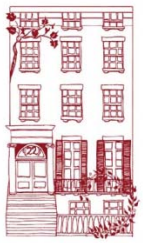

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A Political Theory of Constitutional Democracy. On Legitimacy of Constitutional Courts in Stable Liberal Democracies

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A POLITICAL THEORY OF CONSTITUTIONAL DEMOCRACY. ON LEGITIMACY OF CONSTITUTIONAL COURTS IN STABLE LIBERAL DEMOCRACIES

By Pasquale Pasquino[*]

Abstract

This text offers the draft of the third section of a book devoted mostly to the Constitutional Courts in three European countries: Germany, France and Italy. After a section on the new separation of powers and the legislative role of the judiciary, I present a theory of the legitimacy of the constitutional adjudication by agencies which are non-electorally accountable and have the explicit function of corrective of the majoritarian democracy, based on the principle that there is no right without remedy.

[*] pp14@nyu.edu *To my friend Istvan Hont*, in memoriam

The text that follows is an early draft presenting a section of my current research. I assume here known what European Constitutional Courts (hereafter: CC) do[1]. Here I shall focus on the question of their legitimacy, meaning the question of the rational (I understand this term in the minimalist Hobbesian sense)[2] arguments we can present to support and justify to ourselves as citizens the existence of a CC in a constitutional democracy (*verfassungsmäßiger Rechtstaat*) (*stato di diritto costituzionale*) [3].

Before explaining what I've tried to do in this text, I need to say a few words about what I *do not*. Discussing a research project obviously demands checking the coherence, the "integrity" of the arguments presented, but it has also to be clear about precisely which question the author wants to ask and tries to answer, for it is no sound objection to say that she has failed to answer a question outside the intended scope of her research. The answer may be unclear or unpersuasive (in a strong, rigorous sense of the word, in a research like the one presented here, it cannot be simply true or false), but the question itself can only be unclear and perhaps uninteresting – which is a subjective evaluation and depends mostly on what we can call "circles of recognition".

To begin with, here what I'm not trying to explain and justify. I do not want in my research to talk either about the role of Constitutional Courts in fragile or illiberal democracies[4], and even about American judicial review, or transnational/ supranational courts.

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[1] The basic argument can be read in my contribution to a conference at Washington University Saint Louis. See the FN 9.

[2] I agree with Sharon Lloyd's interpretation when she writes, "Hobbes sought to discover rational principles for the construction of a civil polity that would not be subject to destruction from within [...] Hobbes further assumes as a principle of practical rationality, that people should adopt what they see to be the necessary means to their most important ends [notably the natural right of self preservation]." "Hobbes's Moral and Political Philosophy," in *Stanford Encyclopedia of Philosophy*: http://plato.stanford.edu/entries/hobbes-moral/ .

[3] On the meaning of this expression see my article in *Cardozo Law Review* "Classifying Constitutions: Preliminary Conceptual Analysis", Vol. 34, p. 999-1019.

[4] Sam Issacharoff is writing on this important and difficult topic.

More specifically and assuming the definition of *democracy* offered by Adam Przeworski in a number of articles[5] (i.e., that a democratic regime is one in which the incumbent government can lose elections – so that Cuba or China do not come under this category), I can be even more specific. I won't consider the role, function and legitimacy of the Supreme or constitutional court in countries like Azerbaijan, Georgia, Egypt, Turkey or Pakistan, nor of the new CC of Latin America. I need however to add a supplementary qualification. The case of Turkey is particularly interesting. Since 1961, there is a Constitutional Court in Turkey which has been working pretty effectively (until recently) as guardian of the Kemalist constitutions. Turkey corresponds, by the way, to the minimalist criteria of a democratic regime according to Przeworski: the incumbent party lost the election not only of 1950 [6], but more relevant, the Kemalist political elite was repeatedly defeated in the last 12 years, since the Islamic party AKP (*Justice and Development Party*) took power, without being successfully challenged by military intervention. So a rotation in power seems to be a reality in Turkey (provided that the AKP doesn't place obstacles to it in the future); the reason why I exclude this country from my analysis is that Turkey, so far, doesn't look like a liberal democracy[7] (the treatment of Kurds and of sectors of the opposition in the country is well known and an evident example of disrespect for fundamental citizens' rights).

So the object of my inquiry is limited to stable liberal democracies (notably Germany, France and Italy)[8], by which I mean those political systems that have constitutions resulting from the stable compromise between different social political groups who believe, in principle, in the same basic values, and accept the idea of *limited government*.

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[5] "Minimalist Conception of Democracy. A defense", in *Democracy's Value*, ed. by I. Shapiro and C. Hacker-Cordon, Cambridge University Press, 1999, p. 23-55.

[6] As it is well known, on four occasions (1960, 1971, 1980 and 1997) the army intervened in the political process in the second half of the 20th century to reestablish the supremacy of the Kemalist party.

[7] See Fareed Zakaria, *The future of freedom : illiberal democracy at home and abroad*, New York, W.W. Norton & Co., 2003.

[8] These are countries of which I know not only the language but also a more or less significant amount of history and culture.

As a footnote, I would like to add that a comparative analysis of constitutional adjudication mechanisms should distinguish four basic sub-groups of institutions: 1. the American type of Supreme Courts with competence of judicial review of primary legislation (for instance, the Supreme Courts of India and Japan); 2. the Constitutional Courts of European continental type (those I analyze in this research, but also, Poland, Spain, Portugal, etc.); 3 the important family of Constitutional/Supreme Courts of quasi-democratic, semi-authoritarian or illiberal countries (like Turkey, Egypt, Tunisia, Russia); and 4. Courts which don't seem to do anything or just rubber stamp the decisions of the executive (Georgia, Azerbaijan, Ivory Coast, etc.).

It is, moreover, important to draw attention to the circumstance that in speaking of constitutional courts, it is difficult to say anything from a normative/justificatory point of view if we do not first have a look at the specific constitution that the Court is supposed to protect and guarantee. As the case of Turkey shows, a Constitutional Court can quite effectively protect a constitution imposed by a tiny minority over a population that never freely accepted it. These types of radically transformative constitutions (of Jacobin type) are not the object of my research, even though I believe that they are of extraordinary political interest.

My book ideally will have three sections, referring to, as I said, three European constitutional democracies: Germany, France and Italy:

1. Morphology
2. Genealogy
3. Legitimacy of CC

The first section is based on and it will expand an article published in the RTDP [9] and presented in English as a section of the article *Constitutional Adjudication: Lessons from Europe* [10]; this first part presents the typology of various forms and mechanisms of Constitutional Adjudication in France, Germany and Italy based on the mechanism of referral to the CC (the political referral [*saisine parlementaire*], the judicial referral, [*ricorso incidentale, konkrete Normenkontrolle*, QPC: *question préliminaire de constitutionalité*] and the citizens' referral [*Verfassungsbeschwerde, amparo*]).

The second part will present case studies of the historical origin of these institutions in the three countries with (probably) the analysis of two ancestors: the Athenian institution of the *graphé paranomon* [11], and the French debates in the An III (1795) concerning Sieyes' *jurie constitutionnaire*.

This section will discuss: both the topic of "norms' hierarchy" in a non-Kelsenian perspective [12], and the "functionalist" (in the sense of conflating the function which an institution ends up fulfilling with the reasons that were at the origin of the same institution) hypothesis of Tom Ginsburg [13] as well as the thesis of Ran Hirschl [14].

The third part is on the topic that I discuss, at least in part, in the text presented here; this section will explain the sense in which contemporary constitutional democracies are a form of mixed government, or more exactly as I'll try to show of *divided power*.

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[9] "Tipologia della giustizia costituzionale in Europa" *Rivista trimestrale di diritto pubblico*, 2002, n. 2, p. 359-369. I first presented this paper at the Jean Monnet Center at NYU and at a conference at Washington University Saint Louis, Constitutional Courts Conference 1-3 November 2001: http://law.wustl.edu/harris/conferences/constitutionalconf/Pasquino2.pdf

[10] *Texas Law Review*, vol. 82, N.7, 2004, p. 1671-1704; with J. Ferejohn.

[11] See my contribution in M.H. Hansen (ed.), *Démocratie athénienne - démocratie moderne : tradition et influences. Entretiens de la Fondation Hardt*, Vol. 56 - Genève, 2010, pp. 1-50 («Democracy Ancient and Modern: Divided power».

[12] See for a first draft of the argument my article: "Rule of law and divided power", *Justice System Journal*, 2012, vol. 33, no. 2; p. 131-135.

[13] *Judicial Review in New Democracies*, Cambridge University Press , 2003.

[14] *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, 2004

My intellectual enterprise is both descriptive and normative and normative in a sense that can be qualified as *justificatory* rather than *revisionary* [15].

I have certainly a preference for the German model of constitutional adjudication vis-à-vis the American Judicial Review (a preference that has no significant importance - I have no transformative claim - but it inserts a normative[16] dimension into my descriptive enterprise, since the Courts I discuss are one of the possible models of constitutional adjudication)[17]. My goal, in any event, is primarily to claim that the existing institutional setting (the presence of a divided power of *Rechtserzeugung* – law making power – between elected bodies and courts of justice) is the best form of government (in Churchill's sense of this ambitious expression) we have been able to establish, rather than assuming the posture of the reformer suggesting important, significant and wonderful (and probably impossible) transformations of our institutional and constitutional order. So it is more a sort of apology for the status quo than plea for doing better in the countries of which I'm speaking in my work.

To be faithful to myself, I want to add that I have no hostility at all towards the idea of improving the status quo. Generally speaking I would say the contrary. All the societies in which we are living in the West are to different degrees fundamentally unjust, in my personal opinion.

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[15] I use this term following D. Parfit, see his *Reasons and Persons*, 1984. The term *revisionary* was introduced by P.F. Strawson speaking of different types of metaphysics (see his: *Individuals - An Essay in Descriptive Metaphysics*, London: Methuen, 1959).

[16] Here *normative* means a preference that can be rationally justified.

[17] I'm now old enough to know the very limited possibility of modifying entrenched constitutional conventions, and more important, I have no pretensions at all to suggest anything to my American colleagues being a sort of institutional pluralist and not an expert on the American political and constitutional system. By "institutional pluralist" I mean, in the tradition of Machiavelli's *Discorsi*, that what is good and possible for Florence may not be possible for Naples. Or, to use a more contemporary example, that good institutions for Sweden (uni-cameralism and parliamentary system with an incipient and timid constitutional adjudication) are not exactly the same as those that are good for the US or for Afghanistan.

But my maxim is that before trying to change the world we need to understand it and to see also what the positive achievements are amidst increasingly unjust conditions, both social and economic.

***

Constitutional democracies are political systems where non-elected, non-accountable organs (usually called courts) can modify through interpretation or simply cancel statutory legislation enacted by elected and accountable parliaments.[18]

With the authors of the *Encyclopedia Britannica*[19], I believe that this political system is different from the one imagined by the authors of classical representative government, both in France and in the US,[20] or, to use the English

[18] I define this form of government by the presence of three elements: 1. a representative government based on universal suffrage, where there are regular, repeated and competitive elections; 2. a *rigid constitution*, encompassing fundamental rights and some form of separation in the exercise of political authority; 3. an independent judicial organ in charge of the guardianship of the constitution, which is called in Europe a constitutional court, council or tribunal.
By accountability I mean the need of an agent or organ elected *pro tempore* to return to the electoral body to be renewed in her/his mandate. There are many other possible definitions, but in my text the term means only and exclusively what I stipulate.
A definition of constitutionalism as a key aspect of constitutional democracies is the one offered by J. Weiler that I share: in a constitutional legal order "the constitution meant a higher law with the apparatus of judicial review and constitutional enforcement", *The Worlds of European Constitutionalism*, ed. by G. de Burca and J.H.H. Weiler, Cambridge University Press, 2011, p. 9.
[19] Sub voce democracy we read: "(3) a form of government, usually a representative democracy, in which the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee all citizens the enjoyment of certain individual or collective rights, such as freedom of speech and religion, known as liberal, or constitutional, democracy" *The New Encyclopedia Britannica*, Vol. 4. Micropaedia, 15th Edition, Chicago etc., 1993; p. 5 sub voce Democracy, that the guarantee of rights is for good reasons the task of a court of justice (rather than other possible alternatives) is the object of this text.
[20] I cannot discuss here the controversial origin of judicial review in the US, but I need to remind that article 3 of the Constitution established simply a federal court with the task of what was called in Germany *Staatsgerichtsbarkeit*, the adjudication of conflicts between the competences of national authority and those of the sub-units of the political system (states, *Länder*, provinces, regions, etc.), a function which exists in any federal regime to my knowledge, and not the contemporary *Verfassungsgerichtsbarkeit*, the guarantee of the rights (on this point see the opinion of the USSC: Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 1833) and of the constitutional structure itself characterized by the "horizontal" rather than "vertical" division of political authority. On the original jurisdiction of the US Supreme Court, see J. Madison, *Federalist Paper*

expression, it is unlike the Westminster Model of government (with very weak, if any, judicial review/constitutional adjudication, depending on one's definitions of these terms). [21]

Some (few?) people seem to believe that this change vis-à-vis modern representative government is irrelevant or marginal [22] since these organs cannot do anything contrary to the will of political (=elected) actors. In another section[23] I have to discuss extensively this point, more exactly the latitude of the Constitutional Courts' discretionary power – which is not an *all or nothing*, but of the order of the something. Now I'll take issue with the large body of literature that has recognized this crucial transformation of representative government introduced by modern constitutional regimes, which establish an organ with the competences which I specified [in a previous section]. I will focus here on the question of a constitutional court's *legitimacy*.

Without entering into a conceptual analysis of this term, I need to specify the sense in which I use this concept. The word legitimacy (starting from the seminal work of Max Weber)[24] has a double meaning. From an empirical point of view, Constitutional Courts are among the institutions of contemporary democracies

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#39: "the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated." See also J. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review*, 49 (May 1997), 1031-64.

[21] On this question see now the important book by Stephen Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge, Cambridge University Press, 2013.

[22] This seems to be the opinion of Adam Przeworski, *Democracy and the Limits of Self-Government*, New York, Cambridge University Press, 2011, where p. 160 the author shows, moreover, strong skepticism vis-à-vis constitutional adjudication and a clear preference for *majoritarian* democracy (on this book see my review in *La vie des idées*: http://www.laviedesidees.fr/Le-peuple-en-democratie.html?lang=fr)

[23] And briefly at the end of this text.

[24] "Die innere Achtung bzw. die Bejahung einer Herrschaftsordnung oder in dem hier vorliegenden Fall eines Machtanspruchs".

that have the best reputation among the citizens. (This is the case in countries like Germany, France and Italy [add data]– less so in Spain, because of the tensions between the central government and the provinces of the young Spanish democracy – notably Cataluña, tensions that the Constituent Assembly decided to leave open and up to the *Tribunal Constitucional* to settle).

This type of popular legitimacy or social approval[25] (one should consider that parliaments and political parties have lost such approval dramatically because they have more and more the reputation of narrow partiality/partisanship) is in itself very important, though not the specific object of my intellectual investigation. I am looking for the reasons/rational arguments that could support the existence of such an institution as the Constitutional Court.[26]

One might note here that the classical 20th c. theories of democracy do not discuss constitutional adjudication. Quite paradoxically, Hans Kelsen doesn't speak of it in his *Wesen und Wert der Demokratie* (1929) [27], [28]. Less surprisingly, Schumpeter never refers to this aspect of a contemporary democracy in the famous chapters in his book *Capitalism, Socialism and Democracy* (1942), since

[25] Concerning the German Constitutional Court, see : Simon, H.: „Verfassungsgerichtsbarkeit"; in: Benda, E.; Maierhofer, H.; Vogel, W.: *Handbuch des Verfassungsrechts*, Berlin: de Gruyter 1994, pp. 1637-1681.

[26] [Auf deutsch: „Legitimität meint die Rechtmäßigkeit im Sinne ihrer durch allgemein verbindliche Prinzipien und Wertvorstellungen begründeten Anerkennungswürdigkeit" (Braun, Daniela - Schmitt, Hermann: „Politische Legitimität", in: Kaina, Victoria and Römmele, Andrea (Hrsg.): *Politische Soziologie*, Wiesbaden, 2009, S. 53)] According to Max Weber: „Akzeptanz kraft formal anerkannter und für vernunftgemäß richtig befundener Verfahren" [Weber, Max, 1992: Die drei Typen der legitimen Herrschaft, in: ders., 1992: *Soziologie. Weltgeschichtliche Analyse. Politik*, Stuttgart, 151-166.] .

[27] See a partial English translation of this book in: http://publishing.cdlib.org/ucpressebooks/view?docId=kt209nc4v2&chunk.id=ch01&toc.depth=1&toc.id=ch01&brand=ucpress

[28] The paradox has to do with the circumstance that in the same years Kelsen presented the first systematic defense in Europe of constitutional adjudication in his celebrated text, Wesen und Entwicklung der Staatsgerichtsbarkeit, that he presented in Vienna at the meeting of the German-speaking professors of public law (*Verhandlungen d. Tagung d. deutschen Staatsrechtslehrer zu Wien am 23. u. 24. April 1928* ; Mit e. Ausz. aus d. Aussprache / Berichte von Heinrich Triepel ; Hans Kelsen ; Max Layer ; Ernst von Hippel, Berlin : W. de Gruyter & Co., 1929.
See also P. Pasquino, "Hans Kelsen: Verfassungsgerichtsbarkeit und Demokratietheorie", *in La controverse sur « le gardien de la Constitution » et la justice constitutionnelle. Kelsen contre Schmitt – Der Weimarer Streit um den Hüter der Verfassung und die Verfassungsgerichtsbarkeit, Kelsen gegen Schmitt,* edited by P. Pasquino and Olivier Beaud, Paris, Editions Panthéon Assas, 2007, p. 19-31

what he had in mind when speaking of democracy was the British political system of the 20th century[29]. The same absence persists in books on democracy by Giovanni Sartori[30],[31].

Still, the question of the legitimacy of CC is anything but new: it was discussed not only in the US in the 19th century, but also with an extraordinary richness of arguments and counter-arguments both by law professors during the Weimar Republic and by political actors in Italy during the process of making the republican constitution in Rome in 1946-47 when the institution of a constitutional court was strongly opposed by the Socialist and Communist members of the Constituent Assembly[32].

As I shall show in the section of my research devoted to those historical contexts, there is a remarkably repetitive character within these debates, for reasons partially connected with the fact that comparative constitutional theory has paid so far only a limited attention to these German and Italian arguments.

Criticisms of CCs tend to revolve often around the following points, discussed very well by Mauro Cappelletti in his seminal work *Giudici Legislatori?*[33]:

a) the difficulty ordinary citizens have in understanding the Constitutional Courts' opinions (the objection being that they are in some sense, aristocratic, here referring to the technical dimension of judge-made law, hence the difficulty

[29] In the crucial section of his book devoted to the conditions for the success of the democratic method, the Austrian economist wrote this important remark – on which I have to come back in another section of my research:
"The second condition for the success of democracy is that the effective range of political decision should not be extended too far. How far it can be extended depends not only on the general limitations of the democratic method which follow from the analysis presented in the preceding section but also on the particular circumstances of each individual case". p. 291
(http://sergioberumen.files.wordpress.com/2010/08/schumpeter-joseph-a-capitalism-socialism-and-democracy.pdf).
[30] In English: *The Theory of Democracy Revisited*. Chatham, N.J: Chatham House, 1987.
[31] An important exception is the American political theorist Robert Dahl, notably in his book: *Democracy and Its Critics*, Yale University Press, 1989.
[32] See "L'origine du contrôle de constitutionnalité en Italie: Les débats de l'Assemblée constituante (1946-47) » ; in *Rivista trimestrale di diritto pubblico*, 2006, n.1, p. 1-11.
[33] Milano, Giuffrè, 1984, pp. 72-82.

of accountability, the precondition of which, in theory at least, being that the citizens understand what law-makers do)[34];
b) the occasional retroactive character of judicial decisions (contrasting with the principle of "no retroactive law" – *Rechtsicherheit*);
c) the institutional ignorance of judges and its impact on law making (often in relation to decisions which imply a large set of specific and non-legal knowledge);
d) the anti-majoritarian character of the judicial law-making.

In his book, Cappelletti rejects these criticisms with robust arguments (which I summarize and present in the final version of this text).

Still, the main challenge to constitutional adjudication by courts of justice through a panoply of arguments (systematically repeated by a large number of critics) is that Constitutional Adjudication is undemocratic. Simply formulated, the claim boils down to the following point: if modern democracy is a governmental order in which the exercise of political authority is based on a mechanism of popular authorization: elections, then those governmental organs that are not elected by the citizens and so not accountable to the voters are incompatible with representative government. One can think here of the open opposition of E. Sieyes to the royal veto in 1789: the king cannot be (co-)legislator since he is not elected and accountable[35] – but also of J. Madison's difficulty in justifying the fact that the members of the judiciary do not respect the "republican principle"[36].

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[34] It is, by the way, not necessarily easy for citizens who are not experts to read and understand many pieces of statutory legislation.
[35] See on this point my book *Sieyes et l'invention de la constitution en France*, Paris, Odile Jacob, 1998, passim.
[36] See *Federalist Papers*, #39 "If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." Madison's argument in favor of the exception for the members of the judiciary is – unusually for him – not clear and not persuasive. Alexander Hamilton comes back to the appointment of the judges in the sections of the Federalist Papers he wrote, being a lawyer, on that topic.

In an important book published in 1931, *Der Hüter der Verfassung* (the guardian of the constitution),[37] Carl Schmitt launched an upfront attack against Kelsen's text of 1928[38], the first theoretical foundation of constitutional adjudication in Europe. In his book, the German legal theorist didn't reject the idea that a modern constitutional democracy, like the Weimar Republic, needs a guardian of the supremacy of the constitution. In fact, in his *Verfassungslehre* (published three years earlier, 1928), Schmitt, the theorist of the constituent power of the people, clearly endorsed the idea that the constitution is a political decision *superior* to statutory legislation enacted by an elected parliament, since this one cannot modify the constitution with the same procedures used to enact laws[39]. What Schmitt rebukes, on the basis of his democratic ideology (legitimacy = elections), is the Kelsenian doctrine that the guardianship, of what the Austrian colleague called a 'hierarchy of norms' between the constitutional provisions and the statutory legislation, should be attributed to a judicial organ, meaning to a non-elected and non-accountable court of justice.

The first part of Schmitt's book[40] is a violent attack on Kelsen, aiming to show that the judiciary should not be allowed to exercise the function of guardian of the constitution for two primary reasons: 1. because a constitutional court cannot simply operate through judicial syllogisms, i.e., the mechanism of subsumption of the statutory norm under the constitutional provision, which consists in merely checking the non-contradiction between the two norms of different level, to use the metaphor of the pyramid (the *Stufenbaulehre*)[41], as Kelsen seemed to claim,[42]

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[37] Berlin, Dunker und Humblot.
[38] See FN 48 hereafter.
[39] Schmitt distinguishes not only the statutory legislation from the constitutional provisions (*Verfassungsgesetzte*) but also the latter from the *positive Verfassung*, the constitutional core, which can be modified only by the citizens, the holders of the *pouvoir constituant*. This point has been repeated by the German Constitutional Court that claimed that only the German people and even not the elected representatives can abandon the German national sovereignty in favor of an European federal state (what is the real core of the German national sovereignty or identity (?) is not clear either in Schmitt or in the famous *Lissabon Urteil* of the German *Bundesverfassungsgericht*).
[40] « The judicial power as guardian of the constitution », see notably p. 27-78 (It. transl. Milano, Giuffrè, 1981).
[41] Elsewhere ("Gardien de la constitution ou justice constitutionnelle? C. Schmitt et H. Kelsen"; in *1789 et l'invention de la constitution*, ed. by M. Troper and L. Jaume, Paris, Bruylant - L.G.D.J.,

and 2. because this function of control is an eminently "political" one (I'll come back to this concept analyzing Richard Thoma's contribution at the debate in Vienna when Kelsen and Triepel presented their respective theses)[43].

Equally important is the last part of the book[44] where the German constitutional theorist defends the idea that only a *democratic*, that is, a *popularly elected* organ, can assume the function of guardianship of the constitution: the President of the republic, elected and accountable, is the only agent then who can exercise this crucial function.

I do not need to discuss these issues here nor show the paralogism of Schmitt's theory of the "neutral power"[45]. I want instead to stress that the accusation of incompatibility between constitutional adjudication exercised by a court of justice and democracy is not new, and that any theory of democracy which reduces this form of government to the electoral accountability of the governing organs has to repeat Schmitt's claim that the judges lack the legitimacy for important political decisions and tends toward denouncing such a constitutional court as an *aristocratic* institution[46].

A possible counter to Schmitt's challenge has been to say that Courts that exercise a constitutional review of statutory legislation are not acting as legislators, and so are not usurping this function from its rightful (elected) organ. Thus, there is no reason for democrats (more exactly, *electoralists*, *électionists*[47]) to worry about and be critical of constitutional adjudication by a court of justice.

1994, p. 141-152), I argued that Schmitt and Kelsen were not really speaking of the same question. Here I'm simply trying to show that the objections that Schmitt presented against the constitutional adjudication are a sort of *Ur*-criticism later on systematically repeated.

[42] On this last point I essentially agree with Schmitt, as I'll argue in the text of this article.

[43] See the text quoted FN xx, p. yy.

[44] P. 204-242 (It. transl.).

[45] See my text on the neutrality of Constitutional Courts (unpublished).

[46] Schmitt's position is presented accurately by Armel Le Divellec, "Le gardien de la constitution de Carl Schmitt" in Beaud-Pasquino (see FN xx), p. 33-78, notably (HV2, p 236 ; HV 3, p 156).

[47] Emmanuel Sieyes used the word *électionisme* in his manuscripts to characterize his doctrine of the representative government. Electoralism is used here to qualify the theories of contemporary democracy that reduce this form of government to electoral accountability and majority rule.

On this point I side with the critics. The idea first presented by Kelsen under the label of *negative legislation*,[48] doesn't withstand any serious scrutiny. Likewise, the defense of the Court based on the suggestion that because often members of Constitutional Courts are appointed by elected representatives, they are, therefore, democratic.[49] The last argument sounds like sheer Hegelianism: everything is connected with everything. Such a pseudo-answer begs the question of legitimacy with a conceptual pirouette!

What I want to dispute is the criticism based on the ancient dogma of the separation of powers: specifically, the claim that constitutional adjudication represents an encroachment upon the legislative function. That seems a bold claim: qualifying as *dogma*[50] the pillar of modern liberal constitutionalism that goes under the etiquette of separation of powers. But I'm not an anti-liberal, nor a subversive. I'm repeating a point made quite persuasively by Hans Kelsen[51].

But since this claim, or more exactly *my own version of it*, plays a very important role in my entire argument, I need to clarify what I mean before proceeding.

I do believe that the Constitutional Courts (the European name for governmental organs which exercise constitutional adjudication but which are not elected and not accountable to the voters) do exercise a legislative function; they are, indeed, to use the expression of Michel Troper, *co-legislators*. However, I do not see in the Constitutional Courts' exercise of this function a form of despotism[52] – on the contrary, their participation in the *law-making* function of the political authority

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[48] *General Theory of Law and State*, Harvard University Press, 1945, p. 267-269. See also: Hans Kelsen, La garantie juridictionnelle de la constitution, *Revue de droit public*, 44 (1928), p. 197 ; this text is the French translation (probably by Charles Eisenmann) of the text presented by Kelsen in 1927 at the meeting of the German- speaking professors of public law in Vienna (see FN xx).

[49] See A. Von Bruneck, 'Constitutional Review and Legislation in Western Democracies', in C. Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*, Baden-Baden: Nomos, 1988, p.224.

[50] I use the word in the meaning: "something held as an established opinion; *especially***:** a definite authoritative tenet" (Merriam-Webster Dictionary, *sub voce*).

[51] *General Theory*, op. cit., p. 269 ss.

[52] I use here this term simply as a synonym of *bad or arbitrary government*.

seems a useful mechanism, and one that may, in fact, create crucial obstacles to despotic, authoritarian or illiberal governments[53] and help the stabilization of liberal democratic regimes by improving their ability to protect constitutional rights.[54]

If we agree that interpreting and cancelling statutory legislation (declared unconstitutional by the Constitutional Court) is *Rechtserzeugung* (we can translate the Kelsenian expression as "law-making"), it is not enough to claim, with Cappelletti, that it is a diverse form (different from the parliamentary *Rechtserzeugung*) of law-making, which is certainly true.[55] We have to explain why it is good. More specifically, we must grasp why it is good that law be produced by two different types of institutions, and in which sense they are different, even though they both make laws, i.e., binding decisions for the members of the political community.

To do this we need to step back and have a look at the rationale of the Montesquieuian doctrine of the separation of powers.

Powers/functions.

Given that this point, i.e., the doctrine of the separation of powers, is not always clearly understood[56], we need to remember that, in the famous Chapter 6 of the book XI of his The *Spirit of the Laws* on the Constitution of England, Montesquieu distinguished (not always consistently) between *functions* exercised

[53] One can think that the authoritarian regime established by *Fidesz* in Hungary through a constitutional revision deprived the Hungarian Constitutional Court of almost any power of controlling the government.

[54] My point here is that in our contemporary liberal democratic societies, the popular demand for protection of rights goes beyond the classical claim for political participation (franchise). Citizens ask for protection of civil and social rights and do not want to be limited to fight (those who can) for the political victory to the next election, hoping that at that point, if there is a different representative majority, their rights will be respected.

[55] *Giudici legislatori?* Quoted, p. 63 ss.

[56] For a correct interpretation of the doctrine, see B. Manin, "Montesquieu", in *A Critical Dictionary of the French Revolution*, edited by F.Furet and M.Ozouf, Harvard University Press, 1989, p. 728 ss. and the seminal articles on the same question by Charles Eisenmann republished in C. Eisenmann, *Essais de théorie du droit, de droit constitutionnel et d'idées politiques*, Paris, LGDJ, 2002, notably: « L'esprit des Lois et la séparation des pouvoirs », originally published in *Mélanges Carré de Malberg*, Paris, 1933, Libr. du Recueil Sirey, 534 p.

in each political system and *branches* or agencies/institutions exercising these functions.[57]

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law[58].

The three functions in this first classification correspond to the taxonomy proposed by Locke in the *Second Treatise*: legislative, federative, executive, though in the next paragraph of the same chapter Montesquieu modifies the names of the tripartite classification:

> By virtue of the first, the prince or magistrate enacts *temporary or perpetual laws*,[59] and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions [this is evidently the federative power][60]. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the *judiciary power* [italics mine], and the other simply the executive power of the state.[61]

Now the federative takes the name of executive *function* and the third function (to judge and punish) the name of judiciary. In the somewhat imaginary conception of the English constitution[62] presented by Montesquieu in this

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[57] This distinction is already in John Locke's Second Treatise, see P. Pasquino, "Locke on King's prerogative", *Political Theory*, 26 (2):198-208 (1998).

[58] Nugent translation [http://ia700305.us.archive.org/31/items/spiritoflaws01montuoft/spiritoflaws01montuoft.pdf], p. 151; the original text reads: "Il y a dans chaque État trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

[59] Here what we call statutory and constitutional legislation or alternatively statutory legislation and administrative regulations are brought/unified under the same function.

[60] On the federative power and its modern developments, see: Erich Kaufmann, *Auswärtige Gewalt und Kolonialgewalt in der Vereinigten Staaten von Amerika: Eine rechtsvergleichende Studie über die Grundlagen des amerikanischen und deutschen Verfassungsrecht* (Leipzig: Duncker and Humblot, 1909).

[61] « Par la première, le prince ou le magistrat fait des lois pour un temps ou pour toujours, et corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisième, il punit les crimes, ou juge les différends des particuliers. On appellera cette dernière la puissance de juger, et l'autre simplement la puissance exécutrice de l'État. », ibidem.

[62] On this fundamental: Lando Landi, *L'Inghilterra e il pensiero politico di Montesquieu*, Padova, CEDAM, 1981.

chapter, the judicial function (called also ambiguously *puissance* or *pouvoir*) is famously a "null power"[63]. The federative/executive function is not really an object of discussion[64] and the analysis focuses on the legislative function which is also (as in Bodin and Rousseau) the supreme (sovereign) function/power.

The crucial mechanism needed to avoid a despotic regime was for Montesquieu to stay away from any form of monocratic exercise of the *law-making function*:

> In such a [here the translation is not accurate, better: 'In a'] state there are always persons distinguished by their birth, riches, or honors: but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.
>
> The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.[65]

It is clear that to avoid despotism, Montesquieu, in speaking of England, presents a model of the mixed constitution[66] – here used to divide the sovereign legislative function – typical of the post Glorious Revolution English political order.

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[63] This expression means, in the best interpretation, I know not that the judicial function is without any power, but that it is not attributed to a permanent body of magistrates, since exercised by jurors: "The judiciary power ought not to be given to a standing senate" (Engl. Transl., p. 153)

[64] On the executive function, I want to signal a couple of very important works: Jacques Necker, *Du pouvoir exécutif dans les grands États*, 2 vol., 1792 ; Joseph Barthélemy, *Le rôle du pouvoir exécutif dans les républiques modernes*, Paris, Giard et Brière, 1906 ; Rudolf Smend, *Die politische Gewalt in Verfassungsstaat und das Problem der Staatform*, Tübingen : J.C.B. Mohr (P. Siebeck), 1923 ; Enzo Cheli, *Atto politico e funzione d'indirizzo politico*, Milano, Giuffrè, 1961.

[65] P. 155; "Il y a toujours dans un État des gens distingués par la naissance les richesses ou les honneurs; mais s'ils étaient confondus parmi le peuple, et s'ils n'y avaient qu'une voix comme les autres, la liberté commune serait leur esclavage, et ils n'auraient aucun intérêt à la défendre, parce que la plupart des résolutions seraient contre eux. La part qu'ils ont à la législation doit donc être proportionnée aux autres avantages qu'ils ont dans l'État: ce qui arrivera s'ils forment un corps qui ait droit d'arrêter les entreprises du peuple, comme le peuple a droit d'arrêter les leurs. Ainsi, la puissance législative sera confiée, et au corps des nobles, et au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblées et leurs délibérations à part, et des vues et des intérêts séparés".

The judiciary in turn has to be independent[67],[68] from the law-making function since it would be unacceptable that the judges (or those who exercise judicial function) apply the law arbitrarily. All this is written in the chapter on England. But in the fundamental chapter on legal government (*The Spirit of the Laws*, II, 4), Montesquieu developed the idea of a *dépôt des lois* which endowed the high courts of justice (the *Parlements d'ancien régime*) with some active role in the law-making function:

> It is not enough to have intermediate powers in a monarchy; there must be also a depositary of the laws. This depositary can only be the judges of the supreme courts of justice, who promulgate the new laws, and revive the obsolete.[69]

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[66] As to this classical form of government, I presented my interpretation in "Political Theory, Order and Threat", in *Nomos* XXXVIII: Political Order, 1996, p. 19-40 and "Machiavelli and Aristotle: The anatomies of the city", in *History of European Ideas,* Volume 35, Issue 4, December 2009, pp. 397-407.

[67] "Most kingdoms in Europe enjoy a moderate government because the prince who is invested with the two first powers leaves the third to his subjects", p. 152; « Dans la plupart des royaumes de l'Europe, le gouvernement est modéré, parce que le prince, qui a les deux premiers pouvoirs, laisse à ses sujets l'exercice du troisième. »

[68] On the rationale of the independent exercise of the judicial function, see: P. Pasquino, "One and Three: Separation of Powers and the Independence of the Judiciary in the Italian Constitution", in J. Ferejohn, J. Rakove, J. Riley (eds.), *Constitutional Culture and Democratic Rule*, Cambridge, Cambridge University Press, 2001, p. 205-222.
The bottom line of the argument seems to be the following: Montesquieu speaking of the separation of powers in England was defending the idea that the agencies that have to exercise the function of applying the laws need to be independent from the agency which exercises the function of making law. Why? To avoid judicial decisions *ad personam*. A *loi* for Montesquieu, likewise for Locke, is/has to be a general abstract commandment – cannot be a *bill of attainder* meaning a norm targeting a specific subject. So the judge cannot make special decisions, since he has to enforce the law that is general and equal for everyone (how is that compatible with a *society of ranks* cannot be discussed here). In this sense the citizen is protected vis-à-vis the extemporary decrees of a biased judge (and moreover he can appeal, at least in the contemporary judicial systems) against a judge's decision which seems arbitrary). The law has to be abstract and general, and the judge independent (tenured) to be able to resist the power of the other branches (for instance the King), which could try to force the judge to decide in a way that pleases the King. In the case of the CC, the point is different, and I need to be clear about that: the CC is a co-legislator and if the CC is not legally and de facto independent from the political (elected) branches, the CC cannot be a counter-power and its function would evaporate.

[69] P. 17; "Il ne suffit pas qu'il y ait, dans une monarchie, des rangs intermédiaires; il faut encore un dépôt de lois. Ce dépôt ne peut être que dans les corps politiques, qui annoncent les lois lorsqu'elles sont faites et les rappellent lorsqu'on les oublie. " Montesquieu was referring at the practice of *enregistrement des ordonnances royales* and to the *remontrances* of the *Parlements d'ancien régime*. (See Jules Flammermont, *Remontrances du Parlement de Paris au XVIII^e siècle*, Paris, 1898).

This distribution of the law-making function[70] between different and independent branches/ agencies is for him as well as for modern constitutionalism the essential tenet of a liberal anti-despotic, anti-authoritarian form of government. The contemporary version of the divided law-making power has been presented recently as the end of the democratic regime and as a simple revival of the pre-modern, mixed regime.[71]

In a very useful article devoted to the separation of powers in Montesquieu, Michel Troper [72] wrote recently:

> C'est paradoxalement une variété de balance des pouvoirs à la Montesquieu qui survit le mieux. Assurément pas comme la décrit L'*Esprit des lois*, c'est-à-dire entre une Chambre nobiliaire, une Chambre élue et un roi armé du veto, mais on en connaît aujourd'hui une autre forme. *Dans la plupart des pays, le pouvoir législatif est aujourd'hui partagé entre les assemblées parlementaires et les cours constitutionnelles.* Et si l'on propose plusieurs justifications du contrôle de constitutionnalité des lois, la plus répandue et la plus efficace est de loin celle qui fait des cours des contre-pouvoirs[73]. Montesquieu n'a évidemment rien dit des cours constitutionnelles, mais cette justification peut se réclamer de lui à plusieurs titres: elle permet, dit-on, de préserver la liberté politique conçue comme soumission à la loi, entendue dans un sens large, c'est-à-dire comme soumission à la constitution ; elle consiste à faire en sorte que le pouvoir arrête le pouvoir ; elle permet de ramener le contrôle de constitutionnalité à une forme de *gouvernement mixte*, puisque la volonté de la majorité parlementaire du moment, l'élément démocratique, est contrôlée par une cour composée de personnes choisies en raison de leur compétence, donc

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[70] I'm avoiding the ambiguous word *power*, but if we understand the exercise of a function as an ability of doing, a power that can be entrusted to different organs or agencies, it is possible to speak of legislative power as the equivalent of the exercise of this paramount function. What matters is to take seriously the split of the legislative sovereign function/power among three independent branches -- the point that Madison derived from the "celebrated" Montesquieu and that he adapted to his "republican" (elective) government with two Houses and the President exercising legislative veto.

[71] On the classical doctrine of mixed constitution, see the very important book by Wilfried Nippel, *Mischverfassungstheorie und Verfassungsrealität in Antike und früher Neuzeit*, Stuttgart, Klett-Cotta, 1980 and James Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages*, Princeton, Princeton University Press, 1992.

[72] «Séparation des pouvoirs», *Dictionnaire électronique Montesquieu* (2011 ?): http://dictionnaire-montesquieu.ens-lyon.fr/index.php?id=286.

[73] This idea is already in the text by Kelsen of 1928, and repeated in his answer to Schmitt: *Wer soll der Hüter der Verfassung sein?*, 1931.

> par un élément aristocratique. La difficulté à laquelle sont confrontés les tenants de cette justification est cependant d'assumer entièrement l'héritage de Montesquieu sur deux points principaux: la conception de la puissance de juger comme nulle et donc incapable de jouer un rôle dans la balance des pouvoirs; l'acceptation consciente du gouvernement mixte et *le refus corrélatif de la démocratie*. (Italics mine)

Troper refers here to the idea that the role of the constitutional courts in the contemporary political system we call *democracy* represents a revival of the doctrine of the mixed constitution[74]. But he draws an unclear conclusion from it: that we have to forego calling our systems democracies and, instead, accept explicitly the mixed government. I need to discuss this claim since it presents as accepted evidence something that is based on implicit and disputable assumptions.

Democracy, in Troper's language, seems to be the form of government where law is the will of the representative (parliamentary) majority. In the classical theory of the forms of government, such a regime would have been qualified not as democratic, but at best, as an *elective oligarchy*, democracy being the self-government of the *demos* (in the original sense of the Greek term,[75] and in the Aristotelian tradition the word demos had the meaning of middle-lower classes, the best modern translation of the Greek *aporoi*). In modern political language, the democracy of Troper is a representative government, such as it exists notably in the United Kingdom but not any more in the very large and constantly

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[74] I introduced this idea speaking of constitutional courts in democratic societies in a couple of papers some years ago, see: "Constitutional Adjudication and Democracy. Comparative perspectives: USA, France, Italy", in *Ratio Juris*, vol. 11 No. 1 March 1998, n° 1, p. 38-50 and "Voter et juger: La démocratie et les droits", in *L'architecture du droit. Mélanges en l'honneur de Michel Troper*, Paris, Economica, 2006, p. 775-87.

[75] See Pierre Chantraine, *Dictionnaire étymologique de la langue grecque. Histoire des mots*, Paris, Klincksieck, 1970, p. 273 :

> **δῆμος** : m., dor., etc. δᾶμος ; d'abord « pays, territoire », cf. *Il.* 5,710 : Βοιωτοὶ μάλα πίονα δῆμον ἔχοντες ; les habitants de ce territoire, cf. *Il.* 3,50 ; déjà chez Hom. (p.-ê. parce que les gens du peuple vivent à la campagne et les grands à la ville), les gens du peuple ; par opposition aux εὐδαίμονες, aux δυνατοί en ion.-att. ; dans un sens politique, en ion.-att. : le peuple souverain, la démocratie, le parti démocratique opposé à ὀλιγαρχία, cf. aussi

increasing number[76],[77] of countries which, after the Second World War, introduced, in different waves, Constitutional Courts. Now, since it is evident that constitutional democracy is not the same regime as the representative elected oligarchy established in France at the end of the 18th century, we need to clarify in which sense the new regime - i.e., constitutional democracy - is a mixed government. More specifically, we have to see if it is a real equivalent of the *memigmene politeia* (the mixed government) of the Aristotelian, Polybian, and Machiavellian type, the same that we find revived later in the polyarchic structure of the divided legislature of which Montesquieu speaks in his famous chapter on the Constitution of England.

The divided power, which *The Spirit of the Laws* suggested as an alternative to the French absolute monarchy, was based on the classical *anatomy of the city*[78] of Greek origin according to which the political body is divided into substantive non-homogeneous parts (the Aristotelian/ Machiavellian *mere tes poleos*, the parts of the city) which have different rights (to use our language) and must share political authority by participating actively in the government of the society (see the sections of Aristotle's Politics concerning the *memigmene politeia*, the section of Polybius' *Histories*, Book VI, devoted to the *Romaion politeia*, and Machiavelli's project of a constitution for Florence: *Discursus Florentinarum Rerum*, 1522 [79]).

Now, if we use the same expression "mixed government" without specifying what we are speaking of, we run the risk of saying nothing conceptually useful.

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[76] See T. Ginsburg, *Judicial Review in Modern Democracies*, quoted.

[77] The reform of the French constitution that, starting from 2010, introduced a mechanism of constitutional adjudication of enacted statutes is probably the most important sign of the expansion of the constitutional democracy. See P. Pasquino, "The New Constitutional Adjudication in France. The reform of the referral to the French Constitutional Council in light of the Italian model", *Indian Journal of Constitutional Law*, Vol. 3, Issue 1, 2009, pp. 105-117.

[78] On the precise meaning of this unusual expression, I have to refer to the articles quoted in FN 66.

[79] The text is online: http://www.classicitaliani.it/machiav/prosa/Machiavelli_riforma_stato_Firenze.html, the English translation in Machiavelli: *The Chief Works and Others*, Volume 1, Duke University Press, 1989, p. 101-115.

Contemporary constitutional democracy is based on a legally equalitarian anatomy of the city where fundamental rights are the same for everyone: the abolition of aristocratic privileges is the common element of both the American and the French 18th century constitutional revolution[80]. Judges have no special rights; they are (supposed to be) experts, likewise the older Athenian citizens who manned the people's courts in the 4th century BC (FN concerning the age of the *dikastai* and the less complex expertise required in a society like the one of the ancient *Demokratia*)[81]. If we want to speak of mixed government to qualify the political system the *Encyclopedia Britannica* calls democracy (3) – I prefer to speak of *divided power* – we have to specify that government in this case refers to the legislative, or better, the "normative" function/power, consisting in enacting law, i.e., binding decisions for the entire community. Moreover, the *enemy* and the *antonym* of the ancient mixed regime were both oligarchy and democracy (see Machiavelli's *Discorsi*, Book I, Chapter 2), meaning the domination of one part of the city over the other. The enemy or the threat to the contemporary notion of divided power is governmental absolutism, or unlimited/arbitrary state[82] power.

The apparent paradox of modern political theory is that absolutism was born to protect natural rights and established, indeed, the basis of liberalism, meaning here limited government (as Leo Strauss rightly stressed to his dismay[83], which I emphatically do not share at all!).

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[80] A process that is not entirely realized in the UK.

[81] If competence is what qualifies aristocracy in an institution like NYU, we are living here and even more at the Straus in an extreme aristocratic society; should we then sprinkle our heads with ashes? But this is to conflate expertise with a form of government. The idea that mixed government is a mix of competent and incompetent people is part of the ancient anti-democratic ideology. The Aristotelian idea was based on the need according to him to establish a just and stable society giving an equal part in the sphere of government to the essential parts of the polis. Contemporary democratic theory and practice should be able to combine legal equality with a role for expertise (to avoid an alignment with the position now preached by the Italian clown/politician Beppe Grillo).

[82] I use state in the French – German meaning of the word.

[83] See notably his: *Notes on Carl Schmitt, the Concept of Political (Anmerkungen zu Carl Schmitt, Der Begriff des Politischen*, 1932), Translated by J. Harvey Lomax, http://archive.org/details/LeoStraussNotesOnCarlSchmittsconceptOfThePolitical

Now, what are the parts of the new mix and what are their specific qualities? We need to be clear about this point before asking what is good about the new mixed government.

In the classical doctrine, the *gnorimoi/euporoi* were, so to speak, ontologically (by nature) different kinds of people having superior qualities (Aristotle)[84] or justified (insuppressible) superior *humors* ("il desiderio di dominare") and interests (Machiavelli).

In the Hobbesian *society without qualities*, instead, people can be different only because of their knowledge (there are professors at NYU and people cleaning the apartments of those professors, who had no chance to go to good universities) with the same formal rights and the same dignity (at least in theory). In what sense, then, might the judges be different or superior? In what sense are they an aristocracy – to repeat the term used, somehow in the sense of the French word *nobility* of the Ancien Regime, to disqualify them and their function by radical democrats like Schmitt, Troper and Waldron? They are superior in no substantive sense at all; their function is important and their expertise hopefully high, but they do not need to come from a particular social class (consider in the US the cases of Samuel Alito[85] and Sonia Sotomayor[86] of the USSC) and have no special rights but only a constitutional function. Calling these people an aristocracy is sheer rhetoric[87] or populist anti-elitism, or more simply, it means

[84] To be more precise, the Aristotelian mixed *politeia* was a form of government combining elements of two bad forms: oligarchy and democracy. Aristocracy was a good but ideal form, of limited interest for him because of its ideal character. See my article at FN xx and Nippel's book at FN yy.

[85] Alito was born to Italian-American immigrants.

[86] Sotomayor was born in The Bronx, New York City, and is of Puerto Rican descent. Her father, who had a third-grade education, did not speak English, died when she was nine, and she was subsequently raised by her mother a telephone operator and then a practical nurse (Wikipedia). Antonin Scalia is the son of a Sicilian immigrant. Clarence Thomas was the second of three children born to M.C. Thomas, a farm worker, and Leola Williams, a domestic worker. They were descendants of American slaves, and the family spoke Gullah as a first language (Wikipedia).

[87] If one uses this type of rhetoric, it is difficult to understand why the US members of the Senate would be less aristocratic than the judges who exercise judicial review. It is more persuasive and less rhetorical to speak as I do on non-elected, non-accountable public officials.

that they are not electorally accountable, which by the way, is true and good for reasons I'll try to explain.

If our constitutional democracies are characterized by the division of the normative (*vulgo* legislative) function between electorally accountable organs and non-accountable ones, this is not because one social part can oppress the other[88], but because even an elected and accountable majority can represent a threat to individual rights. The nature of the danger being different, different too is the nature of the remedy, and different also is the anatomy of the city which is presupposed in this new form of mixed government. The Schmittian defenders of democracy[89] will insist that the judges, not being electorally accountable, are therefore not democratic, where democracy boils down to elections, and elections are another name and, in fact, the only name for political legitimacy.

This is precisely the point I want to discuss and reject.

It is a fact that elections are not the only source of political authority in our constitutional democracy. Both judges and members of central banks are not electorally accountable, and a revisionary theory supporting the abolishment or the reduction of power for these authorities is conceivable (even if probably utopist). My project is to offer a defense of the existing political system, at least in countries like Germany, France and Italy.

[88] This was the Marxist preoccupation, following the radical model of the French Revolution according to which the Third Estate was all, and Marx was at the same time against the capitalist oligarchs and against the mixed government somehow revived by the social-democrats.

[89] Qualifying as Schmittians the authors who criticize constitutional adjudication is not an easy rhetorical trick to disqualify them; this effortless and commonly used strategy is not what I need in my justificatory theory to show that they are wrong. It is just "to give to Caesar what is Caesar's". I know C. Schmitt's theoretical work well enough to consider disqualifying the reference to his theses and arguments. Even though his answers were often wrong (like the presidential role in the constitution, which American colleagues like A. Vermeule seem to appreciate, see *The Executive Unbound: After the Madisonian Republic* (with Eric Posner), Oxford University Press, 2010), his questions are in many cases still with us.

Elsewhere[90] I have discussed the weakness of representative government based on simple competitive elections: rational, elected officials tend to be partial (to their voters) and myopic (looking always at the temporally limited horizon of their reelection).

Here I have been claiming, with the critics of constitutional adjudication, that the members of the Constitutional Courts are indeed co-legislators. I can even say that they exercise on top of this legislative function some incremental form of constituent power – constitutions being incomplete contracts,[91] it is *de facto* inevitable that, notably in case of *Organstreit* [92], the Court has to "write" a fragment of the silent constitution. The Constitutional Courts, I wish to claim, have a significant binding power on the citizens – I shall discuss in the next section the limits of this power.

What is good about this power, and why is it rational to accept it, meaning the structure of the constitutionally divided normative power? This is the question to which I want to turn now.

A quotation from Hans Kelsen on democracy and liberalism can usefully introduce my argument:

> The transformation in the concept of freedom, from the notion of the individual's freedom from state rule to the notion of the individual's participation in state rule, also signifies democracy's detachment from liberalism. Because the demand for democracy is considered met to the extent that those subject to the state order participate in its creation, the ideal of democracy is independent of the extent to which the state order affects the individuals who create it—that is, independent of the degree

[90] "Democracy: Ancient and Modern, Good and Bad", in *Democracy in a Russian Mirror*, ed. By A. Przeworski, Cambridge University Press, 2013, p. 99-118 and "Majority Rules in Constitutional Democracies. Some Remarks about Theory and Practice" in *Majority Decisions*, ed. by Stéphanie Novak and Jon Elster, Cambridge University Press, 2013, p. 134-156.

[91] See for instance: Daniel Sutter, "Enforcing Constitutional Constraints", 8 CONST. POL. ECON. 139 (1997), but already Martin Shapiro, *Courts: A Comparative and Political Analysis*, Chicago: University of Chicago Press, 1981.

[92] The case of conflict among the central state organs. (See the decision of the It. CC concerning the conflict between the justice minister Mancuso and the Parliament: http://www.giurcost.org/decisioni/1996/0007s-96.htm).

> to which it interferes with their "freedom". As long as state authority emanates from the individuals subject to it, democracy is possible even in the case of unlimited expansion of the state order over the individual—that is, complete annihilation of individual "freedom" and negation of the liberal ideal. And history shows that democratic state authority does not tend less towards expansion than autocratic state authority.[93]

That majoritarian democracy needs some correctives has always been a tenet characterizing modern constitutionalism. Article 16 of the French declaration of human rights reads:
"Any society, in which no *provision is made for guaranteeing rights* or for the separation of powers, has no Constitution"[94].

And the First Amendment to the American constitution starts with the words:
"Congress shall make no law respecting..."

The name of these limits to the power of the elected majority is *fundamental rights*[95]. They come from a cultural tradition older than the representative government of Madison or Sieyes (now called democracy): the theory of the modern state and more specifically the justification for the *political obligation* of the citizens to obey the commandments of the political authority.

The *contractarian* political philosophy of the 17th century laid the foundations of an important conception of political obligation, and it is this one I need to take into account in order to present what I consider the best possible justification for constitutional adjudication by courts of justice.

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[93] Kelsen, *On the Essence and Value of Democracy* [1929], p. 88, English transl.: http://publishing.cdlib.org/ucpressebooks/view?docId=kt209nc4v2&chunk.id=ss1.17&toc.id=ch01&toc.depth=1&brand=ucpress&anchor.id=ref208#X
[94] English translation on the website of the French Constitutional Council.
[95] A rigid constitution represents, moreover, a limit as to the possibility for the elected majority to modify the form of government and the structure of the "divided power".

It has been claimed that this intellectual tradition supposes a contract at the origin of political authority[96]. The word *origin* is ambiguous and actually misleading. Neither Thomas Hobbes nor John Locke ever tried to present a doctrine concerning the historical origin of political power (this is for Hobbes, mostly originating in a conquest – *acquisition* in his language[97]; and for Locke, in the slow transformation of a patriarchal structure of political authority into a limited form of government)[98]. The object of the intellectual enterprise of the classical contractarians – and I'll focus here on Hobbes – was to offer an argument in favor of political obligation with, in other words, an argument concerning the reasons why it is rational – in their own interest – for citizens to obey the political authority, Leviathan, and *under which specific conditions.*

This point is often disregarded, but it is perfectly clear that for Hobbes it is rational and not self- defeating for the citizens to obey political authority *if and only if* it performs a function[99] which consists in the guarantee of the fundamental (Hobbes says *natural*) right of self-preservation of the subjects, *omnes et singulatim*. The obedience is not unconditional but presupposes an exchange between protection of the fundamental right to "life and limbs" of the members of the political body and their obedience.[100] As Spinoza will repeat later on, *oboedientia facit imperantem* so that political obligation to obey is at the same time the origin of political order (the commonwealth by opposition to the state of nature) and of the legitimacy of political authority, if some conditions, the protection of rights, are satisfied.

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[96] Starting famously from David Hume, *Of the Original Contract*, 1748.
[97] See *Leviathan*, chapter XX.
[98] On Locke, see the article quoted in FN xx.
[99] *Leviathan*, chapter XXX: "The office of the sovereign, be it a monarch or an assembly, consisteth in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he is obliged by the law of nature [...] But by safety here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger or hurt to the Commonwealth, shall acquire to himself.".
[100] I presented a systematic interpretation of Hobbes' political theory in three articles: "Thomas Hobbes. La condition naturelle de l'humanité", in: *Revue Française de Science Politique*, 44, n° 2, April 1994, p. 294-307 ; "Th. Hobbes: la condition légale dans le Commonwealth", in *Cahiers de Philosophie de l'Université de Caen*, n. 34, 2000, p. 147-164 ; "Hobbes, Religion and Rational Choice", in *Pacific Philosophical Quarterly*, vol. 82, 2001, p. 406-419

The concept of the *contract* doesn't refer for Hobbes to a real or tacit transaction[101]; it is a mental experiment. [102] I want to suggest a similar thought experiment as a rational justification of constitutional adjudication.

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"Democracy as a system of majority decision-making presupposes agreement on that which cannot be voted upon"[103]

Suppose we are citizens of a representative government, more specifically of a Schumpeterian democracy, one in which the incumbent government, chosen through competitive elections, can and quite regularly loses the election to the incumbent. I will ask you to decide under a thin *veil of ignorance* what structure of government you would chose. My veil of ignorance is *thin*, indeed, since I'm asking you simply to assume – which is normally the case in a stable competitive democracy – that you do not know whether the party or the coalition of the parties you prefer will be the majority or the opposition after Election Day and

[101] See Ernest Cassirer, *The Myth of the State*, Yale University Press, 1946, p. 174: "Ubi generatio nulla, - says Hobbes -- ... ibi nulla philosophia intellegitur [De corpore, I, 1, 3-8] - where there is no generation, there is no true philosophical knowledge. But this "generation" is not at all understood by Hobbes as a physical or historical process. Even in the field of geometry, Hobbes demands a genetic or causal definition. The objects of geometry must be constructed in order to be fully understood. Obviously this constructive act is a mental, not a temporal process. What we are looking for is an origin in reason, not in time. [...] The same principle holds for political objects. If Hobbes describes the transition from the natural to the social state, he is not interested in the empirical origin of the State. The point at issue is not the history but the validity of the social and political order. What matters alone is not the historical but the legal basis that is answered by the theory of the social contract".
See also Fr. Maitland, *A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge*. Submitted as a dissertation for a Fellowship at Trinity College (Cambridge) and privately printed in 1875, republished in *The Collected Papers of Frederic William Maitland* ed. by H.A.L. Fisher, vol. I, Cambridge University Press, 1911, pp. 1 ss.

[102] On Hobbes' method, the following passage from the Preface to the 1647 edition of the *De cive* is relevant :
"Concerning my method, I thought it not sufficient to use a plain and evident style in what I have to deliver, except I took my beginning from the very matter of civil government, and thence proceeded to its generation, and form, and the first beginning of justice; for everything is best understood by its constitutive causes. For as in a watch, or some such small engine, the matter, figure, and motion of the wheels cannot well be known, except it be taken in sunder, and viewed in parts; so to make a more curious search into the rights of states, and duties of subjects, it is necessary, (I say not to take them in sunder, but yet that) they be so considered, as if they were dissolved".

[103] Adolf Arndt, *Politische Schriften*, Berlin – Bad Godesberg, p. 128.

those for years after. You are also interested, I assume, in the protection of your fundamental (constitutionalized)[104] rights since your authorization (through the election) of political authority (*pro tempore*, until the end of the electoral mandate) is not a total alienation of your rights[105]. You may rationally fear that the majority will not protect them, even more if it is not the one that you would have preferred that wins the election.

Would it not be rational in this situation to establish next to an elected and accountable parliament a court of justice that can possibly protect your fundamental rights?

Let's look more closely at this problem.

After the inception of the contractarian doctrine, born in the middle of the religious civil war, our western conception of fundamental rights expanded from the simple guarantee of "life and limbs" to a larger number of positive and negative freedoms that we citizens do not want to see infringed upon by the government, even if is an elected and accountable one[106]. When modern representative government was established towards the end of the 18th century, the agreement, so to speak, was not only: you citizens vote for us, representatives, and we will command you, with the clause that you citizens choose the

[104] I do not need to suppose any *natural rights*, just those established in a liberal-democratic constitution like the American or the German ones.
[105] Already for Hobbes, self-preservation was not an alienable right.
[106] I do not know of anyone who claims that the representative majority can do whatever it wants (which means a clear rejection of the axiom called "neutrality" of May's theorem justifying majority rule!). See May, Kenneth O. 1952. "A set of independent necessary and sufficient conditions for simple majority decisions", *Econometrica*, Vol. 20, Issue 4, pp. 680–684). The supporters of majoritarian democracy have to suppose that periodical elections and perhaps bicameralism are sufficient mechanisms to guarantee the protection of fundamental rights, though both weak protection mechanisms. Bicameralism with absolute veto power of the two houses in a political system dominated by one political party is of some ambiguous help only if, like in presidential systems, *divided government* is possible. I speak of ambiguous help since this type of system can produce serious gridlock. (The English classical bicameralism with a House of Lords is an effective anti-despotic device, but presupposes a pre-modern, non-equalitarian society). Elections are certainly an instrument of moderation of the power of the majority of representatives, but only for those who can produce an alternative majority; they can be called pivotal voters.

government and can dismiss it after a given lapse of time; it also implied the promise of a guarantee of the constitutionalized political and civil rights, as I said referring to the declarations of human rights. Abandoning these rights would be a sort of suicidal pact; in the Hobbesian logic, it would be perfectly irrational to obey the government.

Now, if we look at the *list of rights* that the political authority promises us to protect and guarantee, it is clear that many of them have a vague character (think of freedom and equality); there is actually a lot of indeterminacy concerning their content.[107] This fact may and will *inevitably* produce conflicts of interpretation concerning the content of rights that, moreover, are never absolute. I want to maintain that this is perfectly physiological; we do not need to think that the majority is willing to establish a dictatorial power. I'm not assuming that we are in Hungary, where the young liberal democracy seems about to collapse,[108] but in stable democracies like France or Germany. I'm just surmising that the citizens and the government (the majority) may disagree as to the respect for the fundamental rights by primary legislation.

Disagreement on such questions is inevitable and even sound, since there is no true solution for such disagreements. So the question is, what to do in the case of such conflicts -- conflicts of interpretation as to the content of the rights that the statutes, enacted by the elected legislative majority, have to respect? And I remember that in the liberal tradition, if the commandments of the political authority violate our fundamental rights, we are unbound from any political obligation to obey.

[107] This indeterminacy is partially reduced by the existence of jurisdictional precedents, but it cannot be extinguished.

[108] "The Fourth Amendment [of the Hungarian Constitution], adopted 11 March 2013, prohibits the Constitutional Court from examining the substantive constitutionality of future proposed amendments to the Constitution and strips the Court of the right to refer in its rulings to legal decisions made prior to January 2012, when the new constitution came into effect" (from the website of the International Bar Association's Human Rights Institute).

To allow that the citizens *uti singuli* be the judges of this conflict of interpretation would be a sort of recipe for anarchy (Hobbes and Locke spoke of *state of nature*). The radical democrats say that it has to be an elected organ, so the majority of the citizens (if we assume, which is normally wrong, that the majority of the representatives are an expression of the majority of the members of a political community[109]). That would be another way of saying that "since we are politically majoritarian, we are legally/constitutionally right!"[110] It seems difficult to defend the thesis that the majority of the representatives are necessarily right in their interpretation of the fundamental rights[111]. This would be another way of speaking of a total abdication of rights in favor of a political elite. True, the abdication would be *pro tempore* and not *ad eternum*. Still, democracy might end up being, as Kelsen warned, a sort of despotism by rotation, each majority being able in turn to abuse citizens' rights, having the monopoly of their constitutional interpretation.

Having the possibility to appeal to an independent court of justice to adjudicate a conflict of interpretation between citizens and the public authority seems prima facie a sensible and rational solution. Still, the democrat will object: Why should we trust the Court more than the elected and accountable majority? The answer is exactly: since the members of the constitutional court are *not* electorally accountable! Were they accountable, their function will be in a sense redundant, at least in a *Parteienstaat* –like Germany, French or Italy; it would be just a third chamber, accountable to the same voters and likely with the same majority (or, then, with a different majority paralyzing the legislative process). Their independence and the obligation they have to justify their decisions[112] are reasons

[109] In many democracies, the electoral algorithm transforms a plurality of popular votes into a majority of seats inside the parliament (data in my article quoted FN xx).
[110] "*Vous avez juridiquement tort car vous êtes politiquement minoritaires*". This sentence was addressed to the conservatives in the National Legislative Assembly by the socialist MP André Laigniel in 1981 at the time of the debates concerning the nationalizations.
[111] On majority and truth, see my article: "Samuel Pufendorf: Majority rule (logic, justification and limits) and forms of government", in *Social Science Information*, (Collective Decision Making Rules), vol. 49, N° 1, March 2010, pp. 99-109.
[112] See M. Cohen and P. Pasquino, *La motivation des décisions de justice. Le cas des cours souveraines et constitutionnelles*, Rapport pour le Ministère de la Justice, Paris, January 2013.

that should push us, under the veil of ignorance that I suggested, to opt for such an instrument in our choice of the set of institutions that is rational for us to choose. Notice that by *independence* I mean exactly non-accountability. The Court is independent since it has no reason to please the plaintiff or the government. The mandate of the judges not being renewable, they have no particular *incentive* to be biased in favor of one or the other party in the constitutional interpretation conflict. Their opinions (considering that in general the vote of the members of the CCs I'm considering is undisclosed)[113] will not have any impact on the renewal of their office (which is impossible) or on possible other appointments at the end of their mandate.

It is evidently true that the establishment of a Constitutional Court creates a powerful organ[114] that is not under control of the voters, but this is the only way I know to establish a possible effective guarantee for our constitutional rights and avoid the *pro tempore* total alienation of them.

Three points deserve closer consideration:
1. the limits of the power of the CC – the absence of electoral accountability is not omnipotence;
2. this accountability limits the power of the elected majorities only if the next majority agrees with the citizen who claims that her rights are violated;
3. the mechanism of appointment of the members of the Constitutional Courts is an important element worth a specific discussion.

I'll come more at length to the first point in a different section of my book. Here I shall discuss briefly 2. and 3.

[113] On this question I wrote a paper "Disclosed and Undisclosed Voting in Constitutional/Supreme Courts", presented at the *Collège de France,* June 5th 2010, to be published in a volume on *Secret and Public Vote* edited by Jon Elster.
[114] New York Senator Charles Schumer once said during the hearings for a nominee at the USSC: "You will decide about our life and death" (abortion and euthanasia, and now we could add marriage).

The democratic argument in favor of political control over the elected branches (and here political means that control over decisions of the elected officials is exercised by the same elected official) boils down to the following thought: Suppose the citizen Lambda believes honestly that a given statute or piece of primary legislation infringes upon her constitutionally protected rights. Suppose, moreover, that there is no court of justice where she can bring her case. The democrat will answer *either* that she is wrong since the representatives are right (so there is no possible agency problem – by *synecdoche*, the representative and the people are identical, going back from this point of view from Locke to Hobbes who claimed that there is no people without its representative, so no agency problem!), *or* that the legislator may be wrong but the only way to check whether the law is unconstitutional (meaning, violating rights that the constitution is supposed to protect) is to coalesce a new majority around the interpretation of the person who complains of the rights' interpretation by the government of her constitutional rights. One could say: Good luck! since plainly this last path is extremely difficult and *de facto* impossible for insulated groups which have no pivotal position in the democratic competition. (I do not need to give examples at the Straus Institute).

We see that in this vision, there is a single authorized interpreter of the content of the constitutional rights the elite who wins the elections, and that there is no hierarchy of norms since the legislator alone is *at the same time* the author and the only interpreter of the law.

The argument against constitutional adjudication turns on the magic power of electoral accountability, by which in any event right (*le droit*) lies always where the number or strength (measured by ballots, once each 4/5 years) is.

The democrats may reply that it is even worse to give the *last word* concerning the content of fundamental rights to 9 or 15 non-elected, non-accountable judges who can impose arbitrarily (without any control) their will over the citizens and the elected representatives.

However, if we consider the mechanism of appointment of the judges sitting on the Constitutional Courts and how they make decisions,[115] we may again find it rational to accept the structure of constitutional democracy and that we have an interest in sustaining it (rather than asking for the dismantling of constitutional adjudication).

I said earlier that elected officials have a special incentive to be partial to their voters, that this is the price we pay to have them accountable not to the voters in general but at least to their plurality (it is, indeed, the largest minority that in general produces a majority of representatives in the elected legislative assemblies). We cannot have neutrality and accountability at the same time, and by neutrality I mean the absence of the structural partiality connected with the electoral mandate. This is a reason why it may be convenient to divide what I called the normative power/function between an elected and a non-elected organ. Moreover, we can decide, under the veil of ignorance, to establish a particular rule for appointing the members of the Court: a bipartisan mechanism that puts on the courts not only legal experts[116], but also candidates who are accepted by both sections that normally struggle for governmental positions through competitive elections. This simple rule should produce a panel court where the members rather than opposing each other from radically diverse positions (which may happen when they are appointed by a simple majority) are more easily prone (than any ordinary elected assembly) to compromise and to function as an *intermediary body* – to use Montesquieu's expression that Alexander Hamilton repeated in *Federalist* #78 [117] – between the elected representative majority and the citizen asking for protection of her rights.

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[115] See my text in the Report quoted at FN 112.

[116] The hostility to expertise is a curious aspect of the contemporary debate that is worth investigating more closely; notably since it comes often from academic elites! If we really believe in the wisdom of the crowd (a word which I find not very elegant), one may wonder why parents make the effort to send their kids to top elitist universities, which, at least in the US, are very expansive. May be these parents are not wise and not part of the right crowd. Perhaps the wise crowd exists only in the elitist university – like the *common sense* that at least in the analytical philosophy coincided with the opinion of an Oxford don.

[117] "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments,

This mechanism of appointment exists in Germany and for part of the members of the Italian constitutional court, and in my opinion is the one that we should choose under the veil of ignorance under which I suggested we run our mental experiment.

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Citizens who are particularly *risk prone* or have very good (historical) reasons to trust their politicians (and to distrust legal experts) may think that they do not need this guarantee of their rights. They may want to accept that the government/the majority are at the same time the author of the laws and the judge of their constitutionality (of primary legislation's respect for citizens' fundamental rights). This is, though, not what many British citizens thought when they sent their complaints to Strasbourg to the *European Court of Human Rights* to ask protection of their rights vis-à-vis the British Parliament.

Jürgen Habermas in a debate with Ronald Dworkin years ago at the Cardozo Law School[118] suggested that Constitutional Courts are needed in democratic societies only in countries like Germany because of its authoritarian past. I'm struck by the unusually parochial Habermas opinion. With very few exceptions, all democratic regimes in the world are either post- authoritarian or post-colonial; it is, in fact, only in the UK and among members of the British Commonwealth where the British were the absolute majority that contemporary democracy did not emerge as a post-authoritarian regime[119].

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it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an *intermediate body* between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority". Montesquieu attributed a crucial role to the *corps intermédiaires* in his theory of limited/moderated government (see M. A Mosher, "Monarchy's Paradox: Honor in Face of Sovereignty", in *Montesquieu's Science of Politics. Essays on The Spirit of Laws*, Pwman & Littlefield, 2001, p. 183 ss.

[118] So far I haven't been able to check whether and where Habermas has written on that question; he writes a lot and I need more time to check, but I suppose that there is something along the same lines in his *Faktizität und Geltung* (1998).

[119] The opinion according to which there is no constitutional adjudication in Scandinavian countries is largely a fantasy. Different forms of judicial review exist in all of them (with the

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Most of the criticisms of constitutional adjudication concern the USSC[120], which is a special court of justice, very old compared with the European Constitutional Courts I'm describing and defending, and characterized by life appointment (not easily compatible in my opinion with a republican culture, the one which doesn't recognize life positions for law-making organs) and by a mechanism of appointment of Justices that, in the absence of "divided government", often select judges with strong ideological biases. It may also be true that the USSC is too powerful or "activist" – from choosing the President of the Union (Bush v. Gore) to deciding on questions like same-sex marriage, something which has evidently to do with the will of the political branches not to take the electoral risk of some of these decisions. But I have neither the competence nor the intention to discuss these topics, which are the subject of entire libraries.

I believe that the only sensible way of discussing the legitimacy of the Constitutional Courts of the European type which I'm considering is to think of the institution as such rather than of its decisions from the usual (at NYU) liberal point of view, so that if a decision of the Court doesn't line up or side with our political preference, we believe *ipso facto* that this is a reason for its lack of legitimacy. The Italian parliament has been controlled for almost 20 years by a majority I deeply dislike. I never thought that this unhappy circumstance disqualified the institution of parliament. Nor would the fact that George W. Bush was the President of the US for eight years during which he made disastrous decisions for the country disqualified the US presidency. Courts most of the time make decisions that some people like and some others don't. This is simply inevitable. In general, the losers (either the citizen or the government) do not

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possible exception of Finland) as I hope to show in a book I should be able to publish soon with my colleague J.L. Halperin.

[120] One can think of the recent works by Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, New York, NY: Oxford University Press, 2004; Mark Tushnet, *Taking the Constitution Away From the Courts*, Princeton University Press, 1999; and Jeremy Waldron, *Law and Disagreement*, Oxford University Press, 1999, plus a variety of more recent articles.

really like the decision that makes them losers – notably since they were no losers before the decision.

Our judgment on the Court's decision is certainly not more neutral than the decision of the members of such bodies. There is no objectively correct decision of a constitutional conflict. If there were, we should have been able to find out the mechanism producing this truth. Certainly the solution which consists in abolishing the possibility of such a conflict, as in China, doesn't look very appealing to me. Actually, in a pluralistic society, there is no such truth since democratic constitutional regimes are systems of limited authority and not institutions like the Catholic Church. Since we disagree about the content of many of our fundamental rights and understandably so, we may want to have a double check on the first interpretation, the one of the elected majority.

Is it then true that the Constitutional Court is the new sovereign and an absolute one?

I do not think so.

Two sets of consideration can be suggested here. The first one has to do with the so-called "last word" of the Court's decisions (Thibaudeau), the second with the limits of its discretionary power.

In the first, a radical attack on the idea of control over the decisions of an elected accountable parliament by a non-accountable body, the *jurie constitutionnaire*[121] proposed by E. Sieyes in the year III, the member of the *Convention* Thibaudeau[122] asked the old question of *quis custodiet custodes* to justify that

[121] See Marco Goldoni, *La dottrina costituzionale di Sieyès*, Firenze, Firenze University Press, 2009 and "At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power" in *Oxford Journal of Legal Studies*, 2012 (2)

[122] In the final version of this text, I'll analyze the details of his seminal criticism presented successfully in his speech at the *Convention* on August 11th 1795 (see *Réimpression de l'ancien Moniteur: Convention nationale,* p. 484 ss:

elected officials had no need of another check than the popular one. Thibaudeau, and even more those who repeated his argument, conflate the final word in a litigation with the sovereign decision. The sovereign decision is the one witch is not revisable, the sovereign being the agent who says: *sic volo sic jubeo stat pro ratione voluntas* (Thus I will, thus I command, my pleasure stands for a reason). Now, in a legal conflict, closure – the impossibility of a further appeal – is inevitable since in its absence the conflict would never terminate and the parties engaged in the litigation would have no hope of a solution and so no reason to enter into the legal dispute. The entire legal system of conflict resolution, in the absence of a final decision, would simply collapse and lose its *raison d'être.* From this point of view, the last word is simply unavoidable. But the solution of a legal dispute doesn't represent the end of debate inside the political system. Famously there are many cases in which the decisions of the Supreme/ Constitutional Courts were neither accepted nor enforced by the other branches of the government, from those of the Marshall Court that President Jackson refused to enforce[123] to the more recent ones of the Italian Constitutional Court concerning the obligation of a pluralistic structure of the media[124]. Courts can speak (and write) decisions, but they cannot control and guarantee their enforcement. A constitutional decision is never the last world in a system of divided power.

It is a "second opinion" [125] legally binding, but open to any sort of resistance (see the crucifixes in Bavaria after and notwithstanding the decision of the *Bundesverfassungsgericht*[126]) and revision, and not only as often repeated by the constituent power[127].

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http://books.google.com/books?id=79JnAAAAMAAJ&pg=PA487&lpg=PA487&dq=Thibaudeau+jurie+constitutionnaire&source=bl&ots=a3I4ufJn6p&sig=0RC91uUnAqYiRcVROt5Ghjl5k4g&hl=fr&sa=X&ei=XYRSUYGuIcPC0gGRx4CIDw&ved=0CEAQ6AEwAzgK#v=onepage&q=Thibaudeau%20jurie%20constitutionnaire&f=false
See also *Mémoires* de A.C. Thibaudeau (1799-1815), Librairie Plon, Paris, third edition, 1913.

[123] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[124] Sentenza n. 826/1988 and sentenza 466/2002.

[125] A. Vermeule, "Second Opinions and Institutional Design," 97 *Virginia Law Review* 1435, 2011.

[126] BVerfG 1995b : 2477. After that decision though:

Divided power is, politically speaking, an open-ended decision-making system, where three actors play an equally important role: the voters, the elected representatives, and the Constitutional Court.

Now, it is the existence of these three actors that can help us understand the limits of discretionary power of constitutional adjudication.

If we look simply at the legal dimension – from the point of view of a pure theory of law that refuses to take into account socio-political reality – one could say that a Constitutional Court can interpret with extreme freedom general constitutional values or principles like "freedom" or "equality". This tells us essentially that the pure theory of law is blind, or at best one-eyed. In fact, and the fact in question implies the existence of a socio-political context in which each Constitutional Court happens to work, the members of such a collegial body[128] not only have to

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German High Court Approves New Crucifix Law

Germany's highest court has refused to hear an appeal of a Bavarian court's decision allowing crucifixes to hang in public school classrooms.

The action by the Federal Constitutional Court is the latest in a long-running dispute over the presence of crucifixes in German public schools. In 1995 the German high court ruled that a Bavarian law mandating display of the crucifix in classrooms was unconstitutional, sparking massive protests in the largely Catholic state. Bavarian lawmakers subsequently passed a new law requiring the display of crucifixes but permitting an exception if a parent raises a "serious and reasonable" objection.

http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=48c44ccb-760c-4869-8e99-fe666bcb4a47%40sessionmgr14&vid=2&hid=24

[127] In any event, the parliament can overrule a decision of the constitutional court amending the constitution. An interesting example is the amendment of the Italian constitution overruling a sentence of the It. CC concerning rules of criminal procedure: the Sentenza 361/1998 cancelling art. 513 of the criminal code modified by a statute of August 7th 1997, n. 267, was indeed overridden by the amendment of art. 111 of the Italian constitution passed on November 23rd 1999.

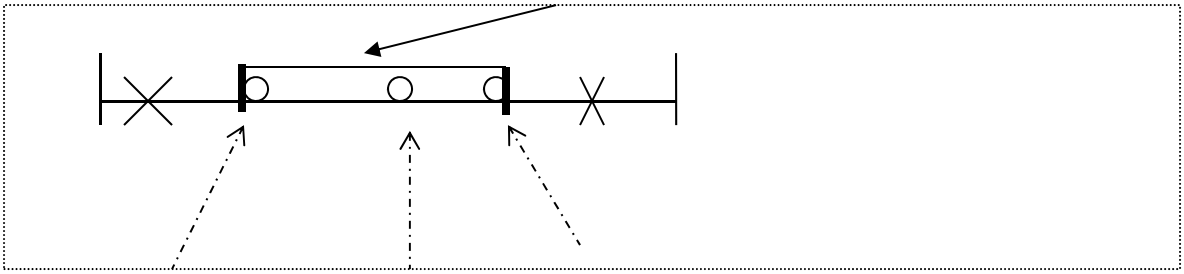
[128] In a different section of my research (already presented in French in the report written for the *Ministère de la Justice*, quoted) and concerning the *reason giving* of the sovereign courts, I analyze the mechanism of decision-making in *collegial* adjudicatory bodies/courts. In that text I put the accent on the fact that there is no constitutional judge (singular, a non-existing entity of a lot of jurisprudential debate) but always a *panel court* of which we have to study, from a descriptive and normative point of view, the rules for decision making -- a very important

persuade the collective body making the decision but have to take into consideration (or at least they will be better off doing so) the preferences of the other major actors of the political system.

Graphs may help here:

Fig. 1

Political possibilities: room for court's discretion



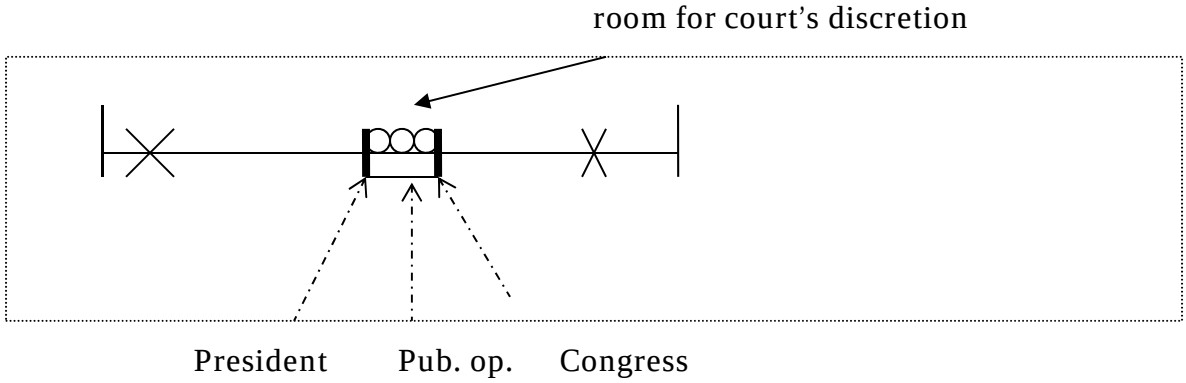
President Public opinion Congress

The distance between the preferences (the small circles) of these three main actors represents what we can call the latitude of *discretionary* power of the Court's decisions. It can choose any point inside the perimeter, which is not in its power to establish but which is imposed upon it.

If, alternatively, the preferences of the three actors are closer, the Court has less significant room for making its decision. Here, again, the judicial body is constrained by forces that are out of its control.

question I can just hint at here. Lewis Kornhauser has published important and well-known contributions on this topic, normally disregarded in the literature.

Fig. 2



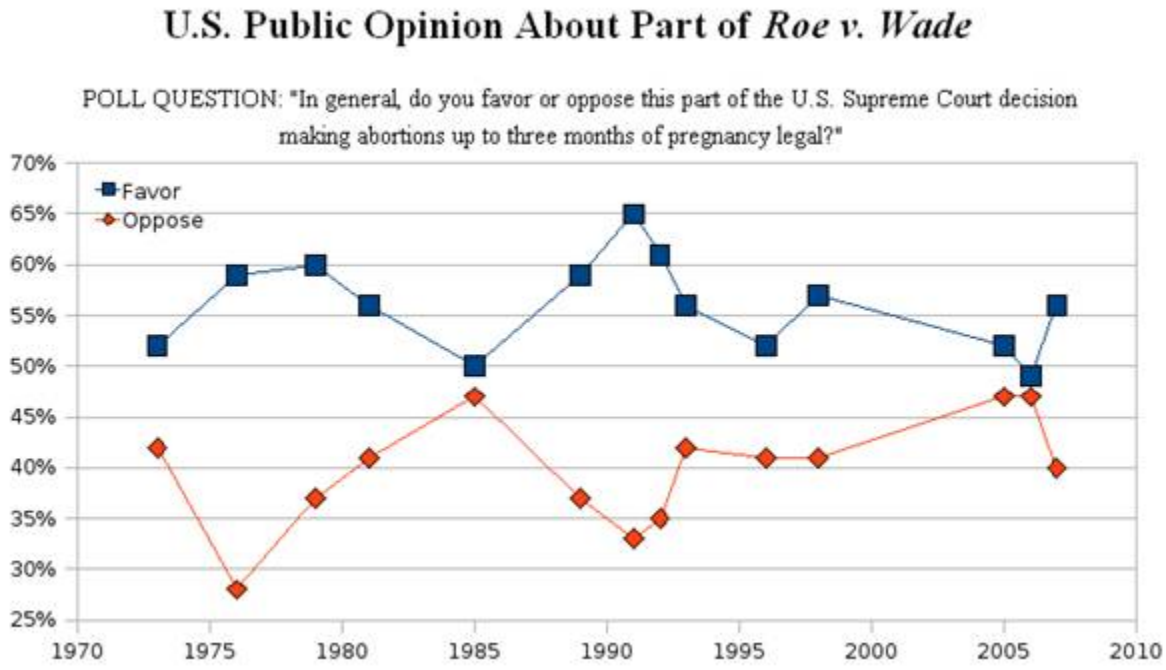
Examples[129] are numerous. As to Fig. 2, we can think of *Korematsu* (v. United States, 323 U.S. 214, 1944) when President Roosevelt, the Congress, a large part of public opinion, and the Governor of California, Earl Warren, were in favor of the emergency measures taken against the American Japanese. Or of *Carolene* (United States v. Carolene Products Company, 304 U.S. 144 (1938) reversing Lochner, when Roosevelt, the Congress, and public opinion were on the same position. A similar argument may be made, in my opinion, concerning *Plessy v. Ferguson* 163 U.S. 537 (1896).

A clear example of Fig. 1 is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), when the USSC was able to oppose President Truman, who lacked the support of Congress and of public opinion.

Even the most famous decision of the French Constitutional Council – the one called the *bloc de constitutionnalité*, 1971 – would not be understandable without the strong split between the *Assemblée Nationale* and the *Sénat* on the loi Marcellin.

[129] For examples in contexts other than US constitutional history, see J. Ferejohn & P. Pasquino, *The Countermajoritarian Opportunity*, 13 (2010) U. PA. J. CONST. L. 353-395.

Appendix: public opinion data:

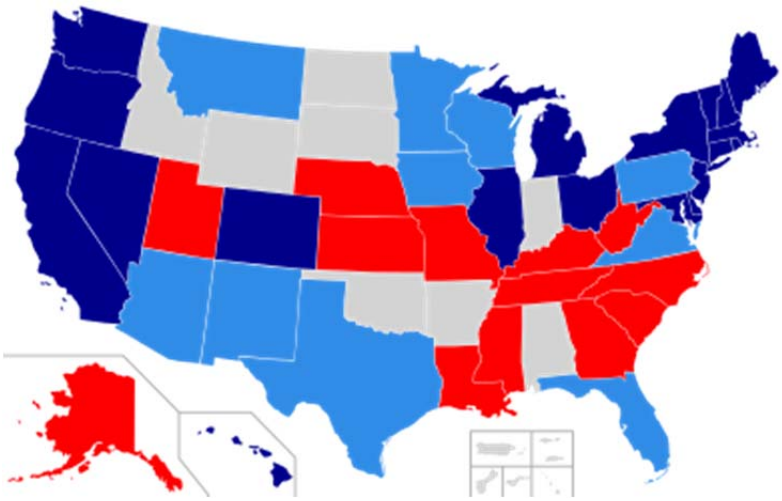


New National Poll Shows Decrease in Support for Capital Punishment

The Gallup Poll's latest national survey of American opinion on the death penalty found that support for capital punishment dropped by 5 percentage points from 2007, down to 64% support from 69% last year. The percentage of those opposing capital punishment rose from 27% to 30%. This poll shows that support for the death penalty is equal to the lowest level in the Gallup Polls during the past 30 years. Support had reached a high of 80% in 1994.

The last time Gallup asked respondents about alternatives (which would be a better punishment for murder, the death penalty or life in prison with absolutely no possibility of parole?) was in 2006. In that poll, more people supported life in prison without parole (48%) than supported the death penalty (47%). (Gallup Poll, 2008 Oct 3-5, Death Penalty)

Same-sex marriage:



Blue Recent polls or ballot votes that show that a majority of that state's population supports same-sex marriage.
Pale blue Recent polls that show that less than a majority of that state's population opposes same-sex marriage.
Red Recent polls or ballot votes that show that a majority of that state's population opposes same-sex marriage.