

State University of New York at Buffalo

From the Selected Works of Antoni Abad i Ninet

March 23, 2009

**DEMAGOGY AND DEMOCRATIC LOYALTY
INSTEAD OF OLIGOGY AND
CONSTITUTIONAL PATRIOTISM**

Antoni Abad i Ninet



Available at: https://works.bepress.com/antoni_abad_i_ninet/3/

DEMAGOGY AND DEMOCRATIC LOYALTY INSTEAD OF OLIGOGY AND CONSTITUTIONAL PATRIOTISM.

ANTONI ABAD I NINET¹

ABSTRACT

This paper is an exercise in legal democratic experimentalism and a defense of the people's role in our juridical and political systems. I use, as the example, the Catalanian Statute of Autonomy amendment approved by the Spanish Parliament. This reform produced an upheaval in Spanish politics which is seriously affecting the confidence of citizens in the whole political system. This case in point is analyzed with other polarization cases and constitutional court models in order to reach general conclusions about the relationship between democracy and constitutionalism, the demos and constitutional/supreme court. The main objective is to verify that a less democratic constitutional court means more possibilities of polarization. The last issue that arises in this paper is the constitutional/supreme court's lack of democratic legitimacy in our modern societies. The conclusion is that constitutional/supreme court legitimacy is based on violence.

¹Antoni Abad i Ninet is Visiting professor of Ancient Constitutionalism and Comparative Constitutional Law, S.U.N.Y. at Buffalo and researcher of the University of Barcelona. I am especially indebted to Michael Halliday, Mark Tushnet, Larry Kramer, James Gardner for helpful comments and discussions during the paper's preparation.

I- INTRODUCTION.

This paper is an exercise in legal theory and comparative constitutional law focused on the particular institution of the constitutional/supreme court. I employ, as an initial premise, the Spanish constitutional system's last events, to show how the paralysis and consequent crisis of confidence may affect constitutional/supreme courts in comparable systems. I outline theoretical and practical amendments to be adopted in order to prevent this sort of crisis.

The first segment of this paper is an introduction of different constitutional court's models. I present three sorts of classifications based on different criteria and characteristics. I assume that the polarization trend will affect, in a dissimilar mode, a constitutional court. These effects will depend on the constitutional system and constitutional court variety.

The second part of this article is related to the polarization phenomenon that is currently involving the interpreter of the Spanish Constitution. As I will demonstrate, this trend has also affected or may affect other supreme/constitutional courts. Starting with an ancient Athenian example and Sunstein's definition of the polarization phenomenon, I will analyze the causes and effects of the phenomenon regarding the constitutional/supreme courts. The amendment of the Catalanian Statute of Autonomy caused magistrates to shift from their initial positions to an irreconcilable and polarized scenario. Paralysis was produced as a result of the Magistrates' polarized positions. After the "Spanish" example I will introduce other polarized examples. The main objective of this section is to prevent these effects.

The third paragraph of this article is focused on a micro-comparison of positive constitutional law. The epigraph seeks to compare legal corpuses and to analyze the solutions adopted by diverse constitutional systems. In addition, it aims to adapt these elucidations to constitutional systems ruled by partitocracy. I present legal positive and jus-philosophical solutions to be applied in order to democratize our constitutional systems and our constitutional/supreme courts.

The first group of these solutions affects the constitutional /supreme court jurisdiction and this allocation into the state's political structure. I analogize the application of the Swiss constitutional system to other constitutional structures. I try to encourage a Swiss democratization effect. The second proposition of this first group is a subsidiary to this precedent. This proposal advocates for a blending of weak and strong judicial review (Tushnet). The second group of proposals is related to the constitutional/supreme court system of election and functioning. I define this group of alternatives as a jus positive because they maintain the main structure of our political systems. The first of these solutions is the democratization and universalization of the constitutional/supreme court system of election. I apply to the constitutional/supreme court a novel interpretation of the responsive democracy theory (Post). The idea is to attribute to the people some sort of responsibility in the functioning of the high court. The main objective is to encourage citizen participation in the highest level of the judiciary. The second proposition is called "atomization of the system of representation" which maintains the current non-democratic framework of the constitutional/supreme court. This proposal consists of an opening of the magistrates' election procedure to professional associations, law schools, notary and attorneys bars. The purpose is to remove the partisan/ president monopoly in this sort of nominations and elections.

As a result of the above segments arises the last issue analyzed in this paper; who and/or what legitimates the constitutional/supreme court. I try to answer this question comparing different legal theories. Finally, I conclude that constitutional/supreme court legitimacy is based on violence, not only as a principle (in cases that the constitutional/supreme court acts according to the people or their representative will) but also as a mean (*Mittle*) in the rest of cases.

I do not obviate, as Mirkin Guetzevitch asserts, that one of the main aspects that highlight the comparative constitutional law studies are the relativity of texts, formulas and dogmas. Men and ideas, parties and principles, mysticism and slogans, customs and traditions, are the determinants factors of a determinate regime.² But if the constitution wants to be considerate of the juridification of democracy³, it is necessary to adapt the constitutional content to the reality that governs every moment, because the definition of juridification is; a phenomenon that appears to regulate and codify new legal fields emerging in society.⁴ If we want to consider the constitution as the codification of democracy then the judiciary, and especially the constitutional/supreme court, require urgent (in the vast majority of cases) correction of this allocation in the political system and the democratization of their systems of elections and decisions, otherwise the constitution will be a juridification of the “*Partycracy*”. This article aims to highlight the urgent need to democratize the constitutional court’s rules involving, in a responsible manner, the real owner of the sovereignty, the *Demos*. I propose demagoguery versus oligogogy.

² VERGOTINNI (1983): 28.

³ ARAGON REYES (2007): 39.

⁴ HABERMAS (1981): 455.

II. CONSTITUCIONAL/SUPREME COURT'S MODELS

As a previous step to study the possible effects of the polarization phenomenon of the constitutional/supreme courts it is necessary to recognize some differences among the structures and functions of these sort of tribunals. I consider that the polarization will affect the courts, depending on their particular features. In this epigraph I employ three sorts of court classifications to highlight these differences. The first categorization is based on the constitutional/supreme court concept of judicial review. Duchacek, stated that, in all kind of systems, federal and unitary, there is a need for an impartial body that can determine the sense of the supreme law of the nation, the constitution, and therefore according to its conclusions, may determine the compatibility of any law or normative act, national or local, with the constitution.⁵ According to this author, this could lead (as indeed has happened) to a broad interpretation of the concept of judicial review, in the sense that courts could void or confirm the validity of laws passed by the national or local parliaments. Duchacek continued stating that a federal system seems to have even more need for an impartial body, because the interpretation of the meaning of the constitution also includes the original and delicate political agreement between the local communities from which the entire federal system was created. In its role of protector and interpreter of the compact and federal arbiter of disputes, about the division of powers between the two jurisdictions, the body should ideally be independent of the sphere of power of the federal and provincial governments.⁶

⁵ DUCHACEK (1970): 255.

⁶ DUCHACEK (1970): 256.

Finally, there is another kind of court with constitutional powers which, although a supreme court could be incorporated into the first category of specified courts. I believe it is appropriate to establish as separate and unique a type as the previous two. The Federal Supreme Court of Switzerland, with a material and jurisdictional uniqueness, is really interesting in relation to the purpose of this paper. The nature of the Swiss Federal Supreme Court is special and limited, as it can only decide on validity of cantonal laws, and generally cannot review federal laws. Thus, only the Swiss people, requested by fifty thousand active citizens or eight cantons may challenge any law passed by the federal legislature (Article 189 of the Constitution of Switzerland). Only the Swiss people can confirm the validity or annulment of a federal constitutional law. Only Switzerland seems to be close to the democratic ideal that all states should move closer.⁷ I really agree with Jackson and Tushnet when they state that “the (Swiss) constitution-makers of the 1874, who were democrats before liberals, would not have wanted a group of judges to be able to undo the work of a parliamentary majority, and even of a popular majority”. Thus Article 113 (3) of the Constitution represents the victory of democracy over constitutionalism.⁸

The second classification is based on the allocation of constitutional interpretation. Which court/s is empowered to engage constitutional interpretation? Jackson and Tushnet differentiated between centralized, decentralized and hybrid review models.⁹ The decentralized model (also known as “American” or “diffuse” model involving “incidental” review) is represented by the organization of the U.S. judicial jurisdiction. A key characteristic of this model is that many courts (state and federal) can exercise

⁷ DUCHACEK (1970): 256.

⁸ JACKSON & TUSHNET (2006): 478.

⁹ JACKSON & TUSHNET (2006): 465.

constitutional interpretation. This system has been used in countries such as Argentina, Australia, Canada and Japan.¹⁰ The centralized model (also called “Austrian” or “European” model) is characterized by the existence of a special court, with exclusive or close exclusive jurisdiction over constitutional rulings. The Austrian Constitution of 1920 created such a court, theorized by the scholar Hans Kelsen, and similar, constitutional courts exist today in countries like Germany, France, Italy, and some of eastern European nations as well. Yet hybrid models also exist, in which the ordinary courts may have power to refuse to apply an unconstitutional law, but only a single court has the power to declare a law invalid.¹¹ From a theoretical perspective, differences between the two systems may reflect different conceptions of the separation of powers. In the American model, limitations on executive and legislative power have been achieved by the progressive recognition of a third power, the judiciary, described as the least dangerous branch.¹² That third power does not exist in most European countries. European constitutional theory acknowledges only executive and legislative power.¹³

The third classification is related to the jurisdiction of the Court. I want to emphasize is Tushnet’s differentiation between weak and strong form of judicial review.¹⁴ The strong form-review will be represented by the U.S. judicial review system and by the constitutional systems around the world which emulated the American system. The distinction between the U.S. and the German constitutional system, based on the existence or not of a specialized constitutional court, is not transcendent in this issue. The difference between strong and weak systems of judicial review is grounded in the

¹⁰ JACKSON & TUSHNET (2006): 465.

¹¹ JACKSON & TUSHNET (2006): 466.

¹² JACKSON & TUSHNET (2006): 467.

¹³ JACKSON & TUSHNET (2006): 482.

¹⁴ TUSHNET (2008).

relations between the judiciary and the legislature and the government. Under a strong-form system like the emerging form of the U.S. Supreme Court's decisions, the tension between judicial enforcement of constitutional limitations and democratic self-government is obvious. The people have little recourse when the courts interpret the Constitution reasonably but in the reasonable alternative view of the majority, mistakenly.¹⁵ The strong court review insists that the court's reasonable constitutional interpretations prevail over the legislature's reasonable ones. Courts exercise strong-form judicial review when their interpretive judgments are final and unrevisable.¹⁶ In these sorts of systems, we can amend the Constitution or wait for judges to retire or replace them with judges who hold the better view of what Constitution means.¹⁷

Weak form systems are systems of judicial review, thereby ensuring that overall constitutional orders in which they are embedded satisfy the requirements of contemporary constitutionalism. But in weak-form system, judicial interpretations of constitutional provisions can be revised in the relatively short term by a legislature using a decision rule not much different from the one used in everyday legislative process.¹⁸ The weak-form review will be represented by New Zealand, The United Kingdom, and Canada.¹⁹ Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance. The basic idea behind weak-form review is simple: weak-form judicial review provides mechanism for the people to respond to decisions that they reasonably believe are mistaken and that can be deployed more rapidly than the constitutional

¹⁵ TUSHNET (2008): 22.

¹⁶ TUSHNET (2008): 20

¹⁷ TUSHNET (2008): 22.

¹⁸ TUSHNET (2008): 24.

¹⁹ TUSHNET (2008): 24.

amendment or judicial appointment processes.²⁰ Another important feature of weak form systems is the treating of constitutional interpretations offered by legislatures as normatively equal in weight to those offered by courts.²¹ Therefore the main practical purposes that I argue in this paper may be applied to strong-form review systems.

Undoubtedly, the issues link with the theory of law questions of whether the Constitutional Court should have the ability to invalidate laws arising from the representation organs of “the people”, or laws ratified through a referendum. In this regard, I want to again mention the case of Switzerland and its Federal Supreme Court, previously classified as a third type of high court with constitutional powers, with a unique nature in comparative law.

As I mentioned above, the Spanish Constitutional Court polarization is going to be the main example to define how polarization affects a high court. I am going to begin with some remarks about the Spanish Constitutional Court; which is characterized as a centralized European constitutional system with a strong system of judicial review. The Spanish Constitutional Court was established by the Constitution of 1978, which disregarded the last legitimate and democratic Spanish constitution of 1931. The court is composed of twelve magistrates appointed by the King, four upon nomination by Congress, four to be nominated by the Senate, two by the government and two by the General Council of Judicial Power. The composition is established by article 159.1 of the Spanish Constitution. The Court has jurisdiction over conflicts between state authorities (including nations and regions), the lawfulness of international treaties according with the constitution, and the constitutionality of laws. In the Spanish case,

²⁰ TUSHNET (2008): 23.

²¹ TUSHNET (2008): 36.

the dispute over the scope of jurisdiction of each unit of government can legally be channelled through the conflict of powers between governments under Article 161.1.c of the Spanish Constitution and by the use of the recourse of unconstitutionality under Article 161. 1. of the Spanish Constitution. There is no doubt about the very important role of the Spanish Constitutional Court as a mediator of conflicts of competence, especially in a system without cooperative institutions between the central and the autonomous entities of the Spanish territorial organization system.²² Compared to the most of the federal systems, this institutional weakness exacerbates a higher level of conflict between the different levels of government. The Spanish Constitutional system does not facilitate communication and negotiation between the autonomous communities and the central state. Furthermore, the Constitutional Court is *de facto* the only institution that can provide solutions to these sorts of conflicts because there is no alternative mechanism to be applied.²³ As Watts affirmed: “ If courts are to be accepted within a federation as impartial and independent adjudicators there appear to be two requirements: 1) independence from influence in the court by any particular level of government, and 2) proportional representativeness of membership on the court”.²⁴ These two conditions will warrant the court's inherent neutrality and hence the precise equanimity to resolve jurisdictional conflicts between the central government and rest of territorial authorities, and what is even more important, can partly restore the confidence lost by the population. The accomplishment of both requirements will directly affect the degrees of participation of the diverse political-territorial entities in the appointment and replacement of the Magistrates of the court. In other words, the central “power” will lose monopolistic power in the Constitutional Court. I consider the existence of tensions

²² ELAZAR (1987): 154-197.

²³ LÓPEZ-GUERRA (1995).

²⁴ WATTS (1999): 100.

between the Court and other state powers as one of the main causes of the Constitutional Court's political mistreatment. I believe that these frictions are a logical consequence of the "checks and balances" system that characterizes the relationship between democracy and modern constitutional systems. The tensions are particularly obvious with the legislative branch of government, considering a key task of the Constitutional Court is to invalidate legislation in the name of rights. In Spain these two requirements are not met. The main evidence of this failure is the challenge of five Magistrates of the Spanish Constitutional Court in the process related with the amendment of the Catalan statute of Autonomy in November 2007. The same sort of politic abuse happened with the same sex marriage resolution. Another feature related to the paper's topic that I want to highlight about the Spanish Constitutional Court is the constitutional system of appointing magistrates. The system is clearly biased in favor of the central government. In fact, not only are all designations the responsibility of state bodies but also those designated by Congress and the Senate (eight out of twelve) need to be approved by a three fifths majority, which in turn requires that candidates should have a high degree of political support by the state majority parties. Moreover, in the Spanish political system the Senate cannot be regarded as a body that represents the interests of the autonomous communities, because their composition is not absolutely dependent on the autonomous units. Consequently, the autonomous communities cannot influence the nominating and appointment of the Constitutional Court Magistrates. Other possibilities to reduce the tendencies of the high court acting as the "leaning Tower of Pisa ", meaning always leaning in the central direction (Wheare)²⁵, will be participation of the Community Autonomous High Courts in the appointment of the Constitutional Court Magistrates. Spain is a very centralized system in this sense. In this

²⁵ COTLER (1996): 174.

case, I understand that comparative constitutional law provides clear solutions to balance the possible trends of the high courts in favor of one or another level of power. The main objective of this correction is to avoid the strong effects of polarization. As an example, article 124 of the Indian Constitution states that, every Judge of the Supreme Court shall be appointed by the President, by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States. Article 94.1 of the German Basic Law will be also an example to allow and guarantee the *Länder* participate in the designations.²⁶ The U.S. is also a good example, in the sense that the appointment of the Federal Supreme Court members requires the “advice and consent” of the Senate, where member states are represented equally. This fact signifies that the U.S. President who nominates the candidates, try to find someone close to their political and legal ideals but that must also be accepted by the majority of the Senate to confirm or reject candidates. I consider that a method to prevent polarization is to permit more participants in the constitutional/supreme court election and function.

I understand that the fundamental problem is not to theorize about the classic dispute between Kelsen and Schmitt on the political or jurisdictional nature of the constitutional courts. The central issue lies in depoliticizing the constitutional court. To situate the court, as much as possible, free from partisan contamination and political influence. That is to correct the delegitimizing process of this very important constitutional institution, the supreme interpreter of the Constitution and settler of jurisdictional conflicts between different levels of power. The next segment will introduce the polarization phenomenon.

²⁶ Another issue is that since 2006 there is a federalism reform process to reorder the powers of the federal and *Länder* spheres, to decrease the *Bundesrat* importance and increase the powers of regional governments.

III. POLARIZATION

The phenomenon of polarization and the havoc that this trend produces to democracy has been observed since ancient times. As Ostwald states, demagogues manipulating the organs of popular sovereignty, the sycophants using the Court of Justice, Cleon's accusation to the young nobles of conspiracy against the *Demos* provoked a sort of intellectual and political polarization in Athens in the year 420 BCE.²⁷ Polarization created a new relationship between politicians and the people. Intellectual and religious poles wrecked the elements of popular sovereignty obstructing the power of the *Demos* and accelerated the transfer of sovereignty from the people to the law.²⁸ The main idea that I want to highlight in this segment is that more democratic functioning in the constitutional/supreme court will mean less risk of polarization.

As Sunstein states, “group polarization is among the most robust patterns found in deliberating bodies, and it has been found in many diverse task”.²⁹ I understand that in the specific case of constitutional/supreme court polarization, this trend has been induced by actions or omissions of partisan allegiance of the justices of the courts. The result is that groups often make more extreme decisions than would the typical of individuals in the group, (where “extreme” is defined solely internally, by reference to the group initial dispositions).³⁰ From the perspective of psychology, the term “group polarization” is somewhat misleading. It is not meant to suggest that group members will shift in two poles. Instead the term refers to a predictable shift within a group

²⁷ OSTWALD (1986): 199

²⁸ OSTWALD (1986): 200

²⁹ SUNSTEIN (2001): 22.

³⁰ SUNSTEIN (2001): 22.

discussing a case or problem.³¹ The effects of the polarization are explained clearly by Sunstein, with the debating experiment in Colorado Springs. Here, in almost every case, group members ended up with more extreme positions after they spoke with another.³² The phenomenon of “group polarization” has conspicuous importance for the operation of many deliberating bodies of relevance to law and politics, including legislatures, commissions, multimember courts and juries.³³ Sunstein argues that if a court consists of three or more like-minded judges, it may well end up with a relatively extreme position, more extreme in fact than the position it would occupy if it consisted of two like – minded individuals and one of a different orientation.³⁴ In the case that concerns us, the approval of the amendment of the Catalan Statute of Autonomy by the Spanish Parliament has been the premise that has allowed a shift toward extreme positions. The polarization caused by external factors to the court meant partisan pressure for justices and challenges in chain of justices. The result is that justices with similar predilections ending up with a more extreme and polarized conclusion. Likewise, in the Spanish Constitutional Court polarization process we can see the existence of so-called “professional polarizers” or “polarization entrepreneurs”. These are political activists who have, as one of their goals, the creation of spheres in which like-minded people can hear a particular point of view from one or more articulate people, and also participate actually or vicariously, in a deliberative discussion in which certain points of view becomes entrenched and strengthened.³⁵ The specificity of the “Spanish case “is that the phenomenon of the polarization leads to a state of paralysis of the Constitutional Court which aggravates the crisis of public confidence in the main interpreter of the

³¹ SUNSTEIN (2001): 23.

³² SUNSTEIN (2007): 61.

³³ SUNSTEIN (2001): 23.

³⁴ SUNSTEIN (2001): 23.

³⁵ SUNSTEIN (2001): 32.

Constitution. Polarization effects are actually more worrisome than the phenomenon itself. We will not discuss in this paper if certain media or political parties are the generators of the polarization, instead we propose alternatives solutions that will provide a greater degree of political independence to the constitutional court. We consider that real independence to this mixed institution will signify less polarization and more guarantees for the democracy. I believe that Sunstein's definition of the polarization's phenomenon omits a transcendent element. Once the polarization began the people's representatives discourses are allocated to dangerous dichotomies, *amie - enemie*, good or bad citizens. This trend has been one of the major instigators of the balkanization of the Spanish politics, and therefore affected the Spanish Constitutional Court because of the partisan obedience of the constitutional court. In this sense, it is necessary for constitutional democracies to take a step to protect deliberation within enclaves, to ensure that those inside enclaves hear alternatives views, and to ensure that those outside of particular enclaves are exposed to what enclave members have to say as well.³⁶ Alternative viewpoints and approaches to ensure diversity, which far from being a source of social fragmentation, should be understood as a creative force that helps identify problems and solutions. Plurality protection is even more imperative in federal or composed states. I cannot hide that the simple exposition of dissimilar opinions generates polarization.³⁷ I believe that the introduction of heterogeneous groups can depolarize the current political situation, producing a movement toward the center. As Sunstein affirms, the persuasive argument theory implies that there will be depolarization if and when new persuasive arguments are offered that are opposite to the direction initially favored by group members.³⁸ In the case that concerns us, the

³⁶ SUNSTEIN (2001): 47.

³⁷ SUNSTEIN (2007): 67.

³⁸ SUNSTEIN (2001): 29.

depolarization will consist of justices of the constitutional/supreme court who did not follow the strictly partisan slogans introducing persuasive arguments towards the center. I understand that the current paralysis that affects the Spanish Constitutional Court has its origins in the polarization that affects the political parties and not the society itself. This partisan political antagonism has been transferred to the members of the Constitutional Court. The Spanish case is interesting because it shows clearly the effects of polarization on the Constitutional Court, citizen's lack of confidence in the institution and a partisan mistreatment and exploitation of the court. Polarization occurred in different constitutional systems with dissimilar effects. However, all these processes have in common a lessening of the people's role in sovereign institutions. In this sense, Tushnet states that in the U.S. a polarized congress (from 1992 to 1996) in a divided government meant a new constitutional order. This new order contained a public that does not participate in politics.³⁹ In fact, Tushnet affirms that the new constitutional order consists of a public that does not participate in politics and weak parties but highly partisan institutions in a divided government.⁴⁰ The author continues defining the implications of this new constitutional order for the judicial review: "Divided government might make a stronger form of judicial review possible and even attractive to politicians. With neither party sure that it would continue to retain power to legislate, each would hope that the courts would persist in pursuing the out-of-power party's program after the party lost control of legislature".⁴¹ The author analyzes how the Supreme Court has been affected by this new constitutional order in aspects such as the understanding of federalism, interstate commerce, regulating states as sovereigns, the enforcement of the Fourteenth Amendment, the Eleventh Amendment and state

³⁹ TUSHNET (2003): 13.

⁴⁰ TUSHNET (2003): 19.

⁴¹ TUSHNET (2003): 31.

immunity, economic liberties and individual rights.⁴² Dislear and Baum also analyzed how the polarization trend affected the U.S. Supreme Court.⁴³ These authors argue that polarization on the Supreme Court increased between 1975 and 1998. A manifestation of this polarization is the tendency of justices to hire law clerks with experience serving lower-court-judges who they perceive to be ideologically similar to themselves. Polarization in this instance is elites moving to the extremes along ideological and partisan lines, where parties vote in opposition to one another, becoming more internally unified and becoming more ideologically distinct.⁴⁴ The concern seems to be that a polarized court, if it does exist, will make less effective or less enduring decisions that rely mostly on politics and not on solid jurisprudence.⁴⁵

The question that arises is, what kind of legitimacy does a polarized court have? In this sense Gibson affirms: "Since the U.S. Supreme Court is often intimately involved in making policy in many issue areas that divide Americans, including the contested 2000 presidential election, it is reasonable to hypothesize that loyalty toward the institution depends upon policy and/or ideological agreement and partisanship."⁴⁶ Implicated in many of the issues dividing Americans is the United States Supreme Court. For a variety of reasons, the court often finds itself at the center of intense political disputes: be it the right to abortion, the right to burn an American flag in protest, the degree to which church and state must be separated, and conflicts between rights of privacy and national security. These issues clearly divide Americans of different ideological and partisan persuasions, and much contemporary debate focuses on what the Supreme

⁴² TUSHNET (2003).

⁴³ PLAGENS (2004).

⁴⁴ PLAGENS (2004): 2.

⁴⁵ PLAGENS (2004): 14.

⁴⁶ GIBSON (2006): 1.

Court has, or has not, ruled.⁴⁷ There are indeed signs that threats to the institutional integrity of the Supreme Court abound. Certainly, the justices of the court have complained about this matter, often couching their arguments in terms of the preservation of one of the most distinctive, essential, and cherished attributes of courts: judicial independence.⁴⁸ Liberals and conservatives unquestionably differ in their preferences for how the Supreme Court should decide important issues of public policy. But as yet, the legitimacy of the Court has not been threatened by the divisions over public policy. Even the most contentious of issues — such as those decided in *Bush v. Gore* or abortion rights — seem not to have undermined public confidence in the Supreme Court as an institution.⁴⁹ I understand this sort of “blind” loyalty as a consequence of a normalization process. I will develop this issue in the last epigraph of this paper. Criticism is always necessary and it cannot be seen as a treason or institutional disloyalty. Thus, polarization does not always affect court’s legitimacy, at least in terms of public acceptance.

Berton, analyzes the relations and effects of popularity and political polarization in a comparative study. One of the main conclusions of this work is that there is an inverse relationship between political polarization in a country and the expression of ideologies in the bosom of governmental action of a country.⁵⁰ Therefore a channel of public opinion open to the people will decrease the risk of polarization. Diversity means less polarization. Berton affirms that contrary to many cultural trends, polarization is a structural fact; it is not about the content of thoughts existing in a society, but on the

⁴⁷ GIBSON (2006): 1.

⁴⁸ GIBSON (2006): 2.

⁴⁹ GIBSON (2006): 26.

⁵⁰ BERTON (2003): 942.

relationships between these different thoughts.⁵¹ We talk about political polarization when individuals perceive the ideologies in their country very opposed regardless of their incompatibility. The work of Berton continues demonstrating the political polarization existing in Germany, France and Denmark and the divergent consequences of this trend.⁵² After studying different scenarios, I propose some jus-philosophical and positive measures to diminish the polarization risk in constitutional/supreme courts.

IV. “SWISS MODEL”, “RESPONSIVE DEMOCRACY” AND MIXED GROUPS.

In this segment I enunciate two sorts of propositions addressed to minimize the risk of polarization in our constitutional/supreme courts. The first segment tends to affect the constitutional court jurisdiction and the political system of our constitutional democracies. I understand that in restricting the court’s jurisdiction we deny a judiciary supremacy over the people and their representatives. The second kind of proposal is addressed to democratize constitutional/supreme courts as institutions, affecting the justice’s election system; consequently these second propositions do not alter the judicial review allocation in our strong review systems.

This section is a sort of “practical” popular constitutionalism applied to the paper’s topic.⁵³ Popular constitutionalism insist that responsibility for ensuring that our system of government adheres to the basic precepts of our constitution(s) lies at least as much with the (American) people as a whole as it does with the Supreme Court justices and

⁵¹ BERTON (2003): 947

⁵² BERTON (2003): 948.

⁵³ KRAMER (2004)

other judges. And that the Judge's views about what the Constitution means have no particularly strong claim on the people, except to the extent that the judges give reasons supporting their interpretations that the people come to agree with.⁵⁴ I consider it necessary to make a clarification between my proposal in this paper and Zurn's work⁵⁵. The main practical difference is that I propose a practical way to democratize the election and functioning of the constitutional/supreme court, and I consider democracy and constitutionalism clearly antithetical and not compatible. In this sense, I believe that all of the paper's propositions are designed to mediate between both of these concepts like a popular constitutionalism endeavor. Zurn advocates for an application of deliberative democracy tools for the judiciary.⁵⁶ I concur with this proposition and I also consider it a necessity for this sort of implementation.⁵⁷ Consequently, I apply this democratic spirit to the constitutional/supreme courts spheres.

- Proposals to relocate the strong-judicial revision model.

- i) The Swiss case. Democratizing our system.

I consider the Swiss constitutional system as a model to be followed, to minimize the risk of polarization. I propose an analogue application of the Swiss "democratic principle" to other constitutional systems. Article 113 (3) of the Swiss Constitution of 1848, defined the Federal Court Public Law Jurisdiction, in its last point (3) stated that: "in all aforementioned instances, the Federal Court shall apply the laws and generally binding decree adopted by the Federal Assembly, as well as the international treaties

⁵⁴ TUSHNET (2008): XXV.

⁵⁵ ZURN (2007).

⁵⁶ ZURN (2007).

⁵⁷ MONSERRAT & ABAD (2008)

approved by this Assembly”. In 1999 Switzerland adopted a new constitution, effective in 2000. The new constitution was understood not as a radical change but as designed to incorporate into a single text the original constitution with accumulated amendments.⁵⁸ An analogous application of the Swiss constitutional systems is not an easy enterprise. Not only because a juridical acculturation is always complicated but also because the common constitutional systems never adopted a real democratic culture. The Swiss constitutional system does not provide any constitutional jurisdiction over federal laws. Laws proclaimed by Parliament or by a popular majority may not be barred by the Federal Court on the grounds of unconstitutionality. This singular feature of the Swiss Constitution is evidence of how democratic principles are held to outweigh the principles upon which the constitutional state is built. Laws proclaimed by the Federal Assembly are not to be taken out of force by a court not chosen by the people. The Swiss system is consistent with the constitutional texts when they affirm that sovereignty resides in the people. This system represents the best solution for defense of democracy against undemocratic actuations of the constitutional/supreme courts. The constitutional/supreme court jurisdiction restriction is legally feasible in our constitutional systems. This simple proposal would mean a political tsunami in most of our political systems and will demonstrate the enormous distrust in the people. I believe that separation of powers does not necessarily mean judicial supremacy. Perhaps, our societies are not ready to achieve the Swiss grade of democracy and they need a group of Platonic philosophers guiding the system.

⁵⁸ JACKSON & TUSHNET (2006): 478.

In this section I would like to mention the Chinese constitution of 1982. Under this constitution there is no explicit jurisdiction in any court to review the constitutionality of laws, decrees, or executive action. Under the 1982 Constitution, the National People's Congress, which is also the supreme legislative body that has the power to "supervise the enforcement"; the NPC Standing Committee has power to both "interpret the Constitution and supervise its enforcement".⁵⁹ Consequently, at least *De Jure*, Congress will have the last word related to the constitutional aspects.

We cannot forget the fact that in the Chinese case, congress represents a dictatorial regime and a human rights offender and not the *Demos*.

ii) Weak and Strong system of judicial review blending.

In addition to the previous proposal I suggest an adoption of a weak system of judicial review. I consider this option as subsidiary because it maintains the main structure of our (strong) constitutional systems. Tushnet's model is probably more feasible than the first option because it means a power limitation of the constitutional/supreme court and not its submission to the legislative power or the democratic will.

I introduced the distinction between weak and strong forms of judicial review in the second segment of the present paper.⁶⁰ At this point I want to remark on the excellent work of Tushnet, and to include his blending proposition as a second option to democratize our system. The author affirms: "Once the structures of judicial review

⁵⁹ JACKSON & TUSHNET (2006): 268.

⁶⁰ TUSHNET (2008)

have been continuumized, we are in a position to think about the possibility of blended systems”.

Perhaps there could be strong-form review with respect to some constitutional issues, weak-form review with respect to others.⁶¹ Tushnet exposes the possible problems that arise realizing this combination, such as the establishment of a basis for allocating issues to one mode of review rather than the other, and to affront the possible abandonment of weak-form review in favor of a rubber-stamping legislation.⁶² It seems to me that the main goal of the author is to limit the scope of the action of the strong – form judicial review, and to enable a more respectful system with the people’s representative sovereign units.

I assume that the blending proposal between both judicial review systems is a “one way proposal”. The strong review systems shall be affected by the weak systems features and not vice versa. I do not think that the “Commonwealth” systems need to introduce features of our less respectful system with democracy and with the separation of powers.

- Affecting the constitutional/supreme court system of appointment and election.

The second sort of proposition is focused on a democratization of the functioning, election and appointment system of the constitutional/supreme court justices. I advocate

⁶¹ TUSHNET (2008): 36.

⁶² TUSHNET (2008): 36 -42.

a new application of the "Responsive Democracy" theory (Post). I consider it necessary to spread the beneficial consequences of referendum and other instruments of direct democracy to the constitutional systems. The main objective of this proposition consists in involucrate the people in constitutional issues, reflections and decisions.

The second proposal of this group consists in the atomization of the election system. This phenomenon will provide diversity in the constitutional/supreme courts. I propose an application of the mixed groups' theory (Sunstein) to the constitutional court appointments and an election system that will guarantee more political independence to the high court. This last proposal is especially desirable in European/centralized systems. As Tushnet affirms, democratization of politics reduced the prevalence of traditional social elites in leadership's positions, and it also heightened the stakes of politics for both winners and losers in situations of real social tension.⁶³

- i. Democratization and Universalising of the constitutional/supreme court system of election.

One of the key functions of the constitutional court is the political power control, therefore it is clear that "the faithful guardians of the constitution of our time"⁶⁴ to exercise their duties with full guarantees the constitutional/supreme court should have independence over the power that they control. The difficulty is how to deal with "the political parties' State".⁶⁵ This section of the paper tries to develop Nino's statement:

⁶³ TUSHNET (2008): 19

⁶⁴ ZAGREBELSKY (2007): 91.

⁶⁵ ARAGON REYES (2007): 39.

“that it is essential to widen the ways of direct participation of the people whose interest are at stake, be general procedures such as plebiscites or popular consultations, or by decentralizing decisions into smaller ambits in which the people concerned can affect them....”⁶⁶ It is compulsory of the democratization of the judicial system and the approach of the judiciary to the people to define our political system as a democracy. As I state above, this variant of democratic election system is based on a novel interpretation of the theory of Responsive Democracy (Post).⁶⁷ This theory is not directed specifically at the systems of representation, election arrangements, interest groups and other similar, but I would like to figure out a possible application of the theory’s essence. The essence of the theory lies in the hermeneutical apprehension of the sense of our democratic institutions.⁶⁸ While the constitutional court is not a democratic institution⁶⁹, its actions affect the *Demos* directly, occasionally against the democratic will. Therefore I believe that constitutional/supreme courts have to be affected by this popular apprehension. A main practical objective of responsive democracy is to inculcate in its citizenry a sense of participation, legitimacy and identification.⁷⁰ This idea of democracy is linked with the citizens’ self-determination and self-government. Citizens, to be able to be self-determinate, can not be excluded from the duties of the highest interpreter of the constitution. The possible role developed by the people would strengthen a system of dualist democracy instead of the monist tendency dominated by partisan interests as happens nowadays in the majority of our constitutional democracies.⁷¹ Popular initiatives, various types of referendums, polls, and internet forums can be adapted to encourage and facilitate public access to

⁶⁶ As quoted in JACKSON & TUSHNET (2006): 259.

⁶⁷ POST (1995)

⁶⁸ POST (1995): 187.

⁶⁹ MICHELMAN (1999): 4.

⁷⁰ POST (1995): 273.

⁷¹ TAMHANAH (2006): 173.

constitutional court issues and debates. A practical way of enabling the performance of citizenship is by linking the professional and legal bar councils, civic organizations, attorneys, judges and law schools. These sorts of institutions can bring the infrastructure and professional organization to arrange citizen participation. In federal or quasi-federal states the sub-national units can also afford some kind of participation, as the local entities, such as city-halls or counties. This is a set of direct democracy experience similar to that established by Ackerman and Fishkin⁷² but strictly applied to the constitutional/supreme court.

One of the main benefits of this peoples' approach would be to decrease the crisis of confidence that blight high courts in decisions against the legislative branch or the popular will. Direct democracy mechanisms will encourage that citizens become partners in the functioning of the court. People will appear as a co-responsible to this institution and therefore the legitimacy issue will be solved.

In this sense the United States federal experience is an important example to be considered when implementing mechanisms of direct democracy to the judiciary. I consider as an example the U.S. constitutional system because the Constitution provides for absolutely no direct involvement by the people in any matter of governance⁷³, but the State's Constitutions adopted different possibilities to enable popular participation, even in judiciary matters. Referendum is understood as an item of proposed legislation or a proposed constitutional amendment that is submitted to the voters' approval.⁷⁴ Nineteen states presently provides for initiative measures. Twelve State Constitutions,

⁷² ACKERMAN & FISHKIN (2004), FISHKIN (2004).

⁷³ GARDNER (2005): 175.

⁷⁴ GARDNER (2005): 176.

for example provide a recall procedure under which the terms of sitting elected officials can be ended prematurely, by popular vote. Forty-three states provide for the election of at least some judges. The greater scope of direct electoral accountability to the people thus gives various tools to ensure that state government is conducted in accordance with their wishes.⁷⁵ Why not to enable popular participation in a national level?

ii. Atomization.

The atomization proposal respects the political parties' and court's "caste rights". Despite Justice John Marshall Harlan's affirmations,⁷⁶ some of the democratically non-consented constitutional court decisions and actuations seem to be motivated by "caste rights". This proposition claims for an innovation in the electing system of the constitutional/supreme court justices. It is necessary to involve more non-partisan actors in the system of electing judges. More non partisan actors mean more independence for the court and less chance of political parties' hegemony in the election of members. Atomizing the election system will reduce obedience to the nominator because there will more "checks" to be paid.

In the Spanish case political influence is even more significant because all of the magistrates of the court are finally elected by the political parties. I understand that the Spanish Constitution of 1978 did an involution in this transcendental issue. From a historical perspective Article 122 Constitution of the Spanish Republic of 1931, this established an election system less dependent on political bodies and partisan

⁷⁵ GARDNER (2005): 176.

⁷⁶ MARSHALL (2008): 69.

majorities. In this sense, the composition of the Court of Constitutional Guarantees included two members elected by the bar associations of the Republic and from law professors. Certainly, from a comparative constitutional law perspective Spain is not an exception. Article 174 of the South-Africa Constitution, Article 94.1 of the German Constitution and Article 56 of the French Constitution link the constitutional court with political powers. Greece is a paradigmatic example that I want to highlight. Article 100.2 of the Greek Constitution states that the court shall be composed of the President of the Supreme Administrative Court, the President of the Supreme Civil and Criminal Court and the President of the Court of Auditors, four Councillors of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court, chosen by lot for a two-year term. The Court shall be presided over by the President of the Supreme Administrative Court or the President of the Supreme Civil and Criminal Court, according to seniority. In the cases specified under sections (d) and (e) of the preceding paragraph, the composition of the court shall be expanded to include two law professors of the law schools from the country's universities, chosen by lot. This system "by lot" which I believe could guarantee more independence to the high courts in our systems. Atomization is much more necessary in European/centralized constitutional systems, considering constitutional courts in this system have a monopoly on constitutional interpretation.

The main ground to not implement this sort of proposals is not only a question of "power" but also a deep belief that people need a guide. As Plato said, opinion (*Doxa*) is the basis of democracy and not knowledge (*Episteme*). Knowledge will be represented by the constitutional/supreme court justices and may be not contaminated by the people's opinion. The question that arises is who says that justices have this

knowledge and that all the decisions are grounded in knowledge and not opinion. *Qui custodiet ipsos custodes?* Justices are finally humans. In Athens, democracy occurred as a result of various reforms, over the V century BC.⁷⁷ From Solon, who democratized the administration of justice, to Cleisthenes who involved the people on legislative procedure and therefore Ephialtes who established the Jury Courts to Pericles. Our society has devices and examples to be democratized, let us trust in our *Demos*.

V. CONSTITUTIONAL COURT VIOLENT LEGITIMATION

After this exercise of comparative constitutional law and theory of law, the question that arises is who or what legitimates constitutional/supreme courts? What happens when judicial review differs from the will of the people or their representatives? American constitutional theory is eternally hounded, if not totally consumed, by a search for harmony between what are usually understood as two clashing commitments: one the ideal of government constrained by law (“Constitutionalism”), the other to the ideal of government by act of the people (“Democracy”).⁷⁸ Democracy appears to mean something like this: popular political self-government, the people of a country deciding for themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organize and regulate their political association. “Constitutionalism” appears to mean something like this: The containment of popular political decision making by a basic law, the Constitution.⁷⁹ After the American constitutional experience the triumph of the constitutionalism appears almost complete. Just about every state in the world has a written constitution. The great majority of these

⁷⁷ OSTWALD (1986)

⁷⁸ MICHELMAN (1999): 4.

⁷⁹ MICHELMAN (1999): 5.

declare the constitution to be the law controlling the organs of the state. This development is generally thought to be a tribute to an especially American idea.⁸⁰ I understand that the debate about harmonization between democracy and constitution should be also exported.

Relations between democracy and constitutionalism have been analyzed from Aristotle, Cicero and Polybius until today. This is clear evidence of the unresolved problematics of this issue. The topic appears and disappears in our systems as a kind of eternal return, in a Nietzschean sense, because it has not given a real solution, (if there is one). As Zurn states there are basically three theoretical options for conceiving of the relationships between constitutionalism and democracy: they can be equivalent, in this sense both concepts can be seen as more or less synonymous, so that use of one of the terms necessarily implies all of the various principles, ideas, institutions and practices involved with the other as well. They can be seen as basically, antithetical: constitutional concerns pull one way, democracy concerns pull the other, and finally they can be seen as mutually presuppositional: according to this view, democracy in some important sense cannot be realized independently of constitutionalism, and constitutionalism likewise inevitably requires forms of popular participation in government.⁸¹

I consider the relations between constitutionalism and democracy as antithetical, because I see the constitutional/supreme court as a sort of modern oligarchy that needs to maintain a contemporary *Mikte*, which consolidates an institutional structure mirroring the socioeconomic classes. *Demos* and Democracy will be the poor class and

⁸⁰ KAY (1998): 16.

⁸¹ ZURN (2007): 104-105.

constitutionalism and constitutional/supreme court will be the rest of economic classes. The antithetical character of these concepts does not mean the need of mediation between them.

I agree with Kramer when he affirms: “Modern Anti-populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy – headed, and simple –minded, in contrast to a thoughtful, informed, and clear headed elite. Ordinary people tend to be foolish and irresponsible when it comes to politics: self-interested rather than public spirited, arbitrary rather than principled, impulsive and close- minded rather than deliberate or logical. Ordinary children are like children, really. And being like children, ordinary people are insecure and easily manipulated. The result is that ordinary politics, or perhaps we should say politics that ordinary people make, is not just low in quality, but dangerous as well. It comes as no surprise that people who hold these sorts of beliefs about ordinary people would gravitate toward something like judicial supremacy”.⁸²

One of the main doctrinal arguments applied to justify the constitutional supremacy is based on consent. It seems to me paradoxical that in the question of legitimacy the “children’s” consent is valid. There are different arguments for consent as legitimator. In this case, the consent of the children is valid to consolidate the power. I classify the consent as a legitimation arguments as a) pragmatics or utilitarian: these arguments are based the cost of keeping order (Alexander, Perry)⁸³, b) power: as The U.S. President Andrew Jackson speaking about Chief Justice John Marshall’s decision in *Worcester v. Georgia*. The often misquoted Jackson line, “Marshall made his decision now let him

⁸² KRAMER (2004): 242.

⁸³ ALEXANDER (1998), PERRY (1998).

enforce it.", in other words articulating the notion, where is the U.S. Supreme Court's Army?⁸⁴ and, c) Hart's rule of recognition.⁸⁵ I consider that these solutions do not solve the issue. I agree with Jackson & Tushnet when they affirm that consent is a plastic concept that requires the consentor's capacity and deliberation, qualities that indicates freedom to choose and informed choice. As matter of practical politics, it is typically doubtful how much either quality is present at the creation of a political order, even when we can put a specific date on a new system's coming into operation.⁸⁶

In a new way to source legitimacy, Tushnet applies the concept of constitutional patriotism to the judicial review stating: "constitutional patriotism has two components. The first is a commitment to constitutional democracy. The second, and more important, grows out of the fact that constitutional democracy takes a variety of forms. Constitutional patriotism arises from a critical reflection on a polity's particular history".⁸⁷ The author continues affirming: "Michelman seems (to me) correct in asserting that the mere fact that the relevant institution has specified meaning in a particular way provides no reason for a proponent of one of the views rejected by the institution to abandon his or her antecedent views. Such a person, that is, could not take as a ground for his or her patriotism the fact that the constitution has the meaning specified by the institution".⁸⁸ Consequently, what matters is public acceptance of the institution as a whole and not of any particular decision. We need to differentiate between the constitutional/supreme court and the decision. This argumentation may be connected with Gibson's research finding that the United States Supreme Court is widely supported by the American people, and that support has little to do with ideology

⁸⁴ *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832). Boller, Paul F.; John H. George (1989).

⁸⁵ HART (1994).

⁸⁶ As quoted in JACKSON & TUSHNET (2006): 293.

⁸⁷ TUSHNET (2008): 72.

⁸⁸ TUSHNET (2008): 73-74.

or partisanship. Instead, loyalty toward the institution is grounded in broader commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system.⁸⁹ I cannot figure out how can we accept the institution regardless of their decisions? Despite that I agree with Frank Michelman when he differentiates social acceptance and legitimation⁹⁰.

What happens when there is a clear lack of people's consent or will? What happens if a judicial decision clearly contradicts the will of the people or their representatives? What occurs if you (citizen) do not observe a judicial decision? I believe that the solution to these question is the answer to the source of legitimacy of the constitutional courts. The source of legitimation of this non democratic sovereign unit is the institutionalized violence, (*Staatsgewalt*) violence in a legal sense instead of a sense justice. The concept of violence belongs to the symbolic order of law, politics and morality, and to the all forms of authority, or at least a pretense of authority.⁹¹ Constitutional/cupreme court legitimation is grounded in the mystical foundation of authority. As an evidence of this statement Derrida analyzed the English words "enforce to law" to define the relationship between violence and justice. This author affirms that the word "enforce" the law, we must remember that justice is not necessary law or right⁹². Without force the constitutional/supreme court is impotent. Derrida quoting Benjamin defines two types of violence related to law, the "founding violence" that establish law and the "preserving violence" that maintains, confirms, guarantees the permanence and

⁸⁹ GIBSON (2006): 25.

⁹⁰ MICHELMAN (1999).

⁹¹ DERRIDA (1997): 83.

⁹² DERRIDA (1997): 27.

enforceability of law.⁹³ I understand that depending on the specific situation, the constitutional/supreme court exercises one or another sort of violence. It seems logical to consider that the constitutional/supreme court applies a preserving violence, especially in these juridical systems (Anglo-Saxon) that do not consider the constitutional /supreme courts as negative legislators (Kelsen).

I consider that in those cases, where the court acts against the will of the people or their representatives, the action is employing a founding violence. Therefore, I understand as Derrida analyzing the police ignominy⁹⁴, that the lack of border between the two sorts of violence, this contamination between foundation and conservation shows the extra limitation of the constitutional/supreme court power in judicial review. I do not deny the legal and unassailable character of the violence used by the constitutional/supreme court, but I request a clear recognition of the link between constitutional/supreme court legitimation and violence.

Violence that legitimates constitutional/supreme court is double, when the court acts with consent, the violence acts as a principle, when the court acts against the people's will or their representatives violence act as a medium (*Mittle*). The modern nation state has successfully linked law to violence not because government managed to monopolize the legitimate means of coercion but because it rest on the oldest form of realizing meaning in the West: sacrifice.⁹⁵ This monopolization does not tend to protect this, that and the other just and legal ends, but the law itself.⁹⁶

⁹³ DERRIDA (1997): 82.

⁹⁴ DERRIDA (1997): 86.

⁹⁵ KAHN (2008): 98.

⁹⁶ DERRIDA (1997): 86

I believe that Michelman and Tushnet view constitutional patriotism's application as a way to legitimate constitutional/supreme court is a variant of this sacrifice rooted in an old Anglo-Saxon thought that makes a difference between institution and act, between constitution and a determinate constitutional article, supreme court and a determinate decision. We the people must accept the legitimacy of the constitutional/supreme court even when the court acts against our will.

I consider that all these elements together, violence, force and sacrifice affected decisively the collective subconscious of the people. One of the effects of this sort of normalization is to believe the convictions of constitutional law, which considers popular politics by nature dangerous and arbitrary; that "tyranny of the majority" is a pervasive threat, that a democratic constitutional order is therefore precarious and highly vulnerable, and that substantial checks on politics are necessary lest things fall apart.⁹⁷

Once the romanticism of the constitutional court legitimation has passed, the alternatives and propositions to gradually democratize the supreme/constitutional court will be more effective and more realistic with a possible enforcement of the constitutional texts. In this sense, popular constitutionalism operates as a mediating device: a way to retain the notion of constitutionalism without placing power outside the democratic majority. It depends, however, on conditions to sustain it--in particular, a public that is prepared to treat the Constitution as something other than politics and to observe a law/politics distinction when hard questions arise about what the Constitution means.

⁹⁷ KRAMER (2004): 243.

VI CONCLUSION

The January 20th 2009, the 44th President of the U.S., Barak Hussein Obama, recited the following oath, in accordance with Article II, Section I of the U.S. Constitution: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." The people's major representative swears to protect the Constitution of the U.S. instead of swearing to protect the people of the United States. Chief Justice of the Supreme Court, John Robert delivered (in his capacity as Chief Justice) the oath to the President, instead of a single American citizen or another representative. I believe that symbols are not free; they are circumstantial evidences of our juridical and political system. All of these symbols are also a way to normalize (Foucault) people with a clear obedience and acceptance message. Juridical fiction bastardies (bastardierte) divine violence (Benjamin).⁹⁸ In this sense, we can assume legal violence as another example of sacred discourse applied to secular systems.⁹⁹ This paper aims to provide arguments for a dual democratic system (Ackerman),¹⁰⁰ and also to encourage the overcoming fear on *Demos* and democracy.

⁹⁸BENJAMIN (1921): 64.

⁹⁹ ABAD (2009)

¹⁰⁰ ACKERMAN (1991).

BIBLIOGRAFÍA

- Abad i Ninet, Antoni: (2008). "Playing at Being Gods" ExpressO
Available at: http://works.bepress.com/antoni_abad_i_ninet/1
- Ackerman, Bruce: (1993). *We the People Foundations*. Cambridge, Mass: Harvard University Press.
- Ackerman, Bruce, and James S. Fishkin: (2004) *Deliberation Day*. New Haven, CT: Yale University Press.
- Alexander, Larry: (2005). "introduction" in *Constitutionalism. Philosophical Foundations*, edited by Larry Alexander, 1-13. Cambridge, U.K: Cambridge University Press.
- Aragón Reyes, Manuel (2007): *Teoría del Neoconstitucionalismo, Ensayos escogidos*, AAVV. Madrid, Spain: Trotta.
- Bertòn, Raül Magni (2003): "Actions Gouvernementales, Popularité et Polarisation Politique: une Étude Compareé", *Revue Française de Science Politique*, Vol. 53 (6), 941-962.
- Boller, Paul F.; John H. George (1989): *They Never Said It: A Book of False Quotes, Misquotes, & False Attributions*. New York, NY: Oxford University Press.
- Cotler, Irwin (1996): "Can the center hold? Federalism and rights in Canada", in *Federalism and rights*, edited by Ellis Katz and Allan Tarr, 173-191. Maryland, MD: Rowman & Littlefield Publishers, Inc.
- Derrida, Jacques (1994): *Force de Loi. Le Fondement mystique de l'autorité*. Paris, France: Galilée.
- Duchacek, Ivo .D. (1970): *Comparative Federalism. The territorial dimension of politics*. New York, NY: Holt, Rinehart & Winston, inc.
- Elazar, Daniel .J. (1987): *Exploring Federalism*. Tuscaloosa, AL: University of Alabama Press.
- Fishkin, James S. (2004): *Deliberative Polling: Toward a Better-Informed Democracy*. In, <http://cdd.stanford.edu/polls/docs/summary/>

- Gardner, James A. (2005): *Interpreting States Constitutions, A jurisprudence of Function in a Federal System*. Chicago, IL: University of Chicago Press.
- Gibson, James L. (2006): The Legitimacy of the United States Supreme Court in a Polarized Polity Available at SSRN: <http://ssrn.com/abstract=909162>
- Habermas, Jürgen (1981): *Theorie des kommunikativen Handelns. Band 1, Handlungsrationalität und gesellschaftliche Rationalisierung*. Frankfurt am Main, Germany: Suhrkamp,
- Hart, Herbert. (1994): *The Concept of Law*, 2nd Ed. Oxford, U.K: Oxford University Press.
- Jackson, Vicki C. & Tushnet, Mark (2006): *Comparative Constitutional Law*. New York, NY: Foundation Press.
- López-Guerra, Luis (1995): "Algunas propuestas sobre los conflictos positivos de competencia", *La jurisdicción constitucional en España* (AA.VV.). Madrid, Spain: Centro de Estudios Constitucionales.
- Kay, Richard S (1998): "American Constitutionalism" in Larry Alexander, *Constitutionalism. Philosophical Foundations*. Cambridge, U.K: Cambridge University Press.
- Kramer, Larry. (2004): *The People Themselves, Popular Constitutionalism and Judicial Review*. New York, NY: Oxford University Press.
- Michelman, Frank I. (1999): *Brennan and Democracy*. Princeton, NJ: Princeton University Press.
- Monserrat Molas, Josep & Abad i Ninet, Antoni (2008): "Monism versus Dualism in the current Spanish Constitutional System" *International Review of Constitutionalism*, Vol. 8 (1) pp.1- 41.
- Ostwald, Martin (1986): *From Popular Sovereignty to the Sovereignty of Law*. Berkeley, CA: University of California Press.
- Perry, Michael (1998): "What Is 'The Constitution?'" in *Constitutionalism. Philosophical Foundations*, edited by Larry Alenxader, 99-152. Cambridge, U.K: Cambridge University Press.

- Plagens, Gregory K (2004): "Polarization in Process or Outcome: An Examination of U.S. Supreme Court Change Over Time" Southern Political Science Association Annual Meeting New Orleans, La., Jan. 8-10, 2004, Available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/7/7/9/page_s67791/p67791-1.php
- Post, Robert C (1995): *Constitutional Domains, Democracy, Community, Management*. Cambridge, Mass: Harvard University Press.
- Sunstein, Cass R. (2001): *Designing Democracy, What Constitutions Do*. New York, NY: Oxford University Press.
- Sunstein, Cass R. (2007): *Republic. com 2.0*. Princeton, NJ: Princeton University Press.
- Tamanaha, Brian Z, (2006): *Law as a Means to an end: Threat to the Rule of Law*. New York, NY: Cambridge University Press.
- Tushnet, Mark. (2003): *The New Constitutional Order*. Princeton, NJ: Princeton University Press.
- Tushnet, Mark. (2008): "introduction" in *I Dissent, Great Opposing Opinions in Landmark Supreme Court Cases*, edited by Mark Tushnet. Boston. Mass: Beacon Press.
- Tushnet, Mark. (2008): *Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton, NJ: Princeton University Press.
- Vergotinni, Guiseppe de (1983): *Derecho Constitucional Comparado*. Barcelona, (Catalunya) Spain: Espasa Calpe.
- Watts, Ronald L. (1999): *Comparing Federal Systems*. London, U.K: McGill-Queen's University Press.
- Zagrebelsky, Gustavo (2.007): *Teoría del Neoconstitucionalismo, Ensayos escogidos*, AAVV, Madrid, Spain: Trotta.
- Zurn, Christopher F. (2007): *Deliberative Democracy and the Institution of Judicial Review*. Cambridge, NY: Cambridge University Press.