and the value of their entrenchment. According to him, a society in which the legislature honours rights but in which it is not constitutionally commanded to do so is inferior to one in which the legislature is commanded to do so, because in a society of the latter kind "individuals do not live at the mercy of the legislature; their rights do not depend on the legislature's judgements (concerning the public good) or inclinations" (2014, 148).

Some comments are in order. My first comment starts with a question regarding the extension of the effects of the right to a hearing: are courts good at deliberating about issues of rights? Harel would supposedly answer affirmatively, but precision is called for. To restate the question: are courts good at deliberating about matters of rights in concrete cases *and* in the name of the whole society? In my terminology: is this justification of judicial review expandable to judicial supremacy?

Restating the question is imperative, since there is a difference between addressing individual grievances and hearing those affected in a concrete case on the one hand, and checking the constitutionality of acts of other branches of the state with the effects of *erga omnes* on the other. This difference is not fully accounted for by Harel. His defence of the right to a hearing is effective as an argument for judicial review, but it is insufficient to ground judicial supremacy. The fact that judicial decisions are individualised represents both a value and a limitation of the judicial process. A value in the sense of providing individuals with a forum where they can defend their understanding of what constitutional rights mean and how they ought to be applied. A limitation in the sense that judicial reasoning is made in a limited context, including a non-representative sample of the population, and is constrained by a sort of second-order reasoning that they

employ to justify their decisions.[66] This prevents them from fully engaging with the moral and political issues brought before them, issues of which it is not obvious that they are well-suited to decide in the first place (Waldron 2007; 2009b; 2009c; 2011).

Even though Harel is adamant that he advocates a constrained model of judicial review (2014, 193), he argues that considerations of predictability, coordination, certainty, etc., provide "independent reasons for granting courts' decisions a more extensive normative application" (2014, 215). The right to a hearing, then, does not only justifies the reconsideration of a decision through an individualised procedure, but also grounds extending the effects of such decisions to other areas and fora (2014, 216). This coincides with my depiction of judicial supremacy.

Harel's reasons for grounding the preceding claims depart, however, from the normative path that he claims to be following. If our empirical knowledge could show that courts always resolve disputes in a principled fashion, following the law and guided strictly by right-based considerations, his trust in their capacity to bring about predictability, settlement and coordination would be justified, as courts would be, in that ideal world, certainly distinct in that regard. In reality, however, things are slightly more complicated. Politics and personal biases play important roles in the judicial decision-making process, especially at the constitutional level. It is well established that courts sometimes decide in a principled manner, sometimes attitudinally and sometimes politically (Segal & Spaeth 2002; Goldsworthy 2011).

Secondly, in the context of discussing the benefits of entrenching binding constitutional directives (2014, 151-152), Harel relies on republican theory, claiming that the special role given to judges is necessary because it is a way of preventing individuals from living at the mercy of the legislature,

> not merely … because of potentially oppressive decisions made by the majority but because even when the majority protects rights vigorously, the decision to protect these rights is discretionary. It is based on the judgements or preferences of legislatures and, consequently, it does not acknowledge the binding nature of the state's rights-based duties (2014, 152).

However, Harel mistakenly equates discretion with arbitrariness; the former does not entail the latter. In fact, the distinction between the two concepts is at the very core of the conception of freedom that Harel claims to endorse. Discretionary power

[66] More on this in chapter IV.

might be delegated to public authorities, but this does not entail that our freedom is immediately reduced because of this single fact (Lovett 2014, 11-12).

The cogency of the republican idea of freedom depends to a great extent on the possibility of offering separate accounts for arbitrary and discretionary power (Larmore 2001, 239; Lovett 2014, 11-12). Every decision is discretionary and reflects one choice amongst an array of diverse options, but this does not make such decisions necessarily arbitrary. Procedurally speaking, a decision is arbitrary "to the extent that it is not reliably constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned" (Lovett 2014, 11). Substantively, arbitrary power is equivalent to "interference that is uncontrolled by the person on the receiving end" (Pettit 2012, 58). If, as Harel emphatically defends, the privileged status of courts as interpreters hinges on their obligation to provide reasons in the context of a deliberative hearing, then he does not deny that courts indeed act with discretion. What he really values is that courts are not arbitrary, that is, that they decide as deliberative fora where grievances are heard and reasons are provided for each decision. He fails to consider that legislatures also offer reasons for their choices, that they are also constrained by procedural rules, and controlled to an extent greater than courts are, for they are subject to evaluation by the electorate. They are discretionary, but not necessarily arbitrary. The latter is conducive to domination *per se*, while the former is not.

There is an additional reason for rejecting Harel's argument, also related to his use of republican freedom. He claims that democratic procedures are often detrimental to freedom because their decision to protect rights does not acknowledge the state's rights-based duties. This, however, cannot be squared with what he calls the *limitation hypothesis*, i.e., that legislatures are morally or politically constrained (2014, 169). Put in republican terms, the limitation hypothesis entails a removal of democratic power to decide in certain ways about certain issues. If majorities break the limits imposed on them, the reasons for justifying their decisions become unavailable to them and are, thus, rendered arbitrary. But this does not mean that, within the interpretive possibilities given by morality, politics, and law, there is no discretion. Again, the first case is detrimental to freedom, while the latter is not.

Finally, even if the idea that societies bound by entrenched constitutional directives are superior to societies where such entrenchment does not exist is theoretically attractive, it faces empirical drawbacks. The fact that a charter mentions fundamental rights is no guarantee of a country's commitment to respect them (Loewenstein 2000,

151-56). Unfortunately, the *framers* of a constitution may include everything they desire in a charter, which raises scepticism about the contention that entrenching rights is proof of superiority in terms of republican freedom when compared to other polities where this entrenchment does not exist. Moreover, Harel does not engage with objections against the alleged benefits of living in a "rights culture" (Bellamy 2007, 49). In fact, an opposite case has been made by Hirschl (2004, 16), who has argued that processes of constitutionalisation that included the creation and entrenchment of bills of rights facilitated the recognition and protection of a negative or noninterventionist conception of rights via judicial review "at the expense of a more 'positive', collectivist conception of rights" (2004, 102). One could still claim that freedom has been recognised and protected in these cases, but this argument would have to limit itself to freedom as absence of interference. And this is not the kind of freedom that Harel relies on.

4. Conclusion

I have shed light on a problem where jurisprudence overlaps with political theory, namely, constitutional interpretation. "Implicit" accounts do not question the judicial nature of methods of constitutional interpretation, implicitly omitting other ways of determining constitutional meaning, but, above all, failing to consider other fora where the constitution could be interpreted with final authority. Thus, they leave unanswered the question of who should be the final interpreter of the constitution by limiting methods of interpretation to judicial archetypes. If the interpretation of the constitution is limited to those arguments, it follows that it is the judiciary the organ that ought to interpret the constitution with final effects. My strategy here has been to question this attitude by denying the premise that interpreting the constitution is exclusively a judicial matter.

Moreover, as we have seen, the techniques by which constitutional courts decide are chosen and applied with no reference to any criterion that regulates their selection, so it is virtually impossible to know what a constitutional court will decide without having in mind non-legal factors that influence the decision and play a role in the process of interpreting and deciding what the constitution means. I grant that deliberation and the quality of constitutional debates in representative forums have not received as much doctrinal attention as its judicial counterpart has, but such tendency needs to be reversed by scholars, not augmented by denying these fora any capacity to engage in constitutional dialogues in a principled fashion, thus hindering their possibilities to decide what the constitution means by themselves.

A more active dialogue between political and legal theory is required for the

theory of the constitution to merge legal and political insights. Doing so would lead to reconsider matters of legitimacy, participation and political inclusion, which in the case of constitutional interpretation have been overshadowed by those legal theorists who reduce the scope of arguments available to judicial approaches and to instrumental justifications. In the words of Richard Bellamy, "the constitutional role of democratic politics has been largely ignored or dismissed in the recent legal literature. The emphasis is always on constraining or regulating political power" (2007, 141). In the same vein, Tushnet writes that "constitutionalism is all about limiting contemporary majorities" (2009, x)

In turn, the "explicit" accounts I have considered fail to provide sound arguments on their own grounds. By addressing Dworkin's justification of judicial review, I have questioned the instrumental benefits he sees in giving judges higher interpretative privileges. One can conclude from this that other sorts of reasons are necessary to justify any political practice, as instrumental approaches will always have to face the consequences of their own arguments. That is to say, the defence of judges or any other institution, based on the outcomes they produce, will weaken in the minute those institutions make "bad" decisions – procedural and normative reasons are necessary to provide a full account of the legitimacy of an institutional framework that gives authority to any institution.

This is why I have considered Harel's defence of a privileged judiciary in terms of its interpretive competences. His strategy is well oriented as he strives to provide a normative account of his institutional design. He fails, however, because the different arguments and theoretical assumptions underpinning his account are, either not properly justified, as his understanding of rights and the alleged benefits of their entrenchment shows, or not properly applied to the concrete case of judicial review of legislation, as exhibited by the (miss)application of republican liberty to analyse legislatures and the judiciary. In conclusion, neither the instrumental nor the normative explicit accounts supporting a strong judiciary that I have considered here justify that support.

This chapter is a normative and political assessment and criticism of judicial supremacy. Yet, this is not the only way that the supremacy of courts can be questioned. In that vein, the next chapter criticises the interpretive privileges of judges on conceptual and institutional grounds by asking what is the relationship of constitutional interpretation and a given institutional instantiation of that concept.

CHAPTER IV

CONSTITUTIONAL INTERPRETATION AND INSTITUTIONAL PERSPECTIVES: A DELIBERATIVE PROPOSAL

1. Introduction

The previous chapter criticised the notion of judicial supremacy, an idea which lends support to the allocation of the final word in constitutional interpretation in the courtroom. The criticism was made on normative and political terms. This chapter supplements that criticism by tackling the problem of supremacy from a conceptual and institutional stance. In doing so, it first rejects the idea that constitutional interpretation is, conceptually, just a matter for the courts. Conversely, after an examination of the features of constitutional interpretation, it concludes that the theorisation and institutionalisation of the agents in charge or providing meaning to a constitution, should be able to incorporate as many individuals potentially affected by the authoritative interpretation at hand. Final constitutional interpreters would look more like deliberative democratic institutions than courtrooms.

More in detail, this chapter suggests perspectives from which legal interpretation in general, and constitutional interpretation in particular, should be theorised and institutionalised. It re-evaluates the centrality the judiciary has with respect to these issues and, in matters of constitutional interpretation, it argues for an alternative based on deliberative democracy.

No institutional consequences are entailed by the concept of legal interpretation. This, which may strike readers as a rather obvious point, needs elaboration, for several legal scholars choose the judges' perspective as the viewpoint from which they reflect about interpretation. Instead, I submit that the institutional paradigm from which interpretation in law should be theorised ought to vary in accordance with criteria external to the idea of interpretation itself, namely, the nature and normative strength of legal and constitutional sources and the capacity of the interpreter to include and consider every possible affected person when interpretations are authoritatively imposed on individuals.

The application of these criteria places the discussion in the domains of democratic theory. Agents holding the final word in constitutional interpretation must then be inclusive, must keep their activity within the limits of an interpretive practice, and their procedures must be sensitive to the societal nature of the context against which they

interpret. An analysis of contemporary democratic theories shows that those conditions are better met in a deliberative democracy.

I proceed as follows. Section 2 discusses Dworkin as the exemplar of someone who methodologically adopts the viewpoint of a judge as the internal perspective from which the interpretive practice of law should be theorised. His is not the only account adopting this viewpoint, but it is the most sophisticated one justifying such adoption. I do this to describe the sort of position I argue against.

The remainder of the chapter builds alternative institutional perspectives for legal and constitutional interpretation. Section 3 surveys different ways in which scholars use the notion of interpretation in law and concludes that nothing at this level of analysis entails a necessary institutional viewpoint from which one may theorise legal interpretation.

Sections 4 and 5 claim that the choice for institutional paradigms from which one can think about interpretation in law must vary according to criteria that operate heuristically: the hierarchy of the source of law being interpreted, and the number of individuals potentially affected by the interpretive standards being applied in the adoption of a decision. These criteria do not entail binary institutional choices, i.e., courts/no-courts. Neither they imply that judges should abstain from interpreting sources of law that, like constitutions and statutes, carry important normative strength. My point is that to the extent judges must decide cases applying those higher sources of law, the effects of their decisions should be ideally limited to the parties at the case *sub lite*.

By relying on Marmor's notion of *conversational context*, section 4 argues that the combination of the aforementioned standards increasingly justifies a judicial perspective when the interpreted sources carry less normative strength and/or when decisions affect a limited number of individuals. In the opposite case, when legal standards carry higher force, most prominently, when the source being interpreted is the constitution, and when the individuals subjected to authoritative interpretations are not parties at a specific trial, judicial perspectives become less justified. In such events, agents and institutions whose *raison d'être* entail incorporating as many individuals and groups as possible in collective decision-making processes, appear as better suited authoritative constitutional interpreters. The choice for institutional paradigms for constitutional interpretation is, then, a matter that must be dealt with by engaging with democratic theory.

Section 5 analyses market, pluralist, agonist and deliberative democratic theories, and asks which of them squares better with the elements of interpretation at the constitutional level. To do this, I abstract three elements of constitutional interpretation derived from the preceding sections: inclusion, interpretive justification and context. I show that, while the first three competing options meet some of those conditions, deliberative democracy can meet all three. This is due to the importance deliberative democrats give to inclusion, argument exchange, preference transformation and to the public justification of collective decisions. Deliberation keeps the process within the limits of an interpretive practice, avoiding its more decisional aspects. [67]

Section 6 concludes that interpretation in law relates to institutional considerations in a more flexible, non-binary way, than a single paradigm can account for. In my proposal, the model from which one should think about interpretation varies depending on the structure of legal sources, their normative strength and the features of institutions in terms of their capacity to include every possible affected by their decisions. These standards contribute to thicken the constitution's conversational context. For all these reasons, deliberative democracy appears as the most suited option to theorise and institutionalise constitutional interpretation.

2. The exemplar: Dworkin on Jurisprudence and Interpretation

Scholars often associate legal interpretation in general, and constitutional interpretation in particular, with the judiciary as the institutional instantiation of that practice.[68] Among these scholars, Dworkin's account is the most sophisticated and its examination serves to describe the sort of positions I argue against. I thus take him as the exemplar of someone making an association that is often made implicitly and explicitly.

Dworkin champions a judicial perspective in legal interpretation on grounds that appeal to both the nature of jurisprudence and legal interpretation. In his view, "legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally" (1982, 179; 1986, 50, 87).[69] With this he meant not only to provide scholars with tools to grasp the meaning of norms, clauses or rules but also to offer an answer to the question of what law is (Marmor 1992, 3; S. Shapiro 2007, 22).

[67] Henceforth, I use 'decisional' in a Schmittian sense, i.e., as unconstrained by rules/norms.
[68] For example, Fallon Jr. 1987; Bakan 1989; Post 1990; Schauer 2004; Ferreres Comella 2013, 210. For a full treatment of this sort of accounts, see chapter III.
[69] See also, Christie 1987, 159; Raz 2009, 47-48; Simmonds 2013, 209.

Dworkin developed his theory as an alternative to "semantic theories of law" (1986, 31-44; Raz 2009, 47-48), of which, Hart's positivism was the most prominent example (1978, 22). They debated various themes, including: the types of standards that constitute the law (1978, 22, 44-47; Carrió 1979, 235; 1980, 348-349), whether jurisprudence is an explanatory or a normative enterprise (Simmonds 2013, 210), and, the perspective from which jurisprudence is to be theorised. This chapter focuses on the last of these issues.

Dworkin insisted that legal theory should be undertaken from the internal perspective of a specific participant of the practice of law: the judge. The interpretive practice that law consists in, what law is, hinges upon what judges make of it. Legal interpretation is interpretation by judges (Mandel 1979; 61; Dworkin 1986, 14-15, 64; Levin 2002, 569).

So, why *judges*? Dworkin answers in this important passage:

> [N]o firm line divides jurisprudence from adjudication or any other aspect of legal practice … Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law (1986, 90).

This reasoning is problematic. Dworkin avows that judges' opinions exhaust both adjudication and "any other aspect of legal practice". For this to be true, however, adjudication would have to be representative of the full array of practices and institutions that constitute the law. But this is hardly the case. Put differently, even if "[a]ny judge's opinion is itself a piece of legal philosophy" it is not equally true that legal philosophy is limited to providing grounds for the judges' opinions, let alone that it should be.

The problem runs deeper, however, as Dworkin is not the only scholar adopting the judges' perspective to theorise in law. Law is often theorised as if scholars asked themselves whether their accounts explain and/or justify what judges do in practice and how they could influence the practice of law inside the courtroom (Wróbleski 1985, 245-246). Yet, it is not obvious that the perspective of the judge should determine the perspective of legal theory (Marmor 1992, 44).

This way of thinking about the problem is at odds with the usage legal scholars give to the concept of interpretation in law. That usage does not lend support to these Dworkinian stances. The following sections provide grounds for criticising these views and propose an alternative. I first survey how the notion of interpretation is used by legal

scholars (section 3), and then provide tools for choosing institutional interpretive paradigms (sections 4 and 5).

3. Interpretation in law: A Survey

This section examines how legal scholars conceptualise interpretation. It provides a framework for the assessment of an association between interpretation and some institutional perspective, such as the one exemplified by Dworkin.

An overview of the literature shows two things. First, legal scholars generally define interpretation as the imposition of meaning on an object.[70] The definition is, in turn, ambiguous between two extremes: at one pole interpretation is similar to the notion of understanding or explaining. At the other, it is close to creation or invention. Whether someone is interpreting and/or creating or explaining is determined by a structure of constraints,[71] such as literal meaning of the text, the author's intention, the genre to which the object belongs, its purpose, among others.[72] Second, no depiction of what interpretation is carries with it an institutional commitment of any sort.

Most scholars consider that the interpretive process is determined by an interplay of semantic and pragmatic factors.[73] Exceptionally, some limit interpretation to either semantics or pragmatics. Solum argues, for instance, that "interpretation is the process (or activity) that recognizes or discovers the 'linguistic meaning' or 'semantic content' of the legal text" (2010, 568), and that "[o]nce we determine that the linguistic meaning of a text is vague, interpretation has done its work" (2010, 572). For Solum, once we introduce pragmatic elements into the process of imposition of meaning, we abandon interpretation and enter the domain of "construction", that is, "the process (or activity) that translates linguistic meaning into legal effects (or 'semantic content' into 'legal' content)" (2010, 568-569).

On the other hand, Richard Fallon Jr. claims that it is pragmatics what ultimately determines meaning. He argues that in the legal context, there is frequently "no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean" (2015, 1272). Meaning is a folk concept that "depends heavily on how ordinary people

[70] Fish 1982, 211; Dascal & Wróblewski 1988, 203-204; Dworkin 1986, 52-53; Marmor 1992, 14, 32; Raz 2009, 250, 268; Guastini 2015, 46.
[71] Fish 1982, 211-212; Dworkin 1986, 52; Endicott 1994, 451; Goldsworthy 2003, 190; Guastini 2015, 47.
[72] For taxonomies of these sort of mechanisms, see Bobbit 1982; Fallon Jr. 1987; Tribe 1988b; Bakan 1989, 123-127; Post 1990; Jakab 2013.
[73] Fish 1982, 211; Dworkin 1982, 68; Wróblesky 1985, 243; Dascal & Wróblesky 1988, 210-221; Marmor 1992, 22, 154; 2014, 146-154; Barnett 2011, 66; Guastini 2015, 46-47.

use the term and would apply it in testing cases" (2015, 1255). The difference with legal meaning is that it depends on standards that are "largely internal to law" (2015, 1307).

Solum is mistaken in equating interpretation exclusively with semantics. It is true that interpretation has a semantic dimension. Individuals give meaning to objects placed in a shared net of communicative linguistic conditions without which they would likely talk past to each other. This is exemplified by cases where we listen to or read a word or expression for the first time. Our usual reaction to these situations is not to say, like Humpty Dumpty, "when I use a word … it means just what I chose it to mean". Instead, like Alice, we become puzzled by our lack of familiarity with the term and feel compelled to search for *its* meaning before we can use it in any given context.

Yet, interpretation is interpretation of something and objects are contextually situated entities. Like works of art, of literature and other textual objects, law has a contextual component, as well. Without context, without pragmatics, interpretation is reduced to pure semantics. But this would turn interpretation into the analysis of categories such as syntax, lexicology, etymology and the like. Such reduction gets us closer to understanding an object, but not close enough as to impose a meaning on it.

Fallon Jr. is wrong as well. Words are not infused with some intrinsic meaning independent of the context in which one makes use of them. Words indeed exercise on us what Wittgenstein called *psychological compulsion*. Yet, it is a mistake to think that the meaning of a word is *something* that we have in our mind "and which is, as it were, the exact picture we want to use". No, "the fact that one speaks of the *apt word* does not *show* the existence of a something that etc…" (2009, §139. Emphasis in the original). Rather, we are forced by a picture, a mental image created by a word, to think that words impose a particular application on us (2009, §140). Our tendency to think that words carry intrinsic meaning that can be discovered without the inclusion of a context in which the interpreter participates, is misguided. The contrary would imply the possibility of fully determining meaning through ostensive definitions. This possibility, however, has been successfully challenged by Wittgenstein (2009, §28, §32, §85).

I submit that interpretation is better understood as a practice of imposing meaning to an object, with flexible constraints limiting the interpreters' abilities to either explain an object or create a new one. It is both a noun and a gerund, a fuzzy and procedural entity that culminates in the decisional act of imposing a meaning on an object. Disagreements regarding what interpretation is take place within the limits of this group of elements. Moreover, the interactions between its elements constitute good reasons to

abandon positions placed at the poles of the scope within which interpretation exists as a distinct notion.

Coming back to my main question, it is fair to say that of all the considerations explored in this section, none supports the idea that there are institutional considerations intrinsic to the concept of interpretation. The idea, exemplified by Dworkin, but endorsed by other scholars, that legal interpretation should be theorised as if X agent is interpreting, must be justified by reasons external to its nature. As I said, the point is a rather obvious – though not trivial - one: any agent can interpret.

Yet, the interpretation of some objects is better justified when performed by some agents, better being measured by standards external to the idea of interpretation itself. The adoption of an institutional perspective and the concession of authority to that agent to determine what words mean in law, ought to be championed on grounds that do not appeal to the nature of interpretation as such.

What is it then the relationship between interpretation and its possible institutional manifestations in law? The next section argues that the adoption of institutional perspectives depends on the sources being interpreted and on the effects authoritative interpretations have on individuals. Contra Dworkin and others, the examination leads to the conclusion that a more visible role of non-judicial agents in legal interpretation is called for at the constitutional level.

4. Conversational context and institutions

The concept or nature of interpretation does not imply necessary institutional perspectives. Selecting the judge's as *the* internal perspective is not a conceptually necessary choice for legal theorists to adopt (Marmor 1982, 44). There are other standpoints from which we can think of interpretation in law.

I submit that the choice for institutional viewpoints for legal and constitutional interpretation hinges on the hierarchy of the source of law being interpreted, and on the number of individuals potentially affected by the interpretive standards applied in a given decision. A combination of these standards progressively justifies judicial perspectives when the sources interpreted carry less normative strength and/or when the decision affects a circumscribed number of people because they have a chance to address the court. On the other hand, to the extent that decisions carry *erga omnes* effects, judicial paradigms become progressively less justified where legal standards carry higher strength, most prominently, where the standard being interpreted is the constitution, and

where the individuals subject to authoritative interpretations are not parties at the trial. In such cases, agents whose *raison d'être* entail incorporating, either directly or representatively, as many individuals and groups as possible, appear as the most suited repositories of constitutional meaning.

This heuristic does not lead courts to refrain from interpreting the constitution and other sources that, like statutes, are placed at the highest positions of the hierarchy of law. It means that, to the extent that they decide cases based on higher sources of law, the effects of their decisions should be limited to the case at hand and to the parties at that trial.

In support, I rely on Marmor's notion of *conversational context*. Marmor says that constitutional terms are *super-polysemous* and "tend to designate different types of concerns, depending on context, background assumptions, the speaker's intention, etc." (2014, 149). The main problem with constitutions, Marmor claims, is their "*essentially thin conversational context*: constitutions do not form part of an ordinary conversation between parties sharing a great deal of background knowledge" (2014, 149). However, when the conversational context is *thicker*, when interpreters do share a great deal of background knowledge, they are better positioned to impose a meaning on an object that is coherent with the language game they are part of.

I partially depart from Marmor's contention that the conversational context of constitutions *is* thin (2014, 149). This is not necessarily the case. The conversational context of constitutions *can* be thin, and *usually* is, because their indeterminacy increases the difficulty to specify what are individuals talking about. But the problem is not that thinness in their conversational context is some intrinsic property of constitutions. It is, rather, that conversations about constitutional problems are usually framed in a relatively high level of generality, abstraction, and polysemy. This does not mean that speakers cannot be on the same page, as it were, when they discuss problems that have bearings on constitutional matters. It means that, for them to be on the same page, such context must be built upon more general, abstract considerations that all parties can identify as relevant for them. Still, and with this caveat, I believe Marmor's category to be useful.

The more the context generates relevant meaningful options, the less decisional the choice for the meaning ultimately imposed. Likewise, the further we are from context - or, what is the same, the more we interpret in the abstract - the greater the number of potentially imposed meanings, the less bound, the more decisional the interpretive practice.

Other scholars argue along similar lines. The argument is similar, for example, to Sunstein & Vermeule's capabilities approach. In their view, one should focus on "how should certain institutions, with their distinctive abilities and limitations, interpret certain texts" (2002, 2). Although I do not discuss the value of their pragmatism, I highlight normative considerations instead. Here, my choice for an institutional paradigm is primarily conceptual and normative rather than pragmatic.

I also disagree with Posner's notion of pragmatic adjudication.[74] Posner's pragmatist judge sees norms "merely as sources of information and as limited constraints on his freedom of decision" in novel cases (1996, 5). Unlike him, I take legal sources as authoritative standards judges are not authorised to disregard.[75]

Waldron avers that judges face hindrances in the resolution of moral issues because the institutional setting in which they discharge their duties requires them to address such issues in a particular legalistic way (2009a; 2009b; 2011). I am sympathetic to this position but shall not delve here into the nature of the practical reasoning judges undertake. Rather, I focus on the more external relationship between the institutional position of judges, the sources with which they resolve cases, and the audience they are likely to affect when making decisions.

As I have stated in the introduction, my proposal is not binary, i.e., judges or no-judges. Instead, I suggest that there are reasons to shift from a judicial paradigm to a different one when sources carry higher normative strength and when the number of potentially affected is higher.

To see how this works, it is useful to examine how Supreme and Constitutional Courts' reviewing procedures are often regulated. Although this varies across countries, the dynamics between legal sources, audiences, semantics, abstraction and context can be examined, generally, according to whether the system under study is a diffuse or a concentrated one, on the one hand, and on whether courts perform concrete or abstract constitutional review, on the other.

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[74] My use of the term *pragmatic* does not refer to the philosophical construct *pragmatism*, understood as an alternative to realism, idealism, transcendentalism, utilitarianism, positivism, etc. Here I use the term in the way Posner does when discussing what he calls "applied pragmatism" (1996, 1). I express this caveat to anticipate the likely objection that pragmatism, understood in the first of these two senses, is also a principled alternative.

[75] I put aside the question of who determines which social facts count as legal sources. Judges are traditionally seen as members of what Adler calls 'recognitional community' (2006, 726). That is, a certain group of people whose patterns of thought and behaviour ground the ultimate criteria of validity of a legal system. Hence, judges' mental states and patterns of behaviour also count to determine which sources bind them and which do not. This problem needs more attention, however, than the one I can offer here.

Diffuse systems are those in which constitutional challenges are made through ordinary litigation (Cappelleti 1970, 1034; Finck 1997, 126; Fernandes de Andrade 2001, 979). The US Supreme Court is the best-known example, but other countries follow analogous patterns (Schor 2008, 263). [76]

In these cases, the interpretive and reviewing process is ignited by specific individuals raising specific grievances. Context is initially determined by the facts of the case provided by the parties in their allegations and by the sources they claim that apply to the issue at hand. It is against the background of those facts and normative standards that allegations are made to convince the court that one party's story is better subsumed in the norms contained in the constitution.

Sometimes courts have competence to determine that a provision is unconstitutional in the specific context of a trial and thus ignore those sources as relevant for their decision. Consider, for example, the Chilean Constitution, whose article 20 prescribes that she who by cause of arbitrary or illegal acts or omissions suffers privation, disturbance or threat in the legitimate exercise of a number of fundamental rights, can "resort to the respective Court of Appeals, which will immediately adopt the measures that it judges necessary to re-establish the rule of law and assure due protection to the affected [person] notwithstanding other rights which he might assert before the authority or the corresponding tribunals". The reviewing process is undertaken against the background of the facts provided by parties affected by the decision. In turn, the interpretations of both the challenged provision and the constitution are performed with the intention of solving the specific case. Context is thus built by parties who rightfully expect the court to adjudicate.

I have no quarrel with this. The process determining to what extent those norms regulate the facts invoked by the parties, the adjudicative process, is one that, courts are fit for undertaking. Moreover, the individuated nature of judicial decisions matters in at least two aspects. First, in terms of legitimacy. Decisions are more acceptable when reasons are provided for them. Second, individuation gives context to the interpretive exercise that needs to be undertaken by the court. Thus, the relation between interpretation and adjudication depends upon the possibility individuals have to access the court and make *their* claims, provide *their* evidence, and expect an *individualised* decision.

[76] See, Article 138 Peruvian Constitution, Article 133 Mexican Constitution, Article 266 Guatemalan Constitution, Article 185 Salvadoran Constitution, Article 4 Colombian Constitution, Article 20 Chilean Constitution. Likewise, Canada, Australia, Ireland, South Africa (Pegoraro, 2004, 69-75).

There are systems, however, where the effects of the courts' decisions have *erga omnes* effects, that is to say, that extend beyond individual cases (Nogueira 2004).[77] The context against which these courts decide is initially provided by the parties, although the decision affects non-litigants as well. As it happens, in some systems, the very possibility for individuals to access the court hinges on the public impact its judges consider the case would have.[78]

The problems motivating specific individuals to take their cases to the court may or may not coincide, however, with concerns affecting society as a whole. In order to justify a decision not only to their initial audience – the parties – judges need to consider an additional set of affected agents to whom they need to give reasons for their decision. But, the sort of considerations they need to take into account to provide that sort of justification ought to include facts, claims, and arguments that are no longer the ones given by the parties. They are to be determined by the court, in abstraction.

What reasons are there to assume that the specific conversational context provided by the parties is the one that is relevant for every other individual or institution that had nothing to do with the trial in the first place?

Three possible answers come to mind. First, that there is nothing, or at least little, in that conversational context that may be relevant for non-litigants that would lead them to accept a given meaning. They were not parties at the trial, and, prima facie, there are no reasons for accepting the decision adopted in that specific adjudicative process, unless the outcomes derived from the decision are seen as satisfactory. However, outcome-based reasons do not justify giving courts a general competence to make decisions affecting non-litigants (Waldron 2006, 1375, 1376-1386).

A second answer is that non-litigants would find reasons to accept the court's interpretive criteria in cases where they, either directly or represented, contributed to the conversational context of the trial. Some legal systems, for instance, allow non-litigants

[77] For example, the following countries' constitutional courts: Bolivia (Article 58 of the Ley del Tribunal Constitucional), Colombia (Article 47 of the Ley Estatutaria de Administración de Justicia 1996, and article 21 of the Decreto 2067/1991), Ecuador (Article 22 of the Ley de control constitucional 1997), Peru (Article 204 of the Peruvian Constitution), Venezuela (Article 336 of the Venezuelan Constitution), Germany, Spain, among others (Fernández Rodríguez, 2002, 110-111).

[78] In principle, this is why the US Supreme Court was given the faculty to grant *writs of certiorari* (Taft 1922, 35; Sternberg 2008, 9). Litigants before the Spanish Constitutional Court also have to prove that their claims (*amparos)* may "involve a legal issue of social and economic repercussion" before the court hears the complaint (Article 49 of the Ley del Tribunal Constitucional). In practice, however, these mechanisms were introduced to reduce the courts' dockets.

to address the court when some issue of their legitimate interest is raised during the trial, for example, through interventions and submissions of briefs by *amicus curiae*.[79]

These are, however, examples of a limited extension of the capacity to be a party at a trial in circumstances where certain agents see their special interests affected or whose opinion may be relevant for these courts' decision. These exceptions do not justify extending the effects of a decision to every member of a polity, particularly to those with no knowledge of or interest in the case. In the language of social sciences, the model lacks external validity. It does not allow us to know whether "the results are generalizable to the whole population". Only a model that "maintains both internal and external validity … can speak credibly for 'we the people'" (Fishkin 2011, 251).

A third reason is that there are uncontroversial examples in other areas of law like private and administrative law, where courts' decisions affect non-litigants as well. Consider private law as an example. Cases like bankruptcy or judicially declared nullity of certain contracts may have effects on some individuals who are not parties at the case. Yet, a claim to the illegitimacy of such decisions, in the same way that I object to constitutional judicial adjudication, seems out of place. Third parties who contracted with other persons who in turn contracted with bankrupted companies or individuals, may see their contracts annulled by the court. More generally, the effects of judicial decisions in private law also have societal effects. They are public instruments that can be made effective against any person, litigant or not. So, one may ask what is so special about constitutional law.

Yet, as much as the whole society may be affected by a judicial decision in private law, non-litigants are affected within the boundaries of the particular relationship put into question in court. One can trace the effects of the decision to specific relationships between individuals who directly relate to the trial at hand. In Marmor's terminology, they are part of the same conversational context. This is not the same with constitutional law.

Things are starker in models of abstract concentrated constitutional review, i.e., models where power is conferred to a single court to determine the constitutionality of a

[79] For example, in the United States (US Supreme Court Rule 37, Argentine (Autoacordada 28/2004, Colombia (Article 13, Decree number 2067/1991; Constitutional Court C-513/1992), Brazil (Article 2.2., Act number 9868/1999; Article 103-A Federal Constitution and Article 3.2, Act number 11417/ 2006), South-Africa (Article 10 South-African Constitution; Rule 10 South-African Constitutional Court, Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003), Canada (Subrule 61(4) of the Rules of the Supreme Court).

legal source. The decisions of these courts are not binding solely upon litigants: "in so far as they apply and interpret constitutional law, they generally bind all constitutional organs, courts, and authorities" (Finck 1997, 126-127). The archetype of this system is the Austrian Constitution of 1920, but it is also present in, for example, Germany, Italy, Cyprus, Turkey, Spain, Colombia, Chile, etc. (Cappelleti 1970, 137; Finck 1997, 125-126). Guastini notes, for example, that in this model of constitutional review, the interpretation of a constitutional court "cannot be overturned by anyone" (2017, 314), sometimes not even by using formal reform mechanisms (2017, 315).

In these procedures, courts review legal sources that allegedly conflict with the constitution. The task the court faces, however, is not of the same kind as with ordinary adjudicative processes. The contrast is between a piece of legislation or a number of them. and a constitutional norm, both in abstraction.

One could still argue, however, that even in those cases there is context conditioning the meanings potentially imposed. The only difference, the argument would go, is the nature of the facts considered by the court. Those facts are not specific disputes between individualised parties, but instead, concerns bearing on societal issues, related to, for example, the likely consequences the decision could produce for this or that group, to the impact on the stability of the legal system, the morality of the norm, its adequacy to constitutional principles, etc.

This is correct. There is indeed context limiting the interpretive activity. Yet, the facts and allegations delineating this contextual background are not offered by those affected by the eventual decision. It could be the case that some affected persons have the chance to make allegations, but this possibility is not of the essence of abstract *a priori* reviewing procedures.

There is one possible reply. Although the citizenry in its entirety does not participate in the provision of meaning of norms affecting them when interpretations are authoritatively performed by a constitutional court, it is usually their representatives who knock on the court's door. They are the ones offering allegations and interpretations of what they, *qua* representatives, think the constitution means. The court then, decides upon those competing visions, which ultimately are the visions of the citizenry.

But this is misleading. The tasks of constitutional courts are not best described by saying that their judges participate in a representative procedure.[80] The ways in which abstract reviewing competences are framed in different countries show that what is expected from courts is the determination of constitutional meaning, not the resolution of political conflicts between factions. Their attributions are framed in terms of granting them powers to safeguard the constitution, not democracy or the representative system.[81]

The nature of the sources subject to interpretation is an additional criterion that, combined with the inclusion of those affected, generates a heuristic that helps to determine in which cases courts are optimal constitutional interpreters. That nature results from a combination of features that include a norm's hierarchy within the legal system, and the indeterminacy of the provisions containing the norm. My suggestion is that the final authoritative interpretation of norms placed at the higher hierarchical positions of a legal system, and whose formulation is ambiguous and vague enough as to demand a normative assessment of their collective effects, ought to be undertaken with reference to a context determined not by specific individuals but by as many affected as possible.

The requirements of *interpretation* are better satisfied when final meanings are argued for by those potentially affected by a decision that hinges on that interpretive process. They are thus met when subjected to procedures of inclusive collective decision-making, that is, to democratic procedures.

Direct or representative democratic institutions hold better credentials to interpret authoritatively at the constitutional level. They are oriented at gathering as many perspectives as possible in decision-making processes that affect large groups of individuals or an entire polity. Because authoritative decisions at the constitutional level generate societal consequences, societal perspectives are the ones prevailing as sources of context in the determination of meaning of constitutional clauses. Picking up again on Marmor's idea, the interplay between participants at inclusive democratic institutions and the sort of information necessary to undertake interpretive processes at the constitutional level thickens the conversational context of constitutions.

[80] This, pace Alexy 2005, 579, and Rosanvallon 2011, 121-168. Similarly, Ely justified judicial review as a safeguard of the representative process. His view has been criticised, however, on grounds similar to the ones I here defend. See, Koffler 1981; Tribe 1988b, 28; Gargarella 1996, 154-157; Posner 2005, 233.

[81] See, for example, the constitutions of Chile (Articles 93.1 and 93.4), France (Articles 61, paragraph 1 and 2, and 62 final paragraph), Bolivia (Articles 196 and 202.1), Colombia (Article 241.8 second paragraph).

These remarks move the examination towards the domains of democratic theory. We need further reflections on the sort of democratic theories that fit this heuristic. The next section offers guidance on what sort of democratic theory must underpin institutions laden with the task of interpreting constitutional provisions bearing on issues of societal scale. It claims that the imposition of meaning on polysemous, abstract, indeterminate constitutional norms is made within a thicker conversational context when inclusive conversations between parties exchanging arguments, information and preferences, take place. Deliberative democratic mechanisms thus appear as ideal theoretical alternatives for the institutionalisation of authoritative constitutional interpretation.

5. Interpretation and Democratic Institutional Perspectives

This section champions deliberative democracy as a theoretical perspective from which constitutional interpretation may be instantiated in concrete institutions. Here, I contrast deliberative democracy with the following alternatives: market democracy, pluralist democracy and agonistic democracy.[82]

These models emphasise different traits of decision-making processes. Deliberative democrats advocate for the idea that collective decisions should be adopted via deliberation,[83] including every potentially affected person (Elster 1998, 8). Deliberation operates as a justification for and as a condition of the legitimacy of the decisions adopted.[84] They are adamant that democratic procedures should not be limited to aggregating preferences during elections. Decisions should be preceded by deliberation (Manin 1987, 359; Martí 2006, 52).

Market or economic models promote the accretion of individuals' wills according to some interpretation of the principle of voting. I include here Schumpeter's elites competition account (2003, 269-302; Held 2006, chapter 5), Downs' economic theory of democracy (1997), and some accounts whose methodological bases endorse some version of social choice theory.[85] Although different in several aspects, they all value the political process instrumentally, as a device for expressing preferences

[82] Of course, definitions and taxonomies of democracy vary. For example, Aristotle 1992, 245. 1290b7; Weale 1999, 19, 25; Dahl 2000, 37-43; Schmidt 2002, 147; Beetham 2005, 2. I here follow Elster 1997 and Martí 2006, 66-73. For examples of typologies based on alternative criteria, see Lijphart 1968; Weale 1999, 24-36; Held 2006; Fishkin 2011, 245.
[83] Manin 1987, 349-353, 359; Miller 1992, 55; Cohen 1997, 67; 2009, 248; 1998, 185; Bohman 1998, 400; Elster 1998, 5-6; Martí 2006, 39.
[84] Manin 1987, 359; Gutmann & Thompson 1996, 4; Bohman 1996, 4; 1998, 401, 402; 2009, 28; Cohen 1997, 67; Chambers 2003, 308; Martí,2006, 22.
[85] For example, Buchanan 1954; Hayek 1944; Buchanan & Tullock 2004; Posner 2005.

(Buchanan 1954, 117; Nozick 1974, 33; Elster 1997, 3), and some regard democracy and the market as "special cases of the more general category of collective social choice" (Arrow 2012, 5).[86]

Pluralists put premiums on association and negotiation or compromise among interest groups. They share with market models, for example, a rejection of any notion of the common good (Sunstein 1985, 32; Martí 2006, 68), and the assumption that individuals enter the political process with pre-selected interests they try to advance through dealing and compromise (Sunstein 1985, 32; Truman 1951, 15). Dahl, the model's most prominent representative (Martí 2006, 68; Held 2006, 170), claims in a Madisonian vein (1948) that the aim of democracy is to distribute power to different centres that mutually check one another through peaceful dealing.[87]

Agonists emphasise conflict and power and belittle rational dialogue (Martí 2006, 65). They can be primarily associated with the work of Mouffe and Laclau (Martí 2006, 71), but other authors have stressed the role that interests and power play in the political process as well.[88] They criticise liberal democracies and consider that power struggles and political conflict cannot and should not be overcome. They ought to be at front-centre of any political analysis (Mouffe 1993, 2; Martí 2006, 71). The alternative is the abandonment of an individualism that renders impossible "the extension of the democratic revolution to an ensemble of social relations whose specificity can only be grasped by recognizing the multiplicity of the identities and subject positions that make up an individual" (Mouffe 1993, 100).

In my view, of the three models under consideration, deliberative democracy is the best alternative for an institutional paradigm for constitutional interpretation when that interpretation carries authoritative *erga omnes* effects. It is the democratic theory whose constitutive features best allow for the generation of institutions with authority to impose meaning on constitutional norms with collective effects, keeping decision-making procedures within the limits of an interpretive practice.

To justify this, in what follows I test to what degree the democratic theories considered meet the conditions imposed by three elements of constitutional interpretation

[86] See also the literature cited by Arrow in 2012, 5-6.
[87] See Dahl 1967, 24, 365; 1989, 221; 2000, 85, 113-114. Dahl's position, however, changed over the years. For example, the criteria set on Dahl 1989 and Dahl 2000 are more demanding in normative terms than in Dahl 1967. In favour of this assertion, Martí 2006, 68 and Held 2006, 170. Also, in Dahl 1997, he defended a model that blurs differences between pluralist and deliberative democracy.
[88] For example, Shapiro 1999 and Walzer 1999.

abstracted from the considerations made in the preceding sections: inclusion, context, and interpretive justification. Meeting those conditions at the theoretical level serves as a justification for the design of democratic institutions in charge of providing authoritative meaning to a constitution

5.1. Inclusion

This criterion is endorsed by most contemporary democratic theorists.[89] Yet, deliberative democracy guarantees it in a stronger fashion compared to alternative models.

Deliberative scholars are generally adamant that deliberative democracy is strongly inclusive.[90] In Habermas formulation, valid norms have to meet with the approval of all those potentially affected (Habermas 1981, 19; 1996, 127). Or, as Manin puts it, "a legitimate decision … is one that results from the *deliberation of all*. It is the process by which everyone's will is formed that confers it legitimacy on the outcome, rather than the sum of already formed wills" (1987, 352. Emphasis in the original). Deliberativists generally consider that it is not only individuals the ones that have to be present at the discussion, but their arguments as well;[91] the higher the number of inputs, the higher the number of arguments and reasons considered, the higher the tendency to increase the quality and/or the fairness of the decision.[92]

Some scholars, however, warn that increasing inclusion and participation may come at the cost of deliberation, and vice versa.[93] It could be, then, objected that two fundamental principles of the theory are irreconcilable. However, the requirements of deliberative democracy would not be satisfied in scenarios where optimal deliberation is achieved at the cost of exclusion.This does not mean that the tension between inclusion and deliberation is solved by appealing to principles. It means that part of the deliberative democracy agenda is to explicitly come up with institutional devices that ease this tension and make deliberation inclusive, even if full inclusion is institutionally unachievable. Some deliberativists favour mass participation over rational dialogue (Young 1999; Lafont 2015). Some, like Fishkin, are more agnostic about mass participation (2009, 98,

[89] With few exceptions. For example, Hayek 1978, 160-161, and Van Parijs 1998.
[90] Manin 1987, 352; Bohman 1996, 7, 9; 1998, 400, 408-410; Nino 1996, 144, 180-186; Martí 2006, 92-93, 211; Waldron 1999, 105-106.
[91] Cohen 1997, 23; 1998, 203; Bohman 1996, 7, 9; 1998, 400, 408-410; Elster 1998, 8; Martí 2006, 42.
[92] Cohen 1998, 187; Manin 1987, 352-357; Gutmann & Thompson 1996, 43; Christiano 1997, 249, 250.
[93] Habermas 1996, 106; Bohman 1998, 400; Goodin & Dryzek 2006, 20; Cohen 2009, 257; Dryzek 2010, 26; Parkinson 2011, 152; Lafont 2015, 42-43.

191), but insist that a balance can be achieved in institutional arrangements like deliberative polls (2009, 96). Be that as it may, the point is that inclusion is not a principle to be sacrificed in favour of rational dialogue or viceversa.[94]

Alternative models are more deficient in this regard. Market models would see their ideal of participation satisfied even when some individuals are not the subject of electoral offers made by competing elites (Young 1999, 155). Likewise, there is nothing in pluralist models indicating that their requirements would not be fulfilled if some individuals were unable to form associations and enter the political arena. I now explain why.

Economic democrats draw an analogy between democracy and the market. They see democratic decisions as resulting from a process of supply and demand, whereby elites compete for the people's votes. Citizens then obtain products that more or less satisfy their needs.[95] But the analogy between the political and the economic market is imperfect,[96] and at odds with inclusion. Information in political markets is usually insufficient and asymmetrical, which undermines the conditions of preference formation the model promotes. As a result, supply may end up conditioning the demand. Some demands are likely to be unsatisfied, excluding the interests of those who are not represented by elites (Ovejero Lucas 2002, 167-170; Martí 2006, 67-68) because politicians lack the incentives to advocate for causes that will not give them votes.

Pluralist models are also at odds with full inclusion. The stress they put on competition and compromise between groups that pursue the interest of their members can lead to passive exclusion (Young 1999, 155; Sen 2000, 15). Pluralists see as natural and desirable that individuals associate to pursue the preferences they share. This extension of methodological individualism to the group level (Martí 2006, 69) could increase the scope of potentially excluded individuals. It fosters the inclusion of those with social capital, the ability, the power and the money to form associations or to join them, if, and only if, those associations pursue their members' self-interest. Those lacking capital, abilities and so forth, will find it harder to form their positions, find others with

[94] As some debates among deliberativists show. For example, Young has criticised Gutmann & Thompson for not emphasising enough the principle of inclusion (1999, 155). Gutmann & Thompson replied that making inclusion explicit is not necessary, for they consider that their conception "already incorporates the basic values of inclusion in the principles of reciprocity, liberty and opportunity" (1996, 263). See also Martí 2006, 265.

[95] Manin 1989, 358; Schumpeter 2003, 269; Posner 2004; Fishkin 2011, 246.

[96] See Ovejero Lucas 2002, 165, and Buchanan's criticism of Arrow 1954, 121.

whom they may associate, and have enough power as to enter the political field on an equal foot with the rest of their fellow citizens.

5.2. Interpretive justification

Agents must keep the imposition of meaning within the boundaries of an interpretive practice. Participants and institutional designs should strive to guarantee that what individuals do is to interpret, not merely explain or describe the object, nor create a new one.

Deliberative democracy has a conceptual apparatus compatible with those conditions. It is about formation (Cohen 1997, 76-77, 78; Parkinson 2012, 159), expression (Martí 2006, 46), justification (Habermas 1988, 108; 1996, 107-108; Cohen 2009, 249) and transformation of preferences.[97] To the extent that individuals engage in deliberative procedures of interpretation, their preferences for any given interpretation become public and, therefore, political, and defeatable by the force of better arguments, for they must be subject to intersubjective scrutiny. This compels individuals to frame their arguments in interpretive terms, that is, to offer them as if they were interpretations of the object under discussion and not just as if they were self-interested preferences or desires.

To make this feasible, agendas can be set to include what could be called 'interpretive moments'. That is, spaces where participants are asked to justify why their preferences represent a better interpretation of a given legal or constitutional provision (Cohen 1997, 73). Consider, for example, deliberative polling. All deliberative polls start with a standard public opinion survey. Organisers reach out to a random sample of the population either through face-to-face interviews or through random-dialling. Participants are then asked closed-ended questions. At the end the the interview, they are invited to spend a weekend of face-to-face discussions (Ackerman & Fishkin 2004, 47). There is no reason why these procedures could not be arranged as to make the discussion about what legal and/or constitutional standards mean, instead of or together with evaluating policy proposals or any other issue. Surveys and discussions can be about the meaning of a constitution or some of its provisions. Moreover, organisers and participants usually rely on briefing documents, informing participants about the procedure and about the discussions they are about to engage in. These materials could include summary views

[97] Elster 1997, 4, 6; Stokes 1998, 126; Cohen 1998, 199; Martí 2006, 50, 90-92

of different alternative interpretations selected beforehand by the organisers. Like in ordinary deliberative polls, participants could be guided by trained moderators, who facilitate the discussion and encourage members to discuss alternative interpretations of a constitutional provision. Moderators themselves should have the skills to establish boundaries determining when a given question is an interpretive question (Ackerman & Fishkin 2004, 48).

Self-interested or insincere interpretations are not discarded or even unwanted. Individuals can advance their own agendas. Yet, because they have to justify their preferences to others, they will have to disguise them as interpretations that happen to coincide with the results they seek (Cohen 1997, 77). They are thus subject to the same imperfection constraints individuals have in any deliberative procedure. If justifications of the interpretation of any normative standard correspond perfectly to the speaker's interest, "the disguise may be too transparent to work" (Elster 1998, 102-104). Self-interested or prejudiced speakers have an incentive to defend interpretations of constitutional norms that somewhat differ from their ideal stance if they do not want to be seen as opportunistic. They have incentives to actually respect the interpretive boundaries of the text or practice under discussion.

Deliberativists refer to this aspect of the deliberative procedure as impartiality, and they see it as essential to any definition of deliberative democracy (Elster 1998, 8). Like any democratic decision-making process, deliberative procedures are oriented to facilitate the transit from a group of individual preferences to a function of collective preferences that are reflected in the decision. But, unlike alternative models, deliberative democratic procedures distinguish between self-interested and impartial preferences. Note that this does not mean that only altruistic, common-good oriented inputs are the ones entering the process. Rather, it means that "[i]n order to increase its support, each party has an interest in showing that its point of view is more general than the others" (Manin 1989, 358; Bohman 1998, 405).

These requirements are hardly met in market, pluralist and agonistic democratic accounts. In the first two models, where aggregation and negotiation are the guiding principles, and voting and compromise the mechanisms by which preferences are expressed, no actual conversation between parties take place. Conversations *could* take place as a matter of fact, but they would not be better accounted for as resulting from the features of market and pluralist theories. Under market and pluralist conditions, it is virtually impossible to know what are the concerns individuals would have when voting

for a given interpretation of a norm. Because preferences are exogenous to the decision-making process,[98] there is little chance for interpreters to know whether the concerns they have in mind when voting for a certain interpretation are the same other individuals have when casting their votes.

In turn, the agonists' claim that it is conflict that drives the political process leaves little room for discussions about something other than individuals and groups' struggle for recognition. The importance given to those power struggles leaves little room for the sort of impartiality that is necessary to argue for some interpretation rather than for some self-interested position. The problem is that these sorts of theories fall prey to objections that are analogous to the ones affecting the liberal and deliberative theories they themselves attack. The idea that politics is reduced to conflict is not that different than saying that politics is merely about self-interest. Assuming that it is impossible to reach sincere agreements entails that the very notion of political legitimacy makes little sense. To the extent that there is no possibility to discuss about the correction or legitimacy of a proposal then any chance of building up a rational normative political model disappears (Martí 2006, 75).

5.3. Context

The context against which the interpretative process unfolds must be congruent with the societal effects produced by the meaning imposed on collective norms. Picking up again on Marmor's notion of conversational context, the possibilities of providing actual interpretations of a given norm are higher the more contextual elements are introduced in the discussion. In individual cases, the context shall be determined by the specific allegations made by the individual party. The meaning imposed on the norm shall then be congruent with that specific case. Cases affecting society as a whole, on the other hand, shall require the introduction of contextual elements of a societal scale. In a nutshell, thick conversational contexts emerge from a shared net of assumptions that are thematised, ventilated and argued for. They result from asking *what is the meaning of this norm in this particular case for this particular people?*

The thickening of constitutional interpretation depends on the possibilities of building common contexts among those affected by the result, so that discussants are on the same page, as it were. But the construction of that collective context requires the sort

[98] Nozick 1974, 325; Posner 2004; Held 2006, 213; Martí 2006, 65-66.

of publicity that would allow individuals to reason why and how their arguments and preferences relate to the arguments and preferences of others who in turn should enjoy the same opportunities. For this exchange to take place, individuals must commit to a principle of publicity without which deliberative democracy is pointless.[99] A commitment to decide on collective matters affecting not only specific individuals but society as a whole entails a commitment to make those discussions public. Otherwise, there is little guarantee that individuals will think about collective problems or will think about how a decision would affect not only themselves, but others as well. This constitutes a reason for preferring institutions asking individuals to justify their claims and preferences, that is, deliberative democratic institutions.

My point is analogous to Habermas' criticism of Rawls' recourse to the veil of ignorance in the original position. According to Habermas' interpretation, the parties in the original position are not able to fully comprehend the highest-order interests of their clients solely on the basis of rational egoism. Moreover, Habermas claims, impartiality of judgement cannot be guaranteed by the veil of ignorance. This is the case because the original position is not an instance where individuals are expected to abandon the perspective of a rational egoist, a perspective that could be adopted only once the veil is lifted:

> At any rate, the parties are incapable of achieving, within the bounds set by their rational egoism, the reciprocal perspective taking that the citizens they represent must undertake when they orient themselves in a just manner that is equally good for all (1995, 112-113)

For the same reasons, the premium pluralists put on association and competition is at odds with the portrayal of interpretation as an activity that determines the meaning of a constitution that is, ultimately, the constitution of the whole society. The problems raised by individualism are not solved by expanding the perspective from the individual to interest groups because they never have the incentives to abandon their private standpoints.

6. Conclusions

Adopting the perspective of the judiciary to think about interpretation in law is not a necessary feature of that practice. I suggested that there is no necessary connection between the nature of interpretation in law and concrete institutional embodiments. Legal

[99] Gutmann & Thompson 128-164; Habermas 1996, 183; Bohman 1998, 402; Martí 2006, 93.

and constitutional interpretation thus gives way to institutional considerations in a more flexible, non-binary way, than a single paradigm can account for. To the extent that legal scholars choose an institutional paradigm from which to think about law as an interpretive practice, they cannot rely exclusively on the nature of interpretation to justify such a choice.

By relying on Marmor's notion of conversational context, this chapter provided a heuristic from which a choice for institutional paradigms can be made. The normative force of the different sources of a legal system, and the effects produced by the decisions adopted by courts in different reviewing procedures justify adopting the perspective of a judge when the context within which those sources are interpreted is provided and determined by those affected by the decision to be adopted. On the one hand, when the conversational context in which sources are interpreted is thin, the courtroom does not appear as the most suited to impose meaning on them. Given that constitutions are generally indeterminate, and given their hierarchical position as the supreme norm of the legal system, the authoritative determination of their meaning ought to be left to agents capable of capturing and constructing the context that keeps that determination within the contours of an interpretive practice. I showed why courts fall short of this objective, and why we should think of this practice as something that should be left to deliberative democratic institutions aiming at including every potentially affected by the meaning of constitutional norms.

The previous chapter rejected judicial supremacy on political, normative grounds. This chapter supplemented that effort by showing that, far from being the ideal instantiations of the concept of constitutional interpretation, judicial procedures face difficulties in meeting the conditions necessary for imposing meaning on a constitution with *erga omnes* effects. The next chapter takes an additional step toward that rejection. It starts from the assumption, defended in this chapter, that constitutional interpretation and deliberation are two related concepts. With that presupposition in the background, it questions whether judges and the people are actually capable of deliberating. The answer to that question is central to the interpretive problem for, if the argument made in this chapter is reasonable, the interpretation of a constitution hinges on the capacity of the interpreters to deliberate about the meaning of a constitution. Consequently, the next chapter examines how deliberation is measured and what do we know about how the people and judges deliberate. This should allow us to know to what extent the judges and *the people* are capable of keeping themselves within the limits of an interpretive practice.

CHAPTER V

ON THE MEASUREMENT OF POPULAR AND JUDICIAL DELIBERATION

1. Introduction

The preceding chapter linked interpretation at the constitutional level with deliberative democracy. As a result, the capabilities of an interpreter entrusted with the final word in the determination of constitutional meaning are related to its capacity to embody deliberative democratic ideals. The question is then, what do we know about the capabilities the people and judges have to deliberate about constitutional issues?

In this vein, this chapter compares instruments designed to measure deliberation in non-judicial settings, on the one hand, and deliberation in the courtroom, on the other. I thus survey different mechanisms deliberative democrats have designed to test what is it that transpires when individuals deliberate from the perspective of ordinary *citizens vis-à-vis* the point of view of judges. From this appraisal I conclude, first, that an examination of the literature on deliberation measurement evinces a number of problems in the process of translating ideal deliberative theory into empirical evaluative schemes. Second, that the structure of judicial procedures makes those difficulties deeper.

This approach is justified and matters for four reasons. First, because the diversity of deliberative experiments and research on specific deliberative sites makes it impossible to cover all those instances in a comprehensive fashion. A more reasonable approach must focus on the instruments designed to evaluate those experiments. Second, because although scholars have pointed to several problems faced by these coding schemes, there are areas where there is still room for more criticism. Third, because in spite of the staggering amount of research dedicated to the evaluation of the deliberative performance of individuals in different settings, researchers do not seem to have dedicated themselves to measure how deliberation takes place in the courtroom. Hence, there is a gap to be filled. Fourth, because this gap does not correspond with the commonplace that courts are ideal *loci* for deliberation. This chapter thus provides a novel explanation for the social scientists' lack of attention on the measurement of judicial deliberation.

The chapter is structured as follows. Section 2 gives an overview of and makes critical remarks on the coding schemes designed to measure individuals' deliberative performance available in the literature, which I categorise as *popular*. I start by surveying the most discussed coding schemes that measure the quality and quantity of deliberation in these fora. In subsection 2.1, I then criticise these instruments on the grounds that they

show deficiencies in their theoretical foundations as well and in their understanding of and consideration for important aspects of ideal theory, such as participation, equality, and sincerity or truthfulness.

Section 3 appraises deliberation measurement in the courtroom or, as I label it, *judicial* deliberation. In spite of the efforts that social scientists and political theorists have dedicated to investigate if, how, and to what degree individuals deliberate in such a varied group of settings, courts do not generally appear as a subject of study. Consequently, the empirical literature on the measurement of the quality of judicial deliberation is scant. Section 3 thus explores reasons for this neglect, it analyses how the problem of deliberative measurement has been tackled when it comes to courts, and shows that what we find in the literature are not empirical but ideal benchmarks. The concern, when it comes to the judges' deliberative performance, is what a deliberative court should look like, instead of how courts actually deliberate. I argue that the reasons why this specific standpoint differs from the *popular* strategy are rooted in the structure of judicial procedures. For this, I rely on Conrado Hübner Mendes' account of a deliberative constitutional court to show that, even in an ideal version, structural features of judicial procedures provide reasons to question that courts are ideal deliberative institutions. Overall, this part shows that there is not enough evidence to know how judges deliberate, let alone to claim that *judicial* deliberation is superior or inferior to *popular* deliberation.

Section 4 concludes, first, that though there is much room for improvement on both *popular* and *judicial* measurements of deliberation, the judicial side of the comparison shows deficiencies inherent to the structure of the procedures conducted inside the courtroom, especially, though not exclusively, when those discussions take place behind closed doors.

2. Popular deliberation

This section gives a critical overview of the devices designed to measure deliberation in real-world fora. Given that the literature measuring *popular* deliberation is vast and extremely diverse, that it focuses on myriad issues, with different levels of salience, with higher or lower degrees of institutionalisation, I will survey some of the most employed and discussed instruments available. After this overview, I will make critical remarks highlighting the limitations faced by these instruments.

Empirical studies in deliberative democracy aim at determining whether individuals are able to engage in conversation with other citizens, mutually respecting each other, letting themselves be convinced by the unforced force of the better argument.[100] This is because even if deliberative democracy is generally seen as an ideal benchmark for decision-making processes, it is nonetheless rooted in actual practices and in the actual possibilities individuals have of engaging in debate and reason-giving (Habermas, 2005, 385). The interplay between theory and the possibilities of its implementation has led researchers to think of ways to measure if and how much theory informs practice, and/or whether practice conforms to ideal theory (Bohman 1998; Bächtiger, et al. 2009, 2; Ryan & Smith 2014, 9).

These efforts are, nonetheless, still work in progress and there is much room for improvement. Some mechanisms are limited to evaluate specific experiments, while others thought to have a more general application struggle to incorporate every possible element of ideal theory. Others have been superseded by more refined versions, which are in turn affected by other shortcomings. Moreover, there is no general agreement on working with a single scheme (Black, et al. 2011, 325; Gerber 2015, 115).

Scholars measure *popular* deliberation in, roughly, two ways.[101] First, they contrast results of deliberative exercises against their initial goals, using measures internal to their experiments. This is what Black et al. refer to as *indirect measures* (2011, 327, 335-338). As they affirm, indirect measures look for indicators "that deliberation might occur or has occurred" (2011, 335), and this is usually made either by looking at antecedents, for example, by determining the extent to which conditions for deliberation are met (2011, 335-336), or by focusing on outcomes, for example, by asking participants to assess their experiences in pre and post deliberation surveys (2011, 327, 336-338). This is a method commonly employed, for instance, in deliberative polls,[102] and National Issues Forums (Gastil & Dillard 1999, 179-180; Melville, et al. 2005, 39). Both have been applied to different sorts of issues.[103]

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[100] Warnke 1995, 127; Habermas 1996, 305-306; Bohman 1997, 322; Bächtiger, et al. 2009, 2; Gold, et al. 2013, 4; Habermas 2005,384; Martí 2006, 49-52.

[101] In this, I follow Bächtiger, et al. (2009, 2) and Black et al.'s (2011). However, the taxonomy does not rule out cases where both direct and indirect measures are applied in the same study. An example of such case is Mucciaroni and Quirk's study of legislation in the US Congress where content analysis and outcome evaluation are intermingled (2010, 39, 43).

[102] Sanders 1999; Fishkin 2003, 128; Ackerman & Fishkin 2004, 4; Fishkin & Farrar 2005,72-73; Farrar, et al. 2010, 334-336; Denver, et al. 2010, 153; Black, et al. 2011, 336-337; Niemeyer 2011, 119; Fiber-Ostrow & Hill 2012, 152.

[103] See, for example, Uhr 2001; Denver, et al. 2010; Farrar, et al. 2010,338-339; Niemeyer 2011, 112-118, 119-124.

By contrast, *direct measures* examine the debate within small groups to determine the "extent to which the discussion corresponds to theoretical conceptions of deliberation" (Black, et al. 2011, 326-327). They include, *participants' assessments, integrated case studies,* and *discussion analyses.* Yet, given that the most prominent example of direct measurement is discussion analysis, I will focus on this sort of method.

Discussion analyses scrutinise communication processes in deliberative sessions, typically through the examination of records, transcripts, videos, or in the verbatim generated record of online discussions (Black, et al. 2011, 326). There are two sub-categories of discussion analysis that can be used complementarily in a single experiment: *micro* and *macro*-analytic approaches (Bächtiger, et al. 2009, 2; Black, et al. 2011, 327-334). *Micro* approaches evaluate the content of discussions, taking texts as elements of analysis, from which researchers try to make valid and meaningful inferences. Such examination can be quantitative, by calculating the number of words or expressions uttered by participants, or by measuring the amount of time each participant has spoken (Bächtiger, et al. 2009; Gerber 2015, 114), but it can also be qualitative, content-based, where meaning springs from interpretative procedures analysts apply to the discussions.

Content analysis is typically made by first developing a codebook containing the elements to be analysed during the deliberation. Two or more coders are then trained to analyse the discussion and to apply the scheme. It is important that the analysts agree on the codes they give to each assessed unit, for the more they agree the more reliable the coding scheme and the measurement is expected to be. In turn, in *macro* approaches, coders are asked to make "summary judgments of the discussions as a whole" (Bächtiger, et al. 2009, 2).

There are several instruments discussed in the literature so, although there are others available,[104] I will discuss the following four, as they are representative of the ways in which content analysis work: Steenbergen et al.'s Discourse Quality Index (2003) (DQI), Bächtiger et al's DQI 2.0 (2009), Black et al.'s measurement of online discussions (2011), and Stromer-Galley's coding scheme (2007).

Steenbergen et al.'s DQI is the most discussed available instrument (Gold et al. 2013, 1-2).[105] It consists of a coding scheme based on the following normative tenets of

[104] For example, Gerhards 1997; Holzinger 2001; Janssen & Kies 2005; Kies 2010.
[105] Here I comment on Steenbergen et al. 2003. The full elaboration of the DQI is in Steiner et al. 2004, 43-73.

Habermasian discourse ethics: open participation, justification, search for the common good, respect, constructive politics, and authenticity (2003, 25).

First, "there should be open participation", so that everyone is allowed to introduce assertions into the debate and express their attitudes, desires, and needs without coercion (2003, 25).

Second, deliberation demands that claims, assertions, desires, needs, etc., are justified. Those justifications should be logically coherent, coherence measured by the degree to which conclusions follow from premises; "the tighter the connection between premises and conclusions, the more coherent the justification is and the more useful for deliberation" (2003, 25).

Third, participants "should consider the *common good*" (2003, 25). Emphasis in the original), by which they mean that "there should be a sense of empathy, other-directness, or solidarity that allows the participants to consider the well-being of others and of the community at large" (2003, 26). Self-interest, though not ruled-out, is accepted only if it is demonstrated that "it is compatible with or contributes to the common good" (2003, 26).

Fourth, there should be respect among participants as it is, according to them, a prerequisite for serious listening, something essential for deliberation. In turn, respect can be expressed towards groups, demands, and counterarguments, where the latter is, in particular, "a necessary condition for weighing of alternatives" (2003, 26).

Fifth, deliberation should aim at *constructive politics*, that is, Steenbergen et al.'s understanding of consensus. Consensus, they note, is not an absolute necessity, as it is often not even possible in politics. Yet, for them it is important "that participants in a discourse … at least attempt to reach mutually acceptable compromise solutions, since this is the only way in which universalism can be attained" (2003, 26).

Finally, their scheme considers *authenticity*, "which is the absence of deception in expressing intentions" (2003, 26). They concede this is an important element of deliberation. Yet based on the difficulty of judging when exactly a certain speech is authentic or deceptive, they consider their measurement instrument would be bound to "introduce large amounts of (possibly systematic) measurement error". For this reason, they do not include authenticity in their coding scheme (2003, 26; King 2009, 3).[106]

[106] Likewise, Bächtiger, et al. drop the criterion of sincerity or truthfulnes from their deliberation measuring standards, given that "true preferences are not directly observable" (2009, 6).

These normative tenets ground the coding scheme, which is divided in three parts: the unit of analysis, the coding categories, and the index itself.

The unit of analysis is speech, understood as a public discourse made by an individual delivered at a particular point in a debate. The speech is then broken down into smaller units whose parts are considered as relevant if they contain demands, or irrelevant if who utters them makes no demand like, for example, when someone makes clarifications or asks for them (Steenbergen, et al. 2003, 27).

As for the coding categories, they are applied to speeches containing relevant parts and measure participation, the levels of justification given for arguments, respect for others' demands, and constructive politics (Steenbergen, et al. 2003, 27-30; King 2009, 2; Black, et al. 2011, 9). The procedure for using these codes in concrete examples of deliberation requires two or more coders. Roughly, each of them must first read through the entire debate individually and code the relevant speeches by assigning them numerical value. Then, they come together to compare codes. If coders disagree, they read through the speech again and discuss the merits of the codes they assigned to those speeches. In the end, coders must deliberate in order to convince each other of the correctness of their evaluation (Steenbergen, et al. 2003, 31).

Bächtiger et al. (2009) designed a re-developed version in order to cope with the shortcomings of the original DQI (2009, 2). They first proceed by defining two groups of normative standards they call type I, "which captures rational discourse" and type II deliberation, "which measures alternative forms of communication such as 'story-telling' and 'deliberative negotiations'" (2009, 4; Bächtiger, et al. 2010, 33). Type I deliberation "embodies the idea of rational discourse, focuses on deliberative intent and the related distinction between communicative and strategic action, and has a strong procedural component" (Bächtiger, et al., 2010, 33). Type II deliberation "generally involves more flexible forms of discourse, more emphasis on outcomes versus process, and more attention to overcoming 'real-world' constrains on realizing normative ideals" (2010, 33).[107]

Type I standards measure equality, justification rationality, common good orientation, respect and agreement, interactivity, constructive politics, and sincerity. I will not comment on justification rationality and common good orientation, as they remain the same as in the original DQI (2009, 5-6).

[107] See also Morrel 2014, 159.

On the other hand, type II standards include less rational forms of discourse (2009, 7). Following Mansbridge (2009), the new version of the DQI includes two elements: story-telling and bargaining. Story-telling is measured by determining whether participants use personal narratives or experiences (Bächtiger et al. 2009, 8). As to bargaining or "deliberative negotiations", theoretically, these authors follow Mansbridge (2009) and distinguish between deliberative and non-deliberative negotiations. Empirically, they follow Holzinger (2001) and try to capture different forms of bargaining, evaluating whether a speech contains threats or promises (Bächtiger 2009, 8).

Like the rest of the measuring instruments, the authors of this version of the DQI create a codebook and apply these standards to actual conversations, assigning codes for each unit of analysis.[108]

Online deliberation has prompted the emergence of measuring instruments in online groups. Black et al. (2011) investigated, for example, policy-making discussions on Wikipedia (2011, 605) "with an eye toward informing future research on virtual teams and online discussion" (2011, 596). They developed a content analysis scheme to measure "the extent to which policy-making discussions adhere to idealised models of high-quality group deliberation" (2011, 596).

Following Gastil and Black's (2008, 1), Black et al. single out five analytic aspects of deliberation: creating an information base, prioritising key values, identifying solutions, weighing those solutions and making best decisions. Deliberation also involves four social components, namely, equality of speaking opportunities, mutual comprehension, consideration of others, and respect. These analytical and social dimensions "form the foundation for the coding scheme used in this research" (2011, 597-599).

The unit of analysis is the discussion post, examined in the order they appeared on the talk page. In addition to individual posts, "discussion threads in their entirety were coded for overall summary judgments" (2011, 607). Researchers were in charge of coding the posts on eight of the nine aforementioned dimensions. Equality was not included in coding, but "it was captured in global ratings that coders made for each discussion thread" (2011, 608).

Stromer- Galley (2007) also designed a content analysis scheme to measure the quality of political deliberation in face-to-face and online groups. She understands

[108] For an example of the application of this scheme, see Bächtiger, et al. 2010-2013.

deliberation as "a process whereby groups of people, often ordinary citizens, engage in reasoned opinion expression on a social or political issue in an attempt to identify solutions to a common problem and to evaluate those solutions" (2007, 4). Her coding scheme considers six elements:

> reasoned opinion expression, references to external sources when articulating opinions, expressions of disagreement and hence exposure to diverse perspectives, equal levels of participation during the deliberation, coherence with regard to the structure and topic of deliberation, and engagement among participants with each other (2007, 4).

Stromer-Galley elaborated her coding scheme from these theoretical elements of deliberation. For this, she developed a codebook whose units for coding "were identified at the level of the *thought*" (2007, 9. Emphasis in the original), defined as "an utterance (from a single sentence to multiple sentences) that expresses an idea on a topic" (2007, 8).

The diversity of the exercises of deliberation measurement makes it practically impossible to undertake a full survey. Yet, instruments I have described are among the most cited in the literature, and are representative of the most developed methods designed to evaluate deliberation. The analysis has been hitherto mostly descriptive, so I now make some critical remarks.

2.1. Limitations

Before I detail more general limitations shared by all the coding schemes described above, some words about the specific shortcomings evinced by the DQI are in order, given its utility and widespread use.[109]

I will not delve too much into shortcomings that are already in the literature. Here, it is enough to remember that Steenbergen et al. themselves have noted problems derived from their decision to drop authenticity from the scheme (2003, 43), from the narrowness of its Habermasian theoretical foundations (2003, 43), from the fact that the scheme does not measure non-textual communication, and from its inability to capture participation in a more substantive way than by coding whether participants are interrupted (2003, 43-44).[110] Additionally they have acknowledged that the scheme's theoretical foundations leave "no room for other conceptual developments in deliberative theory" (2009, 3-4, 33).

[109] See, for example, Steenbergen, et al. 2003, 30-41; Coppedge, et al. 2011.
[110] Likewise, King 2009, 4-5.

Additionally, the DQI has been criticised for its lack of cut or threshold values determining when a given normative goal is met, which limits the index to a mere comparative function,[111] as well as for the fact that it only assesses the quality of entire debates, when it is hardly the case that deliberation is present throughout the entire discussion (Bächtiger et al. 2009, 3).

Furthermore, King notes that the DQI allows incoherent comparisons and balancing between different aspects of speech: "For example, to allow statements declaring that 'the justifications were inferior, but the participation was good, so overall the discourse was', does not seem a coherent or desirable usage of discourse ethics theory" (2009, 4).

Finally, others have pointed to practical problems in using the DQI, time consumption being the most important (Gold et al. 2013, 2).

But the DQI is not the only coding scheme facing problems. Some scholars have also highlighted several limitations affecting all the preceding instruments of deliberative measurement.[112] Yet, the following criticisms have not been fully elaborated.

First, at the level of ideal theory, there is, generally, a sort of fixation with the Habermasian version of deliberative communication that is not adequately justified. For example, Steenbergen et al. argue that they selected a theory "most closely associated with Habermas' … discourse ethics" (2003, 23, 26). Stromer-Galley adopts a definition of deliberation that "aligns most closely with that of Schudson (1997), Habermas (1984), as well as Gastil (2001)" (2007, 4). Also, Gold et al.'s (2013) coding scheme starts "from the ideas presented by Habermas in his work on communicative action and discourse ethics. That is", they claim, "conceptually, we rely on a Habermasian approach to deliberation" (2013, 2). They thus define deliberation as "a communicative process that aims at taking a decision (or recommendation) on collectively binding rules or public projects. The substantive goal is to achieve the common good and universality of rules" (2013, 2).

This approach needs further justification. Deliberative democracy is a polylithic theoretical construction to which Habermas contributed, but his is not the only understanding of what deliberative democracy is, and the choice for his over others' versions of the theory begs for explanations.

[111] In the same vein, King 2009, 5.
[112] For example, Mendonça 2015, 97-105.

Hence, we are in the position to ask: why only Habermas and not any other deliberative democrat(s) whose contribution had been significant for the development of the theory, contribution(s) that could reasonably lead to different or complementary measuring standards. Kies rightly observes that empirical approaches based on, for example, Young's promotion of social justice are likely to insist on the criterion of inclusion. Those inspired by Gutmann & Thompson's notion of disagreement will put the accent on the criterion of respect. Or, to take an additional example, those "inspired by the theories of Sennet or Sunstein [are] more likely to test whether online public spaces have allowed for confrontation of a multiplicity of unexpected and spontaneous opinions" (Kies 2010, 41). Simply claiming that internal consistency is the reason to choose one and not others (Steenbergen, et al. 2003, 23), bypasses important contributions to the evolution and full understanding of deliberative democratic theory.

An additional problem is raised by this fixation with Habermas: these authors use expressions like communicative action, discursive rationality, discourse ethics, deliberative democracy, etc. haphazardly, without providing specific paragraphs and/or page numbers, failing to show that these notions assume different meanings and are applied to different concerns in different periods of Habermas' intellectual development.

This is particularly stark in the use of the concepts of discourse ethics and discourse theory. The first is a concept that Habermas used during earlier stages of his career, where communicative rationality was meant to be employed by individuals who engaged in dialogue, where claims were generally addressed at each other assuming substantive normative presuppositions absent of instrumental rationality. Discourse ethics was independent of the political and legal realms, as "[i]t is by no means self-evident that rules which are unavoidable *within* discourses can also claim to be valid for regulating action *outside* of discourses" (Habermas 1990, 83. Emphasis in the original).

Habermas' explicit concern with this application of his theory to the political realm came later with his construction of a *theory of* discourse, a rather different understanding and employment of discursive rationality where the ethical concern was expanded to other fields of practical reason, and where the justification of norms includes not only ethics but law and politics as well. We find evidence of this change in Habermas' extension of principle (D), which in *Moral Consciousness and Communicative Action* "contained the distinctive idea of an *ethics of discourse*" (1990, 66. My emphasis), whereas, for example, in *Between Fact and Norms*, "it lies at a different level than the distinction between moral and ethical discourse. As a principle for the impartial

justification of norms in general, (D) also underlies both morality and law" (Rehg 1996, xxvi). In fact, Habermas was criticised on the grounds that in making this move towards a theory of discourse in *Between Facts and Norms*, he neglected or watered down the ethical dimension of communicative rationality (Cortina 2009, 172). A proper application of Habermas' theory ought to have these differences under consideration.

This shift of perspective has theoretical consequences, most prominently, for the role played by law in the configuration of a deliberative political system. During Habermas' early period, law was part of the system, and juridification a pathological manifestation of legality, bureaucratising and invading myriad forms of social life, turning citizens into clients of bureaucracies (1981, sec. 3.4). Things are different in Habermas' later works, which he developed from the late 1980's onwards (Thomassen 2010, 85), where law is conceived of as an articulator of the subsystems that together form society, a translator of their different discourses. The bureaucratic and economic system, as well as civil society are now related in ways that admit both communicative rationality and instrumental rationality, as well as forms of reasoning that are now accepted to the extent they are translated into decisions through a legitimate legal system that is the result of a deliberative procedure (Habermas 1996, 165).

These differences show that authors may be promising one thing, that is, to measure political communication or political deliberation, and doing another in an important way, namely, measuring the communicative rationality of different forms of discourse from the point of view of discourse ethics, or vice versa. One could object to this criticism on the basis that the original endeavour – measuring the quality of deliberation – remains firm regardless of this conceptual distinction. Just replace, our objector could say, discourse ethics with theory of discourse, or some other expression doing justice to the evolution of Habermas' work. After all, Habermas himself has expressed satisfaction regarding the ways in which his theory has been operationalised by social scientists (2005, 384).[113]

Notwithstanding, it still remains to be shown that the wording employed in the formulation of the theoretical grounds of their experiments does not hide deeper theoretical misconceptions or misused terminologies. My take on this matter is that the scholars considered may be using terms without reflecting properly about concepts. (Olsthoorn 2017)

[113] Specifically, by Janssen & Kies 2005.

This is not, however, the only limitation these schemes face. Another concern is the difficulty of measuring authenticity. I have mentioned that coding schemes generally drop this category from the analysis, for it is an element that may only be manifested in *foro interno*, limiting social scientists' abilities to codify utterances as sincere or insincere (Steenbergen, et al. 2003, 26; King 2009, 3; Bächtiger, et al. 2009, 6). Kies for example, after acknowledging these difficulties, asks whether this means that we should "ignore the criterion as most of the empirical research does?" (2010, 52). He answers in the negative affirming that "the criterion of sincerity with the one of empathy together form a cardinal evaluative criterion of deliberation". He thus concludes that "[t]his means that if sincerity is absent a debate cannot be considered as deliberative even if all the other deliberative criteria score high" (2010, 52).[114]

I disagree with the last part of Kies' argument. His conclusion is too strong. Even though we lack reliable instruments for the measurement of sincerity, deliberative democrats have been adamant that deliberators face constraints intrinsic to the deliberative process that compensate, as it were, for shortages in truthfulness. Deliberative settings "can shape outcomes independently of the motives of the participants" (Elster 1998, 103). This, what Elster coins the *civilising force of hypocrisy* thus imposes an *imperfection constraint* that avoids a perfect coincidence between private interest and impartial argument (1998, 103). But it also imposes a *consistency constraint*: "[o]nce a speaker has adopted an impartial argument because it corresponds to his interest or prejudice, he will be seen as opportunistic if he deviates from it when it ceases to serve his needs" (Elster, 1998, 103). In spite of the fact that we should pursue sincerity for reasons related to transparency (Gutmann & Thompson 1996, 100-101; Martí 2006, 93; Kant 2006, Appendix II), the notion of the civilising force of hypocrisy argues against Kies' contention that low scores on sincerity somehow cancel or trump high scores on other criteria, because the procedure itself gives participants incentives to wield neutral rather than selfish arguments if they want to achieve their self-interested goals. Thus, procedures may still be deliberative when participants are being insincere.

Another problem is that the coding schemes measure equality either by counting the number of words or by determining whether participants have been interrupted. This is problematic, first, because the meaning of equality in deliberative democracy is a contested issue, more complex than what counting words or interruptions may account

[114] Likewise, Dahlberg 2004, 34.

for, for the literature on equality in deliberative democracy includes formal and material aspects that are not covered by the coding schemes (Martí 2006, 95-96).[115] Second, because there is no direct correlation between equality and the number of words spoken. The fact that some people monopolise time in a discussion may be a sign of their dominance. Yet, it could be the case that individuals who speak a small number of words may also have a dominant position in the group and only need to utter few expressions to impose their preferences. Conversely, people can utter many words without saying anything meaningful.

Additional limitations arise from the application of these coding schemes to deliberative systems.[116] On the one hand, it remains unexplored how to measure the quality of the parts, the subsystems, and the system of deliberation itself (Mendonça 2015, 101). On the other, I do not see how, in the face of this lack of mechanisms, one could apply the coding schemes I discussed above from a systemic perspective. More research is needed in order to measure the quality and quantity of deliberative systems using new instruments or adapting the available ones.

These considerations show that measuring the quality and quantity of deliberation in real-world fora is a pressing, however, limited, project. There is a disconnection between political theory and social sciences that leaves a gap in terms of the theoretical foundations of the coding schemes. This could be the manifestation of an old problem: either our normative conceptions of deliberative democracy are too ideal to be turned into empirical models, or our practices fail to live up to our principles. It could be a bit of both, but, given the limitations here explored, the burden is more on social science than on political theory to work out ways in which deliberation can be measured more appropriately.

One final comment is in order before I move on to the next section. It is worth noting that with all the variety of uses of instruments measuring such a diversity of places and settings, involving individuals and topic of all sorts, courts are never part of such assessment. It is indeed a perplexing fact that, notwithstanding this variety and in spite of the rather rosy picture scholars generally paint of courts, no attention has been paid to these agents in the business of deliberative measurement. I now explain why this is the case.

[115] See chapter II, section 2.
[116] Mansbridge 1999; Dryzek 2011; Parkinson 2012; Bohman 2012; Mansbridge, et al. 2012; Kuyper 2015.

3. Judicial Deliberation

With all their limitations, the coding schemes reviewed in the preceding section have been used to evaluate a vast and diverse array of deliberative settings. Yet, I have not found studies measuring how and to what extent deliberation unfolds in the courtroom. One the other hand, however, some prominent scholars have expressed commendatory opinions for the capacity of judges and for the features of the courtroom that turns it into an ideal place for deliberation.[117] Consequently, the question raised by such opinions is: how do we know that this is in fact the case? The literature on the matter is scarce, the coding schemes analysed above have not been applied to courtrooms and there are no studies or analogous mechanisms telling us how judges deliberate in practice. Thus, we are in the presence of a theoretical gap.

In view of these shortages, the intuition that judges deliberate before they decide, is really difficult to justify. The structure of judicial procedures hinders our possibilities of testing this intuition, particularly during their decisional phase, a point where we are in no position at all to claim that judges deliberate.

In order to justify this claim, I analyse an ideal model of judicial deliberation developed by Conrado Hübner Mendes, as his is the most elaborated scheme in the literature answering what a deliberative constitutional court should look like. I conclude that Mendes' model brings to light limitations courts have in deliberative terms, which are to an important degree rooted in the anonymity of the discussions taking place in the decisional phase of the judicial process, that is, during the moment in which judges deliberate among themselves before they reach a decision.

My analysis generalises conclusions drawn by Gastil's (2008) study on the US Supreme Court. There, he argues that the judiciary "is not an easy governmental body to study, as justices do not generally discuss cases with one another – even when they sit on the same court – and when they do, they do not generally share their discussion with the public" (2008, 142). Consider, for example, his analysis of Woodward & Armstrong study (1979), which he describes as "[t]he clearest window into the [US] court's functioning". These journalists had access to examine how the court worked internally from 1969 to 1975, an access that "was rare indeed", for "since the book's publication, the Court has allowed no other observer a similar vantage point from which to write" (Gastil 2008, 143). The report, Gastil writes, "reminds us that justices are human" (2008,

[117] Sen,2013, 308; Rawls 1996, 231-240; Habermas 1996, 242; Eisgruber 2001, 3-5; Alexy 2005, 579; Zurn 2007, 167, 172. For an analysis of these accounts, see chapter VI, section 2.

144), especially when considering Woodward & Armstrong's recount of the summer of 1975, a moment in which the Court reached a "low point" from a deliberative perspective: "The net result of this constellation of justices was a string of decidedly nondeliberative cert and case conference meetings" (2008, 144).

Gastil concludes that this "is not to say that the Court routinely fails to meet a high standard of deliberation". For him, Woodward & Armstrong's report "does illustrate, however, the susceptibility of the Court to the same distortions, distractions and failures that other deliberative bodies experience" (2008, 145).

This conclusion is true, but not enough. Courts may or may not be susceptible to deliberative failures, just like any other deliberative agent. My conclusion is stronger: we are in no position to know whether judges are deliberative during the parts of the procedure in which they gather to decide. Gastil intuits this when he says that "[w]ithout a record of the Court's deliberation, one can only judge its deliberation by the legal quality of its judgments, but that, alas, is a task beyond the scope of this book" (2008, 145). His intuition, however, was not taken to its fullest extent, perhaps because he only discusses the US Supreme Court and things may be different in other countries. Yet, to my knowledge, there are no studies similar to Woodward & Armstrong's, providing us with windows into the internal functioning of other courts in other parts of the world and indeed elsewhere in the United States. Besides, their study did not intend to measure deliberation quality and/or quantity by using any instruments similar to those examined in section 2.

Although the literature on these matters is scarce, Mendes has provided a unique account of what a deliberative court may look like. He starts from the assumption that if

> deliberation enhances the condition of constitutional courts, such courts need to be more than 'exemplars of public reason' or 'forums of principle', more than reason-givers or interlocutors. These expressions, and the respective expectations that they convey, are still superficial. They lack more teeth (2013, 100).

Mendes elaborates a scheme of judicial deliberative performance that takes the opacity of the decisional part of the process as a given. This allows me to take his account as a viewpoint from which I can make my own critical remarks. My comments are not meant to debunk Mendes' project, nor I am implying that his effort is a misleading one, or that he is embracing some form of judicial supremacy, as he is clear that his attempt is to improve the deliberative conditions of a court, not to show that courts are in fact the

best candidates to embody the ideals of deliberative democracy. Our projects are different. Rather, I use his model to suggest that even in an idealised form, courts do not successfully meet basic deliberative conditions.

The model is structured around three tiers: the 'core meaning', the 'facilitators', and the 'hedges' of deliberative performance (2013, 103). They interrelate in order to determine the central deliberative values a court should pursue, and answer questions like who deliberates, who among those deliberating has the power to make decisions, and what are the stages of the process itself.

Mendes distinguishes "three moments in which [judicial] performance might be discerned and appraised, three slices of an overall enterprise" (2013, 105): a pre-decisional, a decisional, and a post-decisional stage. The pre-decisional phase is charged with the task of "public contestation", the decisional with "collegial engagement", and the post-decisional phase is charged with delivering a "deliberative written decision" (2013, 105). He is adamant that courts "may be deliberative in one [of these stages], but not in the other" (2013, 105).

As to who deliberates, there are two types of deliberators: judges and interlocutors, namely, a community comprising "all social actors that, formally or informally, address public arguments to the court and express public positions as to the cases being decided … They can influence and persuade, but they cannot decide" (2013, 106). Furthermore, deliberators can be formal, if they are

> qualified and entitled to participate of the specific constitutional case (litigants, *amici curiae,* etc.), or informal, i.e., those who "in the attempt to exert an indirect influence on the court, engage in the debates through the various communicative media of the public sphere (2013, 106).

In a nutshell, Mendes' idea of a deliberative court entails tribunals that foster different deliberative values at different times. Deliberation cuts through the continuum of the trial in different ways depending on the institutional capacity the court has during each procedural moment. It thus promotes public contestation between parties at the early stages of the process, seeking to gather as much information as possible, to include all relevant arguments so that the pool of information is as varied and respectful of the parties as possible. Members of the court should then retire to deliberate behind closed doors. During this moment, collegial engagement is the guiding principle among judges who are to discuss the merits of the information and the arguments made by the interlocutors, weigh those arguments against the law governing the case *sub lite*, according to their

principles, and interpretive strategies (2013, 108-109, 113-118). Finally, they should deliver their decision by drafting a text that is the result of the preceding stages, showing that the parties have been considered, their inputs and arguments balanced, and their interests weighed. The decision should be the reflection of the collegiality that drove judges to agree on that particular decision and not on a different one (2013, 109-113). This is a rough image of what Mendes thinks a deliberative constitutional court may look like.

The model does not depend on actual cases or empirical assessments of judicial procedures. What it does instead, is to provide a scheme indicating what we can expect from the court during the procedure, in terms of the values each stage is capable of fostering. He then applies four normative categories of deliberative quality to the pre-decisional, decisional, and post-decisional stages of the judicial process: epistemic, communitarian, psychological, and educative. The interplay between phases and categories results in a scheme that "enumerates the potential deliberative qualities of the three phases", underscoring "the different ways and degrees in which the values and promises of deliberation are in play" (2013, 11).

Public Contestation **Pre-decisional phase**	**Collegial Engagement** **Decisional phase**	**Deliberative written decision** **Post-decisional phase**
weak epistemic	strong epistemic	strong epistemic
—	communitarian (internal)	communitarian (external)
strong psychological	weak psychological	strong psychological
strong educative	weak educative	strong educative
strong intrinsic	weak intrinsic	strong intrinsic

Cf **Potential deliberative qualities of constitutional courts in Mendes' model (2013, 114)**

Mendes avers that these phases "should not be taken to suggest a discontinuous process with tight and segmented characteristics" (2013, 114). To put it in the language of deliberative systems theory, the deliberative tasks are distributed. Different agents have different assignments, and are hold to different deliberative standards (Goodin 2005, 189; 2008, 186; Hendriks 2006, 499). Still, the model allows to show some difficulties affecting accounts relating deliberative democracy to the judiciary. In particular, that the

qualities expected from the court during the decisional phase are not well justified from a deliberative perspective. I will briefly explain each deliberative goal, and then close the section justifying this belief.

The epistemic goal gains strength as the procedure moves forward. The pre-decisional phase, contributes "to the multiplication of points of view on a certain controversy [, and it can] at the very least, be a strong practice of information gathering" (2013, 114). The epistemic goal is weak in this stage because it serves the function of providing interlocutors with a hearing to make their arguments and justify their preferences. It is the court that receives such information, which will be used during the decisional phase, and translated into a decision during the post-decisional phase, which explains the strength of the epistemic objective expected at these two last phases. The learning capacity of the parties is then, limited during the first stage, in the sense that it is not a feature that is generally expected from them to develop. Conversely, given that we assume collegial engagement from judges, "[p]remise unveiling, creativity-sparkling, and truth seeking" are more likely to spring during the decisional phase. The post-decisional stage has the epistemic function of "supplementing the next cases with densely drafted precedents" (2013, 114), in order to avoid future cases from having "to re-inaugurate the deliberative chain from scratch, wasting the argumentative accomplishments and progress of previous cases (2013, 114).

The communitarian goal refers to the capacity of each stage to achieve consensus. This goal is absent during the pre-decisional stage, as "it cannot properly have a special commitment to reduce disagreement" (2013, 115). The decisional stage, on the other hand, "has the responsibility of constructing an institutional and de-personified decision" (2013, 115) that should be accepted by the parties at the post-decisional stage.

The psychological goal refers to the "sense of respect instilled among the participants of deliberation" (2013, 115). For Mendes, the court shows interlocutors respect through a "genuinely porous public contestation and a carefully drafted decision" (2013, 115). Also, collegiality demands intra-institutional respect for the court to maintain "its capacity of deliberation" (2013, 115).

A deliberative process should also educate participants, particularly, at the first and the last stages. The decisional stage, however, is not expected to be a moment during which judges "who deliberate on a routine basis" may learn too much; skill enhancement would be a frivolous expectation", notwithstanding they may still "refine their knowledge on the respective topic" (2013, 113).

All these considerations are instrumental. Yet, in order to make his case stronger, Mendes offers a set of non-instrumental reasons why deliberation may be a desirable thing in the courtroom. During the pre-deliberative stage, there are intrinsic reasons to have a deliberative procedure based on the opportunity they give individuals to "make themselves heard and realize their argumentative autonomy before the court" (2013, 116).[118] The same happens with the post-decisional stage, insofar as a deliberative written decision gives the court the "chance to act as a catalyst of external deliberation and to work as an open and accessible 'forum of contestation'" (2013, 116). Things are different at the decisional stage, for courts may or may not be deliberative in this part of the process. So, if judges promote the sense of respect and recognition each individual deserves through public contestation and through the deliberative written decision, then the court will have performed its tasks. Though present (2013, 117), intrinsic reasons for deliberation wane once judges gather to debate behind closed doors.

Critical remarks are in order. From the preceding description, it becomes clear that courts experience non-negligible limitations as deliberative bodies in the following senses. First, there is a disconnect between the epistemic and the psychological goals, for the fact that the model considers interlocutors as providers of information but not as active parts of the process of deliberation itself, evinces the passive role they have in decisional and deliberative terms. The respect shown to interlocutors is not manifested by acknowledging their capacity to discuss and decide, but to raise arguments and preferences, which remain apparently fixed during the first stages of the procedure. There is no reason to think that the judicial process would serve to change the point of view of the parties at the trial, or that the decision promote anything different from mere acceptance, let alone that it will allow one party to share or somehow identify with the views of its counterparts. Moreover, the epistemic strength of the post-decisional phase is weighed *vis-à-vis* other courts, and not with respect to the parties.

Hence, the epistemic and the psychological goals show that the more the procedure moves from the pre-decisional to the post-decisional phase, the less room there is for the interlocutors to participate. This generates a tension with the notion of deliberative democracy that every person potentially affected by a decision should be included in a more substantive way than by mere aggregation. Mendes's model also sees the epistemic goal of deliberative democracy in a narrower way than the traditional

[118] Likewise, Harel 2014, 192.

understanding of the epistemic values given to deliberative processes, which, among others, include the increase of the relevant information available for participants (Manin 1987, 349; Nino 1996, 117-28; Martí 2006, 42), the detection of factual and logical mistakes (Nino, 1996, 124; Martí, 2006, 42), the control of irrational factors and the filtering of irrational preferences (Martí 2006, 42), and the avoidance of inequalities of information and manipulation of the political agenda (Martí 2006, 43).

None of these epistemic functions is fully met in the judicial model portrayed by Mendes, because the only instance in which participants have the chance to be active, the pre-decisional phase, is more aggregative than deliberative. There, preferences remain fixed, learning is limited, and participation adversarial. An example of this lack of deliberation between parties is the absence of communitarian goals at the pre-decisional phase; parties are not expected to reach agreements, neither consensual nor incomplete.

The lack of fit of a constitutional court to an ideal of deliberative democracy is also demonstrated by the portrayal of the educative function. Parties are expected to learn and to provide the court with information at the pre-decisional level. But to conclude, from this, that the educative function is likely to be strong at the pre-decisional phase is, I believe, expecting too much. We must bear in mind that trials are adversarial procedures: parties learn from their counterparts, not to find common ground with opposite sides, but with the aim of rebutting their arguments. Parties do not attempt to convince their counterparts when they go to court, but to convince judges that it is their argument the one that should prevail. Calling this learning and education seems like an overstatement.

Mendes' scheme shows that the obscurity of the decisional phase works against the deliberative quality of the procedure. A close look to the goals deliberative courts are expected to achieve shows that in those moments where we have disclosed access to the arguments and discussions raised during the process, where we can test and measure the quality and quantity of the arguments wielded, that is, the pre and the post-decisional phases, the participation of the interlocutors is not fully deliberative: parties are either sources of inputs in an adversarial, non-dialogical sense, as they do not discuss with the expectation of changing each other's convictions or preferences, or they are passive addressees of the court's decision.

These problems are starker within the decisional phase. Here, the goals we expect the court to achieve become less observable, to the extent judges discuss the merits of the interlocutors' arguments behind closed doors. We expect that there will be a strong epistemic thrust during the decisional phase resulting from the collegiality that is to

inspire the courts' proceedings; we expect judges to believe in "a supra-individual good that they can reach together, and on which the external respectability of their decision will depend" (Mendes 2013, 134). Yet, we have no way of testing whether this common purpose is what actually inspire judges while they decide. Conversely, what we do know, is that ideology can move judges in one direction or another (Tribe 1985) and that their fidelity to the legal framework and the facts of the case are not to be taken for granted (Segal & Spaeth 2002, 53; Goldsworthy 2011).

We expect the judges' discussions to be infused with cognitive modesty — "a logical and moral condition of preference transformation" (2013, 134) exhorting judges to "make themselves vulnerable to the scrutiny of their fellow colleagues" (2013, 134). But, again, we do not have a way to test the extent to which this happens. Moreover, we expect cognitive ambition to "fuel collegiality with an investigative energy without which the epistemic promise of deliberation gets anaemic and fatigued" (2013, 135). But again, how do we know that judges are not "'advocates of a position' but 'students of an issue' … relentless in the search of the best decision"? (2013, 135). We do not have the tools to know that because we are not allowed to check whether this is the case.

Finally, we expect empathy, that is, that courts have "the ability of vicariously [imagine] the points of view that were not formally voiced in the course of the judicial process" (2013, 135). For Mendes, this is the "principal corrective a constitutional court can have against a poorly pre-decisional phase" (2013, 135). Judges should then be able to "go beyond the arguments [they were] able to collect in the pre-decisional phase through empathetic imagination of the potential community of interlocutors" (2013, 136). Yet, our hopes that courts will put themselves in the shoes of others are not supported by our knowledge of the social gaps existing between judges and ordinary citizens. There is no guarantee, no matter how heterogeneous the court is in terms of its composition, that its members will be able to know what are the preferences, lacks, needs, arguments, etc., of a community that is more diverse than the court can ever be. Even if judges agreed to protect the interests of the minorities who have not been able to reach the court (e.g. Ely 1980, 151), it remains difficult to imagine judges being capable of performing this representative task — the fact that constitutional courts are counter-majoritarian, does not mean that they are pro-minoritarian. Even if *arguendo* one assumed that this is indeed the role of a court, there is still no correlation between the duty we expect judges to fulfil and their actual capacity to do so (Gargarella 1996, 181).

The anonymity of the decisional phase is at the core of these problems. We have the tendency to expect many things from courts, but when we ask whether they are capable to live up those expectations, our best answer has to be found in non-procedural reasons and focus on their outcomes. But then, once we make that move toward outcomes, we tend to leave procedural reasons aside. Moreover, assuming that they can, and that we can envisage schemes that measure the quality and quantity of judicial deliberation, we still lack the access to the fora where that deliberation should occur.

4. Conclusions

Despite the usefulness of the instruments here examined, the chapter shows the areas in which measuring deliberation is still a work in progress, namely, the normative foundations of the coding schemes, their employment of key concepts, and their choice for not measuring sincerity weakens the defence of their employment as justified measuring instruments of deliberation.

The chapter also showed that despite the variety of settings the coding schemes have been applied to, courts are not among them, and that in order to make sense of this omission we have to look at the way judicial procedures are set up. By focusing on Mendes' model of deliberative constitutional courts, Section 3 thus demonstrated that those settings and the obscurity of the decisional phase are at the core of the impossibility of measuring whether judges deliberate.

I thus conclude that the current state of the art in deliberative democracy leads us to think that there is no reason why one would have a high regard for judges in terms of their deliberative capacities: this could or could not be the case. The fact is that, not only we do not know, but also that unless we change the way decisional phases of judicial procedures are structured, we are unable to know.

I must be careful not to overstate my conclusion, as our knowledge of the effects of anonymity in political arenas is limited (Gardner 2011, 930). Also, recent scholarship suggests that the benefits deliberative democrats see in transparency and publicity are contingent. It also indicates that in opaque and anonymous settings, even the most self-interested and market-oriented actors adapt to deliberative norms (Naurin 2007). This means that it may be perfectly legitimate to keep the decisional phase of judicial procedures anonymous. Nonetheless, this scholarship is still too underdeveloped, and too focused on one specific kind of actors, namely lobbyists, who operate with incentives which are, prima facie, different from the ones judges have in their institutional environment. Some studies follow a trend initiated by Posner (1993) that link judicial

performance and incentives, where anonymity and political insulation play an important role. These studies, however, do not measure the effects of those incentives in terms of the effects that they may have in the *deliberative* performance of judges (Schneider 2005; Melcarne & Ramello 2015).

More research is needed on these matters. For now, we can conclude that the scholarship on present-day deliberative democracy proves that when we ask ourselves how people deliberate, we can mostly answer with regard to non-judicial settings. In this ambit, our answer will have to bear in mind that the current instruments we use to determine how people deliberate compromise theoretical ideals to different degrees. My take on this ideal-theory/practice divide is that the compromise is justified only within certain domains, for example, when it comes to measure authenticity. But there is certainly work to be done with regard to the philosophical foundations of the coding schemes. In this respect, scholars need to further think whether Habermas' is the right approach to follow, and, should they decide to stick to that approach, the should also answer "which Habermas" is grounding their schemes – the complexity of his work demands such specification.

Regarding the *judicial* side of the comparison, these pages showed that given the very structure of the courts' procedures, we know a lot less and that we are hindered from knowing much more.

This chapter closes a threefold argument against the supremacy of the judiciary as a deliberative authoritative constitutional interpreter. Recapitulating, the rejection started in chapter III. There I provided normative, political arguments against judicial supremacy in the interpretation of the constitution. Chapter IV supplemented that argument by analysing whether there is something in the notion of interpretation that would entail an institutional commitment of some sort (e.g. with the judiciary). The chapter argued in the negative and, instead, suggested that the normative and the linguistic indeterminacy of a constitution together with the number of affected by decisions at the constitutional level constitute criteria to theorise constitutional interpretation from the perspective of deliberative democratic theory. Finally, provided that there are reasons to think of constitutional interpretation from a deliberative perspective, this chapter has given an argument against the idea that judges are ideal deliberators. Had this understanding been true, judicial supremacists would have had a good argument to sustain the high position in which they place the courts. Yet, this chapter has shown that this is not the case.

The rejection of judicial supremacy from a deliberative perspective lead us to ask what role is left for judges in a system of deliberation that would lead to determine the meaning of the constitution with final effects? This question is answered in the following chapter.

CHAPTER VI

DELIBERATION AND COURTS: THE ROLE OF THE JUDICIARY IN A DELIBERATIVE SYSTEM

1. Introduction

The preceding chapters rejected the supremacy of courts in constitutional interpretation from a deliberative perspective. This chapter reflects on what position is then left available for courts in a system of deliberation.

In this part of the dissertation I subscribe to recent systemic approaches in deliberative democracy for two reasons. First, because the state of the art in deliberative democratic theory is clearly related to the study of these systemic perspectives. Second, because, as my normative argument hinted, systemic approaches are more egalitarian in discursive terms than more traditional, more rationalistic accounts of deliberative democracy. They are compatible with EAD.

Present-day deliberative democracy is silent regarding the role of the judiciary in a deliberative system. I thus examine the opinion some scholars have held concerning the deliberative capacity of judges during earlier stages of the theory and argue that their understanding of the courtroom as an ideal deliberative site is not the proper approach to follow after the systemic turn in deliberative democracy. I show that endorsing a systemic approach entails a rejection of a privileged treatment of judges in terms of their deliberative capacities. I also argue that in spite of this more limited role, courts still serve the deliberative system by making individuals visible in the face of systemic failures.

The chapter runs as follows: section 2 describes the role Rawls, Eisgruber, Habermas, and Alexy have ascribed to the judiciary during the first stages of deliberative democracy. They praise the deliberative capacities of courts on the basis of their alleged ability to engage in rational discourse, provide parties with a hearing, and/or act as argumentative representatives of the people, among other arguments. Others have also underscored the deliberative capacities of judges, but I focus on these authors as their arguments cover most of the defences of such idealistic view. I criticise their opinions in order to reject a division of labour that places courts as ideal sites for deliberation.

Section 3 defines the deliberative system and highlights the features of the transition from the first stages of deliberative democracy to its systemic phase.

Section 4 reflects on these changes and argues that the accounts described in section 2 are incompatible with current developments in deliberative democratic theory.

To do this, I single out three elements common to systemic approaches: an extensive conception of deliberation, an interaction-dependent understanding of legitimacy, and a holistic orientation in terms of the evaluative tests of the system. Against the background of these elements I argue that one cannot maintain a high regard for the judiciary in deliberative terms.

Section 5 concludes that the image of the judiciary portrayed the scholars considered in section 2 should be rejected and courts reconsidered as one element among others forming a system of deliberation. Moreover, it concludes that courts still have a role to play by making individuals visible within the system, providing them with tools to raise their grievances and their own understanding of what a constitution means. This role is, however, incompatible with judicial supremacy.

This section contributes to the literature by examining the relationship between courts and deliberation, which has been neglected after the systemic turn. It also improves the understanding of deliberative systems by engaging with their definition, something necessary provided that the theory is under development and that the concept has not been fully confronted (Mendonça 2013, 19). Finally, the chapter contributes to popular constitutionalism by repositioning the judiciary within a deliberative system in non-supremacist ways.

2. Deliberative Democracy and the Judiciary

Deliberative democracy is a theory whose core claims are that collective decisions be adopted via a method of deliberation, with the inclusion of all potentially affected by the decisions (Elster 1998, 8). Accordingly, deliberation operates as a justification as well as a condition for the legitimacy of the decisions adopted.[119] Additionally, it has the nature of a regulative ideal — a horizon decision-making processes should strive to attain (Kant 1996: A569-B597; Mansbridge et al. 2010, 65). This explains, for example, the ideal character of Cohen's deliberative procedure (1997, 67, 72-9) and Habermas' unlimited community of communication (1993, 56).

Deliberative democracy has experienced three phases, which overlap to some extent: theoretical, empirical, and systemic.[120] The first established its distinctiveness with respect to other strands of political theory.[121] Its proponents showed interest in

[119] Manin 1987, 359; Gutmann & Thompson 1996, 4; Bohman 1996, 4; 1998, 401, 402; 2009, 28; Cohen 1997, 67; Chambers 2003, 308; Martí 2006, 22.
[120] Dryzek 2010, 6-10; Mansbridge et al. 2012, 1-3; Chambers 2013, 201-20; Owen & Smith 2015, 213-214; Lafont 2015, 40-41; Kuyper 2015, 53-54.
[121] Bohman 1998, 400; Martí 2006, 40-52; Fishkin J. 2014, 27-31.

moving beyond the limits of alternative democratic theories, emphasising the epistemic, educational and/or moral benefits of employing processes of deliberation (Chambers, 2003, 307).

Deliberation became the distinctive feature of the model, differentiating it from other perspectives that highlighted the market rather than the forum (Elster 1986). Manin emphasised the importance of deliberation for the legitimacy of political decisions (1987, 359), and Cohen defined deliberative democracy as 'an association whose affairs are governed by the public deliberation of its members' (1997, 67). Bohman claimed that in early formulations of the deliberative ideal "deliberation was always opposed to aggregation and to the strategic behaviour encouraged by voting and bargaining" (1998, 400). Also fundamental was Habermas' contribution to the model, first in discourse ethics (1981), and then in law and politics.[122]

Deliberative democracy then moved to its empirical phase:[123] while scholars continued to develop its theoretical foundations, some also conducted empirical analysis on focus groups, town meetings, school desegregation, deliberative polls, online deliberation, citizen summits, community policy programs, participatory designing of health systems and city's budgeting, etc.[124] Authors thus showed interest in institutional problems by "pointing out empirical problems and obstacles that cannot always be anticipated by conceptual argument alone" (Bohman 1998, 401).

These first two stages continue to this day, but in recent years we have also witnessed a turn towards a systemic stage, which seeks "to develop a comprehensive account of deliberative democracy as a large-scale system" (Kuyper 2015, 54). It assumes that none of the sites accomplishing political work possesses enough representativeness or deliberative quality as to legitimate all the decisions adopted in a polity. A deliberative system thus includes every individual and site of deliberation and attempts to make use of their advantages and strengths while avoiding their weaknesses and shortcomings.

Some scholars indicate that although the empirical turn suggested innovative proposals for turning the ideal into something feasible, they were often motivated by divergent views on *micro* and *macro* sites of deliberation.[125] *Micro* deliberation, the one

[122] Habermas 1990, 83; 1996; Dryzek 2000, 2; Martí 2006, 15.
[123] Bohman 1998; Bächtiger, et al. 2010, 32; Ryan & Smith 2014, 9; Kuyper 2015, 53-54; Owen & Smith 2015, 214; Lafont 2015, 40.
[124] Chambers 2003; Fung 2003; Goodin & Dryzek 2006, 221-225; Delli Carpini, Lomax Cook, & Jakobs 2004; Schkade, Sunstein, & Hastie 2010; Ryan & Smith 2014, 12.
[125] Lafont 2015, 41; Goodin & Dryzek 2006, 220; Mansbridge et al. 2012, 1; Owen & Smith 2015, 214.

that takes place in *mini publics* like citizen juries, consensus conferences, deliberative polls, etc., emphasises deliberation in small-scale sites, where the theoretical requirements of deliberative democracy may be tested while coping with the practicalities of experimenting at large-scale-societal levels.[126] Conversely, *macro* deliberation is concerned with participation and inclusion in large societal scale rather than with the quality of the deliberative process or with the engagement of citizens in the resolution of local problems (Lafont 2015, 40-41).[127]

The relations between these levels is complex, since the quality of deliberation fostered by *micro* accounts and the amount of public participation demanded by *macro* accounts are in tension; increasing one may come at cost of the other: "social complexity and scale limit the extent to which modern polities can be both deliberative and participatory" (Cohen 2009, 257).[128] Hence, deliberative democrats are somehow forced to choose between two essential criteria, namely, the inclusion of those potentially affected by the decisions adopted, and the reason-giving nature of the deliberative process, whose success ought to be measured by the rationality of the arguments wielded (Habermas 1996, 107; Bohman 1998, 400). Favouring the former view, Young (1999) and Lafont (2015, 15) argue for more inclusion and improved mass deliberation. As a sample of the latter, Fishkin defines deliberative democracy "as explicitly affirming political equality and deliberation but agnostic about participation" (2009, 191).

One solution proposed to deal with this has been a division of labour that ensures that both elements are simultaneously taken into account. Accordingly, institutions like legislatures, citizens' review boards and executives would embody the participatory and inclusive pole, while judicial institutions, staffed by judges trained in practical and legal reasoning, would be ideal candidates for the reason-giving, argumentative side of the tension (Zurn 2007, 166; Papadopoulos 2012, 142; Sen 2013, 308).

To different extents, with different normative commitments and via different strategies, John Rawls, Christopher Eisgruber, Jürgen Habermas and Robert Alexy are authors concerned with deliberation who have supported the aforementioned division of labour between participatory and expert deliberative institutions that would "satisfy the

[126] For example, Fishkin 1997; Fung 2003; Gastil & Levine 2005; Goodin & Dryzek 2006; Grönlund, Bächtiger, & Setälä 2014. Also, see the case-studies available in participedia.net (Fung & Warren 2011).
[127] For example, Habermas 1996; Rehg & Bohman 1996; Fishkin 1997; Elster 1998; Ackerman & Fishkin 2004.
[128] See also, Goodin & Dryzek 2006, 220; Dryzek 2010, 26; Fishkin 2011, 243; Parkinson 2012, 152; Lafont 2015, 42-43. Fishkin describes the problem as trilemma between political equality, mass participation, and deliberation (2011, 248-249).

dualistic deliberative criterion for democratic legitimacy" (Zurn 2007, 166-184).[129] These writers are sympathetic to the view that "if … we are trying to locate the institutions where reasoning and deliberation play an important role in public life, it is apt to begin with courts and especially with courts dealing with constitutional issues" (Ferejohn & Pasquino 2002, 22).

Before I discuss their accounts, I must clarify that my question is whether the court-room is the ideal forum for *deliberation*. I emphasise this because the aforementioned authors do not distinguish between this method of decision-making and other distinct category, namely, *adjudication*. Both terms can be mistakenly used without distinction, and this may be one of the reasons why some regard the court-room as ideal for deliberation.[130]

This confusion is present in, for example, Fuller's account of adjudication. He distinguishes between different forms of decision-making or forms of social ordering, as he calls them: contract, elections, and adjudication. The taxonomy is analogous to that of political theorists who distinguish between aggregation, bargaining, and deliberation (Elster 1998, 5-6).

For Fuller, those forms of decision-making are connected to different modes of participation. Hence, negotiation is the way in which parties who contract decide, voting the way in which elections are decided, and "presentation of proofs and reasoned argument" (1978, 363), the way adjudication is exercised. Courts become the place where proofs and arguments are presented and wielded. Adjudication, Fuller claims, gives "formal and institutional expression to the influence of reasoned argument in human affairs" and "as such it assumes a burden of rationality not borne by any other form of social ordering" (1978, 367).

But adjudication and deliberation are different concepts. The term *adjudication* answers how judges should *decide* cases, which in turn is ambiguous between reasoning to establish the content of the law, on the one hand, and reasoning from the content of the law to the decision a court should reach in a specific case, on the other (Dickson 2015, 3-4). This concept does not exhaust the uses of the term deliberation, which is neither limited to the vocabulary of legality nor to the jargon of jurists, as it can be exercised

[129] Portraying Rawls as a deliberative democrat is reasonable, although admittedly contestable. For accounts explicitly in favour of his inclusion, see Freeman 2000, 382; Cohen 2003; Zurn 2007, 166; Dryzek 2010, 325; Morrel 2014, 159.

[130] Some do distinguish both concepts, for example, Mendes 2013, 53-71. I am merely suggesting that conflating both concepts may partly explain the problems evinced by the scholars here examined.

through different non-coercive forms. It is not true either, as I show here, that adjudication is the only device giving "formal and institutional expression to the influence of reasoned argument in human affairs" (Fuller 1978, 366).[131]

Deliberation and adjudication are not, then, the same, and my concern is with how citizens and judges *deliberate,* and not with how they *adjudicate*. Judges may adjudicate better, but that is a different matter. With this clarified, I now move to the examination of scholars who seem to be trapped in confusions of this sort.

Rawls saw the US Supreme Court as the exemplar of public reason and its discourse as the best instance of the language deliberators should use given the expected neutrality of public reason,

> carefully eschewing reference to citizens' diverse comprehensive worldviews, while nevertheless rendering decisions based on fundamental political values shared by all reasonable citizens. Courts are democratic because they exemplify how to *speak* in the political language shared by citizens (Zurn 2007, 167. Emphasis in the original).[132]

Rawls advanced three arguments in support of this idea. First, building on Ackerman's dualistic democracy (1991, 3-33), he thought that in applying public reason, courts "prevent[ed] the law from being eroded by the legislation of transient majorities, or more likely, by organised and well-situated narrow interests skilled at getting their way" (1996, 233). Second, "public reason is the sole reason the court exercises" (1996, 235). Neither citizens nor legislators need be guided by public reason, as they may prefer to deliberate from and vote for their own comprehensive views when matters of justice are not at stake. Judges, on the other hand, do not have recourse to any specific comprehensive view (1996, 235-236). In addition, the court's status as a deliberative institution is "further buttressed by its ability to invigorate and galvanize public discussion, even at times when the court's own reasoning might itself fall short" (Sen 2013, 26-27). Third, the court is seen as a deliberative examplar as a result of its members' capacity to give public reason vividness and vitality in the public forum, by authoritatively and reasonably adjudicating on fundamental political questions (1996, 237). It is important, however, to stress that these remarks do not imply that Rawls was advocating a form of judicial supremacy, something which he explicitly rejects (1996, 237, 240).

[131] Likewise, Harel 2014, 192.
[132] See also, Rawls 1996 231-240.

In turn, Eisgruber seeks to justify the Supreme Court's prominent place in US politics by interpreting the Constitution as a "practical device that launches and maintains a sophisticated set of institutions which, in combination, are well suited to implement self-government" (2001, 3). He thinks the reviewing powers of the court should be regarded as practical mechanisms implementing a "subtle form of democratic rule". The court itself ought to be understood as a kind of representative institution "well-shaped to speak on behalf of the people about questions of moral and political principle" (2001, 3, 5), not because judges have some special capacity to engage in moral reasoning, but because of the institutional incentives from which they are free *vis-à-vis* elected legislators (Zurn 2007, 172).[133] Here the division of labour appears as a result of the justices' insulation from the political process guaranteed by their life-tenure, which allows them to speak on behalf of the people and remain faithful to principled reasoning even in the face of political and social pressure.

According to Eisgruber, a good government must take into account that representatives have myriad incentives to desire things they should not have. Judges, on the other hand, represent the people's convictions about what is right and wrong, and make feasible the aspiration that values should take priority over interests. He thinks that because elected representatives must please voters to get re-elected, they are likely to represent the people's interest. Conversely, the contribution of politically insulated justices lies in their position "to represent the people's convictions about what is right" (2001, 5).

Rawls and Eisgruber fail to consider evidence that questions the neutrality or the "principled" approaches of judges when it comes to decide matters of constitutional salience. But their idealisation should be tempered, for the reasons on which judges decide are in part principled, in part attitudinal, and in part strategic. They are conditioned by institutional design, case salience, ideological preferences of other actors of the political system, norms and procedural rules, among other constrains.[134] Both scholars omit these findings and come up with an overly idealised image of the judiciary.

Turning now to Habermas, I should express the caveat that his main concern is with constitutional review rather than with *judicial* constitutional review. The latter is instrumental to the former, as for Habermas whatever institutional arrangement ultimately

[133] Likewise, Doherty & Pevnick 2013.
[134] Segal & Spaeth 2002, 48; Unah & Hancock 2006; Whittington 2010; Fallon 2010; Goldsworthy 2011, 309-310.

adopted must serve the purpose of securing the constitutional conditions of deliberative politics (1996, 279-280). Courts are better instruments for meeting those conditions, again for reasons of distribution of labour.

Habermas' claim hinges on a distinction between discourses of application and discourses of justification. Accordingly, he sees constitutional review as the application of already justified constitutional norms to ordinary legislation. The adjudicator assumes the role of an impartial referee between citizens and their representatives; it ensures that public opinion is channelled without obstructions into the legally structured public sphere by keeping open the channels of political change, guaranteeing respect for the individuals' legal, social, and political rights. It does this by

> scrutinizing the constitutional quality and property of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers (Zurn 2007, 243).

However, Habermas does not give a compelling argument for championing the courtroom as the best institutional forum to perform these tasks. He briefly considers alternative institutional arrangements like special legislative committees staffed by legal experts which would have the function of inducing legislators to "keep the normative content of constitutional principles in mind from the very start of their deliberations" (1996, 242). Yet, he discards them as he thinks ordinary legislative assemblies do not have a special disposition to consider the content of constitutional rights compared to the disposition they have toward ordinary statutory content. He then engages in a long discussion on the interpretive approaches and methodological issues raised by the practices of the US Supreme Court and the German Constitutional Court, leaving a gap in terms of the justification of their constitutional reviewing faculties.

I can only infer that Habermas' confidence about judges hinges on their capacity to engage in constitutional principled deliberation. This is consistent with Habermas' Dworkinian premises (1996, 204-224). It is also supported by Zurn, who notes that

> these arguments about how a constitutional court should adjudicate already presuppose that the institutionalisation question is settled. Perhaps the richness of the German and American jurisprudential debates simply distracts Habermas from a more wide-ranging consideration of issues concerning the separation of powers and institutional design (2007, 244).

Alexy follows an analogous approach. He recognises that constitutional review does not merely consist in asserting the constitutionality of a piece of legislation but that

typically courts have the power to invalidate provisions they consider unconstitutional, so he takes pains to justify such power.

Generally, judges "have no direct legitimacy and people have, as a whole, no possibility of control by denying them re-election". Alexy thus asks how this is compatible with democratic government (2005, 579) The answer rests on how he understands representation, namely as a relation between a *repraesentandum* and a *repraesentans* that can be exercised through elections, but also and complementarily via argumentation. Alexy considers that in modern democracies there are two types of representation, one decisional justified by elections, and one argumentative or discursive.[135] Under this scheme, democracies ought not to be purely justified by the existence of an elected government, but they should be deliberative as well, justified by the rationality of the procedures by which correct rules and principles are identified and applied to individuals (2005, 579).

I will not fully elaborate Alexy's idea of discursive representation. I will say, however, that it is not clear why he calls it representation at all, specially considering that for him, it is important that the constitutional court "not only claim that its arguments are arguments of the people; a sufficient number of people must, at least in the long run, accept these arguments for reasons of correctness" (2005, 580). This recourse to *ex post* social acceptance may have an appeal in terms of legitimacy, but it is not representation. All the same, and with that caveat in mind, I treat Alexy's account on its own terms.

What Alexy calls discursive democracy (*Cf* Dryzek 2000, 3) is thus linked to the conditions of argumentative representation, which connects legal and political practices to an ideal dimension of correctness in discursive terms. In turn, argumentation ought to be exercised by balancing constitutional principles, a practice judges are well-suited to perform. It follows that the domain of constitutional rationality is the domain of constitutional courts entrusted with the task of balancing rights, understood as requirements of optimisation. Legislatures, on the other hand, are not burdened with the demanding requirements of justification in terms of proportionality and balancing.[136]

Summing up, these scholars share the view that supreme or constitutional courts occupy a distinctive place in the political system because of their capacity to engage in principled deliberation, a view that is consistent with accounts of deliberative democracy

[135] Likewise, Rosanvallon 2011, 121-168.
[136] For a description of the proportionality principle and its relation with balancing, see Alexy 2002, 47; 2005, 572-573; 2014, 52.

predating the systemic turn. A deliberative system, however, poses difficulties to this position. Instead, I will show that a systemic approach pulls in the opposite direction, leading to the conclusion that constitutional debate in courts is one special type of discourse, albeit one insufficient to justify the prominent place these scholars give to the judiciary. But before doing so, in section 3, I describe the systemic turn and examine what is a deliberative system.

3. The Systemic Turn

Scholars embracing systemic approaches to deliberative democracy acknowledge that democracies are complex entities in which a wide variety of institutions, associations, and sites of contestation accomplish political work; that there are no single fora, irrespective of their competence or composition, with enough capacity to legitimate decisions simultaneously at the individual and at the societal level. What the should be designed instead is a system that combine different perspectives and their virtues, avoiding their weaknesses and taking advantage of their strengths not just considered individually, but in relation to other parts of the system. This eludes the fixation with placing all the virtues of deliberation in a single site.[137]

In light of this, deliberative democrats have advocated a deliberative system. For them, a system is a "set of distinguishable, differentiated, but to some degree interdependent parts, often with distributed functions and a division of labour, connected in such a way as to form a complex whole" (Mansbridge, et al. 2012, 5).[138] Hence, a deliberative system is "one that encompasses a talk-based approach to political conflict and problem-solving – through arguing, demonstrating, expressing, and persuading" (Mansbridge, et al. 2012, 5). These authors further clarify the notion when they claim that "[t]he ideal of a deliberative system … is a loosely coupled group of institutions and practices that together perform the three functions … [of] seeking truth, establishing mutual respect, and generating inclusive, egalitarian decision-making" (Mansbridge, et al. 2012, 22).

Simply put, a deliberative system is one where different qualities or features of deliberation are found or take place across a range of differentiated and interconnected venues. The focus is not on a particular institution, process or agent, but on their

[137] Mansbridge et al. 2012, 2; Bohman 2012, 72, 73; Chambers 2013, 201-202; Kuyper 2015, 54; Lafont 2015, 41.
[138] For similar descriptions, see Chambers 2013, 201-202; Lafont 2015, 41; Kuyper 2015, 51; Owen & Smith 2015, 215.

connectedness and interactions. It thus consists of an interrelated set of individuals, civil associations and formal political institutions gathered in a political unit, linked in such a way as to form a complex whole, and engaged in the production, transformation and expression of considered political emotions, preferences, discourses and arguments, in the context of solving conflicts and adopting legitimate, respectful, inclusive and egalitarian collective decisions in an ongoing fashion.

This description covers both poles of a continuum ranging from individual and micro to macro deliberative sites, including all sort of political actors regardless of their institutionalisation, discursive capacity or influence. These subjects are interrelated. What distinguishes a system from a group of independent parts, is that individual sites are studied not in a vacuum, but in light of their contribution to the overall decision-making process in the polity they are part of, bolstering the capacities of some parts, and potentially reducing the influence of others.

Moreover, the subjects are related with the aim of producing, transforming and expressing political emotions, preferences, discourses and arguments. As part of deliberative democratic theory, the systemic approach accentuates the importance of reason-giving in processes of decision-making. Now, what characterises the reason-giving aspect in a deliberative system, is the inclusion of non-coercive forms of talk, justification and argument potentially accepted as deliberative, including rhetoric, bargaining and emotions (Dryzek 2000, 1-2). This is consistent with the ample range of deliberative sites considered as relevant for the system, as individuals and institutions differ in their argumentative capacity, experience, epistemic competence, etc., *vis-à-vis* other more educated and better articulated individuals who may justify their preferences in more rational ways. Ignoring less rational forms of argument and expression of preferences may result in a direct exclusion of individuals from the fora where collective decisions are adopted, and systemic approaches take that into account.

Finally, the examination of the parts accomplishing political work is made with the aim of analysing the extent to which they are part of a process of decision-making in a societal scale. The study of individual sites is then oriented to understanding how they influence the production of norms affecting the political community as a whole, something consistent with the traditional idea that "[w]ith a few exceptions, the task of a political assembly is to choose among policy proposals" (Elster 1998, 100; 7-8). This, however, should not be mistaken for the hypothetical claim that all that matters in a deliberative system are those sites expressly designed for adopting decisions. What it

means is that different individuals and sites become subjects of study to the extent they can influence decisions within a system. That explains why, for example, university debates, radio and television shows, informal talk in private and public spaces become relevant even though they are not primarily oriented towards adopting decisions (Mansbridge 1999, 212). Behind these considerations lies Mansbridge's notion of the "political", namely "that which the public ought to discuss', when that discussion forms part of some, perhaps highly informal, version of a collective decision" (1999, 214).

Incorporating the contributions different sites of deliberation and understanding how they relate to each other allows to think in terms of large-scale implications, (Chambers 2013, 201-202). The Habermasian *two-track* model of deliberative politics that distinguishes between informal public spheres and will formation in formal politics on the one hand, and representative institutions on the other, is thus expanded as part of a reassessment of the kind of talk deliberativists consider as embodiments of the deliberative ideal. This re-evaluation becomes possible by broadening the forms of communication falling under our idea of deliberation, including all the varieties of everyday talk, and by moving the field of deliberative democracy beyond its perceived obsession with formal political fora and processes (Mansbridge et al. 2012, 2).[139]

A deliberative system is also the result of a change of theoretical perspective. Those who embrace it ask questions different from the ones asked in stages predating the systemic turn. Instead of asking which is the best deliberative forum, they would ask how the deliberative contributions of all the sites in a given community can together improve the decision-making process. Instead of enquiring who meets the conditions of ideal deliberation, they would now examine what is the epistemic competence of all the relevant actors in a polity and how their capacities can be used to make better and more legitimate decisions. Rather than striving for accomplishing decisions of great justificatory quality and placing the entire burden of legitimacy on them, they identify all the potential sites of deliberation, prima facie accepting their capacity, improving them when necessary, but making use of their contributions as limited as they may be, so the legitimacy of the ultimate decision be distributed across the board. Finally, instead of exclusively focusing on macro analysis of the whole community of deliberation, they make that assessment from the study of the parts involved in the process of deliberation.

[139] See also, Mansbridge 1999; Dryzek 2000, 2; Chambers 2012, 68-69; Bohman 2012, 79; Christiano 2012, 30; Parkinson 2012, 151; Owen & Smith 2015, 215.

A systemic approach is then an ongoing top-down and bottom-up process of analysis of the deliberative capacities and contributions of the multiplicity of political actors.

Finally, the deliberative system serves a variety of epistemic, ethical and democratic functions.[140] It produces preferences and decisions grounded in relevant reasons, tested against others who potentially have a stake in the results of the process who, in turn, offer their own perspectives, arguments and preferences in order to reach considered and fair agreements (Mansbridge et al. 2012, 11). Adding to these epistemic desiderata, an ethical function implies that a deliberative system must be designed to work in ways that promote mutual respect and take individuals as ends and not as means, as self-authoring sources of reasons and claims. The democratic function, finally supposes the inclusion of all claims, viewpoints, preferences and interests in egalitarian terms, and is perhaps the most central function of a deliberative system (Mansbridge et al. 2012, 11-13).

4. Deliberative Systems and Courts

The preceding sections provide a scheme against which the role of the judiciary within a deliberative system can be assessed. Those discussions allow me to single out three elements common to systemic approaches: (1) an extensive conception of deliberation, (2) an interaction-dependent understanding of legitimacy, and (3) a holistic orientation.

This section critically expounds those elements. They are then applied to the problem of courts as deliberative agents within a deliberative system, questioning the extent to which scholarly accounts of section 2 can maintain their high regard for the judiciary. Overall, I conclude that the features of a deliberative system are incompatible with imagining judges as privileged deliberators.

4.1. An extensive conception of deliberation

Systemic approaches highlight the expansion of the traditional understandings of deliberation to incorporate *everyday talk*, which anchors "one end of a spectrum at whose other end lies the public decision-making assembly" (Mansbridge 1999, 212). That includes "talk among both formal and informal representatives in politically oriented organisations, talk in the media, talk among political activists, and everyday talk in formally private spaces about things the public ought to discuss" (Mansbridge 1999, 211).

[140] I follow Mansbridge et al. 2012, 10-13. Chambers mentions two functions: the promotion of inclusion and of epistemically robust decisions (2013, 207-208).

Indeed, these "loosening of what it might mean to 'reason together' is one of the critical intellectual moves that have allowed the deliberative systems approach to re-emerge" (Parkinson 2012, 153-154).

This opening towards new sorts of talk is incompatible with the division of labour elaborated by the accounts considered in section 2. For a start, the Rawlsian exemplarity of the Supreme Court limits public reason to one aspect of the full array of available forms of talk, limiting the deliberative public sphere to those who access the court and articulate their claims in the jargon of constitutional and legal experts. More importantly, it relies too heavily on a neutral conception of public reason, leaving little room for alternative forms of discourse, such as bargaining, rhetoric and emotions.

These sorts of speech are now accepted as contributions to deliberative democracy. As Mansbridge & Warren affirm,

> although sometimes negotiations that end in compromise may reflect failures to find common interests … such failure can occur only when common interests exist and could be found … Because conflicting interests are an ineradicable part of political life in a pluralistic society, negotiation and compromise are essential features of political systems that maximize democratic goods (2013, 102).

Expansions of the deliberative ideal include self-interest and conflict among those interests "in order to recognize and celebrate in the ideal itself the diversity of free and equal human beings", to the extent self-interested claims can be justified deliberatively (Mansbridge et al. 2010, 69; Dryzek 2000, 1-2; 2010). This entails allowing non-coercive forms of negotiation such as convergence, incompletely theorised agreements, integrative negotiations and fully cooperative distributive negotiations, as well as rhetoric, all of which incorporate self-interest and/or non-coercive power (2010, 70-72; Dryzek 2000, 1-2; 2010). Hence, the court's neutrality regarding competing conceptions of the good does not seem like a sufficient argument to see it as the embodiment of the deliberative ideal, which in current developments of democratic theory includes the acceptance of the speakers' intention to advance their own comprehensive doctrines.

Eisgruber's account does not seem too promising either. Failing to consider informal and non-judicial talk as conducive to principled decisions is at odds with perspectives seeking to ground political legitimacy on the interaction of the different parts of a system (Chambers 2012, 71). Similarly, Alexy's distinction of forms of representation based on types of reasoning seems incompatible with these systemic features, for he reduces electoral representation to a decisional sort of legitimacy, leaving

argumentative representation to the reasoning performed by the courts. For him, the constitutional discourse embodied by the method of balancing principles justifies the deliberative representative task courts are to perform. However, systemic approaches start from the diametrically opposite assumption that no single forum can by itself legitimate most of the decisions adopted in a polity, let alone all of them (Chambers 2012, 65). They evaluate the legitimacy of decisions considering the full array of available discourses, so that the concept of public reason may be enlarged "to encompass a "considered" mixture of emotion and reason rather than pure rationality" (Mansbridge 1999, 213).

Overall, there is little room for accounts of the kind described in section 2 in a stage of deliberative theory that attempts to simultaneously account for the legitimacy of formal, informal, neutral and self-interested deliberative modes of reasoning.

4.2. An interaction-dependent understanding of legitimacy

This element is related to the interactions generated by the notion of a system. Deliberative systems are composed of interrelated parts that accomplish political work through different discourses and at different stages of the decision-making process.

The resulting division of labour is, however, different from the rather binary one envisioned by Rawls et al., whereby judges decide on matters of principle, leaving matters of policy and expediency to majorities. From a systemic perspective, this is an oversimplified picture of the political fora one can find in modern democracies, which fails to consider the myriad available discourses that generate inputs in matters of policy and principle.

The division of labour in a deliberative system is more complex than this. It aims at including every actor accomplishing political work, including courts and legislatures, but also interest group associations, political parties, media, universities, think tanks, blogs, movies, schools, organised advocacy groups, foundations, private and non-profit institutions, individuals, etc.[141] This generates a community of scattered sites, which means that relying on a single forum to embody every ideal of deliberation places an unnecessary burden on such site, a burden which should be distributed across the board.[142] In the presence of this varied public sphere, it becomes difficult to imagine the court-room as the single ideal forum for deliberation.

[141] Mansbridge 1999, 213; Mansbridge et al. 2012, 2; Christiano 2012, 30; 2015a, 257-265.
[142] Mansbridge 1999, 213; Dryzek 2010, 326; Mansbridge et al. 2012, 2-3; Chambers 2013, 202.

Consequently, political decisions result from the combination and interaction of the deliberative exercises made by different actors who contribute in different degrees, regarding different aspects, whose interests are more or less at stake, but who ultimately participate in the adoption of political decisions, to the extent that the system is capable of transforming their preferences into administrative power. The legitimacy of the decision is not assigned to one individual or forum. It results, instead, from the entire system.

Sequential models show how legitimacy in a deliberative system should be sought in different fora. Goodin's model of distributed or delegated deliberation envisages representative democracy as proceeding in different stages (2005, 189), exploring "the possibilities of dividing up the deliberative task, assigning different portions of it to different agents, and holding them to different deliberative standards accordingly" (2005, 182). He presents this an "alternative to the 'unitary' model of deliberation that presently dominates discussion among deliberative democrats" (2008, 186). Similarly, Hendriks's proposal of integrated deliberation conceptualises deliberation as occurring in a variety of discursive spheres in which public discourse materialises through the exposition and discussion of different viewpoints where different agents play different roles at different times (2006, 499).

These models suggest that collective decisions cannot be legitimate if made in a single forum. The judge then becomes one among many actors who are welcome to give inputs, arguments, and solutions to collective problems in different ways, with different degrees of expertise. The idea is captured in Dryzek's notion of *discursive legitimacy*, according to which a procedure is legitimate "when a collective decision is consistent with the constellation of discourses present in the public sphere, in the degree to which this constellation is subject to the reflective control of competent actors" (2001, 660). The second part of this quote reminds us that a deliberative system does not deny that there are people with different degrees of expertise. That control is not, however, itself the condition of legitimacy, which rather rests on the acceptability of the decision on the grounds of its discursive inclusion. So, even if, *arguendo*, one accepted courts as ideal controllers of the political process,[143] the problem of the legitimacy of the decision remains distinct. Such problem in a deliberative system is rather Aristotelian:

> [I]t is possible that the many, no one of whom taken singly is a sound man, may yet, taken all together, be better than the few, not individually but collectively, in the same

[143] Like, for example, Ely 1980.

> way that a feast to which all contribute is better than one supplied at one man's expense. For even there are many people, each as some share of virtue and practical wisdom; and when they are brought together, just as in the mass they become as it were one man with many pairs of feet and hands and many sense, so also do they become one in regard to character and intelligence. That is why the many are better judges of works of music and poetry: some judge some parts, some others, but their collective pronouncement is a verdict upon all the parts. (1281a39)

Admittedly, Aristotle's argument depends upon the epistemic competence of the decisional body. Moreover, this passage values participation instrumentally, something which not all deliberative democrats – me included – are ready to accept unconditionally. However, it illustrates the point of this subsection: a deliberative system cannot place all the burden of a decision and its legitimacy on one agent, courts included.

4.3. A holistic orientation

This element looks at the relationships between the parts and the system and at the sort of criteria determining whether the system fares well (Mansbridge 1999, 221). Should systemic or holistic considerations prevail over the individual level or should it be the other way around?

As said, systemic approaches relax the demands of epistemic competence and the standards of deliberation by which individual sites are measured, and underscore that deficiencies in one site may be compensated by other parts. This, together with Dryzek's contention that "[i]n the end, it is systemic consideration that merit priority" (2010b, 335), show there is a tendency in the literature pulling in the direction of holism rather than towards favouring individual sites. In Mansbridge's wording: "the criterion for good deliberation should be not that every interaction in the system exhibit mutual respect, consistency, acknowledgement, openmindedness, and moral economy, but that the larger system reflects those goals" (1999, 224).[144]

The balance between both dimensions is determined by the epistemic, ethical and democratic criteria mentioned earlier. However, these criteria

> give us little purchase in guiding our judgement on either the justification of non-deliberative speech acts and practices or the relative weight to give these particular acts and practices against the deliberative system as a whole (Owen & Smith 2015, 225).

Given such indeterminacy, it becomes important to develop those criteria so that the evaluation of deliberative quality does not occur only at the systemic level. Their elaboration would help to avoid Mansbridge et al.'s fear of "falling into the blind spot of

[144] Elsewhere, Mansbridge et al. nuance this claim: 'normatively … the system should be judged as a whole *in addition* to the parts being judged" (2012, 5. My emphasis).

old style functionalism" (2012, 19) from becoming a reality. Yet, they have not been fully developed and one can still observe a tendency pulling in the direction of holism (Owen & Smith 2015, 225).

This tendency raises concerns about hypothetical scenarios where a system that meets those loose epistemic, ethical and democratic conditions, may still show deficiencies at the individual level, with deliberation only taking place between elites or where individual participation be passive or inexistent. In republican terms, the danger of domination emerges insofar as the contributions individuals make to the system are obscured. If what matters is increasing the quality of the system irrespective of a malfunctioning individual sphere, then some individuals may suffer a loss of freedom as a consequence of being at the mercy of others — they may go unnoticed if analyses show a good performance at the systemic level.

Now, the role of courts gains importance in light of this third element, as they may help detecting failures at the level of individuals who may not be receiving the benefits of well-working system. Indeed, judicial procedures exist in virtue of the state's duty to provide citizens with institutionalised venues where they may resolve their discrepancies, which could work as a way of achieving a deliberative minimum at the individual level. Indeed, courts are especially useful in contexts where self-interest is unlikely to favour the worst-off, like, for instance, in the case of disputes over property rights. In the absence of adjudicators determining what belongs to whom, power relations will probably benefit those better positioned to impose their own preferences. Courts, with the assistance of the state monopoly on the use of violence, can adjudicate on those matters in non-arbitrary fashions, irrespective of the factual power the parties before the tribunal may have, thus providing the necessary conditions for a non-coercive and non-abusive exercise of self-interest among individuals.

I thus agree with Mansbridge and colleagues that non-coercive self-interest can and should be part of the deliberations that eventuate in a democratic society, and that self-interested actions may have complementary rather than antagonistic relations with the deliberative system. However, I also agree that this interplay should be justified deliberatively (2010, 64, 69), and courts can play an important role in that.

Yet, this should not be received with enthusiasm by champions of judicial review, let alone judicial supremacists. The procedural competence needed to address those controversies suggests the necessity of having a system of lower courts taking care of individual grievances and rights infringements, and a system of higher courts

exercising their traditional nomophilactic function of ensuring a uniform application of the law, helping the rest of the parts of the system to detect deliberative failures at the individual level. It does not justify judicial supremacy, whose exercise changes normative statuses of individuals who are not parties at the case decided by the court. It does not imply placing courts in any privileged hierarchy *vis-à-vis* other political actors.

Moreover, having strong judiciaries might encourage legislators to behave less responsibly than they otherwise would in matters of constitutional salience, because they assume courts will take care of those issues.[145] While defective institutions may have beneficial systemic effects, it does not follow that institutions which may appear as deliberatively exemplar, will for that reason produce beneficial systemic outcomes.

Two institutions consistent with this role come to mind, namely the UK declaration of incompatibility and the Canadian notwithstanding clause. The first, regulated by the Human Rights Act 1998, allows judges to determine whether legislation is inconsistent with the European Convention of Human Rights. Courts are mandated to read the convention and the legislation as compatible (section 3.1), so the declaration is issued only in the extreme that such compatibility is not possible. The challenged provision remains valid and producing full effects (section 4.b) and government and parliament have the possibility to initiate a fast-track legislative procedure (section 10). This remains, however, a faculty they may or may not exercise according to their own judgement. The second allows Parliament or the legislature of a province, under section 33 of the Constitution, to declare that an Act or a provision shall remain operating notwithstanding a provision included in section 2 or sections 7 to 15. These are cases where courts are limited in their reviewing powers, and where institutional dialogue may be initiated in ways that government, the legislature, and the courts may complement each other.

These institutional arrangements have three advantages from a systemic perspective: first, they help to cope with the problems raised by holism, as explained in this section. Second, they create paths that permit to connect the individual and the systemic level in which legislatures are generally placed. Courts thus act as informational transmission belts between citizens individually considered. Third, they put into effect the claims that the rejection of judicial supremacy does not mean that courts would somehow stop interpreting the constitution. They would retain their capacity to interpret

[145] Macedo 1999, 3; Tushnet 1999, 57; Whittington 2007, 143; Mansbridge et al. 2012, 3

the constitution in individual cases. The consequence I want to underscore is that courts would not see themselves in a position of supremacy as interpreters.

I draw three conclusions from this subsection: First, systemic approaches do not justify holism. A systemic perspective does not imply favouring the system over the individual when both levels conflict; one thing does not follow directly from the other. Second, courts may have an important role in making individuals visible inside the system and thus help correct distortions at the individual level. Third, that role is more limited than the one Rawls et al. are willing to concede, and it is circumscribed to the resolution of individual cases via the use of a sort of discourse that does not exhaust all the possible alternatives currently qualifying as deliberative. Also, they cannot answer how courts institution may be permeable to all these sorts of talk or represent the arguments of those who are not part of the case *sub lite*.

5. Conclusions

Systemic approaches are incompatible with Herculean images of judges (*Cf* Dworkin 1978, 105). The authors considered in section 2 do not provide guidance as to how the distribution of labour they favour would hold in the stage of a deliberative democratic theory that has changed in terms of the number of fora recognised as capable of accomplishing political work. Nor do they offer guidance as to how the idealised picture of judicial discourse would make sense from a systemic perspective, which sets a different threshold in terms of the types of reasoning qualifying as deliberative. It is hard to see how theories like Rawls et al.'s would be sensitive to non-legal, non-expert, non-technical everyday talk. Plus, the insulation argument, embraced in particular by Eisgruber but also by Rawls, Habermas and Alexy, portrays the judiciary as impervious to the political system. Instead, systemic approaches are taking research in the opposite direction, for the deliberative system allows different forms of discourse to emerge and individuals to have a voice, irrespective of their capacities to make contributions to the process, so that different parts may influence each other.

Yet, and although systemic approaches entail non-supremacist conceptions of the judiciary, this chapter has shown that courts still have a role to play by making individuals visible within the system, providing them with tools to raise their grievances and their own understanding of what a constitution means. By using the UK declaration of incompatibility and the Canadian constitution notwithstanding clause, the chapter provided examples of the limits that judicial decisions should have in a deliberative democracy in terms of their effects.

The next chapter elaborates an institutional proposal that gives the people themselves the role of final interpreters of the constitution and, in doing so, it incorporates the findings of this chapter.

CHAPTER VII

DELIBERATIVE, REPUBLICAN, AND EGALITARIAN ALTERNATIVES FOR POPULAR CONSTITUTIONALISM

1. Introduction

This chapter examines and proposes institutional instantiations for popular constitutionalism, compatible with the principles endorsed and with the findings made throughout the course of this dissertation. The proposal is a combination of institutions that give the citizenry the final word in the interpretation of a constitution, contributing to securing their liberty in a republican sense, implementing mechanisms of deliberation, and being respectful to the principle of political equality.

The chapter proceeds as follows: section 2 briefly revisits the principles guiding my understanding of popular constitutionalism. It reminds us that giving the final word in constitutional interpretation to the people requires a republican, deliberative, and egalitarian combination of institutional conditions and mechanisms.

Section 3 examines institutional alternatives available in the literature that prima facie would advance the popular constitutionalist agenda. I do this to justify why additional measures are required. The section discusses the proposals made by Kramer, Donnelly, Pozen and Gosh as they are the most sophisticated ones available in the literature. These proposals fall short of achieving popular constitutionalism's goal of giving the final word in constitutional interpretation to the people themselves.

Section 4 elaborates my own proposals. It argues for the implementation of the following mechanisms: contestation without *erga omnes* effects, commonwealth-constitutionalism's judicial review, parliamentary deliberation and justification, and interpretive constitutional mini-publics. These institutional devices meet popular constitutionalism's most general claims, namely, rejecting judicial supremacy and giving the final word in the interpretation of a constitution to the people themselves.

Section 5 concludes that this chapter represents a contribution in four ways. First, it provides reasons for the contention that the direct/representative democracy divide is a false dilemma and that such understanding contributes to the implementation of popular constitutionalism. Second, that popular constitutionalism is not necessarily a radical theory. By contrast, it fits well in current systems of representative democracy, to the extent that institutional mechanisms like the ones I here propose are implemented. Third, by relying on recent accounts of deliberative democracy, the chapter makes possible to

reflect on just how a popular constitutional interpretation would be possible in the context of a representative democracy. Fourth, it offers a rough sketch of a mini-public that, operating in the informal public sphere, would give ordinary citizens the possibility to discuss interpretations of the constitution with real impact in formal decision-making processes.

2. Revisiting principles

This section briefly recapitulates on the principles I advocated for as necessary for the implementation of popular constitutionalism. It serves a twofold purpose. First, as a reminder of the conditions that alternatives available in the literature ought to meet. Second, as regulative ideals for my own proposals.

Popular constitutionalism must secure and foster republican liberty and deliberation among the members of the polity, against a background of egalitarian conditions demanded by the principle of Equality of Access and Deliberation (EAD). I will not expound these concepts in full detail here, but it is important to remember them.

Chapter II articulated an instrumental relationship between republican freedom and civic virtue: these two categories point at deliberative democracy as the best institutional means to prevent domination. This is because being free in a republican sense entails that individuals participate in the process by which they give norms to themselves, to the greatest extent possible. Moreover, it requires the preferences and arguments manifested in the decision-making process to be the highest possible expression of autonomous reasoning and not of others' imposed preferences. These are conditions that deliberative democracy is meant to implement.

Deliberative democrats consider that political participation is achieved when every potentially affected person by an eventual decision is present as a discussant. This provides distinctiveness to its ideal of participation, compared to other political theories, a difference well portrayed by Elster's metaphor: in a deliberative democracy, democratic participation is modelled on a forum, not in a market. Inclusion is instrumental to the republican cause by guaranteeing the right to be present in a substantive way, to the extent that individuals are affected by the potential decision adopted.

Deliberative democracy also puts into place the conditions for individuals to express their preferences, hear the preferences of others, weigh them, form and transform them, and justify them in a context of relative equality, so that no individual is able to arbitrarily impose her own view to others.

I also argued that reading these two theories as compatible to each other entailed the endorsement of a principle of political equality I called Equality of Access and Deliberation. The relation of EAD with deliberative democracy and republicanism, I argued, is intrinsic, meaning that eliminating or reducing the domination of some agents over others is linked to the guarantee of the equal possibility of having a say, justifying one's preferences and considering those of others.

EAD comprises two principles: equality of access and equality in deliberation. Equality of access has a formal dimension consisting of a duty imposed on the state and on individuals to refrain from obstructing others from participating in the political deliberative process, which can be fulfilled via the implementation of a number of constitutional guarantees such as freedom of speech, freedom of movement, freedom of association, voting rights, and so on. Its material dimension involves the guarantee for individuals of a minimum of living standards and political capacity securing their presence and voice in the decision-making process, so that politics does not become a luxury for those without social and monetary capital.

3. Alternatives available in the literature.

The literature on popular constitutionalism shows that available institutional proposals fall short of reaching the objective of giving the people themselves the final word in constitutional interpretation. This is even clearer when analysed against the normative desiderata I endorse.

I now examine institutional proposals made by four popular constitutionalists: Kramer, Donnelly, Pozen, and Gosh. I show that, to different degrees and for different reasons, they fail to meet the republican and deliberative conditions described. After this critical analysis, section 4 suggests institutional alternatives meant to overcome their shortages and to make popular constitutionalism feasible.

3.1. Kramer's proposals

Kramer's positive contributions to popular constitutionalism are rather limited:

> [j]ustices can be impeached, the [Supreme] Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures (2004a, 249)

Not all of these measures advance the popular constitutionalists' agenda. It is hard to see why and how impeachment, budget cuts, changes in the court's size or increasing burdens on judges would realise the principle that the people themselves should be final constitutional interpreters. They would hinder the exercise of judicial prerogatives but would leave the central issue untouched, as neither of them involve modifying the courts' competences and attributions. Courts burdened with these measures may still retain the final word. The only difference perhaps, would be noticed in the quality of their judgements or in the time it may take the court to issue them.

Revising the courts' procedures and competences, on the other hand, aims in the right direction. Procedures condition competences, and to the extent that courts are constrained procedurally as final authorities, their political power is likely to be transferred to other agents. Yet, Kramer just mentions these measures without elaborating on how they would work in practice.

Instead, Kramer provided a "framework in which to think about such matters" (2007, 702) based on what he calls "Madison's theory of deliberative democracy" (2007, 748), namely, a departmentalist account of the inner workings of the principle of separation of powers, more than an actual deliberative model.

This model is weak from a republican and a deliberative standpoint. He calls deliberativist a model that is closer to one whose aim is "to aggregate individual preferences into a collective choice in as fair and efficient a way as possible" (Miller 1992, 55). The departmentalism he endorses seeks to guarantee the community's control over the interpretation of constitutional law achieved through a system amounting "to a competition of understandings among political officials that, by forcing the leadership class to appeal to the community for support, would simultaneously inform public opinion and secure its sovereignty" (2007, 749). But this is more Schumpeterian than deliberative. No further reflections are offered on the ways each branch would come up with its own position on constitutional matters, nor on the ways public opinion could be influenced, included, how it would deliberate, and what its role would be within a system of deliberation other than being a reference point to which public authorities ought to direct their attention. Kramer uses the term *deliberation* as a synonym for the inter organic-dialogue that would emerge if judicial supremacy was debunked. Yet, this is not deliberative democracy in any relevant sense of the term.

Kramer's model is also problematic from a republican standpoint, particularly in relation to the notion of control. In his wording, popular constitutionalism's basic idea is

"that final authority to control the interpretation and implementation of constitutional law resides at all times in the community in an active sense" and that "there are countless institutional arrangements by which popular control can become meaningful" (2007, 703). Control is central in republican democratic accounts. In Pettit's account, to have a degree of control over a result, two things are essential:

> First, you must have some influence over the process leading to the result. And second, you must use that influence to impose a relevant direction on the process, helping to ensure that a suitable result transpires (2012, 153).

The influence must in turn give rise to a recognisable pattern, and that pattern must be one the subject seeks (2012, 154). Hence, there is no control "without an influence-bearing input that controls for the realisation of a suitably patterned output" (2012, 154). There must be a system of popular influence over government that is "equally accessible to each and pushes government in a direction … determined, directly or indirectly, by considerations that all can treat as relevant to public decision-making" (2015, 691). To the extent these conditions obtain, it follows that subjects are not under the arbitrary will of others, that is, they are not dominated. Note that the condition for liberty is not that subjects can do whatever they want without interference. It means, rather that interferences are legitimate if they are not arbitrary.[146]

Kramer does not give us guidance as to how individuals would be safe from being dominated by state agents. Nothing in his work shows how individuals could retain final control and thus be safe from, in this case, vertical domination exercised by public authorities. Because his focus is on institutional dialogue, and not on how the broader public sphere could permeate formal institutions, state organs could still manipulate the decision-making process. Surprisingly, as his reflections become more concrete, the more they envision a top-down relationship of state organs with the public: departmentalism, in his view, is a process "for channelling different positions *to* the public through functional agencies" (2007, 749. My emphasis).

So the question is how can we keep this functional agencies controlled? In the context of a different debate Kramer argues that "once public sentiment has begun to swing decisively in a particular direction, the political branches of government will all invariably follow, whatever the personal preferences of their members" (2007, 750; 2004b, 970). But one point made against judicial supremacy is that, even if judges decide

[146] See my criticism of Harel in chapter III.

to align their preferences to that of the public (Dahl 1967, 155; Friedman 2009, 380), the influence of the public is not dispositive. It depends on the willingness of judges to accommodate their views to that of the public.

Kramer cannot have it both ways. Instead of trusting that "[o]n any issue that captures the public's attention, where the majority goes is where government policy will go" (Kramer 2007, 750) he should have elaborated on specific ways by which that adaptation of officials' views to that of the public does not merely depend on willingness of the former. Otherwise, citizens lose control and capacity to determine the direction of constitutional policies and are thus rendered unfree.

3.2. Donnelly's "people's veto"

Donnelly advocates a "people's veto", a mechanism for reconsidering constitutional decisions made by the US Supreme Court. This, he claims, would promote "ongoing constitutional engagement among average citizens" (2012, 187-188).

The process would work by sending to Congress cases decided by the Supreme Court by a five-to-four majority. Congress would then have an up-or-down vote on public reconsideration. Should Congress vote for reconsideration, the case would then be sent to the American people who would dictate the outcome by a referendum (2012, 188).

To make sure that the final decision is made based on considered views of the people and to "minimize the likelihood that the American people decide the issue based on a snap judgement, or while in a public frenzy", the mechanism must "allow sufficient time between the Court's decision and the national referendum to allow for sober deliberation" (2012, 188-189).

Some criticisms are in order. First, the rejection of judicial supremacy is at odds with how the mechanism is supposed to be triggered. Inasmuch as it starts in judicial procedures, the court-centrism that popular constitutionalists criticise is reaffirmed by positioning the ignition of debates on constitutional matters in courts rather than in other institution or by some other agent. This means that, initially, the constitutional issue to be debated still has to be framed in judicial-legal terms. This has an additional consequence: as I argued in chapters IV and VI, one should be wary of extending the effects of judicial decisions to the entire society. The contexts in which trials initiate are limited to problems affecting concrete individuals. Hence, additional reasons must be provided to consider the conversational context of those trials as relevant for an interpretation affecting the whole society. Individuals who were not parties at the trial at hand, could legitimately ask

why their normative status has been altered by an issue with which they had nothing to in the first place. Put in republican terms, they lack control over something that affects them as members of a collective unit. As a result, they are rendered unfree.

Second, it is not obvious that the time given to the citizenry between the court's decision and their reconsideration will suffice to form an informed and principled judgement on the issue under discussion. It is not obvious either that those results will be reached in the absence of additional institutional structures facilitating deliberation among individuals, about which Donnelly is silent.

Third, it is not clear why the mechanism is reserved to five-to-four Supreme Court decisions. Donnelly seems to assume that divisions among justices somehow amount to social divisiveness outside the court. We know, as I have argued before, that is not the case (Gargarella 1996, 181; Waldron 2016, 256-257). Also, this sort of mechanism could give judges incentives for engaging in pork-barrelling practices.

The people's veto may be a way of reducing the court's power, but it fails at justifying why ongoing constitutional meaning imposition should be triggered judicially and be dependent upon the inner politics of a court that is not a representative institution in the first place.

3.3. Pozen's "judicial elections"

Pozen wants to show "what judicial elections are capable of – to clarify a plausible ideal against which they might be evaluated and in pursuit of which they might be engineered" (2010, 2066). Judicial elections, in his view, would help sustain the democratic legitimacy of constitutional law in a more persistent and nuanced way than traditional reform mechanisms (2010, 2072). They would do this for reasons related to the electors and to the judges. I am interested in the second.

Elections would foster virtues inside the courthouse in three ways: judicial restraint, judicial populism, and role fidelity. Pozen uses the term 'restraint' as a regulative ideal for the judicial function "aimed at minimizing interference with the political process" (2010, 2077). This restraint would depend on different factors related to the political and electoral incentives of the actors involved (2010, 2077). First, "through the types of jurisprudes favored by the electorate" (2010, 2077), so that the court's composition is tied to the voters' preferences. Judges are likely to restrain themselves to the extent that they profess some form of judicial minimalism. Second, judges may be prone to restraint themselves if they consider that this is what the public desires, so that

they can keep their job. This is supported by literature that shows ways in which judges are responsive to their institutional environment (Hanssen 1999, 415; Pozen 2010, 2078).

Regarding judicial populism, that is, the adaptation of the judges' views of the law to those of the public, Pozen argues that there are two ways in which such deference could be implemented. The first is the standard prescription in the literature, namely, "cede as much ground as possible to the coordinate branches" (2010, 2080). But Pozen considers an additional option: "that the judge [incorporates] into her decision-making calculus the beliefs of the citizenry, to the extent she can perceive them, irrespective of what the legislature or executive has done" (2010, 2080); to "mirror popular views" (Friedman 2003, 2598). He calls this *majoritarian judicial review.*[147]

Yet, the proposal repeats the problem evinced by the authors previously discussed. That is, the insistence on turning the judiciary into a more popular and political institution. As I have argued in chapter IV, the focus should be on the effects a decision would produce on the context against which potentially affected persons receive its effects. Courts are limited in their capacity to grasp preferences different than the ones expressed in the cases brought before them. This is normal, for they are not representative institutions, which means that majoritarian judicial review is really an oxymoron (Gargarella 1996, 181).

Regarding role fidelity, Pozen examines whether the judges' selection method influences how they decide cases. Pozen suggests that judicial elections could have the effect of sending judges a signal that consideration for "public opinion is part of the job description" (2010, 2084).

These approaches striving to make the judiciary more receptive to majoritarian concerns, to democratise it, as it were, strike me as odd.[148] If courts are countermajoritarian forces in a democracy, and if they are given powers to control that majorities decide within the limits of the law and not just having electoral incentives and party politics in mind, why is it that Pozen's reaction is to introduce democratic features in the judiciary? Why not working on improving mechanism of representation or democratic mechanisms more generally, instead?

[147] An approach defended by Bonneau (2009, 15), although Pozner rightly points out that this prescription is not novel. See the literature he cites in 2010, 2081. For a similar approach, see Post & Siegel (2007, 390-391).
[148] And others as well. See Atria 2000.

It is not surprising, then, that Pozen does not delve into how and why the citizenry would deliberate on constitutional matters at the level of the informal public sphere. He expects that judges will adapt their views to the of the people. But those views need to be formed and expressed somehow, and nothing in Pozen's proposal tells us how the people would manifest their preferences in a judicial election. In the absence of those deliberative suggestions, the election model remains an aggregative scenario and, in these models the transmission of information from the politicians to citizens is generally asymmetrical.[149]

3.4. Gosh's "constitutional juries"

Gosh's proposal consists of "juries of around 200 members, so that a claim to representativeness is plausible" (2010, 346). Building on the work of Fishkin & Luskin (2000, 20), Gosh claims that a random sample of several hundred is unlikely to differ radically from the population (2010, 346).

Regarding the inner operations of the jury, Gosh first tackles the problem of case selection. Juries could be called periodically to select cases, "based on advisory opinions offered by a panel [that] could be formed from willing members of the Federal Court Judiciary" (2010, 346-347).

After cases are selected for hearing by a jury, "there would be other preliminary matters, including disputes over facts, that should be largely resolved, so that a jury can decide the matter within a few days" (2010, 347). With regard to the decisions of those cases, Gosh proposes two complementary mechanisms. First it should be feasible to vest large juries with significant decision-making power. Second, that power would be conditioned "by a parliamentary capacity to abrogate the decisions of the Court, with a supermajoritarian requirement of 60%" (2010, 347).

Although Gosh does express the caveat that the design is not as detailed as to be applied straightforwardly, the rather uncritical employment of deliberative polls makes his proposal one that falls prey to criticisms against these democratic innovations. Sanders, for example, underscores a problem intrinsic to deliberative polling. She argues that "[i]f poll data are supposed to reveal privately situated individuals' interior states of mind, it cannot at the same time be claimed that survey data represents a product of face-to-face public deliberation" (1999, 11). Modern public opinion research, she argues,

[149] See chapter IV, section 5.

avoids and indeed sees as treacherous "the circumstance that would actually allow opinion research legitimately to be called 'public'. Therefore, it fails also to qualify as deliberative, if deliberation is understood as a process that takes place in public" (1999, 10).

In any case, this criticism is not strong enough as to discard Gosh's account. As a matter of fact, Gosh's proposal seems to aim in the right direction. It gives actual citizens the possibility to have a direct say in matters of constitutional interpretation. This sort of approach gets us closer to a popular constitutionalist model. Yet, further mechanisms are needed. In what follows I suggest mechanisms that would turn popular constitutionalism into something feasible. Although these do not compete, as it were, with Gosh's proposal, they are more complex and implement my republican, deliberative and egalitarian principles in a better way.

4. Republican, deliberative and egalitarian proposals for popular constitutionalism

This section suggests measures for the implementation of popular constitutionalism. It starts by scrutinising some possible limitations affecting those suggestions. It then elaborates on the following measures: contestation without *erga omnes* effects, commonwealth constitutionalism's judicial review, parliamentary deliberation and justification, and interpretive constitutional mini-publics.

The proposals are conditioned in different ways. First, they do not exhaust the range of solutions necessary to realise the principles summarised in section 2. The magnitude and reach of those desiderata overflow any concrete institutional arrangement one could propose. Institutional design must aim at realising principles to the greatest possible extent. One must be aware, however, that those arrangement will likely fall short of reaching the objectives set by their guiding principles. This is not a limitation as such, but how regulative ideals operate (Kant 1996, A569-B597; Martí 2006, 25).

There is also an issue of domain. Should popular constitutionalists focus on realising the theory`s principles outside representative institutions? Or should they aim at improving representative government? This is, I think, a false dilemma whose resolution hinges on the notion of representation one endorses. As I make clear in some of my following paragraphs, I endorse a notion of representation that does not disconnect representatives from the discursive preferences of those they represent. Representative institutions, in such a model, do not exist simply in virtue of practical necessities like scale and time. They are a necessary component of the justification of our collective

societal decisions. The question is, then, not so much do we need representatives, but how do we facilitate discursive transmission from the public sphere to representative institutions.

These considerations are not meant to treat discussions on the justification of representative government as irrelevant. But the topic is complex enough as to merit an examination I cannot fully provide here.[150] I am thus taking sides on one specific account of representation because it allows us to understand the relationship between ordinary citizens and representative formal institutions as a continuum rather than as a solution for practicalities of scale. This is compatible with and accounts for the features of popular constitutionalism I advocate for.

Perhaps with the sole exception of the rejection of judicial supremacy, I do not think a commitment to popular constitutionalism entails a major disruption in institutional systems as they normally exist. As I argue further ahead, popular constitutionalism coexists with representative institutions.

My endorsement of republicanism, deliberative democracy, and political equality implies that the people themselves are entitled to discuss, *and* are capable of discussing, the merits, justice, fairness, defects, etc., of the available alternatives in a decision-making process, not just about the effects the chosen alternatives will have on themselves, but also on the rest of the members of the polity they are part of. This is, admittedly, a lot to ask from a single institutional recommendation.

This is a threefold difficulty: on the one hand, with regard to the pre-conditions under which an institution is supposed to operate, as it would make little sense to incorporate institutional devices that put the people themselves to deliberate in polities where no basic rights and basic material conditions are guaranteed. It is indeed wishful thinking to expect that people deprived of such conditions will be in fact capable and willing to discuss complex collective affairs.[151] These conditions are demanded by the scheme I developed in chapter II, particularly by the material dimension of EAD. The success of the institutional proposals I here make depend on an initial realisation of that principle, notwithstanding they also materialise and strengthen it. The capacity of the public within the deliberative process thus depends on its "support of a societal basis in which equal rights of citizenship have become socially effective" (Habermas 1996, 308).

[150] For a classic discussion on the concept of political representation see Pitkin 1967. See also Manin 1997.
[151] In the same vein, Waldron 2006, 1353.

Just how exactly these preconditions would be implemented and/or satisfied is beyond the scope of these chapter.

On the other hand, the implication that the citizens themselves are entitled as well as capable of interpreting and deliberating about their constitutions leaves a considerable room for institutional devices already present in contemporary democracies. In particular, it leaves room for representative mechanisms and institutions such as Parliament.

Another previous consideration is related to the impact my institutional proposals are expected to have on the fulfilment of the republican, deliberative and egalitarian principles they are meant to instantiate. The restriction is on the ambition, as it were, of the goals they are meant to achieve.

In making these proposals I must consider the limitations shown by deliberative democracy at the empirical level regarding our present capacity to determine deliberative quality. Chapter V showed first, that to the extent that we accept that deliberative democracy is a reasonable way to institutionalise popular constitutionalism, the claim that judicial supremacy is to be avoided is well grounded: the structure of judicial procedures runs against our ability to determine the quality of the deliberations conducted inside the courtroom. This is, in itself, small consolation: we know less about how judges deliberate than we do about how other agents do. Yet, put into a broader context, this knowledge gives researchers a starting point for thinking about the sites that could and should be seen as potentially deliberative. It also represents a starting point that does not necessarily have to rely on the judiciary as an institutional embodiment of some deliberative ideal, for there is nothing structural in non-judicial institutions preventing us from testing their deliberative performance during every stage of the procedure. Those tests may be flawed in all the aspects mentioned in chapter V, but this does not mean that there is no room for improvement.

Having these limitations in mind, in what follows, I suggest four institutional devices and theoretical developments that attempt to make feasible the idea of a republican, deliberative and egalitarian popular constitutionalism.

4.1. Contestation without erga omnes effects

Contestatory mechanisms give citizens the role of invigilators of law through the possibility of recursion, encouraging them to be "alert to any possible misdoing and ready to challenge and contest the legislative, executive and judicial authorities" (Pettit 2012,

14, 215).[152] They put into place the sort of tools that enable the surveillance that citizens must exercise to keep government and other individuals from jeopardising their liberty**.**

The judiciary is perhaps the best example of a contestatory mechanism. Chapter VI shed light, however, on the role that courts may have within a deliberative system, and its conclusions apply here as well. Courts can play a role as providers of the necessary space for individuals to make individual claims about what they think the constitution means, and how those interpretations affect them. Judicial systems thus ensure that individuals are neither vertically nor horizontally dominated (Pettit 2012, 136). This assessment was made answering the question of the role that courts may have in deliberative terms, but their limited role can be accounted for in republican terms as well. I now explain why.

Chapter II objected to the reasons Pettit gives to limit the domain of freedom and its maintenance to contestation, but it did not deny that the control exercised through contestation is not a necessary condition of freedom as non-domination; rather, it argued that it is not a sufficient one. I agree with Pettit on this point. Forums of contestation are necessary to keep government and other individuals from impinging upon the liberty of subjects and, indirectly, provide them with tools to guide and control the direction of governmental policy.

Yet, Pettit does not properly justify why he limits his account to contestation, and why he shows a distrust towards mass participation and deliberation, discarding them as relevant for the protection of republican freedom.[153] Republicans, chapter II showed, have good reasons to value and rely on a participatory citizenry: civic engagement is one element among others allowing for the vigilance demanded by republicanism.

Contestatory models or, rather, models that limit vigilance and final control to contestation, are also impeded in justifying judicial decisions with *erga omnes* effects. Those, like Pettit, who would circumscribe activism to contestation cannot at the same time justify giving contestatory institutions like courts the role of final authoritative agents in the determination of what counts as binding for the entire society without dealing with other sorts of problems that cannot be tackled through contestation alone.[154]

[152] Here, Pettit's reference to judicial authorities must be generally understood, in my view, as courts exercising judicial review.
[153] For a view supporting this statement, see McCormick 2011, 152.
[154] This is what is at the core of McCormick's criticism of Pettit (2011, 154)

Contestation can only indirectly steer the direction of governmental policy, for it is mostly a mechanism of reactions, not of action. It is meant to resist norms and policy and, through that resistance, to influence them.

In Pettit's view, contestation in the public sphere needs a distribution of labour among citizens based on expertise and organisation, a proposal which I endorse as a necessary, not a sufficient condition:

> What is needed, obviously, is specialization and organization: in short, a division of labour in the exercise of civic vigilance. And that ideal is scarcely unrealistic, since contemporary democracies naturally give life to watchdogs, activist bodies – non-governmental organizations – that operate locally, nationally and internationally across the various domains of political life. These include bodies that specialize, for example, in consumer issues, people's working conditions, women's rights, environmental institutionalized, racial equality, opportunities for the disabled, the conditions of prisoners, gay and lesbian rights, health provision and public education (2012, 226)

As I have said, I agree with Pettit that this is a necessary condition for securing individuals' liberty. On the courts' side, their contribution to an unconditioned individualised system of influence is mostly found at this level of contestation. Individuals that go to court to claim that they are being affected by some form of either vertical or horizontal domination need to frame their grievances in accordance to the set of existing sources available for judges to employ. In principle, as much leeway as they could have in interpreting constitutional norms, the judges' primary task is not to advance or create policy, but to apply those that are already in place. Deviations from that principle can be explained, but they are more difficult to be justified and, in any case they cannot be presented as manifestations of the judicial duty to dictate what the law is but as an additional role granted in virtue of their countermajoritarian nature. The onus falls on those who welcome strong judiciaries.

There are some good examples of the sort procedures that would help citizens to air their own interpretations of the constitution in courts are those generically known as writs of *amparo*, like the ones found in the Chilean,[155] Argentine,[156] Mexican,[157] Brasilian, [158] and German constitutions.[159] These grant individuals with a procedure for the protection of constitutional rights, which are more informal in their processing than more ordinary procedures, and have priority in the courts' dockets. Procedural differences

[155] Article 20 of the Chilean Constitution.
[156] Article 43 of the Argentine Constitution.
[157] Article 103 of the Mexican Constitution.
[158] Article 150 of the Brasilian Constitution.
[159] Article 93 Sec. 1 Nr. 4 of the German Constitution.

aside, these writs allow individuals to pursue relief from a court when their constitutional rights are infringed upon or endangered by an act or omission of a governmental authority or another individual. To take Chile as an example, these procedures have proven to be highly effective for the protection of a number of constitutional guarantees (Couso 2005, 74).[160]

These procedures meet Pettit's condition that systems of influence ought to be individualised, unconditioned and efficacious (2012, 209-238), but they do not put citizens as main actors in the generation of collective norms and policies, including those created interpretively. In short, this section does not recommend mechanisms that are not currently available in different polities. My suggestion is, rather, that a republican, deliberative and egalitarian popular constitutionalism should, as a minimum, include these sorts of devices. Notwithstanding, additional mechanisms are required.

4.2. Commonwealth models' institutions

The commonwealth model of constitutionalism, sometimes referred to as the "parliamentary model" (Hiebert L. 2006), is an "intermediate model of constitutionalism that, in somewhat different versions, has been adopted in Canada, New Zealand, and the United Kingdom as an alternative to their traditional principle of parliamentary sovereignty " (Gardbaum 2010, 167-168). The model consists in the "combination of two novel techniques for protecting rights. These are pre-enactment political rights and weak-form judicial review" (Gardbaum 2013, 25). The first asks elective branches of government "to engage in right review of a proposed statute before and during the bill's legislative process" (Gardbaum 2013, 25).

The second technique, weak judicial review, decouples judicial review from judicial supremacy, meaning that although courts have powers of constitutional review, they do not necessarily or automatically have final authority on what the law of the land is (2013, 26-27).

This is not exclusive to commonwealth models for these features have been advocated by popular constitutionalists as well. Gardbaum argues, however, that the Commonwealth model is innovative and distinctive in at least three ways. First, weak forms of judicial review are the general rule in the exercise of the court's powers, whereas in popular constitutionalists' models the supremacy of other branches of government is"

[160] The procedure can only be used to protect first generation rights. Socio-economic rights are excluded.

triggered only exceptionally or only periodically" (2013, 29). Secondly, models of popular constitutionalism do not include the exercise of a legislative override power. In these accounts, courts either defer to the relevant branch or it is the citizenry the one who is holding the final say. By contrast, commonwealth models provide "a far more tangible and concrete institutional mechanism of judicial non-finality" (2013, 29; Hiebert L. 2006, 7, 13). Thirdly, two of the model's mechanisms – Canada's constitution 'notwithstanding clause and the UK Supreme Court's power to issue declarations of incompatibility - "were entirely novel when introduced" (2013, 29-30).

Yet, even though they represent an improvement and a contribution to popular constitutionalism, commonwealth mechanisms are in need of additional measures. The reason is that even though they represent a is a non-supremacist form of judicial review, their exercise in practice "seems to make little difference to the role or influence of [strong] judicial review *vis-à-vis* the legislature" (Bellamy 2007, 47). In the case of the United Kingdom, Bellamy argues, although ministers are forced to issue a declaration of compatibility of legislation with the Human Rights Act and, in spite of the provisions for prior legislative scrutiny of such claims, "it is ultimately judicial review by the judges sitting in the relevant courts which decides the issue". Consequently, "legislators come under pressure to anticipate the court's ruling rather than to elaborate a view of their own". The Canadian experience with the use of the *notwithstanding clause* exhibits similar patterns (2007, 47-48).

An important reason why courts are held in high regard as constitutional interpreters is their alleged capacity to discuss the merits of a case and to engage in reasoned and principled deliberation, providing justifications for those decisions. This dissertation has questioned whether one should be so confident, but this does not mean that the ideal sought is misleading. Decisions should be preceded by deliberation. They should also be explicitly justified. These two conditions, however, are not necessarily secured by commonwealth models, and there seems to be no principled reason for not incorporating these additional innovations to their designs. Adapting Bellamy's words, these legislative and deliberative consideration of constitutional issues will come "not from abstract declarations that are then passed to other to interpret but through the detailed discussion and scrutiny of specific pieces of legislation" (2007, 48). The next point offers reflections in that direction.

4.3. Parliamentary deliberation and justification

Argumentation and justification are features generally present in judicial procedures, but largely absent in the legislative field.[161] As it happens, those who exalt the value of popular or representative institutions *vis-à-vis* judicial institutions, tend to frame their arguments in abstraction, mostly at a theoretical level. By contrast, a great deal of sophisticated scholarship has been elaborated on judicial argumentation and justification.[162] Proportionality and balancing, for instance, two prominent tools for adopting constitutional decisions by judges, have not been studied, however, at the legislative level. Proportionality, for example, has been called no less than the "ultimate rule of law" (Beatty 2005). By contrast, we lack accounts studying the role of parliament in the process of constitutional deliberation (Oliver-Lalana 2016, 9).

Some scholars have taken up this challenge and have made attempts to elaborate a theory of legislative argumentation under the label of *legisprudence*, that is, broadly described, a legal theory that accounts for the principles underlying the activity of the legislator. Legisprudents seek to develop those principles as well as the ways in which our expectations that legislators put forward, debate, and weigh the reasons for which they pass laws, become a reality.

According to Oliver, three theses justify this expectation. The first is a normative thesis that says that inasmuch as they are the product of collective decision-making, "every law can be taken to entail a claim to justifiability which cannot be fulfilled with whatever motives, but calls for good reasons and hence requires an argumentative process for these to emerge" (2010, 3-4). The second is that legitimacy is not binary but rather a

> gradual and compound magnitude that does not get exhausted in the actual working of democratic procedures and the legal form given to statutes, for it is also bound up with the arguments supporting them, in particular with the ones publicly adduced in parliament as the institutionalized centre for lawmaking (2010, 4).

Thirdly, there is a link between the quality of a law and its underlying reasoning. This means that the better the argument for a decision, the higher its quality (2010, 4).

Legisprudents thus make the forceful argument that there is no principled reason to discard parliaments as constitutional deliberators and, as it happens, given their representative role, that there are normative reasons to claim that they *should* engage in deliberation and to demand that they justify their decisions. We should expect this from our representatives (Waldron 2009a, 352).

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[161] Waldron 1999; Wintgens 2006; Pintore 2010, 36; Marcilla 2010, 103; Oliver-Lalana 2016, 7.
[162] For example, Alexy 2003a; 2003b; Barak 2012; Schlink 2012.

Legisprudence thus ties the rationality of legislative production to deliberative considerations, broadly defined (Sieckmann 2010, 71-72). The question is, then, what is it that guarantees the deliberativeness of the process. These authors are adamant that some argumentative conditions inside parliament must obtain to achieve a deliberative minimum. They also rightly underscore the potential that legislative justification has for the legitimation of the state's normative production in general, an emphasis which strengthens the case for including the legislator within the scope of legal and not just political actors (Wintgens 2006, 5).

Yet, the effort can be taken one step further. The normative premises of legisprudence are compatible with extending the scope of legal theory not only to Parliament or to representative institutions more generally, but to the broader public sphere. Legisprudents, however, neglect exploring further links between parliaments and the citizenry, not only in terms of legitimacy, but in terms of the citizenry's capacity to deliberate by itself or to be part of a deliberative process that contributes to the legitimation of the decision-making system they are part of. This marks an important difference between the legisprudential project and my own: legisprudents generally circumscribe their reflections to parliament (Wintgens 2006; Sieckmann 2010; Oliver-Lalana 2016; 2010). This is an unnecessary restriction. I also believe the difference lies in the ways both projects conceive of the notion of representation: for legisprudents, representation is a necessary evil, as it were. Consider, for example, the following statement by Tschentscher et al.:

> Decisions by majority are a necessary restriction, not a fulfilment of discursive ideals. Equally, limiting parliamentary debates to elected representatives is only an approximation to the ideal of universal participation: if we have to rely on participants, we can at least try to keep that group as diverse as possible. Deliberative democratic theory should, therefore, focus neither on outcomes nor on representation (2010, 14)

This is a mistake. In my view, representation is not a tool for coping with practicalities of scale: it is an actual means for channelling discourse. This is a more charitable and more compelling understanding of representation, and there are good reasons to subscribe to it. I suggest that the extension of this project beyond parliament can be made by relating the demands of legislative justification with this charitable interpretation of representative government on the one hand, and with the demands deliberatively expressed by the citizenry on the other.

The relationship between representation and deliberation is indeed tense. Some have argued that there cannot be deliberation in the political realm without representation.

Practical constraints limit the possibility for deliberative encounters to be meaningfully interactive, which would make deliberation "inherently representative" (Bohman 2012, 76). On the other side of the tension, we bump into the "scale problem" of deliberative democracy (Parkinson 2006, 5), that is, that "if deliberation changes minds and positions as deliberative democrats expect … people who did not directly participate in the process do not have reasons stemming from deliberation itself to accept the outcome" (Schäfer 2017, 1). It follows that the way out of this tension is by making representation something more than just a solution for a practicality. Contemporary democratic theory encourages a revision of the idea of representation that would allow us to understand that indirectness in politics is not only a necessary evil but, to say it in Young's words, "as both necessary and desirable" (1997, 352).

In this context, I find Urbinati's account of representation as advocacy particularly illuminating. She offers an explanation and a justification for the compatibility between representation and deliberative public speech. In her words, speech is "a means of mediation that belongs to all citizens, linking them and separating them at the same time … It gives meaning to voting, which presumes evaluation and discrimination among articulated opinions… Thus, it is not indirectness per se that distinguishes representative democracy from direct democracy" (2000, 765). Rather, it is their lack of simultaneity. Judgement and resolution in modern democracies take place at separate times, but not in disconnection to each other. The nature of that linkage is not personal, but discursive. In this vein, I subscribe to Waldron's interpretation of Urbinati:

> [W]hatever its relevance in other functions of government, the abstraction that representation involves is particularly appropriate for lawmaking, which is a domain in which we are striving to produce abstract norms, abstracts in the sense of *general*, rather than directives focused on some particular person or situation in the way that a bill of attainder is focused or in the way that a judicial decision might be focused, at least in the first instance (2009a, 347)

This is absent in accounts providing philosophical foundations for legisprudence. Wintgens', perhaps the most elaborated account available in the literature, challenges the notion of legal theory as a construction that focuses on adjudication rather than promulgation, in the judiciary rather than in the legislature (2006, 4-8), but he does not address the problem of what sort of justification could/should be considered not only rational by those potentially affected by the legislators' decisions, but legitimate as well. In my view, the requirement that decisions made by legislatures ought to be justified, has a particular strength at the constitutional level: when justifying a decision with bearings

on constitutional matters, when such a decision changes the constitution in some way, a duty to provide specific justifications for the interpretation of what the constitution means is brought about. The reason is that impositions of meaning and explicit changes to the constitution represent an alteration of the most basic terms of the social contract. Those terms are ultimately the reasons why representatives gain their authority over their subjects in the first place. They are also reasons for citizens to accept norms that are being imposed on them by legislators.

Habermas' two-track model as well as deliberative systemic approaches resonate in this double extension of the legisprudential demand for legislative justification. The relationship between the formal and the informal public sphere is better accounted for if one abandons the idea, exemplified by Tschentscher et al.'s quote above, that representation is just a practical tool for dealing with scale, space and time constraints and if one understands the concept as an enabler for deliberation.

The question is, then, what sort of framework would be optimal for assessing the type of conversation that would transmit deliberations taking place in the informal public sphere to parliaments, in ways that parliamentary deliberations represent individual not only territorially, but discursively as well. Such a framework would make deliberative democracy and legisprudence compatible to each other.

The compatibility between these concepts and theories is something that has yet not been explored. This is the case in legisprudence and its linkage to deliberation outside parliaments, but is it also the case with deliberative democracy. Schäffer, for example, claims that deliberative democrats have not yet studied the

> embeddedness of parliamentary deliberation … on at least two levels: first, the specific role of deliberation within parliaments, and, second, the particular functions of parliament in democratic systems as a whole. Consequently, empirical research has yet to fully account for this contextual specificity of parliamentary deliberation (2017, 3).

Also, consider Boswell et al's contention that "beyond ideal theoretical prescriptions, we still know very little about if and how … different deliberative sites link together, and how they constitute an inclusive deliberative system in practice" (2016, 264).

These authors give me a starting point to draw a sketch of what a deliberative legisprudence should look like. On the one hand, I endorse Schäffer's suggestion that we should avoid making assumptions about the ethical orientation of deliberating actors to our concepts of deliberation. We should not, he argues, "include a specific ethical quality

of actor's motivations into a conceptual definition of deliberation". (2017, 422). He is led to this conclusion because incorporating those ethical motivations to our concepts of deliberation "produces blind spots in our analytical tools that hinder us from capturing important aspects of deliberative practice, such as more contentious forms of deliberation" (2017, 422), and because actors' motivations vary across different contexts. This does not mean that non-instrumental rationality is beneficial to deliberation in any specific way. It merely confirms what I have argued in other parts of this dissertation, namely that deliberative settings provide means for impartiality that do not depend on the motivations of participants.

This distinction is especially relevant for parliamentary contexts, as legislators discharge their duties in a network of incentives that lead them to enter debates with strategic and positional stances, while asking them to discuss and debate with the counterparts about the matters they are to legislate about.

I submit that this structure of incentives is not only a tension but a benefit from a deliberative democratic point of view. Legislators, while acting strategically and trying to advance the position of the parties they are part of, they do so in ways that must appeal to the views of those individuals they represent or try to represent. So, the main question is not how to avoid strategic behaviour in parliamentary deliberation, but how to make sure that legislators are indeed influenced by the citizens' arguments and preferences. This is a topic that deserves more room than the one I can give here, although I will offer some reflections about this subject in the concluding chapter. There, I suggest that more research is necessary to account for the role that political parties play in a deliberative system and, therefore, in the institutional design I propose here, particularly regarding the ways in which the positions of the parties are formed internally and manifested in parliament.

On the other side of the tension, the next point will elaborate on how the views of citizens are formed through deliberation. Here I am interested in how the transmission of those views to parliament can be generated. One way of approaching this problem is by relying on Habermas' idea of *translation*, a term he first rejects as inadequate to describe the special relationship that law has with the lifeworld. The latter's autopoetical reproduction and linguistic specialisation constructs the law's own image of the world. But then, Habermas acknowledges, law is "supposed to 'influence' general social constructions of reality, and in this way influence those other discursive worlds as well" (1996, 53). The initial rejection of the concept is due to the role it plays in systems theory,

a construction that, in Habermas' view, is not consistent with understanding law as a hinge between the lifeworld and the rest of the subsystems (1996, 53, 56).

Translation takes a more positive form afterwards, as Habermas incorporates it to reject paternalistic interferences of the bureaucratic system into civil society:

> In spite of asymmetrical access to expertise and limiting problem-solving capacities, civil society has the opportunity of mobilizing counterknowledge and drawing on the pertinent forms of expertise to make *its own* translations (1996, 372)

This at the core of Habermas' *two-track* model of democracy, in which "formally institutionalized deliberation and decision must be open to input form informal public spheres" (Rehg 1996, xxxi). Nevertheless, the transmission from one track to the other is still a problem for deliberative democrats. With this in the background, I will rely on Boswell et al.s to explain how transmission could operate in practice.

Transmission is a central concept for systemic approaches. It "places the emphasis on the connections between the various components that that make up deliberative systems, particularly between public and empowered decision-making sites" (Boswell, Hendriks and Ercan 2016, 264). Boswell et al.'s analyse three mechanisms of transmission between individual agency at the level of the public sphere and formal institutional structures: middle democracy, democratic innovation, and discourses. The first, middle democracy, is a notion taken from Gutmann & Thompson (1996), according to which actors pursue matters of common interest through traditional institutional spaces designed to link the citizenry with public authorities (e.g. public hearings, legislative inquiries) (2016, 265). The second, involves the notion of *coupling*, which describes connections between different (formal and informal) institutions and practices, which ideally would involve "'processes of convergence, mutual influence and mutual adjustment" such that "each part would consider reasons and proposals generated in other parts" (Mansbridge, et al. 2012, 23). Metaphorically, "coupling draws our attention to the nature and strength of relationships between different parts in a deliberative system, and to the spaces that might develop in-between" (Hendriks 2016, 44). The third refers to a broad ensemble of ideas, categories and metaphors which may enable actors across the system to draw on as shared argumentative resources (Boswell, Hendriks and Ercan 2016, 265; Dryzek 2009).

Boswell et al. conclude that transmission can occur via any of the three aforementioned mechanisms (2016, 276), that those avenues are not mutually exclusive, and suggest that current political institutions have the potential to enable transmission.

The implication is that no significant changes would be necessary to operationalise transmission in a meaningful way (2016, 276). Moreover, that transmission does not only take place when there is correspondence between deliberation in the public sphere and the one taking place in formal empowered spaces. This, they argue, is at once too restrictive, for there are other forms of transmission besides policy impact, and too naïve, as "discursive affinity does not imply a substantive impact" (2016, 279). The study suggests that some semiformal spaces like commissions of inquiry or parliamentary committees "offer crucial mechanisms of transmission between informal public opinion (public space) and formal decision-making cycles (empowered space) (2016, 276).

Yet, the study also shows that, notwithstanding their potential as deliberative enablers, "relying on the existing institutional architecture may not always be sufficient" because "[s]ome deliberative systems … will continue to feature exclusionary discourses and norms that do not recognize the legitimate meaning-making power of counter publics, and for which there is no easy institutional fix" (2016, 277). Here, the role of mini-publics becomes relevant, given their capacity to bring together actors from the public sphere to a semi-institutionalised setting, they create the space to open up issues usually dominated by elites and expert policy makers and, in doing so, offer "a vital dose of democratic inclusivity, rendering the otherwise hidden or implicit value assumptions more visible, and transmitting lay perspectives on these that can challenge the status quo" (2016, 277).

4.4. Constitutional Mini-Publics

Boswell et al.'s conclusion regarding the role of mini-publics in deliberative systems is both challenging and encouraging. It calls for the development of democratic innovations that open up spaces of interaction among citizens where they may debate about any issue they consider as relevant for the community, in coexistence with existing formal institutions. As it happens, the list of mini-publics and deliberative fora operating in this middle ground between the informal public sphere and formal decision-making public institutions is vast. [163] On the one hand, this limits my capacity to determine with accuracy just how much complexity can be dealt with by employing mini-publics. On the other, this variety shows that there seems to be no limitation on the topic and type of subject that can be deliberated on through mini-publics. This is encouraging, given my

[163] Consider, for example, Chambers 2003; Fung 2003; Goodin & Dryzek 2006, 221-225; Delli Carpini, Lomax Cook, & Jakobs 2004; Schkade, Sunstein, & Hastie 2010; Ryan & Smith 2014, 12. Also consider the staggering number of studies uploaded to participedia.net.

concern here is with constitutional issues, and with whether there is a way to providing meaning to constitutional law through deliberative means.

I am more concerned with some broad features and not with the precise configuration and fine grained practical operation of some specific mini-public which would somehow incarnate popular constitutionalism. Most mini-publics share a number of common features, for example, in the way they select their participants and in their procedures. I now elaborate on these aspects of a possible constitutional deliberative mini-public.

4.4.1. Selection Methods

Regarding selection methods, there are roughly three methods employed in mini-publics: self-selection, random selection, and stakeholder selection. Following Button & Ryfe, selection methods must answer two questions: who initiates the deliberative procedure, and who participates. Regarding the first, these authors found that three kinds of entities typically initiate a deliberative encounter: "grassroots civic groups, such as neighbourhood associations; nongovernmental organizations (NGOs)…; or government organizations". Similarly, there are three "basic kinds of participation selection schemes: self-selection, random selection, and … stakeholder selection". The first two are self-explanatory. Stakeholder selection "involves organizers in a process of identifying groups likely to be affected by a decision and issuing a formal invitation to representatives of these groups" (2005, 23).

I submit that an appropriate mini-public for constitutional deliberations should select its participants primarily by random selection, and it should be initiated, in Button & Ryfe's vocabulary, by governmental organisation.

Moreover, the republican thrust of this proposal would also justify a duty to participate, unless justifications are provided.[164] This does not exclude that some stakeholders can participate as such in the deliberations, in the same way that some organisations go to courts as amicus curiae. Random selection allows us to with some problems raised by alternative methods. It solves the problem that in self-selection schemes, individuals require more motivation and incentives to enter the process, and they would be more prone to abandon the process to the extent their initial motivations and incentives disappear – they may exit with relatively little cost. Moreover, self-

[164] Like with compulsory voting, this is an issue that I leave aside and take as a given in this discussion.

selection would likely incorporate more politicised individuals with less willingness to change positions, which in the extremes would make the deliberative process superfluous, or polarised, to the extent that most members think alike (Sunstein 2002; Schkade, Sunstein and Hastie 2010).

Random sampling has an egalitarian appeal lacking in alternative selection methods. It is, to put it in Hendrik's words, "the antithesis of elite, technocratic, and activist understanding of policymaking" (2005, 82). Additionally, following Fishkin, "[w]ith modern random samples, we can know a great deal about the chances that our sample is giving us the same results as those we would have gotten had we asked the entire population" (1997, 44). Moreover, Calvert and Warren argue that random sampling is beneficial because, first, framing issues are less likely to emerge, given that participants are free from pressures of competitive re-election. Second, randomness avoids the effects of self-selection, "which will often bias participation toward those who are heavily invested in positions that come with problematic frames attached". Third, representative cross-sections of the population are more likely to multiply reflective and irreflective claims [frames], and "dilute opportunities for frame-based coalitions" (2014, 212).

Of course, random sampling is no panacea (Bächtiger, Setäla and Gröndlund 2014, 230). No sampling method can be completely representative of the entire population. Besides, the egalitarian appeals of these mechanisms wanes in the absence of corrective methods for the selection process (e.g. quotas). Yet, random samples and selections are still a very attractive choice for institutionalising a deliberative societal mechanism of constitutional interpretation, because this shortage in the representative capacity of random sampling methods is stronger the smaller the deliberative body. Contrariwise, the bigger the sample, the more representative the mini-public (Bächtiger, Setäla and Gröndlund 2014, 230).[165]

I must leave the question of the total number of participants necessary for my proposal unanswered as this is an issue that will depend on the size of the polity in which the mini-public is being implemented. Some indications in the literature range from Dahl's recommendation of a 1000 citizens (1989, 340) for an population of roughly 246 million , to Ackerman & Fishkin's 500 (2004, 24-25) for a population of roughly 292 million, or Gosh's 200 (2010, 346) for a population of roughly 22 million. There is

[165] Consider, for example, Hendriks study on consensus conferences and planning cells: "[w]hen sample sizes are larger … simple random sampling is usually employed and no adjustments are made to the sample to meet predetermined quotas" (2005, 82)

nothing sacrosanct about these numbers, but given the aforementioned benefits of random sampling when the sample is higher, higher numbers are to be preferred to smaller ones.

That the mini-public is organised by government means that it must be created by law and that it must operate on a regular basis. As to when, how often and for how long, I suggest the body should gather during congressional election year, right before the legal and official beginning of electoral campaigns. This would provide those running for office with incentives to make their own views explicit, and participants with a sense that what they do matters, that both incumbents and campaigners listen and pay attention to their contribution, for they have electoral incentives to do so (Chambers 2012, 68). This coincides broadly, for example, with Ackerman & Fishkin's idea of celebrating Deliberation Day two weeks before national elections (2004, 23).

4.4.2. Procedure

A constitutional minipublic that provides spaces for ordinary citizens to deliberate about the meaning of their constitutions ought to be structured in ways that they put interpretive problems at the centre. This means that participants must be aware that their deliberations and their result do not constitute a decision in a strong sense of the term, that those deliberations and their results are interpretive, that is, that participants do not deliberate about the merits of changing or repealing constitutional norms but to provide them with meaning, and that the results of those deliberations will be transmitted to their representatives who, in turn, are mandated to take them into account in the justifications they provide for their legislative activity.

The success of this scheme depends to a great extent on agenda setting, but not exclusively. The non-decisional, non-binding nature of the procedure can be established by legal fiat. A law or a constitutional provision creating an interpretive and deliberative mini-public would limit its competences to debate about interpretations. Additionally, it would establish the duty for parliamentarians to justify their normative production appealing to the interpretive understanding of the people resulting from the deliberations in the mini-public.

But agendas play a role as well. An interpretive constitutional deliberative minipublic would be different from other democratic innovations. For example, traditional deliberative polls discuss matters previously selected by a leading convenor (Fishkin & Farrar 2005, 73). In interpretive constitutional deliberation the range of topics would be initially determined by the content of the constitution under debate. Convenors

should have some leeway in the choice of topic within the limits of what is seen as a constitutional matter in the polity at hand. In countries with codified and entrenched constitutions it will be easier to make that determination, whereas in other traditions, like in the United Kingdom, things will not be that clear. But even if we accept with Tocqueville, that the British constitution can "sustain endless changes or in reality it does not exist all" (2003, 118), there are matters which are clearly *constitutional*.

Exactly what issues should be selected for interpretive discussion will depend also on the specific constitutional tradition. Some countries are in need of discussing some issues, some countries others, and the determination of which issue is more urgent is usually determined by political practice. Convenors should be aware of this. Consider, for example, Chile, a country with a written constitution, in the midst of great political controversy over issues which are regulated in its constitution. In Chile, the pressure of different social movements for the implementation of a egalitarian non-profit educational system at the university level, free at the point of access, has been exercised against government since 2011. The constitution, in turn, regulates this entitlement as "freedom of education", not "right to education". The first is limited to primary and secondary school levels.

The interpretive question for a potential constitutional deliberator would be whether the Chilean constitution can accommodate the aforementioned demands. The debate around what "freedom of education" means is unlikely to end in the conclusion that the right to education is included in the charter: the semantic content of freedom in the context of a liberal constitution, which gives priority to property rights over other fundamental rights and liberties, leaves almost no room for a demand for equal, non-profit education, free for all at the point of access. This could be received by the citizenry as a reason for changing the current constitution to the extent that the document is no longer able to incorporate the demands of large sections of the population. It would also provide incentives for legislators to promote the necessary changes to the document insofar as they are aware that the population, ordinary citizens have learnt that the charter is biased in favour of those who enjoy the benefits of property rights.

In sum, the determination of which issues merit interpretative deliberation has to be made within the limits of the constitution of every country. Which specific part of the constitution is to be discussed is left to leading convenors, just like in ordinary deliberative polls (Fishkin and Farrar 2005, 73) who are to choose them according to their best judgement.

The specifics of the deliberative procedure may vary, but I am sympathetic to the use of some versions of deliberative polling. In advance of the event, participants should be sent background material presenting them with a range of information and viewpoints on the interpretive matters to be discussed. (Ackerman and Fishkin 2004, 47; Fishkin and Farrar 2005, 72-73) Also, their basic structure would include small-groups discussions, as well as the opportunity to come together as a large group in a plenary sessions. In traditional deliberative polls, participants here have possibility to ask questions to an expert panel. I do not discard this, but in my design, the presence of representatives in that panel would be important, as this would permit incumbents as well as those running for office to be in direct contact with participants and their deliberations. These would "help elites make decisions that have deliberative legitimacy" (Chambers 2012, 68).

The experiment would also include the administration of a final survey, whose results would then lead to a report that would be sent back to Congress.

4.4.3. And Back to Transmission

The results of discussions ought to be sent to parliamentarians for their mandatory use in legislative discussions and justification of decisions with bearings on constitutional law to the extent they refer to the discussions undertaken in the imagined mini-public. As I have argued above, members of parliament should incorporate these results explicitly in the Bills they propose and in the laws they pass. They may not agree with those interpretations, with how participants in the imagined mini-public think, with the likely consequences of the implementations of their interpretations, or with any other aspect resulting from the engagement with the results obtained. Their duty is to explicitly consider them in their deliberations and in the justification for their decisions whether they agree or disagree with them.

5. Conclusions

This chapter undertook three tasks. First, it recapitulated the principles advocated in this dissertation, which ground popular constitutionalists' claim that it should be the people themselves the ones entitled and in fact the ones holding the final word in constitutional interpretations. It proceeded by first making visible the flaws observed in some of the most articulate accounts attempting to make such project feasible. Finally, it shed lights on what a republican, deliberative, and egalitarian popular constitutionalism would look like.

The resulting account is a combination of institutional proposals that start by rejecting judicial supremacy while still giving the judiciary an important role in the securing the liberty of individuals. It also grants judges reviewing powers insofar as those powers do not put courts in some privileged position as constitutional interpreters. Under this institutional arrangement courts can and should give their opinion regarding what the meaning of the constitution is, but they must recognise a higher authority in performing that task: the people. Finally, I argued that parliamentary deliberation and justification are useful tools for meeting these goals.

The capacity of the mechanism I entitled *Parliamentary deliberation and justification* to operationalise popular constitutionalism depends upon three things: a discursive understanding of the notion of representation, transmission, and the installation of deliberative mechanisms in both the public sphere and formal decision-making institutions. In that sense, these pages represent a contribution in different ways. First, they show that the direct/representative democracy, understood in this way, is a false dilemma. Representative democracy does not mean indirect democracy. Second, it follows that popular constitutionalism does not have to present itself as a radical theory, exalting direct rule by mobs. It does not have to give the image of majorities as tyrannical in any sense – a popular constitutionalist scheme would not provide individuals with pitchforks and torches. By contrast, with the introduction of some institutional innovations it fits well in our current systems of representative democracies. Third, the chapter took seriously one of the most vexed issues in contemporary deliberative democracy: the transmission of discourses between the public sphere and the formal decision-making organs. By relying on recent and provocative accounts dealing with these issues, it made possible to reflect on just how a popular constitutional interpretation would be possible in the context of a representative democracy**.** Finally, it broadly sketched a mini-public that, operating in the public sphere, would give ordinary citizens the possibility to discuss interpretations of the constitution with real impact in formal decision-making processes.

The specifics of the institutional design may vary, needless to say, and they certainly require more elaboration, but it is fair to say that it is compatible with the republican, deliberative and egalitarian principles here endorsed.

CONCLUSIONS

This section reflects on some of the contributions made in the preceding chapters as well as on some aspects where there is room available for future research.

This dissertation championed popular constitutionalism. It shed light on the possibilities of its normative justification and institutional implementation. By pointing at the difficulties faced by current accounts, I have developed aspects in need of elaboration from different theoretical viewpoints, thus contributing to debates initially raised within the confines of legal theory and constitutional law. This opened the popular constitutionalist's programme to a broader, interdisciplinary perspective.

Political philosophy and political theory provided the normative tools to justify that individuals, ordinary citizens, are entitled to steer the process of providing meaning to the commitments expressed in their constitutions. The different bodies of literature on which I relied in chapter II were intertwined in original and mutually beneficial ways. In relating republican theory and deliberative democracy, the chapter tackled the troublesome nature of the relationship between constitutionalism and democracy in an original way. This is something that requires more elaboration than the one this dissertation can give, but I believe it represents an interesting step in the direction of justifying the notion of constitutional democracy, which in theory seems like a contradiction but that is a reality in practice. This is a not only a good starting point for my normative argument, but also one that opens avenues for future research in political philosophy, political theory, and constitutional law.

The relationship between political theory and law was also shown in my rejection of judicial supremacy by putting into question the notion that interpretation in law is a matter for the courts. This was evident in the criticisms made in chapter III to those who either implicitly or explicitly take courts as privileged fora for constitutional interpretation. It was also present in chapter IV where such position was not only questioned on legal grounds, but placed as part of the agenda of democratic theory and, in particular, of deliberative democracy. This is an original approach, for the question of the institutional means through which constitutional interpretation can be undertaken has not been addressed from a deliberative democratic perspective. In this vein, this argument paves the way for future research answering just how deliberation can shape constitutional meaning. Mine is *a* proposal and a step in that direction, but there is certainly more room for reflection on the matter.

Chapter IV presented a heuristic to determine when and why judicial or non-judicial perspectives are ideal vantage points to theorise and institutionalise constitutional interpretation. This gives room for further considerations about more specific criteria determining just which sources and which topics are for judges to interpret with or without *erga omnes* effects. The chapter did not need to provide that specification because the general argument made there sufficed for my own purposes.

Notwithstanding, some indications may be offered as suggestion for further research. Constitutional lawyers distinguish between formal and material constitutional norms. The first are norms included and entrenched in constitutional texts through stringent procedures and reform mechanisms. Reform mechanisms in many constitutions require generally high quorums for those norms to exist. These standards can be called constitutional to the extent that they are part of a certain constitutional text or practice. Yet, this formal dimension says nothing about the content of the norm at hand.

Constitutional norms have a material dimension as well. This dimension appeals to the content of the norms at hand, which can qualify them as constitutional depending on the importance of the matter they regulate. Some of those norms may, and usually are, formally constitutional as well. Yet, that may not always be the case. Consider, for example, Chile's regulation of the effects of law in time. The prohibition of retroactivity in criminal law is regulated in the constitution. Article 19.3 section 8 establishes a protection against *ex post facto* laws: "No crime will be punished with a penalty over other than that specified by a law promulgated prior to its perpetration, except where a new law favours the affected [person]". This clause qualifies as a constitutional norm both formally and materially. But, the also important prohibition of retroactive legislation in other areas of law (administrative, civil law, etc) is not included in the constitution but in the Chilean civil code, that is, in a statute. Article 9 of that statute reads:

> The law can only regulate matters towards the future, and shall never have retroactive effect.
> Notwithstanding, the laws that limit themselves to declare the sense of other laws, shall be understood as incorporated in the latter; but they shall not affect in any way the effects of final judicial decisions adopted in the intermediate period.

Is this ordinary legislation or a constitutional norm? Can the legislator modify or derogate this article through ordinary reform mechanisms? There are two possible answers for these questions. The first is yes. Formally, there is nothing in the Chilean legal system preventing the legislator from modifying Article 9 through ordinary reform mechanisms. But there is a more complex answer. The legislator cannot modify article 9

of the Chilean civil code through ordinary reform mechanisms because, in doing so, it would violate constitutional norms, particularly, the right to private property regulated in article 19.24 of the constitution. Allowing retroactive legislation would be incompatible with guaranteeing persons the right to keep the acquired property. Put in the terms of my discussion, article 9 of the civil code is materially a constitutional norm, even if it is formally included in a statute and is, prima facie, available for the legislator to modify it through ordinary reform procedures.

I use this example to suggest that the assessment of which source carries constitutional strength must be made in the context of each legal system. This is why chapter IV presented its criteria as heuristic and not as fixed standards. Courts can and should certainly interpret statutes and constitutions. That has never been the issue in this dissertation. I kept my argument and my standards within the limits of a heuristic because the specification of a criterion or a group of them of when a certain legal standard has *erga omnes* and constitutional effects depends on the particularities of each constitutional tradition. Constitutional rules are not always entrenched in constitutional paper, statutes often regulate matters of high political and moral significance, executives often have prerogatives to regulate matters of constitutional salience and, by contrast, constitutions could contain very specific provisions regulating matters that, prima facie, do not seem to be of great importance (think, for the sake of the argument, that a constitution includes a provision regulating the name of city's square). These complexities should be taken seriously and justify further research.

This dissertation also delved into the extensive literature produced by political scientists working on empirical deliberative democracy. Through an analysis of the tools available for researchers to test deliberative quality in all sorts of fora, chapter V questioned the almost intuitive or at least commonly held notion that the courtroom is a place where deliberation happens regularly. It also highlighted the need for social scientists to continue working on deliberation measurement. In this vein, the dissertation also opens avenues for future research on problems which can and need to be addressed from different disciplinary perspectives.

Chapter V presented a criticism of the methods employed by deliberative democrats to test deliberative quality. Political theorists and political scientists are aware that the instruments they work with to measure the quality and quantity of deliberation are deficient. And yet, these instruments are the best they have and they are regularly subjected to amendments and improvements. This is important not just for the sake of our

theoretical concerns, but because deliberative democracy has been employed in real-world situations, implementing sites where actual individuals have shown their willingness and capacity to participate and discuss issues of all sorts and with different degrees of importance. Moreover, these sites and individuals have been given actual decision-making power. It is then of crucial importance that we find the best possible ways to determine if, when, and how deliberation is taking place in these fora.

This need for legal theory to consider insights from other disciplines was also clear in chapter VI. Systemic approaches to deliberative democracy entail a reassessment of not just the different sites that would be considered potentially deliberative, but also the recognition that no site can meet the requirements of an ideal speech situation. Moreover, these perspectives broaden the scope of speeches accepted as deliberation. The complexity and rationality of legal discourse in the courtroom is then no longer a criterion by which deliberative justification may be measured; at least not exclusively. This openness has an effect on the disciplinary approach one must take to analyse deliberative phenomena. In the case of courts, the deliberativeness of their procedures is measured by the capacity the parties may have to frame their arguments in the language of legality and on the courts' capacity to justify their decisions in the same terms. This is one way of framing discussions, albeit not the only one. Hence, other sorts of criteria determining the success or failure of deliberative decision-making procedures become necessary, and it is the task of other disciplines to provide them.

Interdisciplinarity was also present in chapter VII. The operationalisation of popular constitutionalism, as presented in that part of the dissertation, gains plausibility by merging different perspectives from which an institutional design may be imagined. As said before, the model is normatively justified through political philosophical arguments. These principles give ground and direction to the institutional arrangement as regulative ideals; they specify the goals to be achieved when preferring one type of institutional design over other. Once those principles have been specified and argued for, legal and political theory and political science enter the picture from the perspectives and horizons of their own vocabulary and theoretical and empirical developments. As a result, to the extent that scholars choose principles different than the ones I champion, the institutional designs they may propose would possibly have a different form.

Additionally, I hinted in chapter VII that there is an additional issue in need of more reflection. The chapter did not elaborate on the role of parties in the political system, for the subject is vexed enough as to merit independent and extensive examination.

In my view, future research should concentrate on parties and deliberative representation, on the one hand, and on the role of parties within the deliberative system on the other. As to the relationship between parties and deliberative representation, deliberative democracy can be a useful tool for the fulfilment of what is probably the most important function of a political party, namely, connecting citizens to government. This is the way these organisations were initially conceived and "and it continues to be the main standard according to which their legitimacy as representative institutions is evaluated" (Wolkenstein 2016, 297) By insisting on the necessity to bring about deliberative mechanisms of transmission between the public sphere and formal political structures, chapter VII is a step in that direction, but more research is called for. My view, which needs further elaboration, is that parties would participate in the transmission process to the extent they are able to be internally deliberative and that they generate and employ mechanisms to incorporate the demands and preferences of citizens. The current tendency is, however, the opposite, as parties have moved or gradually transformed themselves from agents that mediate between the state and the public sphere to agents of the state (Katz & Mair 1995).

Research should then be undertaken to understand how parties can be part of the deliberative democratisation implied by popular constitutionalism. By moving the sphere of constitutional interpretation from courts to the citizenry and their preferences, parties would see themselves forced to understand the ways in which they can be part of a model of representation as advocacy, for constitutional issues would be part of the political agenda, not only during exceptional constitutional moments but in times of normal politics as well (Ackerman 1991). Internal deliberative party democracy is essential for that matter. Recent scholarship questions whether the traditional mechanisms of internal party democracy – most prominently candidate selection and direct participation – are up to the task of effectively connecting these institutions with the citizenry. As Wolkenstein argues,

> [m]issing from these models are fora of discussion and debate, in which the party base can critically question the status quo and devise alternative positions on specific policies as well as the party's more general direction. It is these fora parties need to establish and empower to make internal democracy meaningful (2016, 297)

This is a fruitful research avenue for political theorists and political scientists. It is also one that would put additional layers to the argument made in subsection 4 of chapter VII, when arguing for parliamentary deliberation and for the linkage between

parliament and the constitutional mini-public I proposed. Recent scholarship provides interesting potential avenues that would likely give a vocabulary to these problems. One interesting example is Schäffer's recent paper on deliberation in representative institutions (2017). The author presents an analytical account of the relationship between deliberation and representation through an analysis of the institutional logics that guide deliberative action in parliaments. Schäffer argues in the parliamentary context there are two key respects in which we find representative relations: "[f]irst, members of parliament represent their electoral constituencies. Second, they represent their party group within the parliament" (2017, 7). The two logics stand in tension with each other, for deliberation demands actors to be willing to engage in debate and justify their position and this implies

> openness to changing one's stance in the face of convincing reasons. By contrast, relationships of representation demand that pre-established positions pass through the decision-making process with as little changes as possible. Here, the output is usually judged by those represented according to how well it meets their original expectation or at least how closely changes match their preferences (2017, 7).

My proposed design would most likely be affected by this tension. The interplay of expectations and incentives would be, however, modified by the insertion of the deliberative constitutional mini-public to the structure of government. Moreover, the two logics – the discursive and the positional – would stand in a less tense relation to the extent that representation as advocacy incorporates the idea that it is not only concrete individuals the ones being represented but their arguments and interpretive preferences as well. To the extent that individuals themselves air their preferences and arguments in the constitutional mini-public, and that parties would have the incentives to form their own programs and positions in accordance with those arguments and preferences, the positional and the discursive logics would meet somewhere in the middle. Or, if this sounds too optimistic, easing the tension in this sort of scheme would be easier than in purely aggregative models. Just how and to what degree, however, is something that merits more reflection than the one I can provide here.

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