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THE SECOND DIMENSION OF DEMOCRACY: THE PEOPLE AND THEIR CONSTITUTION

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ABSTRACT

This paper argues that procedural and substantive approaches to democracy fail to address the question of the democratic legitimacy of a constitutional regime. Taking Ronald Dworkin and Jeremy Waldron as a point of departure, the paper contends that procedural and substantive democrats approach democracy at the level of daily governance as if it exhausted the democratic ideal. As a result, they not only ignore democracy at the level of the fundamental laws but the question of democratic legitimacy altogether. After examining the under-theorized distinction between these two dimensions of the democratic ideal, the paper builds on the work of Sheldon Wolin and argues that democracy at the level of the fundamental laws should be conceived as a moment in the life of a polity, the moment in which ordinary citizens deliberate and exercise their power to (re)constitute the juridical order and legitimate their constitution. By way of conclusion, the article considers some of the mechanisms contained in new Latin American constitutions as examples of devices that might facilitate the practice of the second dimension of democracy.

KEYWORDS

Democratic Legitimacy, Ronald Dworkin, Jeremy Waldron, Constitutional Reform, Constitution Making, Constituent Power

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INTRODUCTION

Someone who tries to defend the democratic legitimacy of a constitutional regime usually puts forward either one of two kinds of claims. She may point towards the ways in which the regime's laws and institutions are consistent with a particular interpretation of the principle of the 'rule by the people'. For instance, if these laws and institutions give citizens equal treatment and allow them to participate in everyday decision-making, she might plausibly defend that regime on democratic grounds. But she can also take a different route and argue that the regime's laws and institutions are the result of what is thought to be a democratic procedure (e.g. a legislature that functions according to the principle of majority rule), and that this is sufficient to maintain their democratic legitimacy. The first of these approaches can be identified as 'substantive' and the second as 'procedural'. In this paper, I argue that these approaches to democracy not only do not have much to say about the question of democratic legitimacy, but that they tend to negate or at least obscure that question.

When scrutinized from a democratic perspective, the problem with these approaches is that they fail to distinguish between the two dimensions of democracy. The first dimension of democracy, democracy at the level of daily governance (democratic governance), has to do with the adoption of ordinary laws and the administration of a state's bureaucratic apparatus; the second, democracy at the level of the fundamental laws, with the relation of the people¹ to their constitution.² As will become clear later, I believe that this second dimension is directly connected to the question of democratic legitimacy: to defend the democratic legitimacy of a constitutional regime is to say that it is compatible with the exercise of democracy at the level of the fundamental laws.

To present this argument, I will first examine the work of two self-proclaimed democrats, Jeremy Waldron and Ronald Dworkin, the former a proceduralist and the latter a substantivist. I then introduce the distinction between democratic governance and democracy at the level of the fundamental laws and examine the treatment they receive in Waldron's and Dworkin's theories. I will show that their conceptions of democracy operate only within the level of

¹ In using the category of 'the people', it is not my intention to appeal to a sort of collective entity capable of expressing a single, unitary will. I use this category simply to refer to the human beings recognized as citizens in a determinate territorial extension. Although all citizens of a contemporary society cannot come together, deliberate and make a decision about the content of their constitution, they can participate in the positing and re-positing of the fundamental laws through the use of different mechanisms of popular participation.

² One could also add democracy at the level of society (e.g. democracy in the workplace) as a third dimension and democracy at the international level as a fourth. This, of course, is out of the scope of this paper.

democratic governance. Both authors approach the first dimension of democracy as if it exhausted the democratic ideal, and, as a result, they ignore the meaning of democracy at the level of the fundamental laws. Waldron's defense of parliamentary supremacy is only concerned with ordinary representative institutions and, consequently, does not pay proper attention to the relation between citizens and the constitution. Dworkin, on the other hand, not only lacks a 'democratic' account of democracy at the level of the fundamental laws, but his preferred conception of democracy is in potential conflict with any approach that aims to take seriously this second dimension of the democratic ideal. By operating exclusively at the level of democratic governance, both the substantive and the procedural approach fail to address—despite their proponents' claims to the contrary—the question of the democratic legitimacy of a constitutional regime.

I then argue that democracy at the level of the fundamental laws should be understood as a moment in the life of a juridical arrangement: the moment in which important constitutional transformations take place and in which the principle of popular sovereignty comes closer to its realization. Under this view, exemplified in the work of Sheldon Wolin, democracy is not seen as a *form* of government contained and embodied in a constitution (democracy always escapes constitutionalization). Democracy, on the contrary, is approached as a political practice that involves the manifestation of popular sovereignty. In that sense, what in the context of democratic governance is seen as a threat to juridical stability and to the very idea of law, appears as the natural consequence of democracy and as a corollary of the idea of democratic legitimacy. Finally, I briefly consider some of the mechanisms contained in new Latin American constitutions as examples of devices that might *facilitate* the practice of the second dimension of democracy.

1. THE SUBSTANTIVE AND THE PROCEDURAL APPROACHES TO DEMOCRACY

The difference between proceduralists and substantivists is usually posed in terms of their approach to the relationship between rights and majority rule.³ What separates procedural from substantive democrats is that the former tend to stress the importance of having a fair process for making decisions about controversial moral issues. Proceduralists defend majority rule as such a process because it respects the equal status of citizens.⁴ Any realistic alternative to majority rule, they

³ For an excellent hypothetical dialogue between a 'proceduralist' and a 'substantivist' see Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989). See also the discussion in Thomas Christiano, "The Authority of Democracy," *The Journal of Political Philosophy* 12 (2004): 266.

⁴ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (The Belknap Press of Harvard University Press, 1996), p. 26-27.

say, would violate the democratic value of political equality giving more weight to the votes of some citizens (e.g. supermajority rule would give more weight to the votes of those in the minority), and some decision-making rules would privilege the status quo (e.g. the rule of supermajorities or unanimity).

Some procedural democrats agree that those rights that are necessary to create a fair democratic procedure (e.g. the right to vote) should have priority over majority rule, and some might agree that rights that protect minorities should also be outside of the scope of democratic politics.⁵ Most proceduralists, however, would not give priority to rights that are not constitutive of democracy or necessary in order to respect individuals as equal citizens, such as the protection against cruel and unusual punishments.⁶ Substantivists, in contrast, think that not only the rights that are necessary for democracy should be prioritized: those rights and institutions designed to produce just outcomes should also have precedence over the democratic process and its decision-making rule.⁷

1.1. WALDRON THE PROCEDURALIST

One of the most well known procedural democrats is Jeremy Waldron. Waldron's critique of judicial review of legislation (probably the most important component of his intellectual project) rests on a conception of democracy that privileges procedure over substance. This does not mean that Waldron believes that the content of fundamental and ordinary laws is not important or that rights protection should be moved to a secondary plane, but that to inquire into the democratic legitimacy of laws is to ask who made them and by what procedures they came into existence: the legitimacy of laws is a matter of their pedigree.⁸ For Waldron, people have a right to participate in equal terms in all aspects of their community's governance, that is, not just in interstitial matters of social and economic policy but also in decisions of high principle.⁹

The right to participate—"the right of rights"¹⁰ as Waldron calls it following William Cobbett—is connected to values (such as autonomy and responsibility) that are part of the liberal commitment to other basic liberties. When the right to political participation is violated, our respect for other rights is called into question.¹¹ Ordinary individuals are seen as competent judges on issues of rights,

⁵ *Ibid.*, p. 27. For an examination of the implications and limits of proceduralism, see Wojciech Sadurski, "Law's Legitimacy and 'Democracy Plus'," 26 *Oxford Journal of Legal Studies* 397 (2006).

⁶ Amy Gutmann and Dennis Thompson, *supra* note 4, p. 33.

⁷ *Ibid.*, p. 34.

⁸ Jeremy Waldron, "Can There Be a Democratic Jurisprudence?" (Paper presented for Analytic Legal Philosophy Conference, NYU School of Law, April 2004) (On file with author): 19.

⁹ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p. 213.

¹⁰ *Ibid.*, p. 232.

¹¹ *Ibid.*, p. 213.

and we cannot say to be respecting someone's rights if we do not allow them to have a say whenever there is a disagreement about what these rights entail.¹² It is not that the right to participate has moral priority over other rights, but that when there is disagreement about what rights people have (and disagreement about rights is simply inevitable), the exercise of the right to participation is the most appropriate for settling the dispute.¹³

Consequently, Waldron's answer to the question of 'Who shall decide what rights we have?' is: the people whose rights are in question must participate on equal terms in that decision.¹⁴ This is another way of saying that there cannot be a democracy unless rulers are controlled by the people they rule, and that "the people or their representatives" determine the principles of their association and the content of their laws.¹⁵ This, of course, is not the only possible or even the most popular answer to that question, but it is what makes Waldron's approach to democracy procedural and what drives his understanding of rights and his critique of judicial review. A theorist that holds a result-oriented or substantivist approach to democracy would answer that question in a very different way. This theorist would say, for example, that even when it is the people's rights which are at stake, it is better to entrust a body of jurists with the authority to decide what those rights require. According to that theorist, our priority should be to design the institutions that tend to produce the best decisions about rights, and a court, he might argue, is better equipped to engage in those decisions than a legislative assembly. He might also say that this kind of institution (e.g. a court with the power of judicial review) is not necessarily inconsistent with democracy; on the contrary, judicial review is nothing but an important component of a constitution that was adopted (or would have been adopted) by the free decision of a rational and informed people.¹⁶

1.2. DWORKIN THE SUBSTANTIVIST

The main tenet of Waldron's theory is that there is a loss to democracy every time a non-democratic institution¹⁷ imposes a decision on the citizenry, no matter

¹² *Ibid.*, p. 251.

¹³ *Ibid.*, p. 232.

¹⁴ *Ibid.*, p. 244.

¹⁵ Jeremy Waldron, *supra* note 8: 7. See also Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 *Yale L.J.* 1346 (2006).

¹⁶ To argue that a constitution was 'adopted' by the people is to say that it was the result of a *democratic* constitution-making process, one that was consistent with the principle of popular sovereignty. But this is not the case of most modern constitutions. Moreover, in the context of countries like the United States, this argument is even more dubious, as judicial review was the result of a decision of its Supreme Court and not of the deliberations of a constituent assembly. See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁷ For Waldron, a democratic institution is an institution that is representative, accountable to the electorate, and that embodies the 'spirit of self-government'. According to this vision, an elected

how wise (or correct) that decision might be. In this sense, Waldron (and in this point he is in agreement with most substantivists) seems to be committed to the view that there are right answers to questions of political morality. I do not share this view, and, like Allan Hutchinson, I do not think there is a "set of eternal values or objective truths to which a democratic society must conform or by which it can be disciplined".¹⁸ But even if there was, democracy would still have priority over these 'right decisions': all democratic struggles are about the rejection of someone's claim to have the monopoly over truth. Not surprisingly, democratic legitimacy does not ask for right or even wise decisions. It asks for a democratic pedigree even when the decision maker gets it 'very wrong'.¹⁹

For the substantive democrat, this constitutes a serious misunderstanding of what democracy is all about. And Ronald Dworkin is the prototypical substantivist. His view of democracy, sometimes presented as 'the constitutional conception'²⁰, and more recently as the 'partnership view'²¹, looks for the democratic legitimacy of a regime in the content of its fundamental laws and institutions. His favored interpretation of the democratic ideal, the partnership view, qualifies the relationship between majority rule and democracy.²² Here, democracy does not mean that the majority should always or even most of the time have the final word. What democracy requires is that the people govern themselves by treating

legislature deserves to be characterized as a 'democratic institution' and its decisions naturally enjoy democratic legitimacy. As I will argue later, although this might be true with regards to democratic governance, it becomes problematic in the context of democracy at the level of the fundamental laws.

¹⁸ Allan C. Hutchinson, *The Province of Jurisprudence Democratized* (Oxford: Oxford University Press, 2009), p. 81.

¹⁹ See Jeremy Waldron, "Rights and Majorities: Rousseau Revisited": 45; in: John W. Chapman and Alan Wertheimer, eds., *Majorities and Minorities* (New York: New York University Press, 1990). Rawls makes a similar distinction regarding what is just and what is legitimate: "To focus on legitimacy rather than justice may seem like a minor point, as we may think 'legitimate' and 'just' the same. A little reflection shows they are not. A legitimate king or queen may rule by just and effective government, but then may not; and certainly not necessarily justly even though legitimately. Their being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules of traditions of, for example, the English or the French crown. A significant aspect of the idea of legitimacy is that it allows certain leeway in how sovereigns may rule and how far they may be tolerated" (John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), p. 427). Despite this passage, which seems to refer to legitimacy in terms of the lawfulness of a particular regime, Rawls usually seems to conflate the distinction between these concepts.

²⁰ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996). See also Ronald Dworkin, "Equality, Democracy, and the Constitution: We the People in Court," 28 *Alberta Law Review* 329 (1990).

²¹ Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006). In *Is Democracy Possible Here*, Dworkin presents his conception of partnership democracy as flowing from what he calls the 'two principles of human dignity' (the principle of intrinsic value and the principle of personal responsibility). I have omitted direct references to these principles in this discussion, as they are not relevant for my analysis and not necessary to grasp Dworkin's view of democracy.

²² *Ibid.*, p. 143. Dworkin claims that some of the traditional arguments in favor of majority rule (that majority rule results in wiser and better government and that it is the only fair method of decision making) are mistaken. For example, there is no reason to think that a majority is more likely to reach the right answer about moral issues, and the evidence against that assumption is plenty. Moreover, that majority rule is fair because it gives each citizen equal political power is simply not true. In representative government, for example, people who hold office have much more power over political decisions than people who do not.

individuals as full partners in a collective enterprise.²³ Decisions are democratic *only* when the conditions that protect the status and interests of each individual as a full partner are met. For instance, if a community decides, by majority rule (or by unanimity for that matter), to ignore the interests of some individual or group, its decision is not only unjust: it has nothing to do with democracy. According to Dworkin, deciding whether a law or policy merits the adjective 'democratic' is not a matter of looking at the procedure from which it resulted; what is essential is to confront its content with the theory of equal partnership.²⁴ If the theory allows for such content, then the law or policy enjoys democratic legitimacy, no matter if it is taken by a legislative majority or by a non-representative institution.

The partnership view of democracy has also procedural implications. That is, when there are disagreements about what law or policy is more consistent with the theory of equal partnership, there must be a procedure in place for reaching collective decisions. These procedures must show equal concern for the human beings that live within the state's borders. In Dworkin's view, this is best achieved with widespread and roughly equal suffrage, as "[o]fficials elected by a broad swath of the population will do a much better job of protecting the weak against special privilege and tyranny than officials elected by and responsible to only a few"²⁵. The idea is that the test of whether a constitutional arrangement shows genuine procedural equality is to ask "whether that arrangement is likely to produce policies that respect substantive equality in concern for people's lives"²⁶.

Nevertheless, this does not give any reason to think that majorities should be allowed to alter, whenever they wish, the basic constitutional structure that seems 'best calculated' to ensure equal concern: "We may better protect equal concern by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities"²⁷. Under this view, a democratically legitimate regime is one whose officials are elected under procedures that allow a majority of the people to replace them at regular intervals and that "by and large" treats individuals with equal concern.²⁸ An illegitimate regime is one that cannot even defend its policies as failed (but good faith) attempts to show equal concern to every individual from which it claims obedience.

²³ *Ibid.*, p. 131.

²⁴ *Ibid.*, p. 134.

²⁵ *Ibid.*, p. 144.

²⁶ *Ibid.*, p. 145.

²⁷ *Ibid.*, p. 144.

²⁸ *Ibid.*

2. THE TWO DIMENSIONS OF DEMOCRACY

The previous discussion showed the contrast between procedural and substantive democracy and the ways in which a democrat from each persuasion addresses the question of the democratic legitimacy of a country's laws and institutions. In Dworkin's substantive account, the question seems to be exhausted by the very idea of partnership democracy: an elected government that by and large treats people with equal concern enjoys sufficient legitimacy. For Waldron, the procedural democrat, legitimacy requires that the regime's laws are adopted by the people or their representatives. Note that these author's approaches to legitimacy is what separates them and what makes Waldron a proceduralist and Dworkin a substantivist: the former puts a procedural category in his definition of legitimacy ('the people or their representatives') where the latter puts a substantive one, that is, one that asks us to look at the content of the decision in question ('the principle of equal concern'). But this difference at the same time demonstrates a similarity among these authors: each of them identifies the idea of legitimacy with the most fundamental aspect of their theory of democracy. In Waldron, this means that decisions must be made by the people or their representatives; in Dworkin, that governments must treat citizens with equal concern. However, as this section will show, these conceptions do not pay proper attention to what can be identified as democracy at the level of the fundamental laws. And democratic legitimacy is directly connected to this second dimension of democracy: if there is a deficit of democracy at the level of the fundamental laws, the democratic legitimacy of the constitutional regime is inevitably put into question.

2.1. DEMOCRATIC GOVERNANCE

When people say that a certain country is 'democratic', they are usually referring to democracy at the level of governance. That is, they are trying to suggest that that country's laws and institutions provide for frequent elections, that citizens are allowed to associate in different organizations (including political parties) and to express their political opinions without fear of punishment. In short, they are simply making the observation that the country in question satisfies the requirements of what Robert Dahl has identified as polyarchy.²⁹ For most democrats (including Dahl) these requirements fall short of exhausting the democratic ideal. Nevertheless, many argue that while this is the case, in large and complex societies polyarchy is the most democratic system that one could

²⁹ Robert Dahl, *supra* note 3.

realistically aspire to. Others disagree, and insist that countries that are normally identified as 'democratic', in fact could be 'democratized' in fundamental ways.³⁰

More specifically, democratic governance has to do with the daily workings of a state's juridical apparatus, with the processes that result in the adoption of the ordinary laws and policies, and with the content of the fundamental laws. Thus, for example, most claims that judicial review is undemocratic are made at the level of democratic governance. These claims usually stress the fact that judicial review leaves important decisions in the hands of judges, and that democratic principles require that legislatures, as the duly representatives of the people, be the ones called to make those decisions.³¹ The processes through which ordinary laws and policies emerge are also a matter of this first dimension of democracy, and the composition and representative nature of legislatures is the main focus of the kind of critiques that address these processes.³² For instance, an unelected upper house (like the Canadian Senate) and the debate over districting in countries such as the United States are problems of democratic governance, as well as issues like the restriction on campaign finances, proportional representation, and the equal treatment of citizens by a state bureaucratic apparatus.³³ By the same token, the role citizens are allowed (or not) to play in the adoption of ordinary laws and in the workings of their legislative assembly is also a matter of this first dimension of democracy. Are citizens allowed to submit initiatives to parliament? Can they petition for the recall of particular legislators? What other institutions allow or promote citizens' involvement in ordinary law-making and the formation of state policies?

In this dimension of democracy, nevertheless, the democratic ideal of popular participation can only be realized in limited ways. For practical reasons, the role of the different mechanisms that facilitate popular participation (e.g. constituent assemblies and referendums) must be limited in day to day governance and, as a result, representative institutions and bureaucrats must assume a central role.³⁴

³⁰ See for example Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984); Allan Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Canada: Irwin Law, 2006).

³¹ See Jeremy Waldron, *supra* note 9. See also Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

³² See Benjamin R. Barber, *supra* note 30.

³³ For a discussion on the Canadian Senate see David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003); for the debate over districting in the U.S. see the essays in David K. Ryden, ed., *The U.S. Supreme Court and the Electoral Process* (Washington, D.C.: Georgetown University Press, 2000); for proportional representation see for example M.L. Balinski, *Fair Representation: Meeting the Ideal of One Man One Vote* (Washington, D.C.: Brookings Institution Press, 2001); for the issues of restriction on campaign finances and equal treatment see for example, Ronald Dworkin, *supra* note 21.

³⁴ There are, of course, many ways in which popular participation can be intensified in the context of democratic governance, but that discussion is outside the scope of this paper. See for example James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991); Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge

This in no way means that popular participation is not important in this first dimension of democracy. On the contrary, and as the previous discussion suggests, most demands made at the level of democratic governance are about increasing the extent to which the ideal of popular participation is respected.

But democratic governance is not only a matter of ordinary laws, and it is related to the content of a constitution in important ways: Does the constitution provide for universal suffrage? Does it establish an elected legislature? Does it respect basic liberties? If in the context of a particular constitutional regime those questions are to be answered in the negative, democratic governance would not even be possible. In short, democracy at the level of governance is about the way a constitutional regime works in a day to day basis. Because of its impact in the daily lives of individuals, a lack or deficit of democratic governance in a determinate country is more pressing for its citizens than a problem of democracy at the level of the fundamental laws. Needless to say, only the citizenry of a strongly democratic polity, accustomed to vigorous democratic debate and participation about the content of the ordinary laws, is likely to engage in the democratic reconstitution of the constitutional regime.³⁵

2.2. DEMOCRACY AT THE LEVEL OF THE FUNDAMENTAL LAWS

The second dimension of democracy deals with other questions. It is not about the daily workings of the state's political apparatus, but about the relation of citizens to their constitution. It looks at how a constitutional regime came into existence and how it can be altered. In that respect, it revolves around the following two questions: (1) Is this constitution the result of a democratic process?; and (2) Can this constitution be altered through democratic means? To ask about democracy at the level of the fundamental laws, then, is to ask about two different moments in the life of a constitutional arrangement: constitution-making and (the possibility of) fundamental constitutional change. These are the moments in which a juridical order can come closer to affirming the principle of popular sovereignty and in which the question of democratic legitimacy appears more clearly.

With respect to constitution-making, the second dimension of democracy is incompatible with 'given' constitutions, regardless of how liberal or wise their content might be.³⁶ Democracy requires understanding constitution-making as an

University Press, 1970); C.B. MacPherson, *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973).

³⁵ As Habermas has noted, "democratic institutions of freedom disintegrate without the initiatives of a population accustomed to freedom" (Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996): 130).

³⁶ There is a considerably large body of literature that deals with the relationship between constitution-making and democracy, but most authors do not adopt a strongly democratic posture (see Jon Elster,

exercise of self-government that must take place in a context of democratic openness and that requires the maximization of popular participation. The maximization of popular participation refers to a kind of political activity in which ordinary citizens assume a central role in the production of substantive decisions (this includes not only direct participation in referendums but public deliberation on the content of the constitution). Popular participation is the affirmation of the 'popular' element of *popular* sovereignty. Democratic openness refers to a situation in which the constitution-maker finds itself as the potential author of a constitutional text without any principles already sedimented into the constitutional order. It is the affirmation of the 'sovereignty' element of popular *sovereignty*.³⁷

A constitution, then, might enjoy or lack democratic legitimacy with regards to the moment it was created: it can be born democratically or undemocratically. That is to say, it can be the result of an exercise of popular sovereignty, or it can be imposed from the top down (even if by a philosophically gifted political agent). To say that the second dimension of democracy involves an exercise of popular sovereignty is not to say that democracy is exhausted by popular sovereignty (an exercise of popular sovereignty can in fact abolish democracy), but that it *requires* its affirmation in the context of the relationship between the constitution and those subjected to the constitutional order.

In terms of constitutional change, the second dimension of democracy is equally demanding. It is incompatible with the Lyncurgian-constitutionalist obsession with permanence (with the idea of a 'perpetual constitution', as Thomas Jefferson put it)³⁸ and with the insistence in the closure of the political terrain after a

"Ways of Constitution-Making": 127; in: Alex Hadenious, ed., *Democracy's Victory and Crisis* (Cambridge University Press, 1997); Andrew Arato, "Forms of Constitution Making and Theories of Democracy," 17 *Cardozo L. Rev.* 191 (1996); Dennis C. Mueller, "On Writing a Constitution"; in: Ram Mudambi and Pietro Navarra et al., eds., *Rules and Reason: Perspectives on Constitutional Political Economy* (Cambridge: Cambridge University Press, 2001)).

³⁷ The ideals of popular sovereignty and democratic openness are directly related to the principle of the 'rule by the people', democracy's literal meaning. To say that the people rule themselves is to say that they are a 'self-governing' people: a group of human beings that come together as *political equals* and give themselves the laws that will regulate the institutions under which they live. As noted above, this is nothing but an expression of the principle of popular sovereignty and it involves two important and related points. First, for these rules to be the people's own, it must be today's people who rule, not past generations, however wise or well-intentioned their act of constitution-making was, or whatever the content of the provisions they adopted. The idea of pre-commitment (perfectly attuned to the logic of liberal constitutionalism), cannot be brought to a final reconciliation with democracy (Stephen Holmes, "Precommitment and the Paradox of Democracy"; in: Jon Elster and R. Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988)).

A self-governing people must be able to reformulate their commitments democratically. Second, for there to be democratic self-rule, no rule can be taken for granted or removed from critique and revision. In this sense, the idea of placing stringent requirements for constitutional amendments, or of placing part of the constitutional text outside the scope of the amending procedure, is in clear conflict with the ideal of democratic openness (see Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford: Stanford University Press 2003), p. 10).

³⁸ Merrill D. Peterson, ed., *Thomas Jefferson Writings* (New York: Library of America, 1984), p. 983. Lyncurgus, who according to Greek mythology was a direct descendant of Hercules and the author of the Spartan constitution, persuaded Spartans to promise that they would not alter the new constitution until he returned from the Delphic oracle. When the oracle revealed him that the constitution was well written, he killed himself and had his ashes scattered in the ocean so that no one could ever maintain

constitution is adopted. When important juridical transformations are needed, it mandates a process which attempts to reproduce the degree of democratic openness and popular participation present during a moment of constitution-making. These processes can be triggered by specific institutional devices that might facilitate the exercise of democracy at the level of the fundamental laws (I will consider some examples later), or they might be the result of the politics of extra-judicial constitutional change. This last route could involve a revolution in the legal sense, an alteration of the constitution that goes beyond an ordinary amendment and the formal amendment procedure.³⁹

Regarding this last point, a further clarification is in order. The second dimension of democracy is not equivalent to Bruce Ackerman's 'constitutional politics' and should not be confused with it. It is true that Ackerman's theory addresses how the American constitution can be (and has been) altered outside the formal amendment procedure contained in Article V. But the actual role of the citizenry in his theory is not that clear. Ackerman's constitutional politics is mainly about getting the *support* of the People (always with a capital 'P'), about being able to speak in 'We the People's' name.⁴⁰ In contrast, the second dimension of democracy requires the actual participation of citizens in the positing and (re)positing of the fundamental laws through mechanisms such as constituent assemblies, referendums, popular initiatives, and other forms of local and direct democracy. As Ackerman's famous examples of constitutional politics in the U.S. suggest (the Founding, the Civil War Amendments, and the New Deal) 'constitutional politics' is a complex process that involves Congress, the Executive,

that he had returned in any form. The constitution remained unaltered for 500 years (Dennis Thompson, "Democracy in Time: Popular Sovereignty and Temporal Representation," *Constellations* Vol. 12, No. 2 (2005): 251).

For approaches that come very close to the Lycurgian ideal, see Kathleen Sullivan, "What's Wrong with Constitutional Amendments"; in: Louis Michael Seidman and Virginia Sloan, eds., *Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change* (New York: Century Foundation Press, 1999); Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2007); Victor M. Muñoz-Fraticelli, "The Problem of a Perpetual Constitution"; in: Axel Gosseries & Lukas Meyer, eds., *Intergenerational Justice* (Oxford: Oxford University Press, 2009).

³⁹ I believe that Sanford Levinson's attack on Article V and his proposal for convening a new constitutional convention is driven, at least in part, by an interest in the realization of democracy at the level of the fundamental laws. Levinson's approach, however, is for the most part concerned with the correction of what he considers important structural defects of the U.S. Constitutions, and as a result he does not engage directly in a discussion of different kinds of mechanisms that would make the activity of constitutional reform more consistent with the democratic ideal (see Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution goes Wrong (And How the People Can Correct It)* (Oxford: Oxford University Press, 2006)).

⁴⁰ Consider, for example, Ackerman's proposal of the 'Popular Sovereignty Initiative' as a democratically superior alternative to Article V: "Rather than aiming for an Article Five amendment, the vehicle for constitutional change should be a special statute that I will call the Popular Sovereignty Initiative. Proposed by a (second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court" (Bruce Ackerman, *We the People: Transformations* (Cambridge, M.A.: Harvard University Press, 1998), p. 415; see also Bruce Ackerman, *We the People: Foundations* (Cambridge, M.A.: Harvard University Press, 1991); Bruce Ackerman, "Higher Lawmaking"; in: Sanford Levinson, ed., *Responding to Imperfection: Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995)).

and the Supreme Court, and in which ordinary citizens mostly play the secondary role of expressing their assent for change.⁴¹

The distinction between the two dimensions of democracy can be exemplified and summarized as follows. If someone asks: Is a dictatorial regime adopted by a popular majority after a process of deliberation between equals more democratic than a constitutional order that includes the rights and institutions that allow democracy to exist (e.g. freedom of association, freedom of expression, etc.) but that was imposed on the citizenry? The answer to that question is that it depends on what aspect of the category 'democratic' the person who asks the question wishes to stress. For both examples suffer from an important democratic deficit: the former has a problem of democratic governance; the latter a problem of democracy at the level of the fundamental laws (which, in this context, is the same as saying that it has a problem of democratic legitimacy). These two dimensions can also be approached in temporal terms. While questions regarding democratic governance are generally about the present, questions about the second dimension of democracy are normally focused in the past and in the future of a constitutional regime. Democracy at the level of the fundamental laws also tends to be more procedural than democratic governance, to have a 'populist'⁴² bent. However, it is not 'purely' procedural, because it presupposes the recognition of those rights and institutions that are necessary for a constitution to be adopted and changed democratically. When the rights and institutions that are necessary for the very existence of democracy, for the possibility of democratic openness and popular participation, are abolished in an act of constitution-making or constitutional reform, democracy ends in the very act of being practiced.

Taking seriously the distinction between the two dimensions of democracy would increase the opportunities for episodes of popular constitutional change, and therefore strengthen democracy at the level of the fundamental laws. Nevertheless, it could be argued that this distinction is nothing but artificial and disempowering—that any true democratic project should attempt to blur the differences between the

⁴¹ A similar critique can be advanced against Akhil Reed Amar's theory of constitutional change. Amar maintains that "Congress would be obliged to call a convention to propose amendments if a majority of Americans so petition; and that an amendment could be lawfully ratified by a simple majority of the American electorate". Why or how such a petition would ever take place, and if the participation of citizens would extend beyond voting in a referendum, is very unclear (Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment": 89, n. 1; in: Stanford Levinson, ed., *Responding to Imperfection: Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995)).

⁴² The term populism is nowadays used in a derogatory way: populist regimes are basically dictatorships covered by a thick layer of democratic rhetoric, a populist regime is what occurs when a democratic process goes wrong (that is, when citizens opt for a government or system of government repudiated by whoever is calling it populist). Needless to say, I do not use the term 'populism' in this way, but as a way of describing a regime based on democratic self-rule (for an account of the historical uses of the word 'populism', see Ernesto Laclau, *Populist Reason* (Verso 2005); for a discussion of populism and proceduralism see Frank Michelman, "Constitutional Authorship"; in: Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998)).

two dimensions of democracy instead of highlighting them.⁴³ I do not agree with this argument. Where there is no distinction between the two dimensions of democracy, there is no distinction between ordinary and higher laws and, as a result, all laws become ordinary. The inevitable implication of such an arrangement is that either *all* decisions must be left in the hands of state officials (e.g. legislatures) or that they must be left in the hands of the people. Because the first alternative is not acceptable for the democrat and the second is impossible for practical reasons (here the classic 'large and complex' societies' argument is decisive)⁴⁴ that kind of arrangement is incompatible with a serious conception of the democratic ideal.

3. IGNORING THE SECOND DIMENSION OF DEMOCRACY

Now that I have examined the distinction between the two dimensions of democracy it is time to show that the substantive and procedural approaches discussed in the first section not only lack a proper account of democracy at the level of the fundamental laws, but tend to negate it or at least obscure it. In Dworkin's partnership view, which I previously identified as a substantive approach to the democratic ideal, there is hardly any room for the second dimension of democracy and its emphasis on openness and popular participation in constitutional change. That is to say, by setting the traditional content of a liberal constitution as its precondition, the partnership view makes the question of democracy at the level of the fundamental laws simply irrelevant. This means that in Dworkin's partnership democracy all that matters is democracy at the level of governance, and even there it fails in meeting the demands of the democratic ideal.⁴⁵ All that the partnership view has to say about democracy at the level of the fundamental laws is that it is exhausted by the right content; the only objective of such a conception is to ensure the adoption of an 'exemplary' constitution, a constitution whose provisions meet Dworkin's liberal standards. But that very conception, however, negates the very existence of the second dimension. What Dworkin's does is to put the constitutional regime out of the scope of democratic politics, and by doing that, his approach is

⁴³ See for example Roberto Unger, *The Self Awakened: Pragmatism Unbound* (Cambridge: Harvard University Press, 2007).

⁴⁴ See Robert Dahl, *supra* note 3.

⁴⁵ Unless one shares Dworkin's limited conception of participation—that is, "voting and holding office"—neither the majoritarian nor the partnership views seem to take seriously the ideal of popular participation in government (Ronald Dworkin, *supra* note 21, p. 48). None of these views attempt to create institutions that maximize the participation of citizens in the processes that result in their country's laws and institutions. As a result, they deprive democracy of its defining and most threatening characteristic: the participation of citizens in the adoption of the rules that regulate their conduct. And democracy cannot merely require, as Dworkin suggests, a system that gives "the final verdict on *who leads* it to many millions of people"; it must involve the affirmation of the role of ordinary citizens in the activity of governing (*ibid.*, p. 127 (Emphasis added)).

guilty of breeding what Jonathan Wolff has dubbed 'the enfeeblement of the political'⁴⁶.

Under his view, if a constitution provides for the rights and procedures that make partnership democracy possible, it does not make sense to be concerned about who adopted it and how, or to worry about the possibility of important constitutional transformations.⁴⁷ In fact, the very idea of democracy at the level of the fundamental laws, of ordinary people meddling with the constitutional regime, is a threat to partnership democracy. That is why Dworkin, the substantive democrat, favors an amendment procedure that makes constitutional change difficult and unlikely. For him, majorities should not be allowed, "whenever they wish, to change the basic constitutional structure that seems best calculated to ensure equal concern"⁴⁸. Put in a different way, under the substantive conception, there could be a democracy under a 'given' constitution. That is to say, someone (say a group of Western experts) writes a constitution that provides for an elective legislative assembly (and the protection of traditional liberal rights) and tells a group of people: there is your democratic constitution, now, govern yourselves 'democratically'.⁴⁹

While Dworkin's partnership view seems to negate the second dimension of democracy, Waldron's conception simply obscures it. His procedural approach has no account of democracy at the level of the fundamental laws; it is as if democratic governance enclosed all forms of democratic politics. The problem stems from Waldron's defense of parliamentary supremacy, which comes accompanied by a problematic overestimation of legislatures. For instance, when Waldron attacks judicial review his main point is that when there is a disagreement about rights, *it should be the people whose rights are in question who should decide what rights they have*. But of course, when he says that 'the people should decide' he is not

⁴⁶ Jonathan Wolff, "John Rawls: Liberal Democracy Restated": 125; in: April Carter & Geoffrey Stokes, eds., *Liberal Democracy and its Critics: Perspectives in Contemporary Political Thought* (Polity Press 1998). The 'enfeeblement of the political' occurs when, by attempting to protect society from the 'tyranny of the majority', the sphere of democratic decision-making is shrunk to a point in which democracy comes close to becoming meaningless.

⁴⁷ Someone might argue here that Dworkin's approach is entirely consistent with important constitutional transformations, in the sense that he sees the constitution as a "living" document, always susceptible to be interpreted in more progressive ways. I disagree with this view. On the one hand, there are certain things that can hardly be achieved by constitutional interpretation. Profound constitutional changes (including but not limited to those that deal with the basic structure of government) usually require formal amendments to the constitutional text. There is, however, another – more important – reason (on this point, see Sanford Levinson, *supra* note 39, p. 160).

Regardless of the limits of interpretation as a means to important constitutional transformations, the main problem with that approach is that it does not have anything to do with democracy. That is to say, constitutional interpretation is usually done by judges, and *democratic* constitutional change (which is the kind of change that interest me here) must take place through participatory procedures.

⁴⁸ Ronald Dworkin, *supra* note 21, p. 144.

⁴⁹ Perhaps the most famous example of this 'model' of constitution-making is the case of Japan, whose supreme law was written by American experts and translated to Japanese during the postwar occupation (Kioko Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of its Making* (University of Chicago Press, 1991); Jon Elster, *supra* note 36; Noah Feldman, "Imposed Constitutionalism," 37 *Connecticut Law Rev.* 857 (2005)).

arguing in favor of some form of government by referendum, or suggesting that all citizens should come together in an assembly and deliberate about what is the best interpretation of a constitutional right. When Waldron talks about 'the people', he is talking about the legislature, which is why he usually writes 'the people *or their representatives*'.⁵⁰ The problem with this view is that while it gives to the legislative assembly what it takes away from the judiciary, it comes very close to equating 'people' with 'legislature', thus rendering the actual participation of ordinary citizens in framing the content of the fundamental laws unnecessary. His assertion that every time that there is a disagreement about rights "the people whose rights are in question have the right to participate on equal terms in that decision"⁵¹ does not mean much if it only means that an ordinary legislature will do all the work. Popular participation at the level of the fundamental laws cannot merely mean that the people are allowed to have elected representatives take decisions in their name.

Although the legislature possesses a democratic pedigree that the judiciary lacks, it cannot be the main site for the exercise of democracy at the level of the fundamental laws. Democracy at the level of the fundamental laws requires a degree of openness that is neither possible nor desirable at the level of daily governance. Legislatures, regardless of their relationship to the judiciary, operate under a constitutional order. If a legislature is granted the power to freely alter the constitution (even if subjected to procedural hurdles not present in the adoption of ordinary laws) without the intervention of citizens, democracy at the level of the fundamental laws would suffer: it should be citizens the ones who decide on the content of their constitution in a context of democratic openness. In addition, re-writing a constitutional arrangement often means altering the ways in which legislative power is exercised (e.g. substituting a bicameral legislature with a unicameral one, introducing institutions such as recall referendums, etc.).⁵² Having the legislature deliberating and deciding about those kinds of changes without the direct intervention of the citizenry would amount to a violation of the old principle that no one should be a judge in his own case.

I have to be clear here about what I mean. Although I am arguing that Waldron's approach obscures the second dimension of democracy, I am not claiming that he is wrong in his attack on judicial review, that the institution of representation should be abandoned, or that legislatures should not have the final word (with regards to the courts) on the requirements of constitutional rights. In

⁵⁰ Emphasis added. For a critique of Waldron's attack on judicial review based on an examination of the concept of representation, see Dimitrios Kyritsis, "Representation and Waldron's Objection to Judicial Review," 26 *Oxford Journal of Legal Studies* 733 (2006).

⁵¹ Jeremy Waldron, *supra* note 9, p. 244.

⁵² On this point, see Jon Elster, "Legislatures as Constituent Assemblies"; in: Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006).

fact, I very much agree with these views, and I think they are the views that democratic governance requires. More importantly, I am not arguing that Waldron really thinks that democracy can be exhausted in a legislature. My claim is that his defense of parliamentary supremacy and of the right to participate has nothing to say about democracy at the level of the fundamental laws. In Waldron's defense, one might say that his approach does not *exclude* an account of the second dimension of democracy, and that, in fact, it would be entirely compatible with it. But this is precisely my point: procedural accounts of democracy, as substantive ones, operate only at the level of democratic governance and therefore have little to say about the question of democratic legitimacy. In that sense, my critique to Waldron and Dworkin is not symmetrical, for although Dworkin does not leave space for the second dimension of democracy (he sees a constitution that contains the right abstract principles as one that should not be meddled with and that should only be amended in exceptional cases by supermajorities), Waldron's procedural approach may be seen as simply incomplete in that respect.

4. THE SECOND DIMENSION OF DEMOCRACY: APPROACHING THE POLITICAL

My purpose in the previous sections was not only to establish a distinction between democratic governance and democracy at the level of the fundamental laws, but to show how the latter is obscured or negated in familiar approaches to democracy. I briefly examined the kind of issues fundamental to this second dimension, as well as its emphasis on the affirmation of popular sovereignty, understood as including the ideals of popular participation and democratic openness. However, I did not consider the specific constitutional forms proper to it and there is a reason for this: democracy at the level of the fundamental laws cannot be conceived as a regime or identified with a constitution; it is, rather, a moment in the life of a democratic polity that a juridical order *makes possible*. In this section, building on Sheldon Wolin's democratic theory, I introduce this argument.

4.1. WOLIN'S FUGITIVE DEMOCRACY

The idea that I take from Wolin and that will be connected with my previous discussion is that of democracy (in what I call its second dimension) as a moment rather than as a form of government, a democracy that Wolin describes as *fugitive*

to emphasize its necessarily episodic and occasional character.⁵³ My contention, it should be clear from the beginning, is not that democracy *as such* is unrelated to constitutional forms. As I stated above, there are certain rights (whatever specific form they may take) that are necessary not only for democratic governance, but for the very existence of democracy.⁵⁴ What I will suggest is that democracy *at the level of the fundamental laws* is not a matter of entrenching basic principles, of finding the 'most democratic form of government', but a political practice that takes place outside the confines of the established constitution (no matter how democratic this constitution might be thought to be).

To think of democracy and constitutions as naturally belonging together, as each incomplete without the other, is commonplace in contemporary societies.⁵⁵ As Wolin suggests, it is usually assumed "that democracy is the sort of political phenomenon whose teleological or even ideological destination is a constitutional form"⁵⁶. A constitutional form is a structure to which all politics should conform; whatever falls outside it is seen as illegal, improper and anti-political.⁵⁷ That has been the destiny of modern democracy: to be fitted into constitutional forms that allow only a determinate amount of popular politics to take place. For instance, constitutions regulate the periodicity of politics and encapsulate them in ritualistic processes such as giving the 'voice of the people' the opportunity to 'speak' every four years in regular elections.⁵⁸ When democracy is settled into its 'proper' form (becoming a *constitutional* democracy), writes Wolin, it is rendered predictable and easily becomes the object of manipulation.⁵⁹

According to the discourse of liberal constitutionalism, these constitutional forms are designed to protect democracy from itself: a democracy free of forms is synonymous with revolution, inherently unstable, and has a tendency to undermine

⁵³ Sheldon Wolin, *Politics and Vision* (Princeton University Press, 2004), p. 602.

⁵⁴ Moreover, as Christopher Eisgruber has demonstrated, "[p]eople can speak only through institutions, and any sets of institutions will simultaneously enable and constrain political action" (Christopher L. Eisgruber, *supra* note 38, p. 12). In that sense, the de-constitutionalization of democracy is always partial and incomplete. In that sense, I also agree with Stephen Holmes' in that people cannot magically express their will in the absence of institutions and procedures. Nevertheless I don't think that from that it follows that *the* constitutional forms and institutions characterize liberal constitutionalism are necessarily consistent with the democratic ideal (as these two authors seem to suggest) (Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), p. 166). The goal of the democrat, I argue, should be to defend and propose institutions that tend to realize democracy to the maximum degree possible, not to find ways of justifying the constitutional regimes we already have.

⁵⁵ Sheldon Wolin, "Fugitive Democracy": 34; in: Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996).

⁵⁶ *Ibid.*

⁵⁷ Sheldon Wolin, "Norm and Form: The Constitutionalizing of Democracy": 49; in: J. Peter Euben, John R. Wallach and Josiah Ober, eds., *Athenian Political Thought and the Reconstruction of American Democracy* (Cornell University Press, 1994).

⁵⁸ Sheldon Wolin, "Transgression, Equality, and Voice": 63; in: Josiah Ober and Charles Hedrick, eds., *Demokratia: A Conversation on Democracies, Ancient and Modern* (Princeton University Press, 1996).

⁵⁹ For example, public opinion and electoral majorities can be easily manufactured by money and the media (Sheldon Wolin, *supra* note 53, p. 602).

the power of law and the authority of government^{60, 61} Instead of advancing a conception of constitutionalism that avoids democracy's inclination towards revolution while at the same time preserving its best features, Wolin proposes to use these very attacks as a basis for an aconstitutional democracy theory.⁶² Under this conception, it is not assumed that the natural direction of democracy is towards greater institutionalization. Going beyond the emphasis on institutional arrangements in which constitutionalism has priority over democracy, Wolin invites us to think about democracy as episodically dictating the contents of a constitution and as representative of a moment in the life of a polity.⁶³ In his view, democracy cannot be seen as completing its task by establishing a constitutional form and then being fitted to it.⁶⁴ A constitution should not be understood as the fulfillment of democracy but as the transfiguration of the democratic ideal into a regime; and democracy is to be reconceived as a rebellious moment in which, as Wolin says, 'the political' is remembered.

The political refers to the idea that a society composed of human beings with different world views and interests can experience moments of commonality through public deliberations, that is, *political* moments in which collective power is used to promote or protect the well being of society.⁶⁵ The political should be distinguished from politics, which refers to the endless struggle among organized powers (e.g. political parties) over "access to the resources available to public authorities"⁶⁶. Unlike politics, which is continuous and endless, the political is episodic and rare.⁶⁷ The obstacle faced by contemporary democracies is not, as it is usually argued, that the realization of the rule by the people is incompatible with the size and complexity of modern societies.⁶⁸ The problem is that contemporary democratic theory comes accompanied by a conception of politics as a ceaseless

⁶⁰ Regarding this point, a contemporary critic of democracy has stated that the "surge of participatory democracy and egalitarianism [in the 1960s and 1970s] gravely weakened, where it did not demolish, the likelihood that anyone in any institution could give an order to someone and have it promptly obeyed" (Samuel Huntington, *American Politics: The Promise of Disharmony* (Harvard University Press 1981), p. 219).

⁶¹ It is not surprising that from Plato to Bodin democracy was characterized either as the worst of all forms of governments (except for tyranny) or the least intolerable of the worst forms (Sheldon Wolin, *supra* note 55: 31).

⁶² *Ibid.*: 37.

⁶³ *Ibid.*: 39.

⁶⁴ *Ibid.*: 55.

⁶⁵ *Ibid.*: 30. Wolin's concept of the political has been the object of many critiques, mainly because of its obscurity. For the purposes of my discussion, however, this definition of the political (provided by Wolin in his "Fugitive Democracy") is sufficient (for a discussion of this concept see James Wiley, "Wolin on Theory and the Political," 38 *Polity* 211 (2006), and Stephen Holmes, "The Permanent Structure of Antiliberal Thought"; in: Nancy Rosenblum, ed., *Liberalism and the Moral Life* (Harvard University Press, 1989)).

⁶⁶ Sheldon Wolin, *supra* note 55: 30.

⁶⁷ *Ibid.*

⁶⁸ See for example Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: The University of Chicago Press, 1970).

activity directed at assuming control or influence over the state apparatus.⁶⁹ Moreover, any alternative conception of democracy centered in the 'citizen-as-actor' is in conflict with the modern idea of the state as the fixed center of political life. Democracy, says Wolin,

[N]eeds to be reconceived as something other than a form of government: as a mode of being that is conditioned by bitter experience, doomed to succeed only temporarily, but is a recurrent possibility as long as the memory of the political survives. The experience of which democracy is the witness is the realization that the political mode of existence is such that it can be, and is, periodically lost. Democracy, Polybius remarks, lapses 'in the course of time'. Democracy is a political moment, perhaps *the* political moment, when the political is remembered and recreated. Democracy is a rebellious moment that may assume revolutionary, destructive proportions, or may not.⁷⁰

Wolin's approach to democracy needs to be understood in the context of his general critique of liberal constitutionalism. For him, a liberal constitution can be used to shape a kind of 'democracy' in which the demos is subjected to institutional constraints that prevent certain kinds of outcomes, "such as the confiscation of the property of the rich"⁷¹. Not surprisingly, Wolin's writings stress the fundamental role that popular participation must play in any system that aspires to be democratic, and emphasize the minor role that it plays in contemporary constitutional democracies. Because liberal constitutionalism tends to produce systematic inequalities, he considers imperative the need for the active participation of those who historically have been the most politically disadvantaged: "Given the structural tendencies toward inequalities, political action on the part of the socially and economically disadvantaged becomes the crucial means of saving themselves"⁷².

However, this active demos does not (and should not) aspire to the taking of state power; on the contrary, it is engaged in local struggles directed at improving the lives of ordinary citizens, such as those for low-income housing, better schools and health care.⁷³ The demos does not seek to govern because that would require accommodating itself to bureaucratized institutions that are by their very nature hierarchical and elitist.⁷⁴ In addition, given its material conditions, and the fact that "the wealthy have purchased and nurtured political agents to govern for them"⁷⁵,

⁶⁹ Sheldon Wolin, *supra* note 55: 42. See also Sheldon Wolin, *Tocqueville Between Two Worlds: The Making of a Political and Theoretical Life* (Princeton University Press, 2001).

⁷⁰ Sheldon Wolin, *supra* note 55: 43.

⁷¹ Sheldon Wolin, *supra* note 58: 63.

⁷² Sheldon Wolin, "The Liberal/Democratic Divide: On Rawls's *Political Liberalism*," 24 *Political Theory* 101 (1996).

⁷³ Sheldon Wolin, *supra* note 53, p. 603.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 603-604.

democracy is necessarily episodic and circumstantial.⁷⁶ Accordingly, the type of politics proper to Wolin's theory is small scale; its power lies in the multiplicity of different and modest sites dispersed among neighbourhoods, counties, local governments and institutions, and on "the ingenuity of ordinary people in inventing temporary forms to meet their needs"⁷⁷. In conceiving democracy as rare and episodic, however, Wolin provides us with a valuable tool to understand the practice of democracy at the level of the fundamental laws.

4.2. THE MOMENTS OF DEMOCRACY

The kind of democracy to which Wolin refers to cannot be understood as exemplifying what I have called democratic governance. In fact, at times Wolin even seems to suggest that there is no such thing as democratic governance, or if there is, that it does not deserve to be called 'democratic': "Governing means manning and accommodating to bureaucratized institutions that, *ipso facto*, are hierarchical in structure and elitist, permanent rather than fugitive -in short, anti-democratic"⁷⁸. By doing this, Wolin neglects the meaning of the ideal of popular participation in the context of daily governance, and in that respect, his conception results in the opposite problem than that of Waldron and Dworkin. My approach seeks to avoid that problem by seeing what Wolin calls fugitive democracy (understood as a manifestation of democracy at the level of the fundamental laws) as not the only, but one of the possible manifestations of the democratic ideal. Both dimensions of democracy, I contend, are valuable in themselves.

But even if it is clear that Wolin's conception is not to be confused with democratic governance, it is not obvious either that it should be identified with the second dimension of democracy. Wolin's focus on small scale politics and local struggles makes his take on constitution-making and constitutional change very unclear: he seems to suggest that, in light of their material conditions and immediate needs, it does not make sense for ordinary citizens to think about challenging the 'constitutional essentials' of an established juridical order. At other times, however, Wolin appears more optimistic. For instance, he proposes to replace 'constitutional democracy' with *democratic* constitutionalism, which he defines as a situation in which "democratization has dictated the form of constitution" and "representative of a moment rather than a teleologically completed form".⁷⁹

⁷⁶ *Ibid.*, p. 603.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Sheldon Wolin, *supra* note 55: 39-40.

Although this is not the place to attempt to construct a constitutional theory from Wolin's writings, my interpretation of Wolin's idea of democratic constitutionalism is that he is engaged, for the most part, in a discussion of democracy at the level of the fundamental laws. Under this interpretation, democratic constitutionalism is to be identified in the rare and fugitive instances in which an active *demos* posits the content of a constitution, in which ordinary citizens exercise their power to (re)constitute the juridical order.⁸⁰ In characterizing democracy as fugitive and episodic, Wolin effectively describes the defining characteristic of the second dimension of democracy: democracy at the level of the fundamental laws should be conceived as a moment in the life of a juridical order rather than as a completed constitutional form. The distinction between the two dimensions of democracy, while attributing to democratic governance a daily and continuous character sees democracy at the level of the fundamental laws as the instance in which citizens come together and attempt to make their association more just, a 'political moment', to use Wolin's terminology. It is precisely this episodic character what allows for the maximization of popular participation and democratic openness, ideals whose realization is neither practical (and, some might argue, not even desirable) in everyday governance.

Understanding the second dimension of democracy as a moment in the life of a juridical order means that it cannot be understood as expressed in a constitutional regime; on the contrary, it is a democracy that seeks to challenge the established constitutional arrangement and to transform it.⁸¹ In this sense, the very idea of identifying a determinate constitutional form with democracy's second dimension would be based in a misconception. Unlike democratic governance, democracy at the level of the fundamental laws is a political *practice* that never coincides with the established laws and institutions. Its exercise can have the purpose of creating new rights or expanding existing ones (or sometimes even limiting them), of changing the structure of governance or founding a new state; it is always in conflict with the liberal idea of containing politics within certain bounds after an act of constitution-making takes place, of a constituent power exhausted after the constitution is in effect.⁸² It is a democracy that remains forever

⁸⁰ Regarding the idea of 'democratic constitutionalism' see also James Tully "The Imperialism of Modern Constitutional Theory"; in: Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).

⁸¹ James D. Ingram, "The Politics of Claude Lefort's Political: Between Liberalism and Radical Democracy," 87 *Thesis Eleven* 40 (2006).

⁸² See Miguel Abensour, "'Savage Democracy' and 'Principle of Anarchy,'" 28 *Philosophy and Social Criticism* 708 (2002). The most famous formulations of constituent power can be found in the works of Emmanuel Sieyes and Carl Schmitt; see Emmanuel Joseph Sieyes, *What is the Third Estate?* (New York: Praeger, 1963); Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2007). For a contemporary discussion of this concept, see Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 12 *Constellations* 223 (2005) and the essays contained in *The Paradox of Constitutionalism*, *supra* note 80.

incomplete and that when practiced, challenges the very constitution that makes it possible.

That democracy at the level of the fundamental laws cannot be identified with a determinate constitutional form or contained in a constitutional regime does not mean that its exercise is completely independent of the content of a constitution. In fact, there are different mechanisms that might *facilitate* the practice of democracy in its second dimension, making its exercise more likely by giving citizens the institutional tools to trigger an episode of profound constitutional transformations. Ironically, these types of mechanisms are beginning to appear not in the national constitutions of established Western liberal democracies but in the recently adopted constitutions of several Latin American countries. These new constitutions include, among others, mechanisms that allow ordinary citizens to initiate processes of constitutional reform through the collection of signatures, draft the content of the new provisions to be inserted into the constitution, and require the state to call a popular referendum to validate the proposed changes.⁸³ Some of these constitutions even include provisions that allow ordinary citizens to trigger constituent assemblies in order to alter the constitution in fundamental ways.⁸⁴ A constituent assembly triggered by this mechanism is considered a sovereign body, independent of the ordinary (or constituted) powers of government and it operates according to its own rules; it is authorized to replace the existing constitutional regime and create an entirely new one. The case of the new Bolivian constitution is the most interesting, as it not only attributes to ordinary citizens the power to convene a constituent assembly, but specifically states that important constitutional transformations must be adopted through this kind of body. Here is the text of the relevant provision:

⁸³ See for example Article 331 of the Constitution of Uruguay and Articles 340 and 341 of the Constitution of Venezuela. These provisions (called 'popular initiatives') require the collection of a number of signatures usually equivalent to 10% (in the case of Uruguay) or 15% (in the case of Venezuela) of the registered electors. This type of mechanism is also present in the constitutions of several U.S. states. In fact, the increasing use of the popular initiative to amend state constitutions has been the object of many critiques. One of the most pressing concerns is the development of a commercial industry devoted to the collection of signatures (see for example, Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change," 64 *Fordham L. Rev.* 535 (1996)). It is also interesting to note that while in the context of the several states of the U.S. the popular initiative has been used to adopt amendments that affect the rights of some groups (especially gays and lesbians, as in the recent constitutionalization of heterosexual marriage in California through Proposition 8) it has also been used to make modifications of a progressive nature. So, while in Colorado and Oregon the popular initiative was used in 1992 with the purpose of discriminating against homosexuals it was also used to recognize women's suffrage in the 19th and 20th centuries (see David B. Magleby, "Let the Voters Decide?" An Assessment of the Initiative and Referendum Process," 66 *U. of Colorado L. Rev.* 13 (1995)).

⁸⁴ See for example Articles 347 and 348 of the Constitution of Venezuela, Article 408 of the Constitution of Bolivia, and Article 444 of the Constitution of Ecuador. These provisions allow citizens trigger the convocation of a constituent assembly of the type described above through the collection of a number of signatures equivalent to 12% to 20% of the registered electors (12% in the case of Ecuador, 15% in the case of Venezuela, and 20% in the case of Bolivia). Interestingly, the set of constitutional reforms recently rejected by the electorate in Venezuela included an amendment that would have increased the number of signatures required from 15% to 30% both in this and in the other type of popular initiative mentioned above.

The total reform of the Constitution, or those modifications that affect its fundamental principles, its recognized rights, duties, and guarantees, or the supremacy of the constitution and the process of constitutional reform, will take place through a sovereign Constituent Assembly, activated by popular will through a referendum. The referendum will be triggered by popular initiative, by the signatures of at least twenty percent of the electorate; by the Plurinational Legislative Assembly; or by the President of the State. The Constituent Assembly will auto-regulate itself in all matters. The entering into force of the reform will require popular ratification through referendum.⁸⁵

These kinds of mechanisms have a very uneasy relationship with constitutional forms: as means for the exercise of constituent, rather than constituted power, they always operate against the constitutional regime that contains them.⁸⁶ Because they have been recently incorporated into these constitutional systems and have seldom been used, their real effect (in terms of these countries' constitutional practice and quality of democracy) is yet to be seen.⁸⁷ However, they are examples of devices of constitutional reform 'from below' that, by facilitating the exercise of democracy at the level of the fundamental laws

⁸⁵ Article 408 of the new Bolivian Constitution. The original text reads as follows: "La reforma total de la Constitución, o aquella que afecte a sus bases fundamentales, los derechos, deberes y garantías, o a la primacía y reforma de la Constitución, tendrá lugar a través de una Asamblea Constituyente originaria plenipotenciaria, activada por voluntad popular mediante referendo. La convocatoria del referendo se realizará por iniciativa popular, por la firma de al menos el veinte por ciento del electorado; por la Asamblea Legislativa Plurinacional; o por la Presidente o el Presidente del Estado. La Asamblea Constituyente se autorregulará a todos los efectos. La entrada en vigencia de la reforma necesitará ratificación popular mediante referendo."

⁸⁶ This kind of mechanism, although contained in the constitution and in that sense part of the legally constituted order, should be understood as a *means* to exercise constituent power (at least in those moments in which they are used to radically transform the established constitutional order or to create a new one). Moreover, I maintain this is consistent even with Schmitt's theory of constituent power. What I mean by this is the following. Schmitt argued that constituent power could not be limited by positive law or regulated by any legal procedures; the will of the constituent subject was for him an "unmediated will" (Carl Schmitt, *supra* note 82, p. 132). In other words, no constitution can confer constituent power or prescribe the ways this power is initiated: the constituent subject (the people in a democracy) can (re)determine its form of political existence whenever it decides such an action necessary (*ibid.*). But while constituent power activates itself through the making of a fundamental political decision, the "further execution and formulation of a political decision reached by the people in an unmediated form requires some organization, a procedure, for which the practice of modern democracy developed certain practices and customs. These are considered below [he goes on to consider (a) the national assembly that drafts and passes constitutional legislation; (b) The assembly that drafts constitutional norms followed by a popular vote or other express confirmation, direct or indirect, of the drafts by the state citizens with the right to vote; (c) constitutional conventions of federal states that are submitted to the people of each state; (d) general popular vote of a proposal or a new order and regulation of indeterminate origins]" (*ibid.*, p. 132-134). Otherwise, he suggests, the constituent subject would remain in a state of powerlessness and disorganization, unable to transform its will into law.

⁸⁷ The exception is Uruguay, which has used the popular initiative to amend the constitution in several occasions, the most recent being in 2004, to include the 'right to water' in the constitutional text in order to prohibit the privatization of the water sector. In this particular case, after the signatures were presented to the government, the required referendum took place and 64% of the population voted in favour of the proposed amendments (with a participation of 90% of registered voters) (see Carlos Santos, *Aguas en Movimiento: la Resistencia a la Privatización del Agua en Uruguay* (Ediciones de la Canilla, 2006); David Altman, "Uruguay," *Report Prepared for the International Conference of Direct Democracy in Latin America* (2006); José Carlos Madroñal, "Democracia Directa y Globalización: El Caso del Plebiscito sobre el Agua del 2004 en Uruguay," *Paper Presented at the International Conference of Direct Democracy in Latin America* (May 2007); more generally, see David Altman, "Democracia Directa en el Continente Americano: ¿Autolegitimación Gubernamental o Censura Ciudadana?," *Política y Gobierno* Vol XII, Núm. 2 (2005).

and giving citizens a means for 'dictating the content of their constitution', would certainly strengthen the claim to democratic legitimacy of established constitutional states. Moreover, they exemplify what the previous theoretical discussion attempted to show, that there is more to democracy than democratic governance, and that this 'other' dimension of the democratic ideal fails to be captured by the familiar substantive and procedural conceptions.

CONCLUSIONS

The second dimension democracy is either negated or obscured by the traditional procedural and substantive approaches to democracy and democratic legitimacy. Democracy at the level of the fundamental laws belongs to the political, rather than the juridical terrain; it cannot be limited by principles already sedimented in a constitution and it is not *necessarily* exercised according to pre-established procedures. That the second dimension of democracy takes places in a context in which ordinary citizens find the constitutional order radically open and in which legitimacy has priority over established legality should not appear as a threat to juridical stability or as a renunciation of the ideal of the rule of law. It is simply the natural consequence of the ideals of democratic openness and popular participation—the practical implication of taking popular sovereignty seriously. More importantly, it is only by exercising (or by being free to exercise) democracy at the level of the fundamental laws, that ordinary citizens legitimate their constitution.

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