THE RECENT DEBATE ON THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW: CONSTITUTIONALITY VS. POPULAR SOVEREIGNTY

A THESIS SUBMITTED TO
GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

MEHMET MÜDERRİSOĞLU

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION

SEPTEMBER 2007

Approval of the Graduate School of Social Sciences

Prof. Dr. Sencer Ayata
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science/Arts / Doctor of Philosophy.

Prof. Dr. Raşit Kaya
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science/Arts/Doctor of Philosophy.

Assoc. Prof. Dr. Cem Deveci
Supervisor

Examining Committee Members

Assoc. Prof. Dr. Cem Deveci	(METU, PADM)	_____
Assist. Prof. Dr. Fahriye Üstüner	(METU, PADM)	_____
Assist. Prof. Dr. Murat Özbank	(IBU, IR)	_____

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name: Mehmet Müderrisoğlu

Signature :

ABSTRACT

THE RECENT DEBATE ON THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW: CONSTITUTIONALITY VS. POPULAR SOVEREIGNTY

Müderrisoğlu, Mehmet

M. S., Department of Political Science and Public Administration
Supervisor: Dr. Cem Deveci

September 2007, 103 pages

The concept 'Constitutional Democracy' is underpinned by two distinct principles that are in marked contrast with each other: while 'constitutionality' requires political power to be bound by higher-order legal norms, 'popular sovereignty' is based on the determination of laws by the majority will. In contemporary political systems, this underlying tension between the Rule of Law and Democracy is reflected in the practices of judicial review of legislation. In this study, the development of the idea of government under law in political theory, recent discussions on the doctrine of judicial review and the normative aspects of the relationship between law and politics will be highlighted. This thesis concludes that the normative justification of constitutional constraints on democratic process could be highly problematic and that higher law and ordinary politics could not be so easily disassociated from each other.

Keywords: Judicial Review, Normative Political Theory, Constitutive/Constituted Powers, Rule of Law, Popular Sovereignty

ÖZ

YARGI DENETİMİNİN DEMOKRATİK MEŞRUİYETİ ÜZERİNE GÜNCEL BİR TARTIŞMA: ANAYASALLIK VE MİLLİ EGEMENLİK

Müderrisoğlu, Mehmet

Yüksek Lisans, Siyaset Bilimi ve Kamu Yönetimi Bölümü
Tez Yöneticisi: Dr. Cem Deveci

Eylül 2007, 103 sayfa

'Anayasal Demokrasi' kavramı birbirine zıt iki prensip'e dayanmaktadır: 'anayasallık' siyasal iktidar alanının yüksek mertebedeki yasal normlar tarafından sınırlandırılmasını öngörürken, 'milli egemenlik' hukuk'un çoğunluk iradesinin bir ürünü olmasını gerektirir. Hukukun Üstünlüğü ve Demokrasi arasındaki bu gerilim, çağdaş siyasal sistemlerde yasama üzerindeki anayasal yargı pratiklerine yansır. Bu çalışmada, hukuk'a bağlı hükümet fikrinin siyaset kuramındaki gelişimi, anayasal yargı doktrini üzerine güncel tartışmalar ve yasa-siyaset ilişkisinin normatif boyutları incelenecektir. Bu tez demokratik süreç üzerindeki anayasal kısıtlamaların normatif gerekçelendirmesinin oldukça sorunsal olabileceği ve yüksek yargı ile sıradan siyaset'in kolayca birbirinden ayrılamıyacağı sonucuna varmaktadır.

Anahtar Kelimeler: Anayasal Yargı, Normatif Siyaset Kuramı, Kurucu/Kurulu Güçler, Hukukun Üstünlüğü, Milli Egemenlik

ACKNOWLEDGEMENTS

The author wishes to express his deep appreciation and sincere gratitude to his supervisor Ass. Prof. Dr. Cem Deveci for his inspiration, encouragements, patience and stimulating suggestions. Without him, this study would be a collection of incoherent arguments and thoughts.

This study is heavily indebted to Ahmet E. Müderrisoğlu for his understanding and support. The author benefited from to his fruitful discussions with Bülent Vefa Karatay.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

It has been widely acknowledged that the Enlightenment marks the birth of the idea of human autonomy and the anticipation that the just society could be realized if the dictates of Reason may prevail. This marks a fundamental shift in the understanding of the nature of politics and rights. Modernity sets a process in motion, whereby the principles surrounding the just exercise of political power are divorced from transcendental premises. In this process, law, morality and ethical life have been gradually differentiated from each other. In order modern conception of law to assume a binding character, morality and ethical life had to be reduced into 'form(s) of cultural knowledge' (Habermas, 1996a: 442). This was in line with the preeminence of positivism and resentment against the tradition which justified political power as the reflection of divine will. As a result of what Weber (1968) calls 'pervasive rationalization' of social life, law appears as a medium for the purposes beyond maintaining order, as a catalyst for a rational society. In this context, constitutionalism appears as typically modernist project that seeks to dictate social order through a certain kind of institutionalization and imposition of legal norms (Tans, 2002). At its heart, modern constitutionalism aims to control the exercise of political power by means of legal institutions.

Nevertheless, the conception of supra-political law has evolved in the course of time and within particular societies. The idea of constitution, first of all, requires a certain level of differentiation between political power and law. In this sense, it is a historical phenomenon which gone through a long process of a historical development. In Roman times, for instance, the idea of legal control of political power was unknown: although the state was defined in legal terms, law was considered as an extension of the state power (McIlwain, 2005: 42). Therefore, the idea of legal protections against governmental power was unknown to Romans. In the Middle Ages attempts were made to elevate the law to a more autonomous position, as is illustrated by the gradual emancipation of the English courts from the

executive by defining the common law as an independent phenomenon (McIlwain, 2005: 95-98). The 'rule of law' and legal limitation of political power is a product of the struggle whereby courts gained a power to decide on individual rights. In the modern era, this development has reached the point where constitutions (whether written or unwritten) are conceived of as the basis of basic rights and liberties. Yet, the principle of popular sovereignty has developed from a source that is similar to that of rule of law. The concept of autonomy refers to the individual capacity to obey the law which is a product of his free will. The attribution of autonomy to individuals follows that they should have freedom to have a say in politics. At the basis of this autonomous capacity lies the same tradition of enlightenment, which is centered upon the role of human agency for the justification of political institutions. According to this, a political community expresses and constitutes itself as a self-conscious entity primarily through citizens' right to conduct moral deliberation and to implement the outcome in the political system. Locke suggests that the aim of government is to provide liberty and security, but that the citizens have a right to overthrow the government when it fails to provide either: "Thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators..." (Locke, 1995: 12). Although he is a part of the liberal tradition, such views of Locke have profound influence both on the contemporary proponents of rule of law and popular sovereignty.

The principles of popular sovereignty and rule of law constitutes two basic moments of the modern ideal of rational political power. However, their fusion has led to a deeply embedded conceptual inconsistency that still haunts political theory today. While enlightenment humanism provided basis for the justification of power along the lines of immanence (as opposed to transcendence), the development of the notion of 'autonomous person' was underpinned by a certain duality. Although the principles of popular sovereignty and rule of law located human agency at the center of political legitimation, from the outset, they were based on distinct conceptions of the person: the autonomous person was conceived both in terms of the *law-maker* (citizen) and *holder* of inalienable rights (individual). The conceptual differentiation between the two lies at the heart of the unresolved tension between Constitution and Democracy in contemporary society. The concept of 'Constitutional Democracy' is therefore based on two conflicting assumptions: According to the first view—which is based on the 'liberty of ancients' and can be coined as civic republicanism—the

source of legitimate political power is found in the unrestricted will formation of citizenry, and for the second view—that is based on the 'liberty of moderns' and can be called as liberal constitutionalism—the validity of law derives from the conformity of the popular self-determination will to human rights, which are cast in the form of basic rights that set limits to popular will. In this sense, constitutionalism is characterized by a priority given to the need for checking the exercise of political power by legal institutions for the sake of intrinsic and inalienable rights and liberties. On the other hand, popular sovereignty requires that laws should be sourced by the actual will of the collective body of citizens.

In liberal democracies, the practices of judicial review of legislative authority finds their conventional justification in keeping these rights immune to social considerations of utility and empirical value-calculations. Indeed, the primary function of a constitutional text is to regulate the exercise of public power, not determining the ends or form of social behavior. Therefore, citizens do not enter into the domain of constitutionality until they interact with public institutions and remain primarily tied to civil law (Güriz, 1997). In this sense, constitutions entail a specific projection of relations between state and citizens by defining the boundaries of government power. Thereby, constitutions are able to claim democratic legitimacy to the extent that they are able to maintain political power as a rule-bound activity checked in accordance with the consent of general public. Thus, a constitutional norm cannot be regarded being only one among other norms, it must have a qualitative superiority. This is another way of saying that, in order the circulation of power within a political system to be regulated by the constitution, its normative superiority has to be consolidated. Rule of law reflects this concern and needs to be justified by anyone who feels allegiance to democracy. However, this only marks the beginning of the problem: in liberal democracies the primary means of expressing popular consent is majoritarian decision-making, not adjudication. Therefore, the claim that judicial enforcement reflects popular will cannot be maintained without attributing judiciary a higher sense of morality than the people.

Liberal constitutionalism is based on a 'division of legislative labor' between ordinary political acts of legislation and a set of higher rank ground rules that the branches of government are bound to respect. This presupposes that universal human rights grounded in the constitution are conceptually prior to the processes of democratic will-formation. Nevertheless, Montesquieu—who provides the basic

ideas about the virtues of limiting the exercise of monarchical power—did not conceive the seperation of powers in terms of the division of sovereignty. According to him, the three powers 'are forced to move, but still in concert'. In line with this, the supporters of judicial review are inclined to show that adjudication mounts for the self-correction of sovereignty. Yet, the main justificatory force behind judicial control is not the 'self-correction' argument, but the 'tyranny of majority' thesis: in the absence of legal restrictions, the arbitrary will of majority is going to prevail in modern democracy. This 'arbitrary will' may provide basis for the suppression of individual and minority rights, and thus, may run against human rights. Based on this insight, the modern ideology of constitutionalism arrives at a point where it succeeds in fragmenting the domain of sovereignty between politics and law. This is done by the assumption that institutional mediation of majority decisions by legal professionals would rationalize the outcome of the democratic process. In event, judicial institutions are equated with 'reason' as opposed to mere 'will' of majorities. From the constitutionalist point of view, therefore, the institutional mediation of popular will is directed to the achievement of the unity between reason and will. The prospect of this unity has been theorized by the thinkers of modernity from Rousseau to Kant and Habermas. However, as neither 'citizen' nor 'private individual' is viewed as the bearer of ultimate reason in these accounts, the gap between reason and will is either filled by extraordinary legislators equipped with sublime reason (as in Rousseau), enlightened bourgeois politicians (as in Sieyes, Tocqueville and Mill) or public official and judges whose isolation from politics is supposed to let them make rational and more responsible decisions (as in Madison and Hamilton).

In the first chapter of my study, I wish to trace the development of the idea of constitutional democracy in modern political theory. Theories of Rousseau, Sieyes and American constitutionalism have provided the backbone of French revolution and shaped subsequent understanding of the relation between democracy and law. Therefore, the first chapter seeks answers to the questions 'How, in due course, the idea of 'government by law' was shaped?', 'In what ways did the thinkers associated with liberal constitutionalism conceive and justify the legal limits brought upon democracy?' and finally, 'What are the reflections of the separation between constitutive and constituted powers drawn by Sieyes and developed later by Tocqueville, Madison, Hamilton and Mill?'. While Sieyes conceived the mediation of democratic will in terms of factual necessity, for Mill it has been advocated from a

normative standpoint. Therefore, I will pay particular interest to the premises used for a normative justification of legal limitations brought over democratic majorities.

From the outset, the constitutional control exerted upon democratic decision-making processes becomes problematic when we define democracy as: "people of a country deciding for themselves the contents of the laws that organize and regulate their political association" (Michelman, 1999: 21). If this statement makes any sense at all, judicial nullification of decisions made by democratic majorities becomes problematic. The liveliest discussions on the democratic legitimacy of judicial review have been conducted primarily in America. The threat that politics is becoming more of a bureaucratic mediation is best demonstrated in the gradual growth of Supreme Court's institutional power at the expense of legislation in the United States. Perhaps for that reason, much of theoretical perspectives in the debate have derived from the American context. Therefore, for the purposes of this study, a general account of the discussions that takes place in America is important. This is why the second chapter is dedicated to the discussion on judicial review in the United States.

Until recently, American constitutional theory has been driven by adjudication-centered theories aimed at deriving the original meaning found in the constitutional text. Yet, this view has been widely criticized for detaching law from the historical context it was produced and largely been replaced by a more interpretivist approach. At first sight, every constitution functions as a juridico-political document that interprets the act of foundation. As shown by scholars like Dworkin (1986) and Habermas (1996a), the normative character of constitution involves a process of ever-changing interpretations—if not the form definitely the content—for the system of basic rights. From this perspective constitutional norms are not fixed in time, but are open to newly rising social needs and expectations. However, the interpretivist constitutional theory still refrains from granting the final authority to determine these social considerations to the popular will. Therefore, I wish to examine these conventional and novel doctrines of judicial review under the term 'liberal constitutionalism' or 'liberal-legalistic approach'. Essential to this perspective is an emphasis on the role of judicial involvement in politics as being the best way to securing basic rights and democratic participation at the same time. Then, the second chapter is based on a critical evaluation of liberal-legalistic attempts to ground judicial review on democratic premises. It is important to clarify

these attempts to have a better understanding on the possibilities of bridging the gap between rule of law and democratic participation.

Since the second chapter builds upon the actual practice of judicial review, in order to discuss the conditions for a healthy relationship between constitutional jurisdiction and democratic process, we need a higher level of abstraction found in normative political theory. Because the third chapter mainly concerns the discussion on the conceptual priority of democracy or constitution, I call coin rival perspectives presented here as approaches within normative political theory. Today, liberal constitutionalism—which associates 'reason' with the judicial enforcement of a written constitutional document, and 'will' with the arbitrary decisions of majorities—is in need of being revised. Such dispute could not be understood independently from the contemporary transformations of modern society. With the emergence of the conditions of cultural pluralism and social complexity (what is often coined as the 'facts of pluralism' or 'modernity') the debate between constitutionalism and democracy enters into a new phase that has not yet been fully emphasized. Under the facts of pluralism, the justification for the judicial control of democracy is started to be derived from the supposed inability of democratic processes to solve the identity-based problems. It is argued that collective decision-making is being inhibited by fragmenting identities and fails to provide effective re-integration of excluded minorities or individuals. In this sense, the ever increasing diversity of contemporary life forms requires the restoration of social integration and solidarity, while grounding rights and liberties on a much stronger basis. This is Habermas' major concern, and therefore, the third chapter starts with his contribution to the debate. In many respects, Habermas's recent position—with its minimal conception of popular sovereignty—owes much to these earlier formulations of popular sovereignty and rule of law. In this sense, Habermas joins the liberal constitutionalist trend, which justifies the judicial review of legislation. Habermas's point that constitutional entrenchment of rights enables democratic process is contested by Michelman and Ferrara's on grounds that the act of constitution framing proceeds from a 'broader normative network'. The discussion whether basic rights are constitutive for or pre-constituted by self-legislation consists the most prominent debate in normative political theory on the question of 'democratic legitimacy constitutionality' today. In the final chapter, therefore, starting from Ferrara's aim to establish a form of validity based on authenticity, I argue that rights could

legitimately be brought under democratic control only if we can establish a broader view on how politics functions in clarifying the self-understanding of the legal community. With Ferrara's approach, I hope to provide an opening for formulating the equal importance of rule of law and popular sovereignty. Upon this ground, I will try to incorporate certain Heideggerean themes to make sense of dynamism inherent in the relations between historical collectivity and constitutional essentials.

The reconciliation of the ideals of popular sovereignty and constitutionality becomes more urgent need under the pace that the constitutional democratic model is being exported before a considerate balance between the two ideals has been reached. In the recent decades, liberal constitutionalism has expanded both in the West, Eastern Europe and developing countries. The practical aspects of the issue are hotly debated in countries that are going through democratic institutionalization and transition. Also, as the political public culture in the West has grown more sensitive towards the treatment of individuals and minorities, the basic premises of legal limitation of majority decisions started to be challenged more severely. Finally, the prospect of an EU Constitution sparked a debate on the vices and virtues of constitutional entrenchment of human rights, especially in the United Kingdom. A combination of these gave rise to a renewed theoretical debate on the relationship between democracy and rule of law. In many respects, the tension between constitutionalism and democracy can be considered as a Gordion Knot which surrounds our understanding on what it means to be self-legislating under law. What is sought here is not establishing the superiority of one by eliminating the other, but rather try to arrive at a better understanding on what would a balanced relationship between rule of law and popular sovereignty would look like. It runs the conclusion that, in order to truly become an enabling condition for democracy, any form of judicial review should preserve a measured distance to legislation and remain confined to a complementary role when relating to the democratic process.

CHAPTER II
THE NOTIONS OF 'CONSTITUTIONALITY' AND 'POPULAR SOVEREIGNTY' IN THE POLITICAL THOUGHT OF ROUSSEAU, SIEYES, TOCQUEVILLE AND MILL

The mark that distinguishes modern politics from earlier ones could be considered as the conceptual displacement of the 'subject' and 'object' of political power. Here, the object refers to the source and the subject to the bearer of sovereignty. Broadly speaking, this mounts for the inclusion, or rather, the relocation of the collectivity to the source of legitimate political power, which was hitherto been excluded from its domain. At its heart, this new meaning of political power, or rather, its non-transcendental conceptualization depended on a process that is much more encompassing. Enlightenment (Aufklarung)—when taken in the limited sense of being the replacement of the central emphasis attributed to 'divinity' with the ideal of 'rational society'—could be read as the redefinition of human subjectivity as the constitutive of the political. Nevertheless, such redefinition did not remain limited solely to the conceptual level, but rather; it eventually gave birth to the greatest social transformation ever known to humankind. It was through the consecutive English, American and French revolutions that the concepts of 'democracy' and 'rule of law' gained significance and challenged the old basis of political rule in the following centuries.

Conventional political theories, beginning from Plato, have projected the legitimate use of political power to an enlightened ruler or a ruling class. Niccolo Machiavelli's thoughts symbolize a breaking point in the ranks of this tradition for claiming that the well-being and preservation of the republic depended on a broad base of support by the citizenry. Nonetheless, in Machiavelli's account, people were far from bearing sovereignty and their support merely functioned to provide stability for the regime. But when coupled with the teachings of the figures like Spinoza, Locke and Rousseau, the idea of popular sovereignty had profound consequences for the revolutionary challenges against monarchical sovereignty.

The theoretical background of the democratic revolutions that swept the world from eighteenth century onwards could be sought in the major premises of the so-called 'project of modernity'. Habermas skillfully defines the project of modernity as "the grounding (of) our validity claims in the transindividually objective and yet, humanly 'subjective' structures of subjectivity" (Ferrara, 1998: 148). Therefore, modernity mounts for the replacement of God's will by the Man's will in the domain of political power. At its heart, the notion of 'rule of the people' required a conception of legitimacy based on the free consent of the ruled. This was the basis of social contract theories, which aimed to ground the necessity for obedience to political power to an antecedent and willed delegation of natural rights in favor of a Sovereign. The significance of these theories lie in their determination of the 'divine right of Kings to rule' as being insufficient and their efforts to reflect a different mode of legitimacy for political power. Each of the most prominent figures of social contract tradition—namely Hobbes, Locke and Rousseau—postulate a single event that enabled the transition from a state of nature to a civilized state. Yet, these constructions have grave differences. For example, the sovereign body is originated by the social contract, Leviathan, is a "Man, or Assembly of Men...on whom the Souveraigne Power is conferred by the consent of the People assembled" in Hobbes (1968: 228-9). The sovereign is the Legislative, that is the representative of the 'united will of the Commonwealth' for Locke (1988: 355-6). And it is the concrete body of People that participate in the social contract in Rousseau (1997: 50). Yet crucially, each of them postulates some form of *political sovereignty that serves to Reason*. For different reasons, the movement of constitutionalism also aims to reach at a rational form of government. But it seeks to do so in marked contrast with the above mentioned views, that is, not by setting the popular will free, but by limiting and controlling it.

In this chapter, I will try to demonstrate that the principles of 'popular sovereignty' and 'constitutionality' constitute two different moments of the modern ideal of Rational Political Power. In order to examine the intertwining of two rival understandings, I shall start with Jean-Jacques Rousseau. This is because the idea of popular sovereignty which assigns the use of political power to popular will is most clearly explored and defended in his writings. In what follows, I will emphasize how Abbe Sieyes formulates a legalistic conception of sovereignty benefiting from political economy. Before concluding, in the third section, the clarification of the

theoretical basis of contemporary constitutionalism by Alexis de Tocqueville, John Stuart Mill and American federalists will follow.

2.1 Rousseau and the Principle of Popular Sovereignty:

Before Rousseau, modern political thinkers were inclined to believe that departure from the traditional forms of legitimacy would directly make a rational social order possible. Therefore, by proposing a return to harmony of nature and reason against a society which harms rationality through fostering private interests and social differentiation, Rousseau is regarded as the first modern critic of modernity (Touraine, 1995: 20). In a way, contemporary political theory still operates on the basic distinction made by him: particular wills and the general will. He attempts to overcome the problem of reconciling the two by fusing Reason and Will in the political power. As this will provide the backbone of the theories analyzed in the following chapters, it provides a good starting point.

2.1.1 The Fusion of the Faculties of Reason and Will: The General Will:

Rousseau begins his work the *Social Contract*—in which he formulates the principles of democratic legitimacy—by arguing that the legitimacy of political power derives its ability to turn the act of obedience to a duty. According to him, only the legitimate power derives from social contract because obedience to naked force is bare necessity and there is no natural authority of man over man (Rousseau, 1968: 6, 11-2). In this way, the aim to establish the conditions of freedom by maintaining obedience to laws rather than men forms the basic premise of Rousseau's political theory. To become legitimate, any law has to meet the requirement of being willed by the people who are governed by it. This shows the dual requirement of taking sovereignty from the monarchs and giving it to people, on the one hand; and protecting it from the infiltrations of particular wills—which rule with regard to private interests—on the other. Rousseau names the result of this dual process as the general will—one that rules with regard to the common or public interest. The defining characteristic of Rousseauian general will is that it represents the highest form of social objectivity. The concept of general will accomplishes two things at once: it locates legitimacy of political power into the objective laws of reason, and it attains independence of laws with respect to the particular wills of the citizens. The main purpose of Rousseau is to save the relationship between the state and the individual from a master-slave dichotomy and the reconstruct the political unity—or

what he calls the 'Sovereign Being'—on the ground of its constitutive citizens. In this context, the desired reconciliation of necessities or legal obligations with human freedom becomes possible especially if the individual can view herself as the maker of the very laws she obeys.

The general will is what rational people would choose for their personal and common good: "the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty" (Rousseau, 1968: 35). The, it is the self-imposed law of reason, obedience to which is the sole ground for freedom under society. Indeed, in the *Social Contract* we find an early version of the principle of autonomy, which will be fully developed later by Kant: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole" therefore "so long as the subjects have to submit only to conventions of this sort, they obey no-one but their own will" (1968: 24, 35, 39). The purpose of enforceable law and government, of whatever form it takes, is to bring coincidence of the general will and the wishes of the people. Here, we arrive at the ultimate end of modern political theory: to ground individual's legal obligations to political authority and to other individuals on a rational principle of freedom.

Indeed, Rousseau's call for the legitimacy principle of general will turns into a means of struggle against the diversity and inequalities created by the modern society, which increasingly becomes more selfish and subjectivistic. In practice, a state which is grounded on popular sovereignty is viewed as a cure against the vices of modernity. The antidote of modern ills—selfishness and greed that feeds upon private will—is the popular sovereignty that takes the shape of a republican state. According to Rousseau, under the conditions of modernity we gain the deed of being authentically human, first by means of becoming citizens. This idea is the bedrock of attempts to create the new society, and thus, the new human. Therefore, it is possible to argue that the understanding of democracy in the late-eighteenth century was much more 'offensive' than today: setting people's will free through political participation was expected to alter their ontological category, rendering them 'new' humans. In essence, Rousseau represents such hopes within the modern republican movement which are associated with the overthrowing of the notion of divine law and established privileges that accompany it.

2.1.2 The Paradox of Democratic Legitimacy:

We can say that before the deepening of negative rights directed towards controlling political power in favor of individuals and minority groups, popular sovereignty and democracy were yet undifferentiated. However, even in the earlier stages of democratic thought and movement there was a tension that underlies the principle of popular sovereignty. It can be argued that the democratization of the notion of sovereignty did not immediately brought safeguards against the domination of man over man. This is because majoritarianism that underlies popular sovereignty could produce instances where collective will runs against collective interests. It could certainly expected that the collectivity may as well turn towards the goals of material benefit and will to power instead of, say, the freedom of everyone, in which the society has a rational interest vested in. This possible divergence between the will of a sovereign people and rational ends that are necessary to fulfill that will—i.e. identification with fellow citizens or abandoning private will by embracing general will—leads to the so-called 'paradox of democratic legitimacy'. Rousseau was aware of this and he tried to solve this problem by distinguishing the general will from the will of all. Basically, while the will of all is based on the aggregation of private wills and interests—thereby containing the arbitrary and harmful elements for the political unity—the general will is capable to reflect the rational public good.

The dichotomy between the will of all and the general will seems to contradict Rousseau's firm belief in the rationale of the social contract at first sight. However, Rousseau is aware that people could err:

> (T)he general will is always right and tends to the public advantage; but it does not follow that the deliberations of the people are always equally correct. Our will is always for our own good, but we do not always see what that is; the people is never corrupted , but it is often deceived, and on such occasions only does it seem to will what is bad… There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is more than a sum of particular wills: but take away from these same wills the pluses and minuses that cancel one another, and the general will remains the sum of the differences (Rousseau, 1968: 48).

Benhabib criticizes this attempt—what she calls the 'arithmetic solution'—because of the vague meaning found in "taking away the pluses and minuses of individual wills" (Benhabib, 1999: 29). Similarly, Honig argues that this difficulty arises from seeking

mathematical solutions to political problems: "the General Will is *inhabited* by the will of all and that we cannot separate them with certainty at the level of cognition" (Honig, 2001: 10). In Rousseau, the general will could not err simply because of being what it is, i.e. it surpasses partial claims and interests. However, the possibility that the majority, or even, unanimity could make mistakes compels Rousseau to provide an account of how the general will and the will of all could be distinguished. Although he maintains his faith in the people, he can not escape from the fact that popular sovereignty could legitimize and generalize arbitrary, irrational and oppressive decisions in cases where people are not motivated by reason. In this way, the people, whose will supposed to provide the legitimacy of the republican regime, becomes part of a new problem that political power must solve (Honig, 2001: 6).

In his attempt to solve this problem of divergence which poses the general will and the will of all against each other, Rousseau tries to avoid solutions favoring the insertion of external constraints on the popular sovereignty. Instead, he focuses on certain sets of material conditions and social practices that enable citizens to will the general will. According to him, the existence of small communities, without serious inequalities, backed by a unified culture, just laws, a shared sense of togetherness and civic religion are the features that direct citizens to act in favor of the common good and these features serve to clarify the line of separation between the general will and the aggregative will. As for the question: 'how these conditions could be generated?' Rousseau introduces the agency of the Legislator, who, while seemingly be interested in mere civil law, is in fact, an extraordinary lawmaker who seeks the law which "is not engraved on marble or bronze, but in the hearts of citizens" (1968: 81). The Legislator sets the conditions for the generalizeability of a particular will because "the general will, to be really such, must be general in its object as well as its essence" and "the quality of equity…disappears when any particular matter is discussed, for lack of a common interest uniting and identifying the role of the judge with that of the party" (51-52).

Benhabib argues that Rousseau tries to solve the paradox of democratic legitimacy by way of an 'instance of idealized rationality', which is the Legislator equipped with "sublime reason, far above the range of the common herd, is that whose decisions the legislator puts into the mouth of the immortals, in order to constrain by divine authority those whom human prudence could not move" (1999: 65). In this sense, Rousseau is ready to sacrifice the legitimacy that derives from the fallible will

of the people in favor of the rationality found in the Legislator—who is "an instance outside the united will of people…whose rationality transcends the legitimacy deriving from the people" (Benhabib, 1999: 46). In this way, he inserts an external force over the sovereign will of the people and this renders the principles of popular sovereignty secondary to the notion of general will. Moreover, just as the problem of distinguishing the general will from the will of all, Rousseau causes another problem of identifying the particular will of the Legislator as being prior to popular will. Thus, by introducing the Legislator—a concept he borrows from the philosophy of Aristotle—Rousseau not only carries the problem to a new ground, but also preserves an instance of transcendental authority who would fuse the faculties of Reason and Will in the domain of political power. From his point of view, such fusion is the only solution to the paradox of democratic legitimacy.

2.1.3 The Relation of Law to Sovereignty:

In order to locate the problem of legal limitations over popular will we have to delineate the way Rousseau conceives the relationship between law and sovereignty. As stated above, Rousseau thinks that modern subjects could be free if they are governed by laws, rather than by other humans. Note that Rousseau does not reject that freedom under pre-modern societies might not demand the same criterion; it is rather the conditions of modern society that requires to be ruled by laws in order to be free. Such a basis opens way for a notion of limited government by acknowledging the supremacy of law over arbitrary power. Rousseauian understanding of democracy demands magistrates to have no will of their own, but only to have a will to impose the general will. In line with the classical conception of democracy, he views representation as the legacy of *ancien regime*. This is because, the medieval doctrine of representation aimed to bridge the gap between the bearer of power (monarch) and the executer of power (magistrate) (Sartori, 1962: 22). At the conceptual level, representation eliminated any force that is external to the power of ruling elites. In practice, it functioned to legitimize the absolute sovereignty of monarch by saving him by saving him from any genuinely democratic demand that the actual exercise of power had to be determined by the people and it should be responsible to the people. Obviously, the development of representation did not initially pursue a democratic path. Instead, as shown by Dahl (1989) the beginnings of representative government can be found in assemblies 'summoned by monarchs' and made up by representatives from each estate and meeting separately (62-3). In other words, Rousseau's negative

outlook to representation can be understood as a suspicion towards these early practices of representation. Therefore, for Rousseau, in essence, representation is a kind of mediation of that leads to the demise of the Sovereign Being. Just as the sovereign could not be bound by a law that precedes the social contract, it should not be represented. When the self-legislation of the collective will is mediated by the few—i.e. the representatives of the people—sovereignty becomes captured by particular wills, and eventually, it corrupts and disintegrates.

From the perspective of liberal constitutionalist project, however, it is possible to find an idea of government limited by law in Rousseau's writings. This view focuses on certain questions cast by him, such as: "How can a blind multitude, which often does not know what it wills, because only rarely does it know what is good for it, carry out for itself so great and difficult an enterprise as a system of legislation?" (Rousseau, 1968: 62-3). The solution Rousseau offers is to legislate as little as possible. In this sense, his understanding is likely to produce constitutional law (or Law with a capital L) for it is supposed to be very general, formal in statement, pertaining and even unchangeable. Yet again, certain premises of Rousseauian political theory renders attempts to extract a notion of constitutionality from him futile. At its core, the Sovereign Being—i.e. political unity—is solely bound by its constituting (social) contract, in which it finds it *raison d'etre*. Any law that follows from the originary contract is internally related to the Sovereign Being, it cannot impose any external constraints: "…the fact that public deliberation…cannot…bind the Sovereign to itself…it is consequently against the nature of body politic for the Sovereign to impose on itself a law which it cannot infringe" (1968: 31). Because the essence of *souverain* is founded by the fundamental pact and its existence is due to consciously arrived agreement by the people, any external regulatory mechanism over the exercise of political power is bound to be illegitimate. In this sense, social contract, as an originary act, could be viewed as an abstract and even metaphysical constitution, which expresses and actualizes itself in the acts of collective self-legislation, which conforms to the general will. Thus, any attempt at manipulating Rousseauian theory to practical goals of constitutionalism by seeking an idea of judicial limitations brought upon the popular will is highly questionable. As Rousseau declares, "(t)he People, being subject to laws, should be the author of them" (1968: 61). Clearly, this declaration dismisses the very notion of subjecting popular sovereignty to a form of higher law other than the law of original pact.

As argued above, although Rousseau does not conceive the relationship between the nominal attribution (sovereign) and the actual exercise (legislation and execution) of political power in a liberal constitutionalist sense, his theory is not totally alien to the idea of constitution. Because civil society is not a 'natural' but an artificial 'entity' the boundaries between the legislative and executive functions of government needs to be deliberately defined by a constitution. Here, another function of the Legislator comes to the fore: authoring the Constitution while not being part of the process of legislation that enacts specific laws. The Legislator belongs to the 'constituting' power and his main concern is the formulation of supreme Laws. In order for a regime to govern by laws, instead of men, the Legislator has to be present in the form of a sublime figure situated above the erroneous nature of human beings. For the same reason, he must not take part in the actual process of legislation and government at any rate (Rousseau, 1968: 65). On the other hand, the Law passed by the Legislator becomes a feature of constituting power, whereby his particular will could be said to conform to the general will only by being subject to the free votes of the people. Yet, it is not very clear in Rousseau whether people belong to the domain of constituting or constituted power. While obviously they determine the exercise of constituted government, at the same time, they are at the source of political power. Therefore, one can argue that the collectivity has recourse to the making of supreme Laws as well. In this sense, the Legislator and public opinion has to guide each other for the realization of universally valid Law. At this point, it is safe to say that the concept of general will combines the transcendental moment expressed in constituent power—i.e. the metaphysical instance born out of social contract—and the immanent moment embodied in the constituted power—i.e. government branches bound by the popular will. If we accept Carl Schmitt's claim that all of our modern conceptions are secularized versions of religious notions for a moment (Schmitt, 1988), we can view the general will as the substitute of God's will, defined in terms of the Nature or Reason[1]. Nevertheless, it takes a quasi-transcendental form because its physical existence is embodied by the people. Rousseau draws the duality of constituent and constituted powers under the analogy where the legislature is the 'heart' and executive

[1] Carl Schmitt's political theory will be used throughout this thesis, when viewed as necessary. The chief reason for that is Schmitt's legacy on the contemporary understanding of the relationship between the rule of law and sovereignty. Briefly, Schmitt defines sovereignty as the power to suspend the Constitution for the sake of public interest. In this way, his approach provides some insights that are in marked contrast with those of liberal constitutionalism.

is the 'brain' of the sovereign organism (Rousseau, 1968: 149-150). In other words, the Sovereign Being expresses itself in legislation, but this substantive core needs to be directed by the executive power.

It is possible to argue that, perhaps Rousseau was aware of the theoretical impasse created by the impossibility of arriving at an ultimate solution to the paradox of democratic legitimacy. Democracy, at least in its pure form, provides no guarantee for the potentially destructive effects of mere majoritarian will. However, Rousseau does not limit himself to the problem that there is no sure way of distinguishing between the general will and the will of all. Instead, he emphasizes the importance of material, social and cultural conditions in the clarification of the general will, yet, what is to be called constitutionalism, is not content with Rousseau's conclusion. As we shall see, by postulating a dichotomy between the constituent and constituted powers, constitutionalism seeks to constrain the mere will of the majority expressed in the legislative and executive bodies in favor of abstractly formulated individual rights. From one aspect, what supplies a measure of recognition to the paradigm of constitutional democracy is the failure of the reconciliation between the normative requirements of freedom and the factual necessities of order within a purely democratic system. Therefore, in the following sections, the gradual limitations brought over popular sovereignty and the extension of the principle of constitutionality will be examined in a comparative fashion. But before, in order to have a better understanding on how popular sovereignty and constitutionality are brought against each other in the nineteenth century political thought, we need to focus on Abbe Sieyés' work on national sovereignty.

2.2 The Notions of Constituent and Constituted Power in Sieyes:

In general, the early modern conceptionalization of Sovereignty focuses primarily on its indivisibility, permanence, immanence and absoluteness. At the conceptual level, the concept of Sovereignty is formed *quad titulum*—i.e. it recognizes no superior or an external dynamic of power other than itself. From a practical perspective, on the other hand, the concept is formed *quad exertium*—i.e. it is practiced in a particular territorial domain over a particular 'people'. Despite the compromise between the European powers in the treaty of Westphalia (1648) there is no delegation of right to rule to an international legal order, but rather, an exchange between sovereign powers. In later historical stages, in a sense, the immanent

conceptualization of Sovereignty becomes more self-limiting: it locates and specifies the boundaries of sovereign power with regards to its subject—i.e. citizens—and thus, constructs a relation of dependency between the political power and the multitude of citizens. The rational justification of obedience to the state presupposes a citizenry who is the originator of the sovereign power. No one has expressed this more vigorously than Rousseau, but it is Abbe Sieyes who molded the role of the people in constituting sovereignty into a novel form, which is 'national sovereignty'. While in the approaches preceding Rousseau, the 'popular' or the 'national' element merely functioned to strengthen the basis of sovereignty, with Sieyes the concept of national sovereignty appeared as a specific type of sovereignty, which redefines the relationship between the sovereign and its subjects. Sovereignty is embedded in the nation, which is a being that is unified self-sufficiently around common culture, ethnicity and economy. As we shall see, by his juridical-political conception of sovereignty and the reading of social contract from the perspective of political economy, Sieyes opens the way for the constitutional control of the political power.

2.2.1 Juridico-Political Conception of Sovereignty:

The political thought of Sieyes presents a point of departure from the Rousseauian tradition which postulated the civic virtues of Athenian democracy. First of all, by making a synthesis between social contract theory and political economy, Sieyes develops a conception of juridico-political sovereignty based on political representation. By articulating the process of representation into the pre-contract period, Sieyes aims to establish the normative validity of political power, in addition to its factual necessity. Let me quote from following paragraphs from Sieyes' *What is the Third Estate?* which are directly relevant to the issue at hand:

> The nation exists prior to everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation is not the work of a constituted power but a constituent power. …Thus all the parts of a government are answerable to and, in the last analysis, dependent upon the nation.
>
> A nation is all that it can be simply by virtue of being what it is. …The nation's will…simply needs the reality of its existence to be legal. It is the origin of all legality.
>
> Every nation on earth has to be taken as if it is like an isolated individual outside all social ties or, as it is said, in a state of nature. The exercise of their will is free and independent of all civil forms. …However a nation may will, it

> is enough for it to will. Every form is good, and its will is always the supreme law.
>
> There is no reason to be afraid of repeating the fact that a nation is independent of all forms and, however it may will, it is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and supreme master of all positive law.

The similarity of Seiyes' argument with that of Rouuseau's is evident; the source of legality and legitimacy is the multitude itself:

> A nation should not and cannot subject itself to constitutional forms because, at the first conflict between the various parts of the constitution, what would become of a nation so disposed and so ordered as to be able to act in any other way than through the provisions of the disputed constitution?...One or several component parts of a moral body are nothing when taken separately. Power belongs solely to the whole. As soon as a part objects, the whole no longer exists, and if it no longer exists, how can it judge? (Sieyes, 2003: 136-38).

As understood from these passages, the nation is the final authority who should decide in a constitutional dispute. Consequently, the duality between the constituent and constituted powers turns into the relationship between the sovereign and juridico-political order. The sovereign—i.e. nation—formulates a constitution, the constitution gives birth to constituted powers—i.e. governmental branches—and in return, constituted powers are "answerable to, and in the last analysis dependent upon, the nation" (Sieyes, 2003: 136). In this way a permanent legal hierarchy between the constituent and constituted powers is maintained. Under such a scheme, the main function of constitution appears to be the providing security against any divergence in the exercise of political power from the direction of the national will:

> There is…a double necessity to subject a government to fixed norms, both internal and external, in order to guarantee its ability to meet the needs for which it was established and to make it incapable of diverging from these ends (Sieyes, 2003: 122).

Up to this point, we can sense a measure of harmony between Sieyes and Rousseau, which stems from their shared starting point that the basis of legitimate political power lies in the consciously arrived agreement on behalf of each individual to form the political society, which is the social contract. The difference in the positions of both thinkers concerning political representation and the constitution owes much to their differing projections on the form that the transition into the civil

society takes. Therefore, in order to be more precise, we need to analyze Sieyes' peculiar version of social contract theory.

2.2.2 The Synthesis of Social Contract and Political Economy:

The originality of Sieyes' version of social contract theory lies not only in the fact that he expounds it in three epochs—unlike his predecessors, namely, Hobbes, Locke and Rousseau who postulate the transition into political society as a single event—but also that he gives priority to political economy: let me once again quote relevant passages, and then comment on them:

> In the first of these epochs, one can imagine a more or less substantial number of isolated individuals seeking to unite. By virtue of this fact alone, they already form a nation. They have all the rights of a nation; it is simply a matter of exercising them.
>
> The first epoch is characterized by the activity of *individual* wills. The association of their work. They are the origin of power.
>
> The second epoch is characterized by the action of a *common* will. Here, everyone involved in the association seeks to give their union consistency. They all want to accomplish its purpose. Thus, they confer with one another and agree upon public wills and the means of providing for them. Here it can be seen that power belongs to underlying elements. But taken separately, their power would be null. Power resides solely in the whole. A community has to have a common will. Without this *unity* of will, it would not be able to make itself a willing and acting whole. It is also certain that this whole has no rights that are not connected to the common will.
>
> Now consider the passage of time. The members of the association will have become too numerous and too widely dispersed to be easily able to exercise their common will themselves. What do they do? They will detach all that is needed for overseeing and providing for public concerns and will entrust that portion of the national will – and consequently power – to the exercise of some of their number. This brings us to the third epoch, or the period of *government by proxy* (Sieyes, 2003: 134).

We see that in the first epoch there is a political unity that is shaped and run by the particular wills. Political power passes from the aggregation of individuals to the community in the second period. This is the point where the individuals, who aim at maintaining consistency and continuity to their association, deliberate on the means of

determining and satisfying their public needs. Consequently, the power is concentrated in the hands of the community whereby a common—i.e. general—will is born. Up to this point, Sieyes' story resembles Rousseau's: there is a consciously formed association by previously isolated individuals. However, the final epoch signals the enlargement and growth of the society to a level that makes the direct exercise of common will impossible. According to Sieyes, the 'representative common will' is as equally legitimate as the 'real common will' because representation is a *necessary* outcome of the transition from primitive society to a modern one. On the other hand, this transition is also marked by the establishment of constituted powers (i.e. 'government by proxy').

Sieyes' emphasis on political representation is particularly related to the motives that he expresses in his famous pamphlet *What is the Third Estate?*, which is published in the same year as the Revolution. The pamphlet aimed to direct the Third Estate—which virtually included everyone besides the nobility and clergy—towards abolishing the privileges of the *ancien regime.* In order to overthrow the 'spiritual hierarchy' imposed by the Estate system, Sieyes had to show that labor was the primary source from which society originated and was sustained by. By entering into discussions with the physiocrats—who advocated that the primary source of wealth are the forces of nature—he demonstrated that 'it is labor that forms wealth': "The earth only yields (agricultural products) to our solicitations, to our labors, to our investments…In the art of production as in all others, man seizes one part of the forces of nature, with which he subdues another part" (Sewell, 1994: 10). The productivity of nature derives from the application of human labor. As labor is the foundation of society, the social order is asserted as the best possible order of labor.

Sieyes' idea that labor is the originator of the society is in harmony with Locke and Rousseau. Locke views the main motivation for the social contract as the need for the protection of individual's natural right to liberty and property, which presuppose each other. This was because Locke thought that property as providing independence from necessity, hence allowing liberty. The most suitable kind of state to realize such a protection is a minimal state. Once it is found, the questions of production and consumption are delegated to the private sphere. However, Sieyes brings a more positive function to the social contract by projecting it as a means of increasing the efficiency of labor. In this sense, the association that creates the political society not only give rise to the means of protecting property, but also better means for creating

wealth. This is "a living force co-productive of wealth" which is composed of "the sum of the labors of all the citizens" (Sewell, 1994: 77). Just as Rousseau's general will, this sum of labor, that is the 'general labor', accomplishes more than individual efforts in isolation. In sum, the production of wealth by the 'living force of labor' is possible through the 'division of labor' and government action.

From this framework, Sieyes derives a classification of society: agricultural producers who are engaged with the direct cultivation of natural products, industrial producers who transform the natural products of agricultural labor, the ones who conduct the commerce and exchange of these goods, and finally, the professionals who are engaged with services and intellectual labor (Sewell, 1994: 57-8). Obviously, there is no place for nobility in such a non-hierarchical network unified around production and common work on nature. Being a member of the society and having rights is conditional on the contribution one makes to the general well-being. One who renounces his own share in the laboring process, therefore, renounces all his rights. Therefore, once Sieyes establishes the primary role of labor in the creation of wealth, he is ready to launch his assault on nobility, which was parasitic on the entire network of labor.

2.2.3 Theory of Political Representation:

Nevertheless, private economic efforts could not be seen as the only contribution to the survival and well-being of the society. Public services are needed as well, however, in the pre-revolutionary era, the only mode of public services conducted by nobility were the high-paid and honorific jobs, which they monopolized. Sieyes' version of the division of labor is linked to free competition: professions are better filled when they are potentially open for everyone. Then, he argues, by excluding competition for these posts, aristocracy performs these tasks poorly. Therefore, the privileged classes are nothing but burdens for the Third Estate, which makes up the whole society. If the nation or the Third Estate—whose natural or legitimate order is to be a community of citizen-producers united by their work nature—is the source of all wealth, it should also become the source of sovereignty. If the nobility is parasitic on the nation, then the representatives of the Third Estate are the legitimate representatives of the national will. Sieyes locates what he calls the 'extraordinary representatives' of the people in the very place of the people, in order to write a constitution. Because they are as free as the nation in determining the constitutional form, they can exhibit the will of the individuals who have passed from

the state of nature to civil society. Therefore, he accepts the will of extraordinary representatives as legitimate as the national will.

Through the delegation of the actual exercise of power to representatives, citizens would be able to pursue the activities of production and trade. Sartori (1962) argues that in the direct democracies, the active participation in politics that was expected from each citizen, necessitated sacrificing private-economic affairs (254). The more direct democracies become perfect the more the economic wealth is devastated. In line with this liberal conviction, Sieyes offered that the 'invasion' of private sphere by public affairs ends up with citizens having no sufficient time and energy for the creation of wealth. But Sieyes' resentment of replacing *homo economicus* with *zoon politikon* has much more profound reasons. Let me focus on these now.

As mentioned above, both Rousseau and Sieyes sought ways to harness political power to the dictates of the general will. However, while Rousseau tries to overcome the danger that government could diverge from the general will through binding political power to unmediated, unrestrained and rational collective will of citizens in principle, Sieyes tries the same by binding political power to people's constitutionally and representatively mediated will. As we have seen, the difference between the two thinkers stems from their differing projections of the social contract. For Sieyes, the nation pre-exists the social contract, which rather than being a founding moment, merely helps the nation to exercise its rights (Kedar, 2004: 7). This point is the key to Sieyes' theory of sovereignty and pregnant with further differences and resemblances with respect to the accounts of Locke and Rousseau. On the other hand, as mentioned above, contrary to Rousseau, Sieyes (2003) views the delegation of legislative power to the representatives of the people as necessary. On the other hand, he does not elevate the legislative body to the status of the bearer of sovereignty, as Locke does. The reason for Sieyes' confinement of the legislative body to constituted power is that he sees a potential threat that the concentration of power in a single legislative body may limit the liberty of citizens, as much as the executive power. Therefore, as we shall see, he proposes 'differential representation', in which the legislative power is divided between different representative bodies. In this way, the category of *zoon politikon* reserves its first restriction.

It is worth mentioning that Sieyes deliberately avoids using the concept of 'national sovereignty' in his writings. What underlies such avoidance is the central

distinction that he makes between constituted and constituent powers. Rather than merging both in the people, as previously done by Rousseau, he situates the nation in the constituent power and clearly differentiates it from the constituted power. In this way, Sieyes is able to keep people away from the immediate exercise of power, by replacing their representatives for this purpose. However, from this point of view, the exercise of national sovereignty does not evade the instance of originary act, but kept in reserve. In line with Schmitt's characterization of sovereignty as consisting of the decision on what makes an exception in normality (1988: 5), the nation, by virtue of being the constitutive power, bears the right to intervene in the political process. However, such ability is due to constitutional boundaries. In this way the national will is integrated into the system of constitutional regulation of the constituted powers via Municipal, Departmental and National Assemblies.

In effect, it is clear that Sieyes provides no regulatory superiority for constitution over the national will. This is why it is argued that such avoidance of hierarchy creates a kind of two-headedness because both constituent and constituted powers are considered as the expressions of the national will (Maiz, 1990: 12). The fact that Sieyes, on the other hand, locates sovereignty firmly in the hands of the nation, and on the other hand recognizes 'parliamentary sovereignty' or 'autonomous legislative power' blurs the legal hierarchy he builds between constituent and constituted powers. Another way of formulating this paradox would run like this: if the national will forms through the mediation of representative legal order, then how can one claim that national will exists prior to legislative will? A possible answer could be that Sieyes views the representative mediation not as limited to an act of expression, but as producing the very political will that it expresses.

The gap between the general will and the will of all could only be bridged by freeing the representatives from the domination of the represented. According to this, the popular mandate renders the possibility of arriving at common decisions and agreement in the legislature impossible. However, as offered by Maiz, arguing against a strict popular control over the parliamentary body does not necessarily "require an absolute autonomy of the representative in relation to the represented" (1990: 12). According to Maiz, by maintaining the popular control over the representatives through the ability of dismissal and encouraging the participation of active citizens in primary Assemblies, Sieyes' theory of 'representative government'

preserves the principle of popular sovereignty that Rousseau strives so hard to establish.

2.3 The Conceptualization of 'Constitutional Democracy' by Tocqueville and Mill:

Alexis de Tocqueville and John Stuart Mill represent the last chain in the circle of post-Rousseauian political theory which increasingly views the notion of democracy in terms of something to be corrected by law. From the perspective of writers like Sieyes, Tocqueville and Mill, in essence, democracy has never meant 'government of people by the people'. Indeed, their line of thinking increasingly relinquished the conception of democracy from its classical, or lets say, literal meaning. For example, Sieyes always prefers to use the term 'nation' rather than the 'people' as in Rousseau. Possibly, Sieyes disliked the latter for it connotes to poverty-ridden lower classes, while he thought, the former is more inclusive and unifying. When in twentieth century—as in Schumpeter and Hayek—the liberal position evaluated democracy solely from the perspective of control asserted by the voters over their periodically elected representatives. Concerning the intellectual evolution of the concept of 'constitutional democracy', we can say that if Sieyes planted the *seeds*—by establishing the institutional mediation of popular sovereignty—then Tocqueville and Mill harvests the *crops*—by using the basis provided by Sieyes in advancing a moral justification of counter-majoritarian mechanisms.

2.3.1 The Positive and Negative Images of Democracy in Tocqueville:

Tocqueville asserts that in France the term democracy was understood as a new form of social order rather than a novel form of political regime. The French revolution produced a democracy consisting primarily of the abolition of feudal privileges and class order. Hence, for most of the French the notion of democracy had connotations different than 'government of the people by the people': it was characterized by the replacement of rigid hierarch and power relations by social mobility and political equality. However, his experience in America enabled him to develop a much more comprehensive concept of democracy. In his well-known work *Democracy in America* two different images of democracy prevail: one positive, and the other negative. In the first volume, democracy is a dynamic process that will culminate in the eradication of all social and political privileges. In essence,

democracy is more than simply a form of government: it is a project of a new civilization. Democracy transforms the society, penetrating every aspect of social life, that is, "customs, opinions and forms of life; (therefore) it is to be found in all details of social life as well as in the laws" (Tocqueville, 1998: 206). But in the second volume of his work a much more cautious evaluation of democracy is evident. Here, the concepts of majority and minority and individual starts to play a determining role in his analysis. Tocqueville argues that popular forces unleashed by the Revolution would not be contend with the power leveling in the social field and could challenge the right of material property. So he sets his agenda as strengthening the rights and status of the individual against the anonymous power of the masses.

Whilst the antidemocratic connotations in the 'tyranny of majority' thesis, it is hard to label Tocqueville simply as an admirer of ancient regime, or even as rejecting democratic participation. Interestingly, in his writings, the dangers he finds in the will of the masses goes hand in hand with the short-comings of private will. In the first volume of *Democracy in America* Tocqueville observes that because America had no democratic revolution, the traits of ancient society—envy, uncharitableness, hatred, pride, scorn, over-self-confidence—could not be eradicated. Moreover, although Americans achieved political equality before the Europeans, the consolidated position of Christianity in public life restrained private judgment, which was supposed to be freed (1998: 179-181). In this way, the idea that society is composed by self-seeking utility-maximizers bound not by common ideas but by rival interests, gain general acceptance. The eventual self-referentiality of private judgment tends to corrupt, and therefore, needs to be corrected under democratic regimes (181).

In Tocqueville's account, public opinion is in need of being rationalized just as private judgment. Yet, one has to be cautious in analyzing this mode of rationalization, which is not much similar to the positivistic ideal where all the aspects of dogmatism are erased from public consciousness: for a 'good use of freedom' or to think substantively and advance of ideas, we need to have some sort of unquestioned opinions and beliefs before hand. The limited capacity and imperfect nature of human reason requires concepts that are closed to critical reflection, in order to reduce complexity. Therefore, the existence of dogmas in society does not harm the qualification of being a democratic regime (1998: 183).

This is how Tocqueville responds to the replacement of the intellectual domination of kings and aristocrats by public opinion. At first sight, according to him, the equality of judgment fosters the confidence in the aggregate of individual judgment, which is the public judgment. However, the equality among citizens also makes them feel insignificant when left alone. In this way, the intellectual authority attributed to common opinions suppresses individual reason (184). Tocqueville's concern for the threat of conformism is sourced by the belief that democratic regimes provided no guarantees against the domination of the will of all: the establishment of 'equality of condition' leads to the concentration of power (Touraine, 1995: 70). But the solution Tocqueville offers goes well beyond the framework of constituent/constituted powers.

Tocqueville's theory of democracy departs from the discussion of his time, which focuses on practical concern for institutional forms: separation of powers, checks and balances and federalism. According to him, federal government, independent judiciary and autonomous provinces in America were the traits of democracy, rather than causes of it. Turning away from the framework of constitutionalism and contractarianism is accompanied by his effort to locate the problems of political culture and education. Beneath the argument that a democratic regime has to take precautions against the arbitrary use of private and public will in order to secure freedom, there lays a much more profound dilemma. This is in marked contrast to the dilemma encountered by the previous thinkers who were preoccupied with constituent and constituted powers.

Although Tocqueville celebrates popular sovereignty in America, there is an extraordinary tension in his argument between his notion of democracy as embodying an egalitarian political logic and his portrayal of a society rooted in private ownership: "There are two great social principles which…make American society…(that are) first, the majority…is always right and there is no moral force above it. Second, every individual, private person, society, community or nation is the only lawful judge of its own interest" (Tocqueville, 1998: 109). This duality between the majority will and particular interest is configured in the domain of social characteristics and political cognition.

The portrayal of modern society as becoming an atomized crowd that gives absolute power to the will of all, forced Tocqueville to drive individuals to engage in public life. But this public life was not unified around the political power but

scattered around the society. The way he interprets the notion of liberty not only as protection from the abuse of political power, but more as a positivistic idea of liberty as an asset which citizens are obliged to make active use of, seems to separate him from classical liberal theory. However, as argued below, just as in Sieyes, the main subject of his positive liberty is bourgeois politicians, which would assume the role of intellectual and moral guidance for the masses. This is evident when he argues that the principle of popular sovereignty is a dogma because even in America, where it found its broadest base of application, given that women, Blacks and Indians were excluded from political rights, it failed to fulfill its concept. As we shall see, Tocqueville makes use of the ideas developed by his contemporary American federalists. The proliferation of the concept of majority is a watershed in setting the boundaries of modern democracy in the theories of both.

2.3.2 The Debates Concerning 'Tyranny of Majority' in American Federalism:

By the time Tocqueville went to America the principles of contract theory had not declined but incorporated into constitutional theory. The written constitution was taken to embody the contractarian principle of legitimacy: the constituted power had to be founded upon and bound by an explicit document. At the same time, the constitutional control of the executive and legislature perceived as fulfilling the basic contractarian requirement of the consent of the governed (Wolin, 2001: 171). Tocqueville's reading of democracy along social and cultural lines fuses with the assumption of the inability of masses to combine 'reason' and 'will'. In this way, he is able to ground his version of the ideal of a 'political power in the service of Reason' to political representation and constitutionally limited constituted power.

In many ways, James Madison and Alexander Hamilton—who were the key architects of the American Constitution—have influenced Tocqueville's understanding of liberty and democracy. It was Madison first to fiercely reject the idea that 'people' could really have a rational collective will. Both writers agree on the deficiencies of the people in lacking sufficient reason for governing themselves. This is in harmony with the traditional way of keeping people at bay: subjecting the sovereignty of the people to 'formal' confines of political institutions by stressing that voters are ridden with negligence for public good and are self-interested. In Madison we see an "unjust and interested majority" driven by "the impulse of sudden and violent passions" (Madison, 1996: 64). In a similar vein, democratic

societies are becoming swept by "selfishness (that) originates from blind instinct…(and) proceeds from erroneous judgment…" (Tocqueville, 1998: 205). The vacuum left by rational collective will is to be filled by responsible politicians who would exercise political power whatever the 'blind' will of the majority may suggest:

> "The effect of (a representative system)…to redefine and enlarge the public views by passing them from the medium of a chosen body of citizens whose wisdom may best discern the best interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary of partial considerations…(I)t may well happened that the public voice pronounced by the representatives of the people will be more consonant to the public good than if pronounced by the people themselves" (Madison, 1996: 205)

Similarly Hamilton wanted to commensurate political representation with republican principle:

> "(people) know from experience that they sometimes err; and the wonder is that they so seldomly err as they do; beset as the continually are by the wiles of parasites and sycophants by the snares of the ambitious, the avaricious, the desperate; by the artifices of men, who posses their confidence more they deserve it, and of those who seek to posses, rather than to deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is a duty of the persons whom they appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited, in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes and has procured lasting monuments of their gratitude to the men, who had courage and magnanimity enough to serve them at the peril of their displeasure." (Hamilton, 1996: 194)

The crucial point here is that both Madison and Hamilton made it clear that in a situation where a representative has to make a choice between the public opinion and a specific constitutional clause, he has to make a choice between the public opinion and a specific constitutional clause; he has to choose the latter. The uncompromising fidelity of public servants to the Constitution is viewed as a prerequisite for successful and enduring democracy, and therefore, the security of individual liberties and the state. As for the members of highest judicial authority—the Supreme Court Justices—their task is the interpretation of the Constitution

according to the original intent with which it was framed and adopted. This is the basis of the so-called conventional constitutional theory, which is dealt with in the following chapters.

For Tocqueville's American counterparts, the society is made up of diverse interests which divide people into different classes and factions. As shown by Wolin, Madison and Hamilton rejected the idea of a stable majority, which they took as a temporary alliance at its best (Wolin, 2001: 247). One could belong to a majority in one particular question and belong to minority in another question. In this way, while majority checked the arbitrary use of power in Locke, it became a part of the problem in American federalists. If the society is made up by individuals whose interests are situated against each other, in order to maintain stability, the democratic politics had t o prevent the escalation of a continuous rivalry between 'factions' into a clash of naked force. By a faction, Madison understands "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (1996: 60). When the faction forms only a minority of the political community, the democratic procedure of equal voting will allow the majority to vote that faction off. A faction becomes a problem, however, when it makes up the majority. In this case, in the absence of a king or a constitutional limitation of popular government, the majority acquires a power that is unknown to any sovereign before. This is what Tocqueville refers when he introduces the phase of the 'tyranny of the majority'.

In order to solve the problem of majority's tyranny, Madison argues in favor of a set of constitutional arrangements, among which the indirect election of the Senate and the President, and the appointment of the Supreme Court by the President. However, against the danger that the class of representative could become a faction itself, and thereby, ignore public interest, Madison offers a large electoral body. The advantages of a large republic is that it is easier to find proper characters out of more potential candidates and in this way, the candidates would be tested by more voters.

Then it becomes appropriate for us to ask: How could one try to prevent the dictatorship of the majority and establish majority rule at the same time? At this point, Sieyes' distinction made between constituent and constituted powers gain a

new significance. Recall that this distinction entailed a separation between the 'rule' as to who governs by setting policies, ordinary law and national objectives; and the 'rule' as to who reigns by granting governors their license to rule. One should be attentive to the fact that there is no equality between these two kinds of rule. Rather, the qualification that people's representatives are more capable of determining the general interest reduces the constituent power of the people to a level of potential existence. In this way, the constitution represents the popular element that provides the constituted power its legitimacy. Thereby, the constitution gains a janus-faced function: it becomes authorized by the sovereign people to control the constituted power, and at the same time, it provides protection for the political institutions against what majority might will. In this sense, Giorgio Agamben rightly argues that "the constitution presupposes itself as constituting power," positing itself as the "point of indistinction" between constituent and constituted powers (Agamben, 1998: 40-1).

2.3.3 The Development of Tocqueville's Ideas by Mill:

Central to the analyses of those who equate the democratic principle of popular sovereignty with 'the tyranny of majority' is the point that the principles of self-government and popular rule are undermined when the individuals are forced to obey the law. We find an early expression such claim, in the writings of Thomas Hobbes, who wrote in his *Leviathan* that "Liberty, or freedom, signifieth, properly, the absence of opposition; by opposition, I mean external impediments of motion" (1996: 261). In order to emphasize this definition he added: "(a) free man is he, that in those things, which by his strength and wit, he is able to do, is not hindered to do what he has willed to do" (1996: 261). It may be argued that this notion of liberty, which associates it with conscientiousness, has been taken for granted by the British utilitarians form Jeremy Bentham to John Stuart Mill.

Mill's main contribution to modern political theory is to underline certain political criteria for limiting the political power. In line with Bentham's claim that liberty lies in the silence of laws, he develops a negative view of liberty, according to which the liberty of citizens depend on not being constrained by laws and regulations. As Mill gradually rescued himself fro the strict utilitarian doctrine of Bentham, he came to think that the pursuit of happiness should not be regarded as the ultimate end of life, but rather as the by-product in the pursuit of other objectives (Birch, 1995: 98). Rather than dwelling into the moral basis of Mill's utilitarian

doctrine, I shall limit myself to the questions he poses on matter of democratic legitimacy.

In the individualist and utilitarian framework of Mill, on the one hand, we find a minority that has the ability to develop, become more creative, progressive, yet which has provocative ideas. On the other hand, there is a majority that feels threatened by such activism. Masses have natural disposition towards conservatism and distrust both innovation and minority ideas, which it views as threatening the established order. What this majority might possibly do—thanks to its sheer force of numbers—is to eliminate these challenging ideas, and thus, the minority itself. What is worse concerns the loss of neutrality on the side of the state: legal-political authority generally prefers not to act or punishes the victims in order to secure the support of the majority. Moreover, a great deal of people, in a conformist manner, chooses to belong to the majority side, merely because they feel restrained to express opposing views. Under such conditions, Mill argues, liberty of all could only be realized if the juridico-political power secures individual and minority preferences: "the only freedom which deserves the name freedom is that of pursuing out own good our own, so long as we do not attempt to deprive others or impede their efforts to obtain it" (Mill, 1993: 58).

After reading Tocqueville's Democracy in America—which Mill considers as "the first philosophical book ever written on democracy as it manifests itself in modern society"—he was able to incorporate his critique of majoritarianism and egalitarianism, and the idea that the virtue of the aristocracy needs to be reconsidered. By recognizing the danger that in order to maximize the well-being of the majority the one of the minority could be harmed, Mill formulates a guiding principle that the only instance where the state can curb one's freedom is to prevent harm being done to others.

Just like Tocqueville who advises a system of which citizens should elect the most capable among themselves to represent them, Mill favors a classic theory of political representation. In Tocqueville's account, the problem for France is that the population did not consist of responsible citizens, which was necessary for the desired liberal political system. In the years following the revolution, according to Tocqueville, French people have proved that they were not able to exert their democratic rights. Only the wholesale education of the people could transform them into genuine and responsible citizens and establish a democratic political culture. As

mentioned above, Madison proposes a large electorate in order to tackle with the problem of fractions. However, Mill's main concern is the inexperience and instability of the general electorate. The distinction he makes between 'controlling the business of government and actually doing it' (Mill, 1951: 229-30) lends the actual running of the government to professionals. If the general public does not get involved in the details of government, this will not only increase efficiency of administration but also the actual decisions made would tend to be better. What is more important is his point that the justifications for democracy do not require that the exercise of political power be conducted directly by the general electorate. Mill's mode of justification suggests that democracy enhances the development of individual capacities, which is demonstrated during the election process when the general public chooses its representative in the government. According to him, when people actually rule, their self-development is hindered by the inefficiency and instability.

To be sure, Mill does not have much faith in the judgment of the elected as well as the electorate. Although he champions a system of general elections, the right to free speech and free press, he goes so far to propose unequal voting rights. According to this, more votes would be allocated to those who are wiser and more talented. Mill's distrust in the general public's judgment and sentiment is the major reason leading him to propose a representative form of government in which important public decisions would be made by qualified leaders with knowledge, expertise and wisdom.

While explaining how Mill turned away Bentham's political philosophy and embraced socialist ideas, he confesses that, as a liberal, he used to be horrified by the popular will—which was supposedly illiterate, ignorant, self-interested and cruel—that he took as necessarily tyrannical by nature (Mill, 1988). Elsewhere he mentions that his and Tocqueville's main concern was not so much physical domination of the few by the many but spiritual, or rather, conscientious enslavement. Indeed, beneath Tocqueville's distrust in majority opinion there lies a suspicion and a corresponding effort to prevent the (mis)equation of wisdom and reason with flattery and conformism. Similarly, Mill argues that the majority's tendency for despotism is directed fundamentally towards the control of the field ideas. Whether by enacting the laws that it favors, by creating exceptions in the enforcement of law or by mere social pressure through dismissing the ideas it

dislikes from education and public discourse, the majority could not only manipulate civic associations but also may harm the process of cognition through which the basic processes of identity formation and cultural socialization thakes place.

Conclusionary Remarks:

The theorists of social contract tradition mainly focused on the redefinition of power relations with a strong emphasis on the criteria for the legitimacy of the political power. Many thinkers tried to answer the question 'who has the power and who should have it?' by reflecting on the origins of political society. What underlies the genuine theories of Hobbes, Locke and Rousseau, is a basic assumption that if one wants to protect his liberty, then one must obey only to a legitimate authority. However, as Wolin argues, by restricting themselves to an idea of individual consent abstracted from the context of practice, contractualists could provide only a limited account of the potentialities embedded in political participation, which in turn underlined the constitutive role of the 'people' (2001: 175). This gradually opened way for the disassociation of popular consent from substantive participation and the grounding of it into political representation.

At the root of what is called 'the paradox of constitutional democracy' lies the justification of newly found democratic regimes in a way that limits the scope of democratic power. Without presupposing a people that posses the right and ability to govern itself, no form of rule could meet the criteria of democratic legitimacy: "Men would have to be prior to the law what they ought to become by means of law" (Rousseau, 1968: 69). This statement crystallizes the basic postulation of Rousseau that even if the immediate motive of the social contract is to establish a political society, its ultimate end is the self-constitution of the people by means of law. This is why popular will precedes a constitution. In this sense, the constitutional law could claim priority over the ordinary law to the extent that it serves to the project of self-constitution of the people.

Onwards Sieyes, through his distinction between the constituent and constituted powers, it is not difficult to witness the movement towards setting the priority of the constitution over popular will. A reading of social contract from the perspective of political economy—as offered by Sieyes—defines society and social actors in terms of their actual contribution, rather than by reference to nature. But

the economic priorities that Sieyes attributes to the nation runs at a deeper level: division of labor necessitated by the transition into civil society. Once he reflects the requirement of division of labor to the political realm: Sieyes could redefine the ideal requirements for legitimizing democracy by saying that people's representatives are as good in determining the fundamental law. Therefore, in Sieyes, the political mediation of popular will gain a power that is sanctioned by Rousseau: an ability to produce, not merely to express, the higher law of the land.

After reading Tocqueville and Mill, it becomes clearer that the locus of trust of an enlightened rule has been shifted in favor of the well-educated bourgeois intellectuals. While in Sieyes, the constitution functions to strengthen the coincidence between the national will and executive power, in Tocqueville and Mill, it is primarily a safeguard that corrects democratic process by the elected officials and judges. Therefore, it would still be possible to provide a civic republican defense of Sieyes, let alone a liberal constitutionalist one. But this is not the case for Tocqueville and Mill. Although the two were no less admirers of liberty than Rousseau, their approaches exhibited a serious departure from that of Rousseau's thought: unlike Rousseau's inclination that political participation mounts for the realization of freedom—which is embodied in the natural human characteristics—Tocqueville and Mill have strong convictions that a combination of political equality and social inequality cast the greatest threat for liberty. Mill's account deserves particular criticism since he himself casts obstacles before the betterment of norms for the conduct of political power by reducing the function of political society—law and democratic power—to the protection of individual liberty. Paradoxically, he prepares the ground for realizing the immobility that characterizes the Chinese Empire—an analogy he frequently uses—in a liberal democracy by prioritizing a right to be left alone rather than to engage in public matters. As put forward by Barber (1978) political participation makes one recognize the interests held in common and gain sensitivity for shared life of fellow citizens. In this sense, we cannot ground a necessary contradiction between individuality and having a sense of commonly shared ideals.

It is interesting that in the writings of Sieyes, Madison, Hamilton, Tocqueville and Mill the elected legislators, high court judges and other state officials are thought to occupy an undifferentiated sphere that has moral authority and political ability to rationalize the popular will. In the following chapter, we shall

see that the contemporary sides of the debate operate on a much more nuanced conceptual framework. Here, the contemporary proponents of judicial review strictly separate the constitutional sphere between the judiciary and the legislature (including the executive). Nevertheless, they share with their predecessors the same profound distrust in the wisdom of collective decisions and the portrayal of majorities and minorities as particular factions that follow nothing but their particular interest.

CHAPTER III
THE LIBERAL CONSTITUTIONALIST JUSTIFICATION OF THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW

In the years following the Second World War we witnessed the rise and empowerment of human rights understood as the fundamental condition of a just social order, which were placed above the realm of politics. In this way, human rights came to define the 'moral parameters' within which all legitimate governments must operate. This is the basic postulate of liberal-legalistic view in modern constitutionalist theory, according to which, political power should be exercised in accordance with procedural and substantive rules found in the constitution. In this view, the constituted power—legislative, executive and judicial branches of the government—must be subordinated to the constituent power represented by the constitution. However, liberal-legalistic approach goes one step further and defines judiciary as the only institution that is appropriate for interpreting and applying the norms inherent to the constitution. In this way, judicial review of legislation appears as the mechanism through which 'constitutional supremacy' is enforced. Yet, although the followers of Sieyes formulated the principle of constitutional supremacy, they did not delegate the power of constitutional interpretation to any judicial institution. Neither Tocqueville nor Mill, not even the American federalists were defending judicial review. The republican tradition, at times, pointed out the fact that it is not possible to find any provision that explicitly establishes judicial review in the American constitution. Today, the liberal and republican theories of law have profound influence on the discussion concerning the problem of constitutionality. The liveliest debate between these two seemingly incompatible views takes place in the United States—the oldest constitutional democracy in the world. For the purposes of this study, I shall focus on earlier doctrines of judicial review and the contemporary shape that the debate takes in the United States.

The constitutional status of human rights derives from being an abstract and objective category of justice applied to all individuals. Yet, while these rights should

be general enough to avoid any particular conception of good, they must be precise enough to be applied to concrete circumstances. At this point, we arrive at the central theme in the debate, which goes beyond ordinary politics and embraces the question concerning how to conceive the relation of supreme law to political realm. The exact content of rights and constitutional meaning is subject to ongoing redefinitions and challenges. Therefore, the debate I wish to illuminate in this chapter is about two rival normative justifications on whether judicial review or democratic process should mediate disagreement on the content of rights. The contractarian tradition lends the basic terms at the service of both rival positions: liberal constitutionalist theory (i.e. liberal-legalistic view) holds that a consensus upon basic rights and liberties should be isolated from controversy on rights-claims, whereas contemporary republican theory inherited the understanding that political participation constitutes 'the right of rights'. Therefore, the latter stresses that there is a requirement for constitutional rights to be open for social and political contestation in order to allow the resolution of conflict concerning these rights. From this perspective, positive liberty is essential for the effective exercise of civil and political liberties. In contrast, liberal constitutionalism advocates that civil and political liberties are best secured under constitutional entrenchment and judicial enforcement of these liberties in the form of rights.

In the twentieth century constitutional theory, 'interpretivism' (or 'non-originalism') and 'non-interpretivism' (or 'originalism') appeared as two possible paths to advance judicial supremacy as opposed to constitutional supremacy[2]. Nevertheless, originalism/non-interpretivism and non-interpretivism are not merely doctrines for judicial decisions. Instead, they offer general explanations about the nature of law. Before exploring the recent debate on constitutionality and popular sovereignty in the American context, therefore, I will consider the critique of

[2] American constitutional thinking has long been dominated by the originalist/non-interpretivist view that conflict between rights-claims is best resolved through the intervention of a politically disinterested and independent judiciary, which is situated to clarify the original meaning found in the constitution. In this sense, the originalist approach feeds from legal positism, in which the law is a given text, arising from the sovereign will. Yet, interpretivism—based on openness of constitutional meaning—has emerged as an alternative to the non-interpretivism within the constitutionalist paradigm. Briefly, the main proponent of interpretivism, Dworkin suggests that it is the political values of the society that justifies the interpretation (1986: 234-5). These two approaches make up the backbone of the novel theories provided in the second section. I will use the term originalism to refer to the family of theories, which start from the view that constitution has a fixed meaning that could only be authoritatively settled by a higher judicial branch.

originalism and interpretivism while limiting myself to their justifications of judicial review, not to their general conceptions of law. Following the historicist critique of non-interpretivism or originalism in section 2.1.1., I proceed to analyzing what is essentially misleading about interpretivism, in section 2.1.2.

A defining characteristic of the traditional constitutional theory is the central focus on adjudication, which is also apparent in the writings of Madison and Hamilton. Even though they preserve an adjudication-centered approach, John Hart Ely and Ronald Dworkin are much more cautious than the earlier constitutional theorists in not denying the rational collective will of citizens. Instead, as I shall more thoroughly emphasize in Habermas' discussion in the next chapter, they start from the mutual dependency of the spheres of law and politics. In this way, these writers hope to portray judicial review as an appropriate way of according an equal weight to political participation and basic rights. Thus, they depart from the idea that in modern society basic liberties should be attached a greater emphasis—the position advocated by Benjamin Constant and Isaiah Berlin. Together with Christopher L. Eisgruber, Ely tries to prevent arbitrariness in judicial decisions by subjecting constitutional interpretation to procedural principles found in the constitution. The view that the character of judicial reasoning has to do with the legitimacy of judicial review is therefore, a leap forward in constitutional theory—which I wish to present in section 2.2. However, these attempts have met a serious challenge by Jeremy Waldron's 'rights-based' critique of constitutionalism. As we shall see, Waldron shows that questions concerning the meaning of democracy could only be settled democratically because, unlike judicial decisions, majority decisions are in principle open to participation by everyone. This is why, for him, judicial nullification of democratic decisions leads to the infringement of civil and political rights. Thus, the debate at hand revolves around on justifications of institutional authority—judicial or legislative. One possible way of justifying institutional authority in decision-making is to demonstrate that a specific constitutional choice is "the most rational path" to be taken. Therefore, before concluding this chapter, in section 2.2.4., I present the discussion between Dworkin and Waldron, on the legitimacy of judicial and democratic modes of decision-making.

3.1 Rival Liberal-Legalistic Perspectives in American Constitutional Theory:

Conventional constitutional theory in the United States grounds its defense of judicial review on an account concerning how the Supreme Court should interpret the principles embodied in the Constitution. From this perspective, the success of a theory is measured with its ability to justify the historical events that increased the power of the Court (Ward, 2003). Or rather, the legitimacy of judicial review depends on its 'correct' interpretation of the constitutional text. This position is sometimes coined originalism in constitutional interpretation. It is based on the assumption that the formative intention of the constitutional drafters could be objectively discerned by a group of legal professionals. Also, the view that constitutional change is tied to literal meanings found in the constitutional text or precedents of the Supreme Court is sometimes called non-interpretivism (Ely, 1980), 'hypertextualism' (Manfredi, 2001) or 'literalism' (Ackerman, 1998). In an effort to 'settle' the meaning of the constitutional text authoritatively, originalism focuses on the understanding of the ratifiers of the constitution, who enjoy the privileged position of having written the text (Goldford, 2005: 12). The most distinctive aspect of this view is the focus on adjudication, i.e. how judges decide on constitutional matters. Thus, originalism defines the success of constitutional interpretation with the congruence between the judicial decision and the objective meaning implicit in the constitutional text. In this sense, conventional constitutional theory concentrates on what is the best conception of justice, which is to guide judicial review. This is also the case for the contemporary proponents of 'constitutionality,' in that, they tend to equate judicial decision-making with moral principles or the 'right', on the other hand, majority decisions with strategic interest and ethical doctrines. Yet, at the same time, we see that originalism has lost a significant ground even among the proponents of judicial view. The primary reason for this is the wide recognition that all interpretations are indeed historically and culturally context-dependent, and that judges are not immune to advancing a set of political preferences. Eventually, we witness an upsurge in attempts to salvage constitutional interpretation from the premises that make it resemble to the theologian's approach towards the holy text. In this context, the historical institutionalist critique of originalism—which has characterized constitutional thinking in America for more than two centuries—is an

important step towards arriving at a deeper understanding of the reciprocity between democracy and rights.

3.1.1 Historical Institutionalist Critique of Originalism:

Historical institutionalism provides a useful background for critically assessing the changing relationship between political and legal institutions. As an approach primarily used in comparative politics, international relations and political economy, it offers certain analytical tools for examining the relations between various political actors—including that of government branches. In general, historical institutionalism attempts to explain how institutions shape political goals and structure power relations (Thelen & Steinmo, 1992). Normative constitutional theory in US explains constitutional change primarily through formal amendment, Supreme Court decisions or legalistic interpretations of the text. For this reason this adjudication-centered and purely legalistic perspective offers not much to grasp the wider social and political developments that determine the context in which constitution is interpreted. With its explicit focus on the historical development of state institutions, historical institutionalism could provide a clearer understanding of the relationship between law and politics.

Griffin's analysis provides a good example of historical institutionalism applied to constitutional theory. His main argument is that constitutional change in American history primarily occurred through new set of rules and institutional structures that are initiated by ordinary politics and not overseen by the constitution (Griffin, 2001). For this reason, Griffin asserts, the Supreme Court could not control the flow of constitutional change. Rather, the judiciary focuses on reviewing the state and legislation only after the policies have already been developed: "(the Court draws) a line between law and politics and place(s) itself on the law side of the boundary…thus (it cannot) control the total flow of constitutional change" (306). As a result, the constitutional text starts to tell us less and less about the key elements of these new rules, practices and institutions and how they should operate. This shows that the function of constitutional change starts to dissolve into what Griffin calls 'the political Constitution' (i.e. the state) outside the formal judicial mechanisms of amendment. These rules, practices and institutions become the functional equivalent of those in the constitution, and more importantly, they are not sourced from an authoritative text.

Ackerman's theory of constitutional change is similar to that of Griffin's. Basically, his account concerns how constitutional change has occurred essentially by political means. In *Foundations,* because Ackerman justifies his theory with reference to *The Federalist,* it is not clear whether he offers an originalist argument. But in *Transformations* he demonstrates the historical and structural conditions that could be employed for studying constitutional change today. Yet, we need to emphasize a crucial difference between the arguments of Ackerman and Griffin. Ackerman takes Founding, Reconstruction and New Deal as the instances of unconventional but legal change. However, according to Griffin (1996), in this way Ackerman "ignores the role of constitutional politics conceived as *structural politics of fundamental values*, not as an alternative means of amendment or legal change" (110). While Ackerman explains the legitimacy of amendments by a five-stage theory of functional amendment, Griffin explicates the same process in terms of structural politics—that is uniquely focused on fundamental constitutional values and how best to realize them. According to Griffin, these epochs produced a dynamic political situation in which departures from normal legal practice—such as the imposition of amendments on the Southern states that had left the Union during American Civil War—became conceivable and necessary. In essence, although the forced ratification of constitutional amendments was unconstitutional, Griffin argues, the Civil War created circumstances under which such amendments became politically legitimate. Thus, Griffin's conception of structural politics encompasses the boundary between ordinary politics and higher law without staying confined to any one of them.

To sum up, we can say that a historical institutionalist understanding of constitutional change and interpretation presents a useful step towards establishing the conceptual priority of the law-constituting feature of democracy over the constituted-law. As we have seen, historical institutionalism in American constitutionalism contradicts with the originalism of conventional theories by highlighting the discontinuities. For example, as the value of democracy increased in twentieth century in America, the Supreme Court has changed its behavior even though the text of constitution remained the same. Following Griffin (2001: 321), it is possible to argue that this happened because the political aspects of constitution moved towards democracy. This shift cannot be explained from the purely legalistic perspective of the originalist theory of constitutional decisions. In consequence, an

interpretivist approach that is based Court's autonomy of determining constitutional meaning has gained stronghold and emerged as an alternative to originalism/non-interpretivism in the US. As we shall see, this rival perspective provides the basis for present arguments in favor of judicial activism and supremacy.

3.1.2 Interpretivism and Judicial Supremacy:

In broadest sense, we may define interpretivism as simply the recreation and non-interpretivism (originalism) as the enforcement of the constitution. We have seen that non-interpretivism views constitutional meaning as fixed and pre-consensual, which makes it vulnerable to attacks from the historicist and contextualist arguments. The interpretivist view, on the other hand, allows a much wider room for judicial autonomy by viewing the judiciary as the most capable institution capable of capturing the ever-changing nature of constitutional norms. The fact that the United States and Canada are swifting towards the consolidation of judicial supremacy has fused criticism from the so-called Critical Legal Studies (CLS) movement primarily in the 1980s. In one sense, interpretivism and CLS are in agreement that the meaning of the supreme law could be understood differently according to historical and cultural circumstances. The main argument from the CLS perspective, however, is that judicial activism serves to usurp the ability of the people to reform, reinterpret and reproduce the fundamental law through their elected representatives (Mandel, 1989; Levy, 1988). Also it is suggested that constitutional court decisions are based on the comprehensive views of judges rather than on public norms (Tushnet, 1988). However, the interpretivist judicial strategy claims to employ means that empower majority decisions: the purpose of adjudication is taken to give effect to the normative judgments of the majority by reconciling them with the norms implicit within the supreme law. The determining characteristic of the interpretative analysis is that it justifies judicial review on grounds that it enhances a conception of substantive justice that is expected to be endorsed by all rational persons. In this sense, higher court judges are required to find the correct answers to the questions on the best way for preventing the imposition of a conception of good over others. Needless to say, the non-majoritarian contention of the interpretivist theory is in marked contrast with 'popular constitutionalism' of the CLS movement.

Michael J. Perry's assertion that "the status of constitutional human rights is almost wholly as function, not of constitutional interpretation, but of constitutional policy-making by the Supreme Court" (1988: 21) marked the re-emergence of the

debate on the democratic legitimacy of judicial review in America. The problem here is not whether the Supreme Court can check the compatibility of enacted laws with the Constitution, but whether the Court can determine the very content of constitutional clauses. The worry among legal scholars—including Perry, who also remain closer to CLS than interpretivism—is that if the Court can go beyond the original intention of the framers, it may itself become a form of political power, which it seeks to limit. Jeffrey Reiman's suggestion to this impasse is to conceive the requirements of political legitimacy in terms of a dynamic process of self-correction. According to this, for legitimacy is a moral condition, and therefore, could not be secured once and for all, a government should continually reflect upon the pre-given set of conditions that makes itself legitimate (Reiman, 1988: 121-2). The legitimacy of government is 'built-into it an institutional mechanism' for continual correction, which interpretative judicial review is a part. In this sense, because a legitimate government is the one that continually reflects on the content of fundamental human rights possessed by citizens, the Supreme Court may legitimately 'discover' new rights in the Constitution. The discovery of new rights, in Reiman's account, depends on the duty of the Supreme Court as an institutional mechanism that corrects the legislature in monitoring its own legitimacy.

Reiman's interpretivist approach suggests that in the historical process, we discover whether the laws we inherited from the past are oppressive or not. Therefore, a mere subjection of government to constitutional limits may not render political power legitimate. If legitimate government is the one that continually checks the conformity of its actions with the requirements of legitimacy, then the Constitution could be reinterpreted under the light of changing conceptions and priorities. Here, Reiman offers a substantive criterion for constitutional interpretation: arguments made by the Court must reflect that it nullifies a certain enactment on grounds that it violates a moral conception of the rightful exercise of political power (1988: 138). Thus, chief Justices must demonstrate that their interpretation could be seen as an extension of the historical process whereby constitutional limitations brought over government has evolved. Here, we arrive at an understanding that views the higher courts as agents that guide the public in order to develop their conception of constitutional meaning. However, in order to fulfill the role of moral guidance, judges must ask objective questions—i.e. 'what basic rights should be defended in order political power to be legitimate?'—that leaves no room

for personal interpretation. Only in this way, judges may defend their decisions publicly.

The substantive understanding of the interpretivist point of view invites us to conceive the constitution as embodying a 'moral vision' similar to social contract: one that eliminates injustices and subjugation among people with different world views. However, the major backlash of this position is that, in upholding this moral accord, judiciary depends on no other source than its own judgment. In other words, interpretativism provides no satisfactory solution to the fact that judicial monopoly over constitutional interpretation might constrain popular reflection on the legitimacy of democratic power. Just like originalism, interpretivism is characterized by a reliance on 'judicial self-restraint'. Thanks to the interpretative autonomy it enjoys, judiciary becomes the only authoritative source for deciding on the fundamental law. As shown by Manfredi (2001: 80-83), this does not subordinate legislatures only to constitutional norms, but also to the court's interpretation of those norms. The presence of a 'threat' of judicial nullification leads to 'policy-distortion' by forcing legislatures to pragmatically change its own enactments: the legislature is forced to adopt the judicially articulated norms of constitutional meaning, rather than its own understanding of these norms. Moreover, this 'legislative self-control' makes a genuine dialogue between the judiciary and legislature impossible: judicial decisions are equated with the constitutional text itself, and therefore, the legislature is robbed from effective means of asserting its own interpretation (Manfredi, 2001: 83-4). As I argue in the following section, some theorists go beyond the boundaries drawn by interpretivism and non-interpretivism and try to overcome judicial arbitrariness by subjecting judicial review either to procedural or substantial principles found in the constitution. Moreover, some scholars still pursue judicial autonomy in constitutional decisions, but now in an effort to render judiciary compatible with democratic values.

3.2 Post-Interpretivist Constitutional Theory: Proceduralism vs. Substantivism:

Traditional constitutional theory has tried to justify counter-majoritarian legal measures on grounds that they are vital for securing the rights that are constitutive of well-functioning electoral and legislative process. John Hart Ely's *Democracy and Distrust* and Ronald Dworkin's *Freedom's Law* could be considered as paradigmatic

examples of such a position[3]. In what follows, in order to clarify the recent discussion on the relation of rights to democracy in the US, views of Ely, Tushnet, Eisgruber, Dworkin and Waldron will be analyzed in a comparative fashion. Interestingly, the choice of proceduralism or substantivism does not necessarily determine one's position on the legitimacy of judicial review. As we shall see, there is a good deal of variety of views among the contributors of the debate and it is possible to defend both judicial review and majoritarianism either through a proceduralist or substantivist approach.

3.2.1 Ely's Proceduralist and Tushnet's Substantivist Revisionism:

A recent turn away from the originalist argument in constitutional theory suggests that the goal of judiciary is not simply to arrive at an already present meaning found in the constitution but rather is to advance a set of political preferences. But this is not merely taken as a partisan imposition of arbitrary opinions to constitutional interpretation. Instead, according to this new strain of theories—which could be coined as 'post-interpretivist'—the role of judicial review should be to resolve disagreements on constitution's meaning through debate and reasoning based on political morality. Ely is considered to be the scholar who opened the final episode of the debate on the democratic legitimacy of judicial review in the US. In essence, he argues against two distinct positions: a revived form of originalism and civic republicanism. As we have seen, the former takes judicial review as legitimate only if the judges enforce principles they derive from the ordinary or plain meaning of the Constitution. On the other hand, the latter position emphasizes that principles according to which the judiciary operate could be found within the wider social context in which the citizens debate and define norms to govern the political community. In *Democracy and Distrust*, Ely defends judicial review by arguing that the main threat that judicial decisions casts on democracy is the possibility that judges might enforce their personal will rather than the general will. Having distinguished law and politics as two autonomous realms, Ely asserts that judges should not interfere with politics unless their actions meet the

[3] An alternative view treats judicial review as inconsistent with 'popular sovereignty' but not 'democracy'. From this perspective, constitutional control over legislation promotes justice and protects individual rights (Barber, 1993; Fleming, 1995). This second view does not explain why justice and individual freedom should be drawn out of democratic deliberation and majoritarian decision-making. Given that existing disagreements are not simply caused by the clash of egoist interests, but largely by reasonable comprehensive doctrines, why should the resolution require non-democratic means? The first view, i.e. revisionism, as I shall attempt to demonstrate, directs much more challenging and coherent arguments in defense of judicial review.

requirements of democratic legitimacy. This requirement, he explains, is the judicial enforcement of the procedural values that are acceptable for all the reasonable people as worthy of being supreme law. As the democratic institutions are better designed to reflect the popular will, judicial authority should be based on formal rules that characterize democratic principles. Notice that Ely is not concerned with the 'content' of judicial decisions, but rather with the 'procedure' that these decisions follow. In this sense, judges should enforce principles endorsed by the citizenry and, at the same time, their practice of discretion should remain under democratic control. In other words, the principles that direct judicial review should give voice to popular concerns and constrain judges in the meantime. In order to achieve this, Ely states that constitutional theorists should assign prime importance to the question of how a well-ordered democracy functions.

Another valuable contribution to the debate came from Tushnet who advocates what he calls 'populist constitutional law' as opposed to judicial supremacy. According to him, people's disagreements about constitutional meaning should be addressed by a 'thin' constitution the basic principles of which are accessible to all (Tushnet, 1999). Tushnet's main argument is that we have no reason to think that judges do a better job than elected officials in implementing the thin Constitution (Tushnet, 1999: 129-53). If the value of political institutions is based on their capacity to resolve *substantive* questions of justice, he concludes, legislators and citizens are highly successful in implementing the thin Constitution, whereas, the Court does less of a good job than it is usually thought of (1999: 54-55, 70). Although political considerations could help to resolve constitutional conflicts, Tushnet agrees that political practices themselves may be constitutionally problematic. At this point, he focuses on the content of adjudication by turning to how judges decide on particular issues. He asserts that citizens would be divided with respect to whether the decisions of the Court conforms their own political views (1999: 86). As the Supreme Court Justices have political beliefs just as ordinary citizens, for example, some judicial decisions would be favored by liberals and others by conservatives. In some way, although he begins with the path opened by Ely, Tushnet arrives at a quite different conclusion: the judiciary should reflect the political disagreement that occurs among citizens, not avoid it. For him, the Court could claim to enhance democracy only if the political content of judicial decisions represents popular disagreements. Here we arrive at two different interpretivist

strategies of structuring the Supreme Court as an institution that contributes to and activates the democratic process: Ely's procedural and Tushnet's substantivist interpretivisms. The rest of the discussion in this chapter follows from either one of these views.

3.2.2 Eisgruber and Judicial Review as Self-Government:

Eisgruber, in the vein of Ely, concentrates on the formal processes by which institutions make decisions rather than the substance of particular decisions. Together with the work of Waldron, his argument could be considered as the culmination of the two centuries of discussion on the relationship between democracy and rule of law. It is appropriate to continue with Eisgruber, since he builds his argument along similar ways with Ely and breaks all ties with originalism. Eisgruber's defense of judicial review represents a novelty in liberal constitutional theory in that it rejects the idea that legislatures are better positioned to reflect popular will than the courts. While rejecting Ely's conventionalist argument that the norms of democratic participation and constitutional interpretation should determine how the Court decides the constitutionality of legislation, Eisgruber follows him by construing judicial authority as a function of democracy. Eisgruber argues that the "Supreme Court should 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). According to him, the Court could do so because of its impartiality, which entails that government represents not all but only some of the moral views pursued by the population. This view comes close to equating government with a partial aggregation of interests in the society. To employ a Rousseauian analogy, in Eisgruber, the legislative authority signifies the will of all. The Supreme Court, on the contrary, is associated with the general will. The disinterestedness of judges—that is secured by their life tenure—allows them to resolve moral controversies from an impartial perspective (Eisgruber, 2001: 58-60). In other words, life tenure would make judges less likely to be influenced by political favors or threats, and make them more inclined than elected officials or the voting public to be guided not merely by interests but by moral principles. The disinterestedness is crucial for Eisgruber, since he thinks that we can derive the advantage of chief Justices from it, not from their superior capacity of moral insight when compared to other people (2001: 205). Moreover, the structural characteristics of judiciary—its size and the accountability of judges—provides an incentive for

judges to ground their decisions on moral reasons (2001: 62). Finally, the selection process of judges—i.e. nomination by the President and confirmation by the Senate—makes it likely that judges will reflect the moral perspectives of the voting public (2001: 40, 48, 65-66). For these reasons, Eisgruber thinks judicial review can actually promote the conditions that would strengthen democracy. That is, the Court is structured particularly to address moral questions concerning the nature and meaning of democracy.

In Eisgruber's account, apart from impartiality, the criteria for an institutional system for promoting democratic government are named as serving citizens' capacity of 'effective choice', 'participation' and 'public deliberation'. In this sense, in order to be democratic, a political system has to be able to reflect popular will (effective choice), provide opportunities to share (participation) and intellectually engage (public deliberation) in the exercise of power (2001: 84-86). As shown in the first chapter, Madison saw that a large republic assures that the elected officials would have undergone the test by much diverse interests. Eisgruber, on the other hand, assumes that in large republics such as the United States, the principal means of self-government are realized through civic participation in local government. However, local decisions in the US could often be overrun by federal institutions such as the Senate. Therefore, Eisgruber is content that judicial review could help citizens to have some voice in the local government without compromising democratic values and political justice (2001: 86). From a similar vein, contrary to civic republicans who oppose judicial involvement on grounds that it undermines engagement in public debate by having the last say, Dworkin (1986, Introduction) argues that judicial review could actually improve public deliberation. According to him, when an issue is regarded as having constitutional importance and resolved by the courts on the basis of constitutional principles, a 'sustained national debate' with an emphasis on political morality begins (Dworkin, 1986: 345). In this way, he argues, courts may initiate participatory politics better than legislative process.

It is important to view that Eisgruber and Dworkin do not assert judicial review of legislation as a fundamental feature of democracy. Rather, they think that it "reinforces self-government in the United States" (Eisgruber, 2001: 108, Dworkin, 1996a: 15). This view allows forms of institutional mediation other than judicial review in different countries in order to achieve democratic goals. Eisgruber's main reason for justifying the democratic role of judiciary is based on the recognition of

disagreement as an unavoidable feature of modern democratic politics. It is because majoritarianism will have to accommodate dissent of political minorities, judicial review can act as a mechanism that facilitates bringing moral reasons for moral issues, rather than simply interest-based reasons. Eisgruber concludes that, judges, in contrast to legislatures, are more likely to correct local institutions that provide citizens an opportunity to exercise 'effective choice' and to participate, as well as encouraging deliberation based on political morality rather than strategic interest (2001: 108).

While he joins Ely and Tushnet in opposing originalism, Eisgruber recommends restraining courts by subjecting their judgment to procedural moral principles—as opposed to comprehensive ones—that are found in the Constitution (2001: 205-6). According to him, Justices are not well suited to apply comprehensive principles, which call for assessment of an entire system of social interaction. Rather, they should focus on the specific forms of governmental action (2001: 171). Therefore, they should refrain from passing judgment on issues such as balance of powers between states and federal government, for here the Court is incompetent and should leave things to be settled by other political institutions. Instead, judges should be expected to uphold particular norms concerning, for example, citizens' equal liberty and dignity, right to association and free speech.

Together with Tushnet, Eisgruber represents a breakthrough in contemporary constitutional theory by shifting the focus on the Court as a legal institution—whose decisions are justified by its faithful interpretation of the Constitution—to the Court as a political institution—attempting to resolve disagreements on the meaning of the Constitution (Ward, 2003: 7). Nonetheless, Eisgruber shares much with the conventional constitutional theory in giving heavy emphasis on how the Court actually decides on particular issues. His focus on how the structure of the Court—i.e. disinterestedness and political accountability—qualifies it as an impartial and morally informed decision-maker makes his argument to get closer to the conventional defense of judicial review. But crucially, this is not an account on how the Supreme Court should interpret the Constitution. Rather, according to him, "what matters is not the outcome, but the character of the arguments" (2001: 202). At this point, the pragmatism of Eisgruber's theory comes to the fore: the arguments of the Supreme Court should be practical and functional in nature, and they should not be derived from some implicit meaning on popular sovereignty found in the

Constitution. In other words, judiciary should intervene only when it is able to demonstrate that it applies constraints on political institutions, which *in fact* enhance liberty and equality (202). By rendering any reference to abstract and ambivalent constitutional principles illegitimate, Eisgruber hopes to prevent arbitrariness in judicial decisions.

At the heart of Eisgruber's defense of judicial review as a form of self-government lies an emphasis on the members of the Supreme Court being appointed by the political authority, which is electorally responsible. However, oddly enough, there is no detailed account in his book of why we should regard the selection process of Justices as qualifying them to be the representatives of the people. Indeed, Eisgruber mentions alternative methods that could have been used to nominate and appoint judges; however, he fails to show that the actual procedure (i.e. Presidential appointment) in use allows them to manifest the will of the people. In principle, there is no popular participation in the indirect appointment of bureaucrats and experts by the elected. Therefore, the lack of democratic accountability for Supreme Court Justices re-inserts the problem of judicial self-restraint, even if it increases the moral wisdom of the Court. This point is developed thoroughly in Waldron's majoritarian yet rights-based challenge to judicial review.

3.2.3 Waldron's Rights-Based Critique of Judicial Review:

Similar to Eisgruber, Waldron offers a contextual analysis of which institutions (legal or political) are better suited to pass judgments about the issues of substantive justice. In Waldron's account, however, the fact of disagreements extends from the conceptions of good to the conceptions of justice. In other words, in a pluralist society, people would not only disagree on what is good but also, on what is right. Therefore, institutional procedures must be designed so as to tackle and respect the facts of disagreement (1999: 191). Waldron's central goal is to show that majority rule advances the procedural value of equality no matter how judicial institutions are good at resolving controversies. He contends that because legislative process could decide disagreements on constitutional meaning in a manner that is open to the views of all citizens and that counts each citizen equally, we have a reason to favor democratic resolution of these questions over the judicial ones. According to him, in order to respect popular disagreements, the institutions should be legitimized by the fairness of procedures, rather than the substantive decision they offer. For Waldron, the legislative process has a distinct advantage over other

institutional structures because it ensures that the procedural values that do not depend on the decisions which legislatures make (Waldron, 1999: 117-8, 299). In this sense, judicial review runs against the fact of disagreement. Instead, Waldron views majority rule advances procedural fairness by ensuring that each person's view is counted in the same way by the procedure which resolves the disagreement: "When there is disagreement in a society about a matter on which a common decision is needed, every man and woman in the society has the right to participate on equal terms in the resolution of that disagreement" (2001: 283). Therefore, he declares "the point of law is to enable us to act *in the face of disagreement*" (2001: 7). When courts are allowed to have the powers to review and overrule the decisions made by democratically elected legislatures, legal institutions obstruct the proper functioning of democratic process:

> "...democratic rights...(are) called seriously into question when proposals are made to shift decisions about the conception and revision of basic principles from the legislature to the courtroom, from the people and their admittedly imperfect representative institutions to a handful of men and women, supposedly of wisdom, learning, virtue, and high principle who, it is thought, can alone be trusted to take seriously the great issues they raise." (Waldron, 1999: 283).

Waldron is concerned with the danger that the entrenchment of judicial review in a bill of rights may in the end prevent the revision and reformation of laws by the legislatures. In short, judicial review of legislation undermines democracy and establishes in its place a 'judicial aristocracy' (2001: 248). For these reasons, Waldron recommends that we should reject the bills of rights and recognize democratic institutions as the only legitimate means for collectively binding decisions under the conditions of disagreement.

Waldron makes a distinction between the collective process of settling disagreements about justice ('procedural value') and the substantive norms that individuals hold as to guide the institutional resolution of such conflicts. He goes on to argue that the focus of constitutional theory should be how to respond the disagreements on justice rather than finding the best conception of justice (Waldron, 1999: 3-4, 7, 159-61). Democratic legitimacy requires that we justify institutional authority on certain values that are not internal to our substantive views of justice. These values must reflect impartiality with regards to our controversial views, and then, should indicate that we have to resolve substantive disagreements through a

certain democratic procedure. If one takes democracy seriously, the majoritarian means of resolving substantive disagreements should be given priority over the substantive judicial decisions that provide definitions for the requirements of democracy. Although procedural values are themselves controversial, at least, they allow us means to clarify the consequences of competing institutional structures. Crucial to Waldron's case against judicial review, therefore, is the basic distinction between 'rights associated with democracy': right to political participation as the *constitutive* of democracy and the rights that are *presupposed* by democracy. The significance of this distinction is that it clarifies the importance of political participation: procedural values (such as the majority rule) indicate the *raison d'etre* of the democratic process, whereas the substantive values (such as personal autonomy) signify its fundamental orientation.

Similarly, Dworkin (1996a) argues that membership in a polity requires that others respect our moral independence. This would mean the reconciliation of membership (citizenship) and self-respect (moral autonomy), and that community should not dictate our 'fundamental ethical convictions' (1996a: 25-6). In this way, the second category of rights lay the basis for substantive aspect of democracy. However, for Waldron, the first category itself, understood as 'right to have rights,' already requires regarding fellow citizens as morally capable of acting responsible (Waldron, 1999: 282). This is the 'primary basis of democratic competence' which constitutes the formal procedure for decision-making. In this sense, political rights *already* presuppose that individuals must have an involiable sphere of moral independence to be secured by rights. Indeed, Waldron seems to argue that the second set of rights are presupposed by the former, in that, without regarding others as morally responsible, we cannot view them as the bearers of rights, including participatory rights.

It is crucial that Waldron incorporates individual rights to democratic rights: democracy and majoritarian decisons are meaningful only when citizens are endowed with personal freedoms, such as free speech and freedom of association. Democracy could be constrained by the second set of rights by virtue of being presupposed by the former category. Given that politics is often about constraining some existing rights in favour of others, as Waldron contends, participatory rights are not only about freedom, and therefore may involve infringement of individual rights. However, contrary to Waldron, liberal constitutionalist theory acknowleges

individual rights as being unrelated to democratic process. Therefore, they are taken as resulting in entitlements that are to be kept out of majority decison. In liberal-legalistic terms, contrary to being undemocratic, judicial review makes a society more just by ensuring that the rights associated with democracy will continue to be respected in the future. This is the view pursued by Dworkin in his *Freedom's Law*, that which Waldron tries to refute. Although both writers agree that there is no conceptual trade-off between rights and democracy, Dworkin hopes to show that judicial review helps to perfect legislation and that it is ultimately consistent with democracy: "Democracy does not insist on judges having the last word, but it does not insist that they must not have it" (1996a: 7). In this way both writers give opposite answers to the question: Is there a democratic loss when an elected legislature is subjected to an unelected judiciary?

We arrive at a better understanding of Waldron's argument when we view how he tackles with Dworkin's defence of judicial review. Dworkin begins his analysis by asserting that any society would like to ensure that enacted legislation conforms to fundamental democratic principles (1996a: 6). Often, as in the United States, the legislature may not be seen as the most reliable institution to guarantee the consistency between rights and democracy. Judicial review has no cost on democracy since when courts turn down a piece of legislation by showing that it was incompatible with democratic rights, it actually adds to democracy. As the courts are reliable at making good decisions about democracy, they are not required to be accountable (1996a: 36). Dworkin (1986) justifies judicial review when it promotes democracy and the norm of equality that defines democratic regimes. By marked contrast, Waldron emphasizes the link between democracy and majority rule by insisting that the decisions on the meaning of democracy and collective participation in such decisions must go hand in hand. Contrary to Dworkin, Waldron argues that by separating a decision about democracy and a decision made by democratic means, judicial review could not give an account of the loss of democratic values (Waldron, 1999: 292-294). Waldron's account of the fact of disagreement implies that people will not converge on a substantive view about democracy, at least in the future. Therefore, we cannot define a substantive conception of democracy before determining the institutional process that best secures it, as Dworkin tries to do. This is why Waldron could argue that judicial review is inconsistent with majority rule: it enforces decisions about what democracy requires although being an non-elected and

democratically unaccountable institution. In other words, judicial review runs against the very value of equal respect and concern by excluding popular will from the process through which the political community resolves its citizens' disagreements about justice.

As we have seen, Eisgruber and Dworkin, in order to strengthen the case for judicial review, argue that judicial mediation of majority decisions rationalize the democratic process by improving public deliberation. This view seems to presuppose that in order to conduct a discussion on political morality, people would need a prior judicial debate on how to interpret the issue with regard to relevant constitutional clause. However, even if the courts provide some moral ingredient to public debate—which is not always the case—the last say of the judiciary runs against the 'essence of active citizenship' because what really matters here is the actual political debate *prior* to the final decision. Therefore, as Waldron holds, whenever a view about what democracy requires is imposed by a non-democratic institution, even if the view is correct and improves democracy, there is an overall loss to democracy.

As shown in section 2.2.1., Ely's distinction between procedural and comprehensive principles found in the constitution suggests that judicial review is legitimate if judges enforce the former set of values that reasonable people could accept as constitutional law. Similarly, Eisgruber hopes to avoid judicial decisions being grounded on comprehensive constitutional principles. Although Ely and Waldron share the distinction between formal process and substantial value, Waldron is firmly against Ely's attempt to ground judicial review on the former. This is because Ely's non-controversial constitutional principles are in fact controversial. This is to say that the procedural principles that are meant to guide judicial discretion indeed presuppose a certain substantive ideal on democracy. That would lead judges to pursue substantive values that are controversial, and eventually run against Ely's intention.

Although Tushnet agrees with Waldron's conclusion on the primacy of democratic process over judicial review, his account is centred on how judicial institutions resolve disputes. Tushnet's adjudication-centred view resembles traditional constitutional theory and prevents him from developing a coherent theory of democracy through which he can criticize judicial review. Instead, he tries to undermine the role played by the Supreme Court of the United States by claiming the judges do a less well job than elected officials in resolving disagreement on political

justice. Thus, his comparison between how representative and legal institutions deal with questions about democracy takes the shape of demonstrating how both of them reflect a plurality of views on justice. In other words, just as majority rule, judicial decisions are oriented towards privileging some controversial views about political morality. But this aspect of Tushent's account provides a viewpoint from which judicial review could actually be defended. That is, judicial institutions could be representative of competing views about justice in a society—just like legislatures. In the end, Tushnet would not be able to avoid the pitfall, which is focusing on the contingency of judicial decisions that are pragmatically successful in representing popular views while ignoring the basic principle of majority rule.

In his defence of legislation as opposed to judicial review, Waldron makes two important assumptions. First, he assumes that we would prioritize our views on procedural justice over substantive justice. Second, he contends that one cannot defend judicial review independently of considerations of political justice. Interestingly, this is what Eisgruber (2001) tries to achieve, i.e. a defence of adjudication based on the very controversies that political institutions are meant to resolve. Thereby, Eisgruber arrives at the structural characteristics of how judges exercise their authority in general, rather than how they resolve particular cases. However, as argued by Ward, Eisgruber's account of democracy is not sufficiently developed to demonstrate that judges are better positioned to enhance the procedural value of impartiality than elected officials (2003: 436). Moreover, Ward correctly identifies Eisgruber's effort to show that the structural features of courts render judges more responsive to moral reasons than legislators is likely to fail, since democratic accountability of the legislators give them more incentive to be sensitive to those reasons. In essence, Eisgruber tries to counter Waldron's point that judicial review leads to democratic loss by offering that judges represent popular moral views. However, above all, Eisgruber does not engage with Waldron's central argument, i.e. that majority rule advances the procedural value of equality in a way that judicial review does not. Unfortunately, Eisgruber is not explicit about what is gained from the representative function of judiciary and why it should be preferred over a purely majoritarian scheme that protects the principle of equality. To sum up, Eisgruber's point that an appointee is just as representative as the elected who appointed him/her suffers from an overly thin theory of democracy. When the issue of justice concerned, a controversial judicial claim to empirical success in upholding

popular will loses its appeal. Instead, for the sake of legitimacy, loyalty to the very principle of democratic participation becomes unavoidable when disagreement on justice is at stake.

3.2.4 The Problem of Constitutional Design: Results- or Procedure-Driven Test of Legitimate Decision-Making?

As argued in the previous chapters, contemporary political theory strives to resolve the Rousseauian dilemma of combining particular and general wills. The dilemma touches the 'fundamental problem of designing a constitution' that would provide a legitimate framework for future institutional decisions that concern shared interests. Ronald Dworkin invites us to adopt a "results-driven standard of legitimacy", whereby the "best institutional structure is the one best calculated produce to the best answers" (Dworkin, 1996a: 34). According to this approach, as long as institutional decisions conform a right way of interpreting constitutional rights, there is no requirement for them to be made by democratic means. At the stage of constitutional design, therefore, a results-driven test for institutional structure secures the best answers to questions on what democracy requires. Waldron's rejection of results-driven criterion for constitutional design is based on an insight on the primacy of procedures to outcomes in collective decision-making. In this sense, even to get a result, we need a prior decision-making procedure: "we *already* know and *already* agree about the basic principles of justice" (Waldron, 1999: 157). Yet, what if disagreement goes all the way down to the conception of political justice and the decision-making procedure to be applied? If we lack an agreement on a certain conception of 'right' does that mean we cannot speak of legitimacy at all? At this point we have to clarify Waldron's understanding of 'disagreement'.

The starting point of Waldron's analysis is the existence of disagreement as a fundamental feature of political life. However, his conception of disagreement is quite different from that of John Rawls' understanding. According to Rawls, Western societies are characterized by a permanent, but reasonable, '"diversity of conflicting and irreconcilable comprehensive doctrines" (Rawls, 1993: 327). Therefore, Rawls' 'circumstances of justice' stress the necessity of agreement on common rules and norms under the conditions of unavoidable social coexistence. Unlike Rawls, Waldron thinks that disagreement penetrates to fundamental questions about justice, rights and social cooperation (Waldron, 1999: 1). Thus, Waldron invites us to

acknowledge not only disagreements about the nature of the good life, but also "the existence of disagreement among individuals about rights and justice" (1999: 3). In marked contrast with Rawls, Waldron believes that such "disagreement on matters of principle...is not the exception but the rule in politics" and we should not attempt to avoid them through a deeper running moral consensus (1999: 15). Hence, Waldron advises us to accept that the problem of legitimacy should not be associated with the existence of disagreement, but with the way collective decisions are made. In contrast to Rawls, Waldron puts forward the 'circumstances of politics' where we have to reach collectively binding decisions in the face of substantial disagreements without invoking views of justice, which themselves are controversial. What is important here for Waldron is that, there is nothing wrong in majoritarian process causing disagreement with regards to its outcomes. It is because disagreement extends so far as the original constitutional choice, we need a criterion for judging the legitimacy of institutional authority. As long as all views are adequately represented under a procedurally fair framework, there could be an agreement on the form of mutual respect we want to practice.

Waldron's response to Dworkin's argument on the fallibility of democratic institutions is the recognition that "legitimacy is an issue that pertains to all theories of political authority about procedures when there exists disagreement about the structure and conditions that make a particular form of authority legitimate" (Waldron, 1999: 298–9). In this sense, the threat of 'tyranny' is not confined to majority rule (1999: 299). When people disagree about what conditions does democracy require, the legitimacy of majority-decision to settle the disagreement becomes controversial indeed. However, this does not mean that any appeal to the legitimacy of judicial review would not beg any questions. Even if there are electoral minorities that regard the outcome of elections as illegitimate, that does not make judicial decision-making more preferable or more legitimate than democratic procedures.

If we cannot be certain about the legitimacy of the decision-making procedure, all we can do is to preserve a pragmatic hope that a legitimate procedure will emerge somehow in the future. At this point, Waldron suggests, when making a constitutional choice, we are standing on a 'legitimacy-free zone' in which we are not necessarily using a result-driven test of legitimacy. But rather, we are using a pre-established procedure only for being 'stuck-with' it in a legitimacy-free zone

(1999: 300). Yet, this leaves the 'pragmatic possibility' open for both results- and procedure-driven approaches. Therefore, Waldron chooses not to engage with the results-driven criterion directly. Instead, he asserts that we have no reason to prefer it over a procedure-driven test:

> On the one hand, we cannot use a results-driven procedure, because we disagree about which results should count in favour of and which against a given decision-procedure. On the other hand, it seems we cannot appeal to any procedural criterion either, since procedural questions are the very nub of the disagreement we are talking about (Waldron, 1999: 295).

Then, we may properly ask whether we are privileging the particular procedure we use when deciding about which procedure to pursue in the first place? Waldron replies this by saying that we are simply using that procedure, not making any substantial preference. In other words, we are not privileging or legitimizing democracy when using democratic means to decide questions about constitutional fundamentals of the regime. Waldron insists that the selection of democratic procedures is not 'privileging one of the possible outcomes (that is, democracy)...by using *it* as the procedure for deciding about the possible outcomes' (1999: 300). It is, rather, 'simply to use it' and we do so 'simply because *we need a procedure* on this occasion and this is the one we are stuck with for the time being' (1999: 300). We need a procedure because there cannot even be any disagreement about the results of institutional decision-making without a previous agreement on the democratic procedure (1999: 295). In brief, Waldron assumes that the democratic procedure is simply a pragmatic device in order to solve the questions about constitutional design we are faced with.

Waldron's reply to Dworkin implies that binding decisions on what democracy requires need to be in line with the relevant democratic procedure, even if the answer given by non-democratic authority is right. But Waldron's concept of legitimacy-free zone—where we should refrain from making normative arguments in favor of pragmatic choices—blurs when he inserts a moral consideration into the framework he draws. According to him, for example, whilst the wrong answer provided by the majority-decision that results in democratic loss, *at least* citizens and their representatives could be held accountable for that decision. In other words, a procedure-oriented test of legitimacy is still preferable because—in the worst case—citizens and legislators would be making *their own* mistake (Waldron, 1999: 293-4).

Now, Waldron's legitimacy-free zone is supposed to deprive us of moral reasons to choose democracy over its alternatives. However, in order to strengthen his argument against Dworkin's result-driven approach, he concludes that non-majoritarian decision-making has one extra defect: not allowing a voice to every citizen; instead, it proceeds to make final decisions without them. As some argued, this comes at a cost of supplanting a moral supposition in his legitimacy-free zone. North points out that such an argument increases the likelihood that the democratic procedure will be preferred as the basic decision-making procedure, and thus, privilege it over the others (2003: 171). Similarly, Fabre (2000) notes that Waldron "cannot avoid appealing to the moral considerations pertaining to the value of democracy in order to argue convincingly" (278) against judicial decision-making procedures. It follows that Waldron cannot simply advance moral reasons such that the democratic procedure is superior because it allows people a voice under a legitimacy-free zone. In this way, as argued by North (2003), Waldron returns back to where the disagreement begins and makes a moral rather than a pragmatic preference in favor of the democratic procedure (172). Also, the point of legitimacy-free zone renders Waldron's position vulnerable against Eisgruber's (2002) criticism that majority rule is itself a substantial value that competes to define equal respect with other values, or Dworkin's (1996b) argument that even if our views on democratic decisions are controversial we may still find a best answer to them, which may not be through majority decision.

Nevertheless, it is hard to escape the strong intuition that people would want to rule themselves not only with regards to ordinary political matters, but also to constitutional essentials. Perhaps, this is why Waldron's analysis asserts the moral superiority of the unrestrained majority rule over its alternatives. But, does the fact that the majoritarian procedure is not neutral simply make Waldron's position irrelevant? In the next chapter, through an analysis informed by normative political theory, we shall see that a non-proceduralist and ethical/substantivist grounding of democratic decision-making is defensible against the attacks coming from Eisgruber and Dworkin. Before concluding, it is important to note that Waldron accepts that there are certain rights that democracies must respect and there might be reasonable disagreement about the scope and meaning of rights, but crucially, there is no credible alternative to resolving these *within* the framework of majority rule: "(A) political culture—such as that which pervades and surrounds the US Supreme

Court—may be a culture of rights…even though it is at the same time a culture of disagreement…and there may be nothing to do about disagreement except count up ayes and noes" (Waldron, 1999: 306-09).

Conclusionary Remarks:

A brief consideration of the views presented in this chapter helps to clarify the mindset of the liberal constitutionalist theories in the US: they take democracy as the aggregations of self-interest and judicial review as the rationalizing dimension of democracy. Both originalist and interpretivist theories strictly identify the democratic process as mere will of all, and therefore, seek to render judicial nullification of legislation acceptable from a democratic point of view. Essentially, these approaches view judiciary as the institution which explicates the normative core implicit in the constitution. In some way, Ely, Eisgruber and Dworkin still pursue the path opened by Sieyes and the American federalists. They do so by maintaining that institutional authority which is drawn from immediate democratic control could help to strengthen the exercise of popular will in the government, and thus, support democracy. From a similar vein, Eisgruber argues that a court could represent popular will better than a parliament because while as 'voters' or 'legislators' we can only exercise a constrained choice when voting, judges have a larger room for moral discretion. As we have seen, in this context, the core argument in favor of judicial review is that constitutional courts are best suited to protect basic rights and liberties, which must be isolated from social considerations or political pressure. Yet, as Waldron's account suggests, we do not have to rely on such a negative portrayal of democratic majorities. After all, democracy is not all about pushing vested interests, but rather, majoritarian decisions are usually based on some sort of compromise (Waldron, 1990: 31-34). This shows that our attachment to moral principles involves some form of sensitivity towards their consequences in particular circumstances (Bellamy, 1995: 68). This is in line with political rights, which demand that we respect the moral capacities of fellow citizens. Following Waldron we can say that democratic process is in principle superior to the resolution of social conflict for it can legitimately claim the involvement of all parties concerned.

Liberal tradition justifies the restriction of liberty only if it is in favor of the overall scheme that protects liberties. Ideally, then, when two or more different forms of liberty come under conflict they need to be 'balanced' in a neutral way. The

practical aspect of contemporary American constitutional debate is mainly concerned with a range of disagreements—from the constitutionality of affirmative action to pornography—which require the neutral balancing of liberties. However, it might not be possible to decide on these matters without recourse to our comprehensive moral doctrines and commitments. This is because liberties may not only be incompatible, but also be in conflict with other values—such as equality, dignity or security. Therefore, if a final political decision based on a certain ethical world view is inescapable, the best form of decision is the one which enjoys the potential participation of everyone. In this sense, the very political isolation that guarantees judges their disinterestedness also renders them rather poor in balancing how their decisions might affect society at large (Bellamy & Castiglione, 1997). Following Schmitt (1988: 43) it can be argued that a constitution can not resolve political instability, but can only spell out who could decide. From this perspective, through the separation of state and civil society, liberalism provides a constitutional framework which prevents activities within civil society degenerating into political and moral conflict. However, as socioeconomic activities create inequalities and cultural conflict, the need for democratic political action for resolving these conflicts becomes prominent (Schmitt, 1988: 44).

When we take the nature and scope of disagreement in modern society seriously, one structural deficiency of courts in resolving disagreements becomes explicit: rival versions of good are combined with conflictual interpretations of constitutional principles. These could be mediated on grounds of entrenchment of rights only if those rights are isolated from the sphere of political contestation. However, expert knowledge becomes incompetent when a collectively binding decision on conflicting fundamental values is needed. This is especially the case, as shown in this chapter, when we have reasonable disagreements at hand, which could not simply be tackled with reference to an abstract notion of justice. A constitution is usually codified by a popularly elected constitutional convention and sustained by the consent of majority. Thus, in order to be legitimate, the final settlement must enjoy popular support and reflect interests and values of the wider community. Therefore, as it will be argued in the following chapter, there could be no popular identification with the constitution under strict limitations on political participation. That is to say, political public sphere, rather than courts, is the better forum to decide value-conflicts. As long as our conceptions of rights are subject of disagreement and

are imprecise, it would be difficult to ground their codification outside politics. Moreover, the content of rights is subject to ongoing redefinitions and interpretations. In deciding between incompatible principles, the democratic process gives rights and liberties their force, form, content and effectiveness.

The indisputable authority granted to the courts in interpreting the constitution is only accurate when one maintains the prejudice that the legislatures are normally destined to deny individual and minority rights. When citizens and their representatives commit themselves to the basic norms of equal dignity and concern, however, legislatures are more sensitive towards the rights of dissenters. This returns us back to Rousseau's emphasis on the role played by political culture in determining the reasonableness of majority will. Next chapter is dedicated to portraying the philosophical attempts to resolve the tension between democracy and rule of law—judicial review or constitutionality in particular—under the premises of liberal political culture. This is crucial since the debate pursued in this chapter arrives at a deadlock without an insight into social and philosophical foundations of the two principles at hand: constitutionality and popular sovereignty.

CHAPTER IV
THE NORMATIVE POLITICAL THEORY DEBATE: THE 'PARADOX' OF CONSTITUTIONAL DEMOCRACY

The standard liberal constitutionalist justification of judicial constraints on government is based on the idea that there are 'pre-' or, 'extra-' principles that need to be kept immune from political interference regardless of what popular will may suggest. At its core, constitutional limits to politics are viewed as a measure against protecting democracy from itself. As we have seen in the preceding chapter, recalling the Rousseauian contention that the Sovereign Being could only be bound by its own will, liberal constitutionalists try to associate judicial review with self-government and collective autonomy. Within this framework, higher court interference in democracy is seen as part of fulfilling people's own pre-commitment to collective self-restraint (Holmes, 1988: 24). Yet, this recalls the Jeffersonian criticism of the highly objectionable legitimacy of the 'living bound by the dead' (Bellamy & Castiglione, 1997). This basic problem sets the terms of the debate concerning the democratic legitimacy of judicial review: how can a collective body of citizens exercise self-legislation and be bound by an originary moment, which factually remains external to its will? The liberal-legalistic argument starts from the principle that the Sovereign should act as if it is subject to universal law. From a similar vein, Jürgen Habermas attempts to reconcile democracy and the rule of law by offering a theory according to which the members of a polity gain the same interpretative perspective employed by the framers of the constitution through socialization within the same political culture (Habermas, 1996a, 1998, 2001). Habermas' approach recalls Hart's concept of 'society with law': basic rights provide a moral basis for democracy when citizens look upon constitutional rules from the internal point of view as accepted standards of behavior (Bellamy & Castiglione, 1997). Similarly, traditional republican theory views self-government as being possible only when sovereignty is justified by the standards internal to the contextual understanding of political morality. Yet in civic republicanism, the source of normative validity is the actual democratic process, not a universalist conception of human rights, therefore, it

is impossible to put forward a legitimate system of higher lawmaking prior to democracy. Hence, the current debate on the democratic legitimacy of constitutional measures brought on the processes of opinion- and will-formation takes places between the claims to conceptual primacy of constitutional founding act or long-running historical ideals of a community. As we have seen in the second chapter, the dimension of the debate which occurs in the US concerns whether practices of judicial review of legislation could be construed as a form of democratic participation (Dworkin, 1986; Eisgruber, 2001; Ely, 1980; Tushnet, 1999) or not (Waldron, 1999; Manfredi, 2001). In that previous chapter, the doctrine of judicial review has been tested against its capacity to advance democracy and its compatibility with democratic principles. Yet, if we are to arrive at a clearer understanding on the issue, we have to dwell into the origins of the relationship between law and politics, with respect to judicial review. In this final chapter, therefore, I will focus only on the debate on the normative primacy of higher law and democratic process.

Since Sieyes, the liberal constitutionalist theory postulates a distinction between constituent and constituted powers. While the former connotes to the actual source of sovereignty in a state, the latter is the political institutions. Similarly, the issues concerning the actual meaning of the constitution are elevated to 'high politics' whereas everyday legislation finds its expression in 'ordinary politics'. As such, the constituent power (represented in the constitution) originates and draws the boundaries of democratic institutions and practices. Recently, there has been severe criticism of this schema from the ranks of normative political theory. Frank Michelman (1995, 1999) and Alessandro Ferrera (1999, 2001) aim to reverse the liberal constitutionalist understanding of democracy: they oppose the view that takes constitutional founding as the historical starting point of all legality, a view which they take as inescapably rooted in the social contract tradition. Their common point is the argument that the event of constitutional founding has to be responsive to a 'broader normative framework'. According to them, there exists an 'already present idea of reason or right' or 'community's ultimate law or protolaw' to which the framers of the constitution have to preserve an interpretative relation. In order for the rule of law to preserve an 'internal' relation to democracy**,** legality should be construed as arising only from people's pre-constituted legislative will. This pre-constitutional popular will is conceptualized under 'constitutional identity'

(Michelman, 2000) and 'cultural identity' (Ferrara, 1999; 2001). I would like to start by analyzing Habermas' position in the debate: his attempt to bring constituting and constituted powers together through the metaphor of '(being) in the same boat' and his concept of 'constitutional patriotism' is a major contribution to the discussion at hand. In what follows, I will scrutinize Michelman and Ferrara's republican criticism of Habermas and liberal constitutionalism at large. In the last section, I would like to emphasize whether the historical sense of political justice could be construed employing the conceptual tools of the understanding of the Being of Dasein developed by Heidegger's ontology. Through a republican reading of Heidegger—which may sound strange—I would like to question whether it would be plausible to uncover the transcendental structures of socio-political existence—the structures that make possible the 'possibilities' for every human society—in a way to make stronger arguments in favor of the priority of the concrete historical community over its fundamental law, or the superiority of constituent principles over the ordinary institutions.

4.1 Habermas and the Two-track Model of 'Constitutional Democracy':

In his recent work, Habermas hopes to resolve the tension that underwrites constitutional democracy by discourse as the constitutive of legality. Indeed, an exclusive focus on communication as a process abstracted from the facticity of actual life and pointing beyond the reality of injustices characterizes the distinct feature of Habermas' approach. He his discussion on the relationship between law and politics from the assumption that the premises of unrestrained communication—as the main source of normative validity—are hampered by increasing social differentiation and cultural pluralism. The distinctive aspect of his recent position is supporting the legitimacy generating potential of communication by the medium of law. In this way, citizens can view themselves both as the *addressees* and *authors* of laws under cultural pluralism and social complexity, only if the legislative act of government is construed as being enhanced by rational law. As we shall see, Habermas first conceives majority rule as a factual necessity, and then, sets the normative priority of the Rule of Law.

4.1.1 Internal Relation between Democracy and Rule of Law:

In *Between Facts and Norms* Habermas's programs of the discursive grounding of democracy and the dialogical reformulation of Kantian categorical

imperative has arrived at a new junction. In this work, he attributes law the role of mediation between normative claims to validity and empirical facts of power: "…facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty" (1996a: 28). Similarly, he asserts "(i)n the legal mode of validity, the facticity of state's enforcement of law is intertwined with the justificatory force of a lawmaking process that claims to be rational to the extent that it guarantees freedom" (1996a: 46). Accordingly, Habermas' association of the contemporary conditions of social complexity and cultural pluralism with the marginalized role of traditional value systems—i.e. 'strong institutions'—in supporting social integration, renders moral norms insufficient means for sustaining social coordination and transmitting communicative power to democratic decision-making institutions. These so-called 'facts of modernity' are supposed to exclude the possibility of reaching at common agreements solely through the democratic process without the provision of a set of higher order regulative standards and rules. These legal safeguards can provide a basis for common agreements among differentiated and pluralized 'life-worlds' by stabilizing expectations and preserving "the order of freedom within their fact-givenness" (Habermas, 1996a: 31). This dual character of law could provide a basis for the mediation of deliberative politics by institutions based on 'a system of basic human rights' (Habermas, 1996a: 32). Because reaching at a substantive consensus on a set of abstract principles of right is no more very likely, the regulative norms for deliberative politics could be derived only from the very preconditions of democratic discourse (Habermas, 1996a: 21). As we shall see, Habermas associates the preconditions of discourse with the origination of the constitution, and thereby, hopes to form a conceptual link between constitutional framers and ordinary citizens.

The dilemma set by Rousseau was that without an actual expression of the general will through the democratic process, people are left estranged from the law. Habermas, as mentioned above, is aware of this fact and tries to overcome it by forming a strong link between law and democracy: "The democratic principle cannot be implemented except in the form of law" (1996a: 94) and "(t)he idea of self-legislation must be realized in the medium of law itself" (126). Therefore, essential to Habermas' understanding of the relationship between rights and politics is that the legitimacy of law depends on an agreement of all citizens in a discursive process that is open to all. Although this agreement is hypothetical, the actual democratic process

allows us to claim that everyone has a reason to agree. What is important here is that the actual democratic process is constituted by legitimate law itself. James Bohman (1994) argues that the acceptance of "rights as conditions of legitimate lawmaking" gives Habermas a chance to reduce the complexities left by the strong idealizations of his theory of rationality. If both higher law and ordinary democratic decisions are discursively formed, then citizens have a chance to reflect upon and reproduce the constitutive moment of their polity. When citizens perform critical reflection on constitutional lawmaking they exercise an 'originary use of civic autonomy' thereby self-referentially constitute themselves as a legal entity: "Citizens themselves…decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy…they make an originary use of civic autonomy that thereby constitutes itself in a performatively self-referential manner" (Habermas, 1996a: 127-28). In this sense, constitution "(is) a living project that can *endure* only as an ongoing interpretation, continually carried forward at all levels of the production of law" (Habermas, 1996a: 92). From this reading, one might have the impression that Habermas defends the idea that legislative bodies should have an equal say about the constitutionality of enactments with higher courts. Indeed, this impression is strengthened by his account on the 'equi-primordiality' or 'co-originality' of the concepts of political participation and basic rights and liberties.

In essence, Habermas argues against two rival understandings of law: the former is the classical liberal view, which moralizes law, and the latter is civic republicanism, which ethicizes law. His 'co-originality of private and public autonomy' thesis is based on the insight that human rights or basic rights could neither be imposed on the sovereign will as a limitation nor be conceived as a mere subject or instrument of that will (Habermas, 1996a: 159-61; 2001: 768). He argues that just as 'nationality' and 'citizenship' (1995) public and private autonomy not only conceptually, but also materially dependent on each other (Habermas, 1998; 2001):

> "Citizens can make an *appropriate* use of their public autonomy, as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct. But members of society actually enjoy their equal private autonomy…only as if citizens they make an appropriate use of their political autonomy" (Habermas, 2001: 767).

Once a material implication between the two is formed, Habermas could argue that democracy and rule of law are internally related. In this way, he insists that constitutive rules that make a democracy possible are the *enabling* not *constraining* conditions, and therefore, they can not limit democratic practice in the manner of externally imposed norms. Rule of law simply describes, not shapes, the process whereby citizens constitute themselves as a democratic polity (2001: 770). At its core, there is nothing new about the argument that constitutional entrenchment of rights enables democratic process. What is original about Habermas's approach is the claim that prescribed higher law could be understood as capable of effectuating the communicative power generated by the processes of opinion-and will-formation in meeting the requirements of social integration and solidarity under the conditions of pluralism and complexity. Communicative power generated by public discourse and deliberation also shapes the exercise of political power in administrative institutions, which enforce law coercively. In this way, a 'system of rights'—as the basis of Rule of Law—ensures both public and private autonomy. In this account, law becomes a means of bringing the bureaucratic power of the state under public control. Until this point, Habermas' account preserves a conception of radical democracy to a certain extent. However, as we shall see, for him, the conditions of pluralism and complexity reduce the potential for unmediated self-government of the people. Step by step, we can sense that Habermas approaches to the idea that judicial institutions are necessary for rationalizing the democratic will—which is apparent from his minimal conception of popular sovereignty.

4.1.2 Minimal Conception of Popular Sovereignty:

A quite different approach—namely that generalized conditions of diversity make it harder for majority decisions to express rational collective will—becomes dominant in Habermas' recent work (1996; 2001). Starting from the sociological diagnosis that the loss of strong social institutions exerts constraints on the socially coordinating function of moral norms, Habermas suggests that the democratic and participatory capacities of complex societies have been diminished. According to this, as an external ('systemic') constraint on facticity and validity, the modern societies have become 'polycentric'—in the sense of lacking a political centre. Therefore, the 'sovereign will of the people' is no longer able to control and constitute the whole society, a fact that renders the united popular sovereign subject a fiction (Bohman, 1994). Because the socio-cultural environment of complexity and

pluralism diminish citizens' ability to arrive at common good and general interests through discussion, Habermas puts forward a separation between opinion-formation found in informal public sphere ('periphery') and will-formation located in formal decision-making institutions ('centre') (Habermas: 1996a: 177-178). Although formal and informal discursive arenas operate in conjunction with each other, the latter is incapable of enacting laws or expressing strong collective opinions. Therefore, the main function of informal public sphere becomes not determining but *inspiring* legislation. This inspiration is a necessary ingredient to democratic decision-making; however, this separation widens the gap between political public deliberation and formal decision-making.

Habermas proposes a 'political division of power' in order to meet the challenges cast by social complexity upon civic participation. In this political division of legislative labor the final say rests strongly at the centre. Again here, 'deliberative democratic legitimation' is done not by a 'collectively acting citizenry' but by the "interplay between democratically institutionalized will-formation and informal opinion-formation" (Habermas, 1996a: 298-99). Up to this point, his account shows no radical break with the civic republican approach. However, he contends that, there is no sovereign body of people equipped with a complete public reason, and therefore, we can speak only of a popular will having partial or potential public reason, which can not be entitled to self-legislation without mediation. The complexity and pluralism inhibit the peripheral public sphere in that they limit the scope of insights arrived after discussion: the network of discourses generate a public 'potential of reasons' where, for example, some stress the need for efficiency and others morality (Habermas, 1996a: 126). In this sense, public opinion is an aggregation of reasons as such. In the end, a decentred and 'subjectless' network of communication replaces the collective body of citizenry in Habermas's constitutional theory. At this point, the principle of popular sovereignty is lowered to the status of a hypothetical or counterfactual idea. By weakening his conception of 'popular sovereignty', Habermas offers that the remnants from the ideals of political participation and self-determination have to be worked out within the context of liberal constitutionalism. Another significant result of Habermas' recent position is that political public sphere has become just one among other social sub-systems, such as bureaucracy, economy and culture. As its central role has been eroded by

complexity and pluralism, political public sphere could only be defined as the core of political system, not as a model for all social institutions.

4.1.3 The Link between Communicative Reason and Constitutional Theory:

Habermas seeks to maintain the central role played by public sphere in the formation of 'social reason' and human autonomy in the face of 'social and ideological pluralism' (1995: 117). The underlying question of his endeavor is "how can law fulfill the function of social coordination and enable discursive conditions of opinion- and will-formation under altered social and cultural circumstances?" Lauder (1999) argues that, in seeking an answer to that question, Habermas seeks to replace the concept of 'universal reason' found in the 'classical' understanding of law with an idea of 'procedural reason'. According to Lauder, the classical conception of law requires individuals to transcend themselves by taking part in the 'timeless unity' of a general consciousness of subjectivity that is taken as the essence of 'man' (1999: 6). Thereby, individuals were conceived as coming to grasp the essence of the lawfulness of a unified world. In his theoretical reconstruction of constitutionalism, Habermas departs from the universalism implicit in classical idealism and tries to emphasize law's claim to rationality by setting a higher level of abstraction for cultural pluralism and by extending the rationality-testing criteria. In this way, he hopes to render law capable of meeting the challenges cast by value pluralism: claims to universality are no more situated in the general law found in a unified world, but instead in 'intersubjective practice of argumentation' (Habermas, 1995: 117). Here, Reason is redefined in procedural sense, and accordingly, its grounding under permanent multiplicity of world views demands an "idealizing enlargement of their interpretative perspectives (where) (e)veryone is required to take the perspective of everyone else, and thus, project herself into the understandings of self and world of all others" (Habermas, 1995: 117). It is remarkable that Habermas' avoids the view that universality of reason is dependent on the transcendence of individual particularities by thinking in the same way, which provided the philosophical basis of classical legal theory. What is important for our purposes, however, is the centrality of procedural reason for constitutional considerations of enacted law: 'we can no more rely on an understanding of constitution as being general before an evaluative process whereby different effects of the application of enacted law is compared and balanced'. In other words, we can assure the constitutionality of a piece of legislation *only after* it is tested by various view points

in the public forum. Rather than a pre-given ideal concept, universal reason is generated step by step through the procedure of argumentation. Yet, we see that procedural reason meets classical universalism to the extent that individuals are required to transcend themselves if favor of a 'we-perspective'—even if there is no 'universally valid view of the world' (Lauder, 1999: 8). Nevertheless, Habermas revises his concept of procedural reason in *Between Facts and Norms* in a way that distinguishes it from the fallacious accounts of moral objectivism. The public process by which legal validity is generated is truly intersubjective, not determined by an objectified 'we-perspective': "unlike success-oriented actors who observe each other as one observes something in the objective world, persons acting communicatively encounter each other in a *situation* they at the same time constitute with their co-operatively negotiated interpretations" (Habermas, 1996a: 360).

While a 'system of rights' constitutes the legal community, a particular form of language has to be created in which "a community can understand itself as a voluntary association of free and equal legal consociates *under law*" (Habermas, 1996: 206). This 'language' is the community's own creation and link up with its particular constitutional tradition. Therefore, any understanding of a constitution is necessarily bound up with a particular language, which ties the convictions concerning actual constitutions to the procedural reason found in discourse.

Habermas constructs the relationship between the principles of constitution and democracy in a similar fashion to the co-originality of private and public freedom. At the constitutional level, we are able to institutionalize the conditions for political autonomy by applying the 'discourse principle' to the 'general right to liberties': "By means of this political autonomy, the private autonomy that was first abstractly posited can retroactively assume an elaborated shape" (Habermas, 1996a: 121). This is coined by Habermas as the 'logical genesis of law' which is captured by the particular constitutional language. Although I will turn back to how for Habermas the constitutional language provides democratic legitimacy to constitutional clauses which are not the results of democratic decisions (in the section 3.2.1.), it is sufficient to complete his discussion on the 'logical genesis of law'.

As a consequence of argument that the constitutional legal code and principle of democracy are constituted co-originally (1996a: 122), Habermas portrays the principle of discourse as the only legitimate domain through which private and

public autonomy could be arbitrated. Moreover, Habermas' schema of 'logical genesis of law' asserts the priority of basic rights over the political process: (basic rights) "only regulate the relationships of freely associated citizens *prior to* any legally organized state authority" (1996a: 122). That is, we gain a 'right to have rights' and become 'authors of legal order' *only after* our private autonomy is guaranteed by a legal code: "Basic rights to equal opportunities to participate in the processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law" (1996a: 122). The priority of private autonomy is a conceptual necessity which is embodied in a particular constitutional language. In this regard, the idea of the subordination of political outcomes to a constitutionally entrenched basic rights and liberties is not open for discussion. This conclusion invoked a number of criticisms with regard to the role Habermas gives to the rights as the rational framework for political practice in general.

4.2 Responses to Habermas by Michelman and Ferrara:

Although they start from different study-fields—Michelman from legal theory and Ferrara from political philosophy—they share in common a concern for justifying law as an extension of the community. In essence, Michelman and Ferrara's objection against Habermas's recent position is based on the argument that the event of constitutional founding has to be responsive to a 'broader normative framework' (Michelman, 1995, 1999; Ferrara, 1999, 2001). There exists an 'already present idea of reason or right' or 'community's ultimate law or protolaw' to which the framers of the constitution have to interpret and translate into a written constitutional text. In this way, Michelman and Ferrara reverse the liberal constitutionalist understanding of democracy in terms of changing priorities. According to this, in order for the rule of law to preserve an 'internal' relation to democracy, legality should be construed as arising only from people's preconstituted legislative will. In what follows, by discussing Ferrara and Michelman's criticism of Habermas, I hope to demonstrate how these two thinkers try to avoid the risks implicit to any theory that tries to justify democracy with reference to democracy itself, instead of an external realm of universal human rights. More clearly, the risk inherent to self-referentiality is that it could open way for denouncing the very basis of democracy and human rights. In other words, I also intend to demonstrate how

normative political theorists try to develop an 'internal' justification of the 'universal'—in a somewhat Kantian fashion.

4.2.1 Michelman and the Notion of 'Infinite Regress':

In Michelman's terms, whenever one aims to justify what he calls 'laws of lawmaking' or constitutional rules and regulations on the grounds that they originate democratic self-legislation, an 'infinite regress' becomes inevitable. This is because; in order a democratic procedure to legislate legitimate laws, it has to be legally constituted, which in turn, has to be framed in accordance with preceding legitimate laws that must be the product of a still prior procedural event and so on. In short, people can become the constitutive power only *after* being organized by a preconstituted legality (Michelman, 1995, 1999). Indeed, there is a strong ground to argue that there is something problematic about the idea of constitutional founding as a completely new beginning: founding declaration simultaneously lends itself the right of founding and creates itself by declaring the monarchical sovereignty void (Lauder, 1999). In this sense, it was absolute monarchy itself that had made this foundation possible by preparing the ground from which the conception of popular sovereignty could start. For instance, according to Seligman, Rousseau's understanding of the social contract takes off from the conception of absolute monarchy and constructs the general will as a form of the unity of objective reason and collective will patterned on the sovereign will of the monarch (1992: 112). On the contrary, in line with the argument that the normative character of constitution involves a process of ever changing social interpretations (Dworkin, 1986: 154), Habermas argues that the source of 'regress' is the open and future-oriented character of the constitution, it is part of something productive (2001). In this sense, the founding event starts a process whereby the constitution gradually actualizes the normative core it embeds. Consequently, Habermas coins this dynamism as the 'self-correcting historical (learning) process' (2001: 790). Thus, he invites us to view the 'regress' not as an infinite one, but rather, as something that is overcome in due process.

At the heart of Michelman's criticism leveled at viewing basic rights as the precondition of political participation lies the concept of 'juris-generative' politics—an actually existing instance during higher-law making. According to this, the moments of historical change in higher law feed from the prior political processes and launch a new normative legal framework for subsequent politics, which can be

named as 'juris-generative' events. Yet, juris-generative politics designates a specific set of structures that sustain political support for individual freedoms: "…politics itself, through the authorship of the legal order, shapes the social and economic conditions on which the political support of freedom depends" (Michelman, 1988: 1531, 1502). The term has some similarities with Griffin's (2001) concept of structural politics, in that both refer to a process that shapes the understanding of higher law by political means. Also, it may be argued that juris-generative events are made possible by a 'zone of indifference' between law and politics that, in Agamben's (2005) definition, that allow the sovereign decision on what makes an 'exception' in the normal course of legality. These assertions also seem to contain profound familiarity with Schmitt's (1988) criticism of liberal constitutionalism: the legalistic liberal approach rests on a constitutive political moment that establishes the rule of law. Rather, constitutionally entrenched basic rights and liberties are end-products of historical political struggles. In order to be valid, legal norms require a 'normal situation'—i. e. order, stability, peace—and because the sovereign decides whether a normal situation exists, *sovereignty is a political act outside law* (Schmitt, 1988: 21). In this sense, by insisting on the conceptual priority of fundamental rights, liberal-legalistic approach ignores the very political basis of law itself. Although Schmitt and Agamben's approach would prove to be too 'illiberal' for Michelman, his conception of juris-generative politics touches a fact pointed by them: law-constituting aspect of human interaction, and the fact of sovereignty.

If we turn back to Michelman, the infinite regress argument is turned against the views that take the constitutional founding as the historical starting point of all legality, views that are inescapably rooted in the social contract tradition. Indeed, we can sense the enduring influence of the contractarian tradition and the ontological primacy of the individual in liberal theory. Liberal constitutionalism views that the coercive capacity of the state should be justified by the consent of everyone affected. But every ordinary act of the government cannot be justified as such. Therefore, the liberal tradition tries to demonstrate that these acts are legitimate and could meet everyone's reasonable agreement, only if they derived properly from a prior political act. Therefore, it is always easier for liberalism to justify ordinary political acts in a derivative way while justifying constitutional essentials directly (Michelman, 1996: 309). According to Michelman, without law, people cannot become the *pouvoir constituant* and it is the actual authors of the constitution who organize people into

pouvoir constitue: "Only under the constitutive legal provision already in force…can a 'people' exist or conceivably legislate anything" (Michelman, 1996: 310). Nonetheless, Michelman concedes that a set of abstract principles of right can be derived as the very conditions of democratic discourse and that a procedural derivation of politics is needed in order to render law valid. However, he warns us that, under the fact of pluralism, the procedural derivation of regulative norms for self-legislation has to be corrected and reformulated by actual democratic discourses. Similarly, McCarthy insists that individual rights could be adequately formulated only after public discussion (1994: 911). Michelman argues that the only way that the 'originary constitutive moment' mentioned by Habermas could legitimately enact law and supersede 'infinite regress' is to conceptualize public sphere as a 'pre-legislative forum' that could critically re-examine and amend the regulative norms at will (Michelman, 1996). In fact, Habermas' own approach is not alien to the idea of civil society as a 'proto-legislative constitutional organ': "(constitution) as a living project that can *endure* only as an ongoing interpretation continually carried forward at all levels of the production of law" (Habermas, 1996a: 408). Yet, such more flexible apprehension of discursive process would require leaving the clear distinction Habermas has drawn between opinion- and will-formation institutions behind and embracing a form of full interaction between judicial decisions and wider public. In this sense, while the responsiveness between higher court decision and public opinion would bring greater legitimacy for the former, the perspective of the latter would be broadened (Michelman, 1999). Clearly, Michelman disapproves Habermas' distinction between formal and informal public sphere: popular will has a potential for guiding courts in their decisions concerning higher-law and vice versa.

At this point, a new problem emerges: even if we enlarge the conception of popular sovereignty so as to redefine it in terms of a constitutional 'pre-convention', how can we claim democratic legitimacy for those political decisions which are taken by non-consensual means? Given that, if especially under the 'fact of modernity', a settled agreement even on ordinary legislation or public policy is unlikely to be sustained (if attained at all) how can popular will fulfill its function of revising constitutional principles? Habermas attempts to resolve this problem with recourse to a historically situated form of constitutional language—which has a thick mark of Gadamer's theory of language: each political culture interprets the same constitutional principles—such as popular sovereignty and human rights—

distinctively by the light of its own historical experience (Habermas, 1994: 118). Each political culture understands its own constitutional principles under the light of a common 'interpretative horizon'. For Habermas, questions concerning 'citizen's ethico-political self-understanding' are publicly debated *within* that interpretative horizon (1994). This debate revolves around 'the best interpretation of the same constitutional rights and principles' (1994: 118). The system of rights is located into the historical context of a legal community through such fixed points of reference, by 'constitutional patriotism'. Yet, constitutional patriotism does not offer any guidelines on how to resolve principled disagreement among citizens concerning certain constitutional provisions. Even though citizens may recognize that they operate on the same interpretative horizon, the lack of a settled agreement on specific constitutional clauses brings back the requirement of enforcing non-consensual political decisions.

Then we might ask how could the disagreement on constitutional provisions be justified when there is a factual necessity to make a decision about them—just as in the Schmittian problematic? Or rather, what can we provide an objective standard for judging the politically matters? Following the basic Rousseauian insight, we can say that obligation or compliance towards politico-legal order cannot be justified simply in terms of it coercive capacity, therefore, we need a moral point of view. Habermas is helpful at this junction by offering that under ineradicatible doctrinal pluralism the moral point of view can only be realized through communication—i.e. through the acceptance of all those concerned in their capacity as participants in practical discourse (Habermas, 1993a). In his quest for a standard for the justification of the constitutional provisions of basic liberties and limitations on legislative process, Habermas privileges the moral point of view, which entails norms that give weight to the 'rational force of the better reasons' (Habermas, 1993b). Accordingly, in order to understand whether the processes of opinion- and will-formation meet the conditions for legitimation, citizens need to apply the proceduralist test of normative rightness—i.e. ask themselves whether everyone does or could have a reason to agree.

However, against such suggestions, Michelman argues that there is nothing procedural about this test. Because it requires a judgment on whether a standard is met, rather than whether a procedure is simply followed, the question concerning what norms the decisions of a sovereign will must meet is a substantive moral

question (Michelman, 2000). In other words it is not merely a matter of procedure. In this sense, the rational-universalist standard could only be applied to a set of abstract principles and ideals for a law making system. However, the discussion over the interpretation of constitutional essentials is a special kind where the very "possibility of a form of political association that is *just* in the sense of rationally and reasonably acceptable to all" is at stake (Michelman, 2000: 1022). This approach is also apparent in Michelman's critique of Post's proceduralist conception of 'responsive democracy'. Post argues that in order to achieve popular self-government, democratic decision-making should not be grounded on any substantial 'foundation' (Post, 1995: 23). Instead, democratic government could only be limited by a purely procedural norm, that is, the requirement of public discourse open for all citizens (Post, 1995: 275). Michelman counters Post by arguing that constitutional democracy contains procedural rules primarily to serve a set of substantive values: the rules of majoritarian decision-making essentially serve to the ideal of the equal dignity of every individual human being, i.e. the primary substantive value (Michelman, 1998: 65). Therefore, the sole limit on sovereign will could arise from this substantivist concern for how to treat persons, rather than a procedure on how to decide publicly the issue of the treatment of persons. The principle of unrestricted public discourse, when taken as a basic right, defines a form of government, which requires obedience to the norm of public discourse by everyone. Yet, given that disagreement on how to apply that procedural norm is inevitable, constitutional interpretation becomes inescapable as well. In this sense, the previously non-controversial procedural norm becomes an object of the disagreement on the legal limits imposed on government (Michelman, 1998: 40-3). It is worth noting that Michelman shares Dworkin's starting point—i.e. that democracy is grounded on a primary substantive value, equal dignity and respect for all. However, he arrives at quite a different conclusion in that he thinks this value is best secured when it is possible to define and re-define it democratically, without the risks of judicial sanctioning.

We may suppose that when a dispute concerns the ethical self-understanding of the people, the resolution of practical considerations of ordinary politics is relatively easier. But when it is based on a 'core demand' of political morality—that figure the fixed reference point for constitutional patriotism, which contextualizes the system of rights— the question concerns the morally fused 'constitutional

identity'[4] (Michelman, 2000). This is also why Habermas proposes a form of moral justification based on unanimity for such matters. Yet, for Michelman, a disagreement on constitutional identity would bring questions such as: what constitutional constraints we would like to impose upon our political conduct? In order to answer such a question, we have to have unrestricted recourse to ethical foundations that could only be articulated by popular will. Michelman continues to argue that integration in a given political culture is merely an empirical and contingent expression of "intersubjective cognitive convergence experienced by the people" (2000: 1023). Unlike Habermas, therefore, he argues that this convergence is not simply procedural, but that there are substantive values implicit to the ideals of 'persuasion by the reasons among equal and free citizens'. The superiority of sincere reasoning over manipulation by force is itself an ethical value. Hence, Michelman, contra Habermas' constitutional patriotism, concludes that the convergence within a political culture is achieved by the popular will of citizens, and as a result, the 'ethical-political self-understanding of citizens' is still prior to the historical and institutional conditions that makes the expression of that popular will possible. Up to here, we have scrutinized Michelman's criticism of the proceduralist grounding of constitutionality. We will now look at the work Ferrara who takes up and develops Michelman's ethical/substantivist defense of democracy.

4.2.2 Ferrara and Constitutional Politics as 'Authentic Self-Clarification':

At the core of Ferrara's philosophical program there is an attempt to establish 'authenticity' as the basis of validity (Ferrara, 1998). His understanding of validity is based on an internal standard to test the norms and claims to validity which excludes the context-transcending 'presuppositions of communication' or a 'neutral language of commensuration'. According to him, rather than self-determination based on the concept of 'autonomy', the criteria for legitimate norms depend on 'exemplary uniqueness' derived by reflective judgment (1998: 11-2). Consequently, higher lawmaking could be justified by the implicit notions of validity found in 'authentic self-clarification', that is implicit to ethical-political self-understanding of citizens. Instead of principles that are conceptually located in a domain external to the historical and cultural context, the legitimacy of law should be measured with the

[4] The term 'constitutional culture' may appear to designate something homogenous and static. However, Michelman uses the term in a similar fashion with Ferrara's 'cultural identity': the historical understanding of political justice more or less shared by the members of a cultural entity.

extent that it enhances a contingent and situated understanding of justice. Starting from this philosophical background, Ferrara develops Michelman's central concern that political rightness rests not in transcending particularities of people's ethical self-understanding, but in the very normative core embedded in political culture. According to Ferrara, liberal theorists are wrong to base their assumptions of a concept of higher lawmaking as a form of privileged legislative activity that sets the standards for 'ordinary' lawmaking (Ferrara, 1998: 11). Both in Habermas, Dworkin and Rawls, we find an external point according to which sovereign decisions are measured against: constitutional rights preside over sovereign will for being based on the relation between discourse and validity (Habermas), corresponding to a 'trans-contextual' concern for equality (Dworkin) or being compatible with a conception of political justice arrived under overlapping consensus (Rawls) (Ferrara, 1998: 87-88). In each case, popular sovereign will is justified when it is responsive to intuitions that goes beyond that will itself. On the other hand, Ferrara and Michelman are content that although the popular sovereign will conducts higher lawmaking under law, this higher law is a politically immanent creation, not due to 'trans-political reason' (Ferrara, 1998). But that does not mean that Ferrara and Michelman are eager to subject normative validity to arbitrary will of all. Then we might ask: how the popular will be sovereign while at the same time being responsive to a normative framework that goes beyond its ordinary acts, and yet, remain internal to it? In order to have a better understanding of this problem, we first need to view how the relation between right and good is conceived by the proponents of republican theory.

In fact, Habermas recognizes that disagreements may not end up with rational consensus even under ideal discursive conditions because sides may not share sufficiently common ground or interests (1996a). Therefore, he relaxes his account so to accommodate 'fair compromise' (Habermas, 1993a). However, he insists that democratic politics could only be justified from the perspective of right. According to him, although the articulation of justice may find its point of departure in good, in the course of discursive exchange of arguments between partial approaches, the fluctuating general concept of justice is still context-independent (1996b). On the other hand, McCarthy and Ferrara argue that agreement on justice depends on the modifications undergone by our conceptions of good, therefore this agreement is dependent on the good (McCarthy, 1996; Ferrara, 1999). One reflection of this argument is that there could only be a difference of degree, not of quality, between

the right and the good, and that what we can best hope to achieve is a situated form of neutrality (Ferrara, 1999).

Each proponent of the debate agree that, in order for democracy and rule of law to be reconciled, the successors of the constitution have to project themselves as 'in the same boat' with the founders of the constitution. It is only if citizens view the founding event as a 'shared practice' and interpret it from similar critical perspective then the gap between the founder and the founded, or the ruler and the ruled could be closed. This is reflected in Habermas as a 'shared interpretative horizon' (1998, 2001), and 'true constitutional reason' in Michelman (2000). However, Michelman is not convinced that discourse ethics can sufficiently close the gap between constitutional founders and subsequent generations. Habermas' scheme may bring together the framers and current citizens under the same discursive domain; however, this still presupposes a 'legal big bang'—i.e. a particular event that started all legality—and cannot explain how that domain was originated by preceding political order. Michelman's solution to the problem is conferring an identity to the 'people' which is continuous across the event of higher lawmaking (1998). People can acknowledge themselves as self-governing only if they view themselves as participants in some already present idea of 'political reason or right' (in Ferrara, 1998: 153). This idea is generated by the politics of a self-governing collectivity, and therefore, identifiable as theirs. Therefore, in their exercise of popular sovereignty, both founding and present generations are responsive to an already present and immanent framework where this specific idea of political reason or right is found. This historical framework is already present in the sense of being the moral horizon that encompasses their ordinary acts of both the framers and the framed.

Similar to Michelman, Ferrara rejects that the qualification that a certain political process of will-formation is 'democratic' is gained only *after* the constitution is enacted. The qualification of being 'democratic' starts with the historical political ideals, not with their translation into a legal document. Dworkin and Habermas' idea that democratic process clarifies and actualizes this hidden normative core found in constitutional principles is not alien to Michelman and Ferrara. However, the latter gives priority to the value orientations that makes the constitutional project as authentically citizens'. Ferrara thinks that constitution-making entails the objectification of the normative core apparent in community's basic political ideals (Ferrara, 2001). What is important for the preceding idea of

reason or right is that it is essentially a *political* articulation. Therefore, there is a sense of political identity of the people on which the constitution translates into a general legal code: 'People, qua collectivity endowed with cultural and political identity, both *discover* on reflection that…the idea of equal respect among free and equals is inescapable *for us* and at the same time *rethink* ourselves now as a demos unified through the ideal of equal respect adequately translated into a positively enacted constitution' (Ferrara, 2001). Therefore, in Ferrara, as well as in Michelman, contrary to the civic agreement on the democratic procedure followed in the act of framing as in Habermas, the ethical self-understanding of citizenry (understood as their political identity) overcome the threat of 'infinite regress'. But still, the political identity of the people remains confined to the sphere of constituted power. Self-government is possible when legislators, chief judges and people share the same sort of political identity. Yet, people attain this political identity only after the enactment of the constitution. As we shall see in the next section, Ferrara confers people the 'cultural identity' in order to locate them into the domain of constitutive power. Following that, I will present the possibility of supporting the republican priority of popular sovereignty with an ontological intuition found in Heidegger's philosophy. In the final section, therefore, I wish to provide some starting point for viewing 'political justice' as something that transcends the everyday politics and written constitution alike, thus as something exemplified in the authentic civic self-understanding of the people.

4.3 Towards a Socio-Ontological Understanding of Sovereign Being?:

In general, constitutional conventions are the products of extraordinary historical events—such as revolutions, national independence struggles or even military takeovers—that have their roots in the long-running social and political transformations. In such cases, however, to argue against the fact that the constitutive power at least partially derives its legitimacy from pre-constitutive forces is to distract the founding event from its space and time. On the other hand, viewing the constitutive power as a direct instrument of pre-constitutive powers would be to ignore how extensively the founding shapes the subsequent political identity of the people. For Ferrara, the founding event is part of the historical and cultural commonality that could neither be reduced to a set of shared ethos nor to the constituted political identity (1999, 2001). This normative core as the 'people qua

collectivity endowed with cultural identity', in which all the political and legal definitions and identifications take shape, contains the general idea of higher law and actualize itself both in the constitutional text and people's acts of self-legislation. In this sense, we may interpret the motto 'We the People' in the American Constitution as 'we' referring to the cultural identity and 'people' in terms of the political identity of the people (Ferrara, 1999: 121). Accordingly, collective decision-making is part of a process whereby people form an interpretative relation with their own basic notion of 'political reason or right'. The concrete document of constitution is an expression and objectification of that underlying understanding of the 'laws of lawmaking'. Consequently, the constitutional project is best understood by judicial review exercised by higher courts, but assessed, reassessed and transformed by people's higher law understanding and democratic will. Here, the crucial difference between courts and public opinion is that the former provides intellectual and technical guidance, whereas the execution of change could only be done by the public itself. Before proceeding any further, I would like to note that I limit myself with the case of constitutional politics and decision-making.

Following Ferrara, it is possible to redefine the modern form of validity based on 'autonomy' so as to accommodate 'authenticity', so that the 'reflexive self-grounding' of particular identities could attain 'reasonableness' and enter into a healthy political communication. From this perspective, the analogy between universal moral principles and the rule of law in the Kantian categorical imperative, that which Habermas conceptualizes (2001), superimposes a constitutional reason over the free popular will. According to this, just as a universal principle directs will under the light of an idea of justice, a constitutional principle bind sovereign will with the idea of legitimate law. In Kant's own account, the categorical imperative simply describes what a free will must do in order to determine itself (Korsgaard, 1996). In this sense, with respect to the will, the categorical imperative concerns the question of 'how to determine itself *according to its own characteristics*' (Korsgaard, 1996: 15). In order the 'will' (legislative popular will) to endorse the 'reason' (constitutional norm) as internal to itself; it must be able to freely adopt the reason as its own expression. If the sovereign is to be bound by a universal law—in the form of constitutionally entrenched human rights—it must do so by employing an inner evaluative standard. This standard is 'inner' in the sense of being 'contextual' or 'internal' to the historical community and its democratic practice, as opposed to

being 'external' or 'universal' as in the case of human rights. Hence, a more proper analogy of categorical imperative with respect to constitutionality would be as follows: a universal-rational principle being taken up by a contextual will and rendered appropriate according to its own structural characteristics. In other words, universal legal norms should somehow be identified as belonging to citizen's ethical self-understanding. However, conceptually, the general principles of human rights are still 'free-standing' with respect to a particular people's constitutional or cultural identity. At this point, a socio-ontological perspective might help to close the gap between authentic cultural identity and human rights. To this purpose, let me introduce certain themes from Heidegger's work that seems to be relevant to this study. After all, Ferrara's 'authentic self-clarification' has its roots in Heidegger's ontology.

Heidegger's hermeneutical phenomenology consists in looking behind "everyday experience in order to uncover the conditions for the possibility of everyday existence" (Heidegger, 2006: 14). For the purposes of this section, I will limit my analysis to 'openness' of Dasein and will try to incorporate this theme into the discussion concerning constitutional dynamics of a self-constituting body politic. In Heidegger's account the 'essence' of Dasein lies in its 'to-be'—i.e. in its comportment towards its own Being. However, there is no external relation between Being and Dasein. Rather, there is a unity that is constituted by the dynamic movement ('self-comportment') of Dasein towards its Being. Because Dasein 'in each case mine' or characterized by *mineness* (indifference), it can choose to win (authenticity or *eigentlichkeit*) or loose (inauthenticity or *uneigentlichkeit*) itself (Heidegger, 2006: 67-8). Dasein exists—authentically or inauthentically—in a general framework which Heidegger describes as 'average everydayness' and renders the uncovering of Dasein's existential structures possible. For the most part, Dasein exists in its average everydayness since it is a 'Being-in-the-world', and unlike the entities 'present-at-hand', it is in the world in the *active sense* of dwelling or residing (being alongside) (2006: 79-83). The 'active' sense of Being-in allows Dasein to shape the world and get shaped by it at the same time. If we reflect this insight to our main topic from the socio-ontological perspective, then, this active sense of belonging to the world corresponds to the reciprocal relationship between pre-constituted law and everyday politics where both sides shape each other. Tans (2002) argues that it is fictitious to assume that social order is a direct reflection of

constitutional arrangements of institutional structures. Then, we may say that, basic rights that are already set in motion by the constitution provide guidelines for the body of citizens in their Becoming whatever their historical notion of right suggests.

By 'letting something be involved,' Dasein 'allow' entities to become ready-to-hand, thereby, 'free them' to become 'equipment' (*Zuhandenheit*). In this way the 'equipmental totality' is grounded in the existence and self-comportment of Dasein. Yet, at the same time, Dasein, in its concernful dealings, encounters entities that have already been freed within a context before itself (Heidegger, 2006: 56-8). In this sense, while the 'world' (as totality of involvements) is generated by Dasein, it is still grounded in that 'world'—i.e. existence presupposes a world while Dasein exists as being in-the-world. Similarly to an individual Dasein, human societies in a given time and space, find themselves constituting an already constituted world (the collectivity is already thrown into the world). As a collective unit, a polity occupies a pre-established world. In a political sense, the institutional framework regulated by a constitution is the world that the 'collective Dasein' finds itself inhabiting. Therefore, we may draw some parallels between ethical self-understanding of a citizenry (understood as their trans-historical political identity) and Heideggerian Dasein, which is collectively and historically open to changes. If we pursue this analogy, Ferrara's duality between political and cultural identity becomes clearer: the polity finds itself constituted (having a constitution), and yet, re-constitutes its constitution through ordinary acts of legislation and constitutional interpretation. But more importantly, the fact that the body politic perpetually constitutes an already constituted world shows the difficulty of setting a fixed point of reference that starts all legality—as implied by Michelman's notion of 'infinite regress'. What is more, if we keep on pursuing this account, the presence of institutional structures become meaningful when they are taken as 'equipments' in the service of the self-comportment of collective entity towards its own defining principles. In other words, constitutional text is an 'instrument' in the service of self-interpretation conducted by the body politic. Nevertheless, it is a special kind of instrument: it reflects the 'mood' of the constitutive epoch in which the collective Dasein forms an unusually close connection with its cultural identity.

In *Being and Time*, to have a mood is to discover something more than ontical: in fear Dasein realizes that it 'is', its attention has been drawn to the fact that 'it is in the world'—in the sense of its contingency, its facticity e.g., that it can get

'hurt' (2006: 180-81). If we carry this moodiness to the level of collectivity, we may argue that since the moods are (such as fear) disclosive, events such as wars of independence or revolutions could have an effect of throwing the collectivity back upon itself—in a manner in which 'one finds oneself'. In such founding events, people may have a clearer understanding of their cultural identity and engage in shaping their new political identity with the help of pre-constituted social forces and decision-making procedures. The event of constitutional founding can be read as a moment disclosive of cultural identity, yet something not as identical with that identity. In other words, constitution-making entails the *expression* of the normative core apparent in community's basic political ideals or the underlying understanding of the 'laws of lawmaking', not its *creation*. This is in line with Michelman's criticism of legal-big bang: rather than forming it, the constitutive power only represents and discloses the constitutional (cultural) identity.

If, following Ferrara (2001), we view higher lawmaking in terms of a *political*—as opposed to a *judicial*—process whereby people form an interpretative relation with their own basic notion of 'political reason or right', then we can say that everyday collective decision-making has a potential of laying-bare and unconcealing the cultural identity, or the actual Being of the collectivity. The actualization or objectification of this hidden normative core—which might have been expressed in terms of constitutional principles—has its source in the self-interpretation of the collective Dasein. From a socio-ontological standpoint, collective self-interpretation refers to politics, taken in broad terms: means of resolving disagreements concerning state institutions and lives of citizens. Constitutional politics presents a special case, in which the general idea of justice is the main focus. Yet, it must be added that the Heideggerean account of collective self-legislation leaves the door open as to the question whether or not the judicial involvement could broaden the perspective from which the collective Dasein understands its own fundamental law. As mentioned above, both ordinary legislation and constitutional interpretation are the means which may unconceal the cultural identity. This brings the problem balancing or setting a priority among the two? Dasein's dynamic and dialogic character might provide some openings on this.

Although, at the ontological level, Dasein is never an isolated "I" or self (rather in Being-with-others, *Mitsein*) we are able to comport ourselves to others in the manner of 'caring for' or 'solicitude' (Heidegger, 2006: 161). Yet, this

comportment or 'caring for' others could be authentic (a freeing of the other for their possibilities) or inauthentic (a leaping in for the other, a 'taking care' of their possibilities for them). Heidegger distinguishes the inauthentic notion of the Others as 'the they', whose existential characteristic is 'averageness'. 'The they' is essentially "insensitive to every difference of level and of genuineness" therefore limits the interpretative horizon before Dasein (2006: 165). From our standpoint, at the socio-ontological level, 'the they' has to become 'us' if anything like 'authentic self-clarification' of a community is possible. If the reconciliation between democracy and rule of law requires that we imagine ourselves as being 'in the same boat' with the constitutional founders, this 'shared interpretative horizon' requires a wide public recognition of Being-in-the-same-world with precedent generations. In actuality, higher judicial institutions are structurally isolated from political influences. As concluded in the second chapter, this renders courts inappropriate for settling political questions in a manner sensitive to cultural and historical dimensions of collective truth. In the present context, similarly, because of their political detachment, the courts themselves could not open way for the public recognition of counstitutional founders. In other words, the judiciary could not transform 'the they' (constitutional founders) into 'us'. Any endeavor to comprehend the priorities of the founding generation—which were translated into the constitutional text—would mount for the self-clarification of the fundamental principles we share in common thanks to our cultural identity. The whole point against judicial review could therefore be construed in terms of the barriers it could erect against an authentic understanding of our cultural identity or Constitutional Being. In this sense, any judicial nullification of legislation would lead to an inauthentic taking-care for democracy. Rather than an authentic freeing of people for their own possibilities, at best, the duty of courts would be guiding public opinion to understand the defining characteristics and cultural foundations of their own political regime.

The Heideggerean schema is mostly based on the self-interpretation of an individual entity. When we view the body politic in terms of collective Dasein, as if it is a monolithic and living organism, a significant problem emerges: this collectivity lacks internal plurality of views and legitimizes its fundamental principles without recourse to anything external, i.e. self-referentially. The second aspect becomes a problem because of the first: when higher-law is made with reference to vague conceptions, such as the trans-historical characteristics of the *folk*,

politics becomes romanticized. This reminds us the familiar dangers associated with totalitarian regimes. However, the radical openness that characterize Dasein would suggest that the constitutional meaning may also arise through a free and dialogical process. From the perspective of Heidegger's ontology, Dasein has the character of not being closed off, or 'sealed off' within itself such that it would lack openness to itself and other beings. Rather, Dasein exhibits a radical openness—it is disclosive. Indeed, *Dasein is the place of Disclosedness* (*Erschlossenheit*) (Heidegger, 2006: 126). The political conception of right is essentially open for contestation; in fact, it cannot emerge without free discussion and essential inputs from the general public. In a constitutionally guided process of Becoming, every individual citizen—including high court justices—could view the political conception of right from his/her perspective. Yet, the fact of modernity suggests that it may never be possible to reach a consensus on this conception. What matters is keeping this general notion of moral legitimacy and autonomous form of validity as regulative ideals in constitutional politics.

Conclusionary Remarks:

In essence, the discussion I have pursued in this chapter revolves around the justificatory weight carried by a people's historical notion of 'political right' and the constitutional origination of democratic procedures through which that notion of right is expressed. The underlying question is whether constitutional review by higher courts or the democratic process is the ultimate authority in expressing and reshaping the cultural understanding of political morality. In this sense, from the point of political philosophy, particular instances of judicial review and legislation could have the function of explicating the fundamental meaning that lies beneath ordinary acts of government. A Heideggerean approach to the debate could help us conceive judicial review and legislation as moments of the same self-comporting collective entity. This would be particularly useful in transcending the dualities such as constituent/constituting powers or higher/ordinary lawmaking and comprehensive/procedural justifications of political power. These dichotomies tend to be grounded on rival ontological priorities given to the individual and the community, and therefore, limit the epistemological scope of the debate.

As we have seen in the second chapter, liberal constitutionalist tradition ultimately grounds the normative justification of judicial controls asserted on

collective decision-making to the possibility that majority suppresses the individual or minority views. In his recent turn, Habermas joins this liberal trend. The weak conception of popular sovereignty signals the abandonment of a central theme in him, namely that the rationalization of social life through a radicalized democracy. In Habermas's minimal conception of popular sovereignty, 'anonymous' communicative networks replaces deliberative majorities. Popular sovereignty finds its expression in the still informal and pre-legal communicative power. Basically, Habermas's model offers complementing a periodic aggregation of votes with a more frequent public forum as the source of democratic legitimacy. However, this runs against Habermas's own insight that law and politics must "ultimately be brought under the control of the people themselves" (1996a: 132). How, then, the requirement of unanimity that Habermas poses upon legitimate higher lawmaking be preserved under increasing plurality of life forms and ethical self-understanding? How come a body of citizens, equipped only with partial or potential public reason that can at best be entitled to self-legislate with judicial mediation, could agree on the core principles and norms of constitution? Ferrara and Michelman's approach could be helpful in avoiding this impasse: if an authentic identification with constitutional essentials among the general public is possible, then citizens can undertake the burden of moral justification based on unanimity. The realization that constitution is authentically 'theirs' could give citizens a strong sense of duty that would motivate them for constitutional deliberation. This sense of duty cannot be generalized without the backing of an established political culture that freely expresses itself in acts of self-government. As we have seen in this final chapter, the chief advantage of Ferrara and Michelman's position is the insight that the historical continuity between constituted and constituent powers implies that the legitimacy of constitutional law largely depends on its contribution to the development of democracy.

Instead of judicial review, a broad and sustained base of political participation which integrates as many interests and values to the democratic process as possible, would suffice the conditions for nurturing a political culture which is sensitive towards the basic rights attributed to each member of that community. In other words, if the role of judicial control mechanism is to be limited to the interpretation of the constitutional project—which is ultimately kept changed by the democratic will—then the institutional authority given to opinion- and will-formation processes has to be enlarged. That is to say that, without a democracy that

is entitled to define itself, there is no ground to overcome the threat of 'infinite regress'. The fact of pluralism is underpinned by an ongoing process of constitutional politics, which is essential for generating civic recognition and legitimacy for legal norms and political institutions. Therefore, reflecting existing principled disagreements to higher lawmaking could be read as what gives majority rule its normative force.

In one sense, in this chapter I have put political morality in the place of Rousseau's general will. Being less demanding then the general will—since it requires no unanimity— just like public reason, it sets forth guiding ideals and principles for constitutional politics. A Heideggerean reading of Ferrara and Michelman provides us with conceptual tools that could prove to be an alternative to Habermas' approach to constitutionality and democracy. Habermas attempts to contain the ever-changing character of political Dasein within law by construing the constitution in terms of 'self-correcting historical (learning) process'. Yet, there is a crucial difference between a living entity and a written text—the former is capable of self-understanding, while the latter offers guiding principles. If, then, Habermas would want to regard the 'idea' of constitution as prior to the concrete constitutional text itself, he has to accept the superiority of the collectivity in Becoming over its own creation, the Law. This is because the 'idea' of constitution is ultimately political in nature; it is not merely a technical term employed by the constitutional jurist.

CHAPTER V
CONCLUSIONS

In the course of this study, the complexity of the theories analyzed required me to view a lot more subjects than I originally intended. Nevertheless, I had to engage with and form relations among as many perspectives as possible. Having said that, the first conclusion that is likely be derived from this study is that the tension between constitutionality and popular sovereignty is built into the nature of contemporary political systems. As we have seen, contractarian philosophers understand liberty as being possible only under legitimate authority and law. While the law is a means to popular self-constitution, gradually, in Sieyes, Tocqueville and Mill, it becomes a means to order, security and individual development. This trend is reflected in grown emphasis on political representation and institutional mediation of the majority will. In the contemporary context, the liberal constitutionalist scholars advance this point in a way to render judicial limitations on popular will enabling conditions for democracy. In brief, the institutional isolation of judiciary from politics provides judiciary moral neutrality. However, as argued with reference to Waldron in the second chapter, because majoritarian decision-making is potentially open to the participation of everyone, it is normatively superior to judicial decision-making. In the final chapter, the normative aspects of the relationship between law and politics are traced to general framework of public political culture. It became apparent that the schema of constituent/constituted powers only makes sense under a historical perspective that explicates the origination of supreme law within particular cultural contexts. It became apparent that, the constitutional text embodies a conception of political justice, which is articulated within the broader process of collective development. Before concluding, I attempted to support this account with a socio-ontological understanding that feeds from Heidegger's philosophy. This, I argued, allows us to back democratic and judicial decision with reference to a broader normative framework in which the historical collectivity articulates its political conception of right.

Common to all modern constitutions is a view that takes all citizens as inherently equal, endowed with inviolable rights and as beings who deserve to be ruled by consent. This is the core moral and political value from which the constitution derives its legitimacy. In this sense, the desirability of political equality and democracy follows from a moral assumption of intrinsic equality of all human beings and a practical judgment that, no one should be assigned ultimate authority because no one is superior by nature. This is in line with Rousseau's basic insight that man is born free but enslaved by the society. Yet, the idea that equality and liberty are bound to clash emerges in subsequent writings of the authors like Tocqueville and Mill. In this context, legal institutions are viewed as safeguards of liberty against the prospect of absolute power of the majority. The ultimate justification of judicial controls asserted on collective decision-making in liberal constitutionalist tradition is the possible insensitivity of majorities towards basic rights and liberties. But, as Dahl (1988) argues, the most distinctive feature of democratic government is the presupposition that citizens possess a body of fundamental rights, liberties and opportunities. If so, liberty (private autonomy) and equality (public autonomy) do not necessarily conflict with each other. This is in line with Waldron's contention that right to participation presupposes that citizens are already endowed with moral autonomy. The fundamental ethical convictions of the individual become valuable sources for political discourse to be channeled into the circulation of power. Habermas provides a much more detailed account on the mutual dependency of political equality and personal freedom. In this sense, the full exercise of private autonomy requires an appropriate use of political autonomy and vice versa. If these make sense at all, then we should presuppose that there is a pre-commitment of the people for seeking to extend the sphere of rights by relying on political equality. This drives us into prioritizing the role of political culture in minimizing the risks associated with the 'tyranny of majority'. It is the established modes of behavior that are found intuitively in citizen's everyday practices, which defines the nature of majority decisions in a given context. These cultural modes determine whether politics consists of pushing vested interests against others, or attempting to realize a form of conceived public good. In the second case, Tocqueville's schema becomes meaningless, since public interest could well be defended by a majority in favor of a minority. If politics is not a field devoid of moral concern and democracy is not simply the aggregation of self-interest, then we

should leave the idea that judicial review as the one and single rationalizing source for democracy.

If we listen to Rousseau more carefully, we realize that he sets the fundamental criterion for democratic legitimacy: the priority of the people over the law, which is a means to their own self-realization. In order the self-constitution of the people by means of law to be the case, the primary function of law should be effectuating popular will. Indeed, in the arguments of Eisgruber and Habermas, we find a conception of system of rights which is essentially oriented towards empowering popular sovereignty. In this sense, the normative superiority of constitutional law over the ordinary law depends on the extent that it serves to the project of self-constitution of the people. Here we find an intuition that majority-decisions are turned down by the judiciary in order to strengthen these decisions by forcing them to be more responsive to fundamental rights and liberties. In other words, judicial review does not represent general will, but it corrects legislation in the light of a more generalizeable will.

At the conceptual level, it is possible to conceive some form of institutional authority which is drawn from immediate democratic control but helps to strengthen the exercise of popular will in the government, and thus, support democracy. Nevertheless, the perspective of democratic majorities could be enlarged by external instances. Although, at times, this could be the case, there is an underlying danger in pursuing this view at the normative level—namely that, politics run the risk of becoming a matter of bureaucratic management. Another difficulty in construing higher courts as the sole defenders of individual rights is the various functions of judicial involvement in politics: judicial review may be used strategically against separatist tendencies of local government (Quebec) in Canada or, as more recently witnessed, against protecting the official doctrine of the state against the re-interpretation of constitutional essentials, such as laicism, in Turkey. Here the problem of the detachment of final decisions from democratic will becomes clearer: judicial nullification of legislation may turn into a device for advancing the independent priorities of the state as opposed to the people. Hence the problem of legitimacy arises, because judicial review, in such cases, is used for the maintenance of the state and the regime, rather than democracy and basic rights.

If one agrees with liberals on the atomistic picture of society, then political life would mean a little more than continuous coercion. However, from a republican

perspective, citizens take part in the creation of enforceable law through asserting their common will on the state. In republican theory, the state is understood as nothing but an extension of citizenry. However, in practice, contemporary bureaucratic state apparatus could gain a 'relative autonomy' from the will of citizens, thus becoming able to assert its independent will and define self-defined goals. As long as the constitutional control of constituted power is viewed as the only, or the best means to protect rights, these safety measures against the violation of individual or minority rights could easily become a means to turn democratic questions into matters of bureaucratic administration. Yet, if we give support to full democracy, we should avoid relying on a negative portrayal of democratic majorities, especially if one accepts that politics is the only way through which moral sources that define rights could be effectuated in institutional mechanisms. In this sense, there is a contradiction between advocating minority or individual rights and restrain ordinary acts of people's self-determination. One can not help but wonder whether supporters of judicial review portray some individuals as not fully worthy of political rights? Indeed, liberal constitutionalist theory nurtures a fundamental distrust in the judgment of masses, a worry which arguably feeds from the ideal of imposing rationality to social relations.

One possible way to bridge the gap between higher courts endowed with constitutional reason and legitimacy-generating force of democratic majorities would be forming channels of dialogue between courts and public opinion. Michelman's contention that the perspectives of the judiciary and general public could be enlarged as a result of exchange of opinions needs to be considered more deeply. By advocating that individual rights and liberties could only be guaranteed by adjudication of legislative will, the advocates of judicial review miss the point that it is the *conditions* and processes of opinion- and will-formation which make majority decisions arbitrary or rational. Arguably, in cases where popular will meets the criterion of rationality, judicial review would be anti-democratic. But who would be entitled to decide whether that criterion is met? In any case, we can not escape the final political decision, which has to be based on some comprehensive consideration based on ethical self-understanding of the collectivity. Procedural reasons are highly plausible in demonstrating whether the fundamental substantive values—equal dignity and concern—are advanced or damaged as a result of majority decisions. However, in the end, people evaluate their political engagement with reference to the

underlying substantive value (i.e. equal dignity), rather than to the procedure that is simply followed.

In one sense, the so-called 'paradox of Constitutional Democracy' is due to the fact that we moderns have not yet achieved to find a way to fill the gap left by the 'divine right of Kings to rule'. Although, we may confirm that constitutional democracy is a 'self-correcting historical process' in which we learn how to govern ourselves better, still we seem to need some extraordinary figures to guide us in the way. It is possible to argue that popular identification with political institutions including the constitution is consolidated within time and political culture. But when we think in terms of political culture, we have no choice other than relying on the intuition that people cannot come to accept constitutional provisions as internal to their self-legislation unless they are granted ultimate responsibility of their decisions. In other words, a sense of political duty for engagement with moral justification of constitutional essentials could only gain strength if the scope of popular will is kept as broad as possible. In this sense, if constitutional democracy connotes to a learning process, the universal moral law which defines the limits of political action should be construed on the ethical basis of the historical community.

REFERENCES

Ackerman, B. (1998) *We the People: Transformations*, Cambridge: Harvard University Press.

Ackerman, B. (1997) 'The New Separation of Powers' *Harvard Law Review*, 113, 3: 633-729.

Agamben, G. (1998) *Homo Sacer: sovereign power and bare life*, Stanford: Stanford University Press.

Agamben, G. (2005) *State of Exception*, Chicago: Chicago University Press.

Agresto, J. (1984) *The Supreme Court and Constitutional Democracy*, London: Cornell University Press.

Alexander, L. (2003) 'Is Judicial Review Democratic? A comment on Harel', *Law and Philosophy*, 22: 277-283.

Barber, B. B. (1978) 'Political Participation and the Creation of Res Publica', Bloomington: The Poynther Center of Indiana University.

Barber, S. A. (1993) *The Constitution of Judicial Power*, Baltimore, MD: Johns Hopkins University Press.

Bellamy, R. (1995) 'The Constitution for Europe: Rights or Democracy?' in R. Bellamy, V. Bufacchi, D. Castiglione (eds.) *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian.

Bellamy, R. & Castiglione, D. (1997) 'Constitutionalism and Democracy: Political Theory and the American Constitution', *British Journal of Political Science*, 27, 4: 595-618.

Benhabib, S. (1999) 'Deliberative Rationality and Models of Democratic Legitimacy', *Constellations*, 1: 25-53.

Birch, A. H. (1995) *The Concepts and Theories of Modern Democracy*, New York: Routledge.

Bohman, J. (1994) 'Complexity, Pluralism and the Constitutional State: On Habermas's *Faktizitat und Geltung*' *Law and Society Review*, 28, 4: 897-930.

Dahl, R. (1989) *Democracy and its Critics*, New Haven: Yale University Press.

Delanty, G. (1997) 'Habermas and Occidental Rationalism: The Politics of Identity, Social Learning and the Cultural Limits of Moral Universalism' *Sociological Theory*, 15, 3: 30-59.

Dworkin, R. (1986) *Law's Empire*, Cambridge, MA: Harvard University Press.

Dworkin, R. (1996a) *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, MA: Harvard University Press.

Dworkin, R. (1996b) 'Objectivity and Truth: You'd Better Believe It', *Philosophy and Public Affairs*, 25: 81-103.

Eisgruber, C. L. (2001) *Constitutional Self Government*, Cambridge, MA: Harvard University Press.

Eisgruber, C. L. (2002) 'Democracy and Disagreement', *Legislation and Public Policy*, 6, 35: 34-47.

Ely, J. H. (1980) *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, MA: Harvard University Press.

Fabre, C. (2000) 'The Dignity of Rights', *Oxford Journal of Legal Studies*, 20, 2: 271–82.

Ferrara, A. (1998) *Reflective Authenticity*, London: Routledge.

Ferrara, A. (1999) *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy'*, London: Sage.

Ferrara, A. (2001) 'Of Boats and Principles: Reflections on Habermas's 'Constitutional Democracy'', *Political Theory*, 29, 6: 782-791.

Fleming, J. E. (1995) 'Securing Deliberative Autonomy,' *Stanford Law Review*, 48, 1: 1-71.

Gosepath, S. (1995) 'Equality in Habermas' and Dworkin's Theories of Justice', *European Journal of Philosophy*, 3, 1: 11-32.

Griffin, S. M. (1996) *American Constitutionalism: From Theory to Politics*, Princeton: Princeton University Press.

Griffin, S. M. (2001) 'Constitutional Theory Transformed' in Ferejohn, J., Rakove, J. N., Riley, J. (eds) *Constitutional Culture and Democratic Rule*, Cambridge: Cambride University Press.

Güriz, A. (1997) *Anayasal Demokrasi*, Ankara: Siyasal Kitapevi.

Habermas, J. (1993a) 'Further Reflections on the Public Sphere' in Calhoun, C. (ed.), *Habermas and the Public Sphere*, MA: MIT Press.

Habermas, J. (1993b) 'On the Pragmatic, the Ethical and the Moral Employment of Practical Reason' in *Justification and Application*, Cambridge, MA: MIT Press.

Habermas, J. (1994) 'Struggles for Recognition in the Democratic Constitutional State' in C. Taylor (ed.) *Multiculturalism*, Princeton, NJ: Princeton University Press.

Habermas, J. (1995) 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Beiner, R. (ed.) *Theorizing Citizenship*, Albany: SUNY Press.

Habermas, J. (1996a) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Oxford : Polity.

Habermas, J. (1996b) 'Reply to Symposium Participants, Cardozo School of Law', *Cardozo Law Review*, 17: 1083-1125.

Habermas, J. (1998) 'On the Internal Relation between the Rule of Law and Democracy', in C. Cronin & P. DeGrieff (eds.) *The Inclusion of the Other: Studies in Political Theory*, Cambridge, MA: MIT Press.

Habermas, J. (2001) 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' *Political Theory,* 29: 766-781.

Hamilton, A. (1996) *The Federalist Papers 71*, London: Everyman.

Harel, A. (2003) 'Rights-Based Judicial Review: A Democratic Justification', *Law and Philosophy*, 22: 247-276.

Hart, H. L. A. (1963) *Law, Liberty, Morality*, Oxford: Oxford University Press.

Heidegger, M. (2006) *Being and Time*, London: Blackwell.

Hobbes, T. (1996) *Leviathan*, Cambridge: Cambridge University Press.

Holmes, S. (1988) 'Precommitment and the Paradox of Democracy', in J. Elster & R. Slagstad (eds.) *Constitutionalism and Democracy*, Cambridge: Cambridge University Press.

Honig, B. (2001) 'On Two Paradoxes in Democratic Theory: Rousseau, Habermas and the Politics of Legitimation,' draft paper prepared for University of Chicago, PT Colloquim, 20, May 2002.

Kedar, A. (2004) 'The Concept of Sovereignty in the Abbé Sieyés' *What is the Third Estate?*' (www.polsci.berkeley.edu/grad/GradConference/papers/2005/kedar.pdf).

Knight, J. (2001) 'Institutionalizing Constitutional Interpretation', in Ferejohn, J., Rakove, J. N., Riley, J. (eds) *Constitutional Culture and Democratic Rule*, Cambridge: Cambride University Press.

Korsgaard, C. M. (1996) *The Sources of Normativity*, Cambridge: Cambridge University Press.

Lauder, K-H (1999) 'Can Habermas' Discursive Ethics Support a Theory of the Constitution?', Working Paper, Florence: European University Institute.

Levy, L. (1988) *Original Intent and Framer's Constitution*, New York: MacMillan.

Locke, J. (1995) *On Government*, Routledge Philosophy Guidebooks London: Routledge.

Madison, J. (1996) *The Federalis Papers 10*, London: Everyman.

Maiz, J. (1990) 'Nation and Representation: E. J. Sieyés and the Theory of the State of the French Revolution,' Working Paper No. 18: http://www.recercat.net/bitstream/2072/1465/1/ICPS18.pdf

Mandel, M. (1989) *The Charter of Rights and Legalization of Politics*, Toronto: Wall and Thompson.

Manfredi, C. P. (2001) *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, Don Mills, Ontario: Oxford University Press.

McCarthy, T. (1994) 'Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue' *Ethics*, 28: 897-930.

McCarthy, T. (1996) 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions', *Cardozo Law Review*, 17: 1083-1125.

McIlwain, C. H. (2005) *Constitutionalism, Ancient and Modern*, New York: Lawbook Exchange.

Michelman, F. (1988) 'Law's Republic', *Yale Law Journal*, 97, 8: 1493-1537.

Michelman, F. (1995) 'Always Under Law?', *Constitutional Commentary*, 12: 227-47.

Michelman, F. (1996) 'Review of Jurgen Habermas's *Between Facts and Norms*', *Journal of Philosophy*, 93: 307-313.

Michelman, F. (1998) 'Constitutional Authorship' in Alexander, L. (ed.) *Constitutionalism: Philosophical Foundations* (1998) Cambridge: Cambridge University Press.

Michelman, F. (1999) *Brennan and Democracy*, Princeton: Princeton University Press.

Michelman, F. (2000) 'Morality, Identity and 'Constitutional Patriotism'', *Denver University Law Review*, 76: 1009-28.

Mill, J. S. (1951) 'Considerations on Representative Government' in H. B. Acton (ed.) *Utilitarianism, Liberty, and Representative Government*, London: Dent Press.

Mill, J. S. (1988) *Principles of Political Economy: with some of their Application to Social Philosophy Volume I*, London: Longmans, Green & Co.

Mill, J. S. (1993) *On Liberty*, Harvard Classics Volume 25, London: P. F. Collier & Son.

Mill, J. S. (1998) 'M. De Tocqueville on Democracy in America' in J. B. C. Schneewind (ed.), New York: Collier.

North, R. (2003) 'A Response to Jeremy Waldron's *Law and Disagreement*,' *Political Studies Review*, 1: 167-178.

Perry, M. J. (1982) *The Constitution, the Courts and Human Rights*, New Haven & London: Yale University Press.

Post, R. (1995) *Constitutional Domains: Democracy, Community, Management*, Cambridge, MA: Harvard University Press.

Rawls, J. (1993) *Political Liberalism*. New York: Columbia University Press.

Reiman, J. (1988) 'The Constitution, the Rights and the Conditions of Legitimacy,' in A. S. Rosenbaum (ed.) *Constitutionalism: The Philosophical Dimension*, New York: Greenwood.

Rousseau, J. J. (1968) *On the Social Contract*, London: Penguin.

Sartori, G. (1962) *Democratic Theory*, Detroit: Wayne University Press.

Schmitt, C. (1988) *Political Theology: Four Chapters on the Concept of Sovereignty*, Cambridge: MIT Press.

Seligman, A. (1992) *The Idea of Civil Society*, New York: Free Press.

Sewell, W. H. (1994) *A Rhetoric of Bourgeois Revolution: Sieyés' Political Theoght*, Durham & London: Duke University Press.

Sieyes, E. J. (2003) 'What is the Third Estate?', in Sonenscher, M. (ed. & tr.) *Sieyes' Political Writings: Including the Debate Between Sieyes and Tom Paine in 1791*, Indianapolis, Cambridge: Hackett.

Tans, O. (2002) 'The Constitutional Theatre', *Res Publica*, 8: 231-248.

Thelen, K. & Steinmo, S. (1992) 'Institutionalism in Comparative Politics,' in S. Steinmo, K. Thelen & F. Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis*, New York: Cambridge University Press.

Tocqueville, A. (1998) *Democracy in America*, Kent: Wordsworth.

Touraine, A. (1995) *Critique of Modernity*, Oxford: Blackwell.

Tushnet, M. (1988) *Red, White and Blue: A Critical Analysis of Constitutional Law*, Cambridge: Harvard University Press.

Tushnet, M. (1999) *Taking the Constitution Away from the Courts*, Princeton, NJ: Princeton University Press.

Waldron, J. (1990) *The Law: Theory and Practice in British Politics*, London: Routledge.

Waldron, J. (1999) *Law and Disagreement*, Oxford: Clarendon.

Ward, K. D. (2003) 'The Politics of Disagreement: Recent Work in Constitutional Theory,' *The Review of Politics*, 65, 4: 425-440.

Weber, M. (1968) *Economy and Society: An Outline of Interpretive Sociology*, edited by Roth, G. & Wittich, C., Fischoff, E. (tr. et al.), New York : Bedminster Press.

Wolin, S. S. (2001) *Tocqueville Between Two Worlds*, Princeton, NJ: Princeton University Press.:

Vogel, H-H (2003) 'Constitutional Review and Democracy – Constitutional Courts and the Legislative Process,' *European Commission for Democracy through Law,* seminar paper presented in: 'Strengthening of the principles of a democratic state ruled by law in the Republic of Belarus by way of constitutional control'.