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A Political Reading of the Constitution

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## A POLITICAL READING OF THE CONSTITUTION

### *Abstract*

Constitutional theory greatly benefits by the use of intellectual resources from disciplines such as political theory and philosophy of language. In this work, such elements are combined to elaborate on the agenda of constitutional theory and distinguish it from other projects. The emphasis is put on the possibility of understanding the constitution as a political grammar, providing its users –the participants of the politico-constitutional process broadly speaking– with syntactic rules and semantic signposts to formulate their ideas, projects, strategies. This view can account for the radical instability of constitutional meaning –in other words, disagreement– by pointing to the so-called separation of signifier and signified made prominent by contemporary philosophy, reinforced by the fact that the recursiveness and self-reference of written language makes the syntactic functions of the constitution open to the same instability that its semantic contents have. Regarding the constitution, just as any other text, we can proclaim the death of the author.

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### *The frail foundations of constitutional law*

A good deal of what is written and taught in the field of constitutional law has, just as the statue in Nebuchadnezzar's dreams, feet of clay. Its frailty consists in its lack of a sound reflection on its object of regulation: politics.

Constitutional law is, indeed, political law by definition. Its role is to provide a legal structure for politics. Now, how fit would it be a regulatory enterprise that lacks a comprehensive understanding of the phenomenon that pretends to regulate? Such project is bound to fail. Similar considerations lead torts, property and contracts law to an interdisciplinary turn that resulted in the *Law & Economics* approach.<sup>1</sup> In the case of constitutional law, to provide it with a solid theoretic foundation implies turning towards the discipline that studies the political phenomenon, political theory, undertaking an exercise that I would call *a political reading of the constitution*.

Because of its own nature, a political reading of the constitution does not purport to be univocal; in other words, it does not expect to be *the* political reading, but *a* political reading. What is rejected is the expectation to ground clear-cut and unequivocal truths, waiting to be discovered by the hard-working exegete. In this sense, any political reading is rooted in a *phronetic* understanding of social sciences and humanities. *Phronesis*, that virtue of practical judgment opposed both to *episteme* (the epistemic, the sphere of intellectual understanding) and to *techne* (the technical, the sphere of craftsmanship) has

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<sup>1</sup> See GUIDO CALABRESI, DOUGLAS A. MELAMED, *Property Rules, Liability Rules and Inalienability: One view from the Cathedral*, 85 Harv. L. R. 1089 (1972).

been vindicated as the grounds for a social science that opens the floor for such questions as, Where are we going? Who gains and who loses? By which mechanisms of power? And what, if anything, should we do about it?<sup>2</sup> A social science that abandons epistemic pretenses native to natural sciences<sup>3</sup> and that at the same time rejects to be relegated to a merely technical role will tend to distrust any social discourse that claims authenticity or objectiveness for itself.

A phronetic emphasis should reformulate the way that we reflect on various topics of constitutional law. The language of constitutional thought is packed with concepts that obscure asymmetries in relations of power. How often has been the defense of minorities against the tyranny of majorities invoked by those who pretend to defend property against redistributionist majorities? Indeed, that is the political and legal use of that idea found in so diverse political actors as James Madison,<sup>4</sup> John C. Calhoun,<sup>5</sup> and General Augusto

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<sup>2</sup> BENT FLYVBERG, *MAKING SOCIAL SCIENCE MATTER: WHY SOCIAL INQUIRE FAILS AND HOW IT CAN SUCCEED AGAIN*, Cambridge University Press (2001), 60.

<sup>3</sup> A goal problematized even in that field. *See* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, University of Chicago Press (1996).

<sup>4</sup> “A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it.” JAMES MADISON, *THE FEDERALIST PAPERS* N. 10, Signet Classics (2003), 79. This quote shows also an anxious need for restraining the display of passions in the public sphere, an apprehension that I will criticize.

<sup>5</sup> Calhoun adduces that the purpose of the constitution must be “to give to each interest or portion of the community a negative on the others. It is this mutual negative among its various conflicting interests, which invests each with the power of protecting itself — and places the rights and safety of each, where only they

Pinochet's constitutional advisor Jaime Guzmán.<sup>6</sup> Perhaps constitutional theory would benefit from importing other categories for reflecting on who deserves to be protected from majorities, such as that of exploitation, marginalization, and powerlessness, among others.<sup>7</sup>

The immediate obstacle that a political reading of constitutional law confronts is what position to take regarding the relationship between law and politics. Is the law, as some claim, nothing but politics by other means? This oversimplified statement and its incensed rejection by many amounts to nothing but a failure to perceive the complex and nuanced dimensions of the problematic relation between law and politics; the tensions and mutual reinforcement between legality and legitimacy, the law as the outcome of policy-making procedures, the law as the discourse of the legal profession, the law as a depository of reasons for action, and so on. In this work I am concerned mainly with the disregard by the legal culture of the legitimacy and field of the political; therefore, at least

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can be securely placed, under its own guardianship.” JOHN C. CALHOUN, *A Disquisition on Government*, SELECTED WRITINGS AND SPEECHES, Gateway Editions (2005), 20. The specific structure that he so wanted to protect was slavery; a property right that symbolized the slaveholders' wish to preserve their social structures from any criticism.

<sup>6</sup> He maintained, “universal enfranchisement must too recognize as a limit the essential values of Chilenity. It is not a matter of ‘inventing’ or ‘decreeing’ the content of these concepts. It is enough with extracting them out from the national consciousness in order to give them a juridical formulation recognized by the very same citizenship as an objective expression of it.” JAIME GUZMÁN, *El Sufragio Universal y la Nueva Institucionalidad*, 42 Estudios Públicos (1991), 336.

<sup>7</sup> IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, Princeton University Press (1990), 48- 58.

operationally, I am working on the assumption that the law, understood as the disciplinary knowledge of practitioners and scholars, has a relative autonomy from the realm of politics. I believe, thus, that the relative autonomy of law and constitutionalism must be based on a deep understanding of the political condition as a central dimension of the human condition.

It is worth to notice that the project of reformulating constitutional theory under the light of sound political theory is a long term one, that in these short lines can be merely sketched. This paper must be seen at most as an effort to elicit debate in the field of constitutional theory. In any case, it will be the reader who will judge if my accusation of frailty thrown at constitutional law's face can stand up. With this purpose in mind, I will start this paper by focusing my attention in the political phenomena, analyzing subsequently the role that the constitution is meant to play in the context of democratic politics, and then drawing some institutional conclusions from that role.

### *Some words about moral disagreement and politics*

It would be a gross mistake to deny the importance of moral disagreements for those who take part in them. Nevertheless, this awareness does not commit us to believe in the transcendental truths that they brandish in their controversies. Whether one believes in the existence of moral facts independent of the judgments of moral agents or not, the fact is that humans are moral agents that assign an intense importance to this dimension of their experience.<sup>8</sup> We are moral beings; we feel the need to justify our actions, to ground

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<sup>8</sup> Personally I do not believe in moral objectivism; that is, I do not believe that moral judgments have an ontological status of their own. That does not mean that I don't believe in the existence of moral judgments;

them in principles. But this anthropological statement, that as I have said does not commit us to moral objectivism, has more consequences than what is usually recognized. Moral disagreement finds its expression in what is referred to as the theory of value pluralism, which recognizes the existence of several and different values that may be in conflict with each other without being possible to disqualify one of them as wrong, not even as subordinated to the others.<sup>9</sup> A consequence sometimes neglected of value pluralism is the fact that the realm of values does not really have a binding power in us. To the contrary, the heterogeneous and contradictory inhabitants of that realm –perhaps precisely because of their mutually exclusionary force– seem to be affected by a

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let me insist that I think that moral statements –made, to be sure, by moral agents, by subjects, in accordance to their moral beliefs– constitute a fundamental dimension of human experience. Moral ‘truth’ would be, in this view, the adequacy of a moral statement to the larger moral discourse with which it is being judged. The moral discourse used to assess a particular moral judgment can be, for example, the prevailing in a given place and time; or more simply, the one that the agent who is passing a judgment subscribes. To know what is the moral discourse prevailing in a given society implies a work of reconstruction that not always is meant to arrive to satisfactory conclusions; sometimes moral disagreement in a given sphere of human life is so strong that there is simply no such thing as a prevailing moral discourse; not a majoritarian one, maybe not even an ‘overlapping consensus.’ It can be the case that in these situations, the very existence of that sphere –be it an activity, a social practice, even a whole society– is threatened by those disagreements; but that is a contingent problem that has to be judged in its own merit, case by case.

<sup>9</sup> Isaiah Berlin is credited with the enshrining this position in contemporary thought, by means of his praise of the “freedom to choose ends without claiming eternal validity for them, and the pluralism of values connected with this.” ISIAH BERLIN, *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY*, Oxford University Press (2002), 217.

fundamental impotence to determine us unless other agents, often more profane, come into their help: emotions, upbringing, appetites. No matter how hard we try, it is not possible to trace our way back to some principle or meta-value that grounds, unifies or reconciles the contradictory world of values.

An interesting consequence of this is that, even though we feel that we need to provide justification for our individual acts and the institutions that we live in, it is impossible to present such justification as a necessary consequence of the order of things;<sup>10</sup> that is, as Weber said, “in practice, the ‘scientific justification’ of an opinion is impossible— except when investigating the means of achieving a purpose that is accepted as *given*.”<sup>11</sup> That is why in a world where purposes are not given, where the death of God proclaimed by Nietzsche has prompted the birth of many gods mutually incompatible in the guise of a polytheism of values, the space that once was filled by the True God and the True Morality needs to be filled by an act –conscious or unconscious, explicit or implicit– of decision.

The relevance for my present purposes of this consequence of the pluralism or polytheism of values is that, paradoxically, much of what has been written and is read

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<sup>10</sup> Well, sure it is possible to do so, but only at the cost of ignoring value pluralism and affirming that all those who disagree with us are fundamentally wrong. The philosophical problem with this position – besides the authoritarian political consequences of it, which probably would not be very important if Truth was really at stake– is that it fails to take moral disagreement seriously and all that is going on in this phenomenon.

<sup>11</sup> MAX WEBER, COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS, Algora Publishing (2008), 44.

precisely in the field of political philosophy (think of Rawls,<sup>12</sup> Nozick,<sup>13</sup> and Cohen<sup>14</sup>) consist of a search for justifications for social and political institutions of the kind that I have recognized as central to the human experience (that is, some kind of broadly understood moral justification) but by deploying an interesting argumentative strategy that runs counter to value pluralism. The philosophers of justice argue that the apparatus of governance (alternatively identified with democracy, the constitution, or some other construct) has some deep lodged purpose of characteristic that is inherent to that system and from which their preferred value (political liberty, economic freedom, equality) is naturally and smoothly derived, as if it was not necessary to found it in a decision but was given to us by the nature of politics, of democracy, or of the constitutions.

Reflections on governance of the kind that political philosophers elaborate have important power-consequences, because they provide the citizenry with a specialized lexicon to reflect on the political. Since the aim of these lines is ultimately to make visible how constitutional theory is also an instrument of power and how its internal objectives can be achieved more consistently with the help of political theory, I have the responsibility of pointing out that undisputable and neutral 'truth' does not lie either in the hands of political philosophers who hide the ball of their deciding which God to worship and present it as the natural flow of their arguments. Also, it is necessary to keep in mind, accordingly, that these apparatuses of governance do not guarantee any outcome

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<sup>12</sup> JOHN RAWLS, *A THEORY OF JUSTICE*, Harvard University Press (1971).

<sup>13</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, Basic Books (1974).

<sup>14</sup> GERALD COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY*, Cambridge University Press (1995).

in terms of values. A constitution is no more capable of guaranteeing political liberty per se than it is capable of guaranteeing economic freedom or social equality; in other terms, a constitution –just like democracy, or any other form of governance for that matter– can be stretched to fit both a liberal and an illiberal regime, an egalitarian and a deeply unequal society, and so on. Thus, the effort to link any of those apparatus of governance with a particular set of values is not only a tricky strategy of power; it’s also inaccurate. As children of Enlightenment, we like to think in terms of procedures rather than in terms of substantive commitments or “concrete orders.” But the problem is that our moral agency precludes us from being morally indifferent to the outcomes of these procedures. This tension between “neutral” procedures (which nevertheless tend to be the more partisan the more they insist in their neutrality, just like the philosophers of justice) and moral outcomes is one of the dilemmas of contemporary governance and reflection. One effort to solve this dilemma, perhaps the most frequent but in my opinion the most easily detectable in its rhetorical deceit, is the one that we have associated with the philosophers of justice, consisting in affirming that the solution is already there in our system of governance. Another philosophically more interesting effort is what we could loosely describe as the neo-Kantian attempt to discover the conditions of possibility of the system of governance, something that could be associated with Habermas’s “communicative ethics.”<sup>15</sup> This is certainly a more dexterous strategy, one that explicitly claims to

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<sup>15</sup> Habermas promotes “a pragmatic conception of justification as a public practice in which criticizable validity claims can be defended with good reasons... Hence procedural characteristics of the process of argumentation itself must ultimately bear the burden of explaining why results achieved in a procedurally correct manner enjoy the presumption of validity. For example, the communicative structure of rational

accommodate value pluralism; but one that still anchors its validity in an untestable claim of value rationality. Probably the time has arrived to recognize that our systems of governance and our terms of social coexistence are not necessary but contingent, grounded more in will and chance than in values immanent to a constitutional democracy or in its preconditions.

### *Politics as Conflict*

Carl Schmitt stands as an inescapable figure in the task of formulating a political reading of the constitution. The German jurist remains a controversial character in the history of political and constitutional thought because of the role he played during the breakdown of Weimar democracy and the first years of Nazi rule. However, if despite all but Schmitt is still influential is because of his insightful, albeit often aphoristic writings on the intersection between constitutional law and political struggle. In this sense, it seems at moments that Schmitt set the agenda of constitutional discussion. Once and again we take issue with the topics that he put forward (political theology, the proper guardian of the

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discourse can ensure that all relevant contributions are heard and that the unforced force of the better argument alone determines the 'yes or 'no' responses of the participants." Jürgen Habermas, *On the Cognitive Content of Morality*, in 96 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 335, 350 (1996). Habermas tends to rely on argumentative structures as his strategy of critique; for instance, he accuses the postmodern critique of Enlightenment (exemplified among others by Heidegger, Georges Bataille, and Adorno) of a "performative contradiction" because "in the moment of description it still has to make use of the critique that has been declared dead;" resulting in "the embarrassment of a critique that attacks the presuppositions of its own validity." JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY*, The MIT Press Cambridge (1987), 119- 127.

constitution, decisionism, concrete-order thinking, among others) be it agreeing or contesting the stances that he took on them. This is why it is not strange that in developing an exercise of political reading we recurrently revisit his steps. In my case, I will use two assertions or intuitions of Schmitt as the leitmotifs of my reflection on the political phenomenon: the first being his opinion that the specific political distinction to which political actions and motives can be reduced is that between friend and enemy;<sup>16</sup> the second, his belief that democracy requires homogeneity and the concomitant elimination or eradication of heterogeneity.<sup>17</sup> From now on I will refer to them as the theses of *enmity* and *homogeneity*.

It is clear that for Schmitt, politics is not an activity with a determinate content or purpose but rather a quality or characteristic of social dynamics: everything can be the object of an alignment between friend and foe. By consulting his texts it is also patent that for him politics entails the potentiality of mutual destruction; he does not employ the imagery of conflict metaphorically but to express that ultimately political oppositions are overshadowed by the potentiality or possibility of mutual destruction. Also, we can deduce that for Schmitt politics is not a phenomenon that should be normally present within a nation, which for Schmitt should not have internal divisions. In fact, inside a homogeneous people there are no enemies in the Schmittian sense but only friends, the role of enemy being played by other peoples whose concrete way of life differs and

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<sup>16</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, University of Chicago Press (1996), 26.

<sup>17</sup> CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, The MIT Press (1988), 9. He works on the same idea in his *CONSTITUTIONAL THEORY*, Duke University Press (2007).

potentially threatens them. Politics in Schmitt seems to be restricted to the international arena; to the conflict between rival nations where the potentiality of war is pervasive, while within any single nation a homogeneous society is carried on.

In contrast, when we think of democratic politics we tend to associate it with the principle, value, or idea of inclusion. Inclusion can refer to inclusion of issues into the sphere of politics or the inclusion of more people into the political process by distributing the entitlement to participate in it –particularly in the form of political rights-. Democratic politics seem thus to be radically opposed to Schmitt’s formulations, but as we will see, if we take his intuitions in a functional<sup>18</sup> rather than institutional way (that is, as offering us conceptual notions to understand constitutional politics rather than promoting a particular institutional model), his intellectual contribution can play an important role in developing a political reading of the constitution.

### *Enmity and democratic politics*

Schmitt understands enmity to be a hostility opened to the destruction of the enemy; it is not a metaphor but the real possibility of the resolution of conflicts by force. The role of force and violence in politics, of course, cannot be neglected given that the modern state itself is “an institutional association of rule, which within a given territory has succeeded in gaining a monopoly of legitimate physical force as a means of ruling.”<sup>19</sup> Schmitt

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<sup>18</sup> I borrow this expression from Paul Kahn, who pushed me to take Schmitt in this way not only regarding his concept of enmity but also his ideas on homogeneity.

<sup>19</sup> MAX WEBER, COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS, Algora Publishing (2008) 160- 161.

complements this awareness by emphasizing the pervasive shadow of conflict over politics, whether we understand it as a phenomenon –the political as the emergence or manifestation of conflicts- or as an activity –politics as the struggle for the power of the state -.

What is interesting of the Schmittian turn in the reflection on violence and politics is that by giving it a dialectical shape –the confrontation between enemies and friends– Schmitt furthers to a functional level (almost to a logical level, despite my reluctance to immanent rationalities) our understanding of the centrality of conflict for politics. It is not only true that states have an ongoing history of ruling through the continuous threat of exerting violence; also, the very emergence of the political is bond to the capacity to identify different sides in a concrete opposition between forces. Now, this not only means that there will be always be room for enmity even in the most inclusive of democracies (sedition will always be a crime in all systems of government)<sup>20</sup> but also that the political process itself, in its most quotidian aspect, needs functional oppositions to gain shape. In the context of political conflict, the *other* is a necessary and dialectic complement of the

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<sup>20</sup> Robespierre made this point brilliantly in his speech on December 3, 1792, to the National Convention, regarding the Trial of Louis Capet, formerly known as Louis XVI: “The Assembly has been led, without realizing it, far from the real question. There is no trial to be held here. Louis is not a defendant. You are not judges. You are not, you cannot be anything but statesmen and representatives of the nation. You have no sentence to pronounce for or against a man, but a measure of public salvation to implement, an act of national providence to perform. A dethroned king, in the Republic, is good for only two uses: either to trouble the peace of the state and threaten liberty, or to affirm both of these at the same time... I utter this deadly truth with regret, but Louis must die, because the homeland has to live.” MAXIMILIEN ROBESPIERRE, *VIRTUE AND TERROR*, Verso (2007) 57- 64.

*self* that helps us to make sense of the concrete alignments and oppositions of which the political landscape is compounded; the need for this opposition seems not only to be logical but first and foremost practical.<sup>21</sup> Without this ‘other’ serving as a touchstone, how could we understand or even justify our own presence in the political activity? How would we define ourselves? We enter the political arena to fight for a good or against an evil. It is not fortuitous that ordinary political language abounds in sayings like ‘the enemy of my enemy is my friend.’ Politically there is no left without right, government without opposition, liberals without conservatives, pro-choice without pro-life. Even one of the most political institutions, the political party, is usually torn inside by internal tendencies that compete with each other for controlling the party apparatus.

A functional rather than institutional understanding of enmity, of course, shapes democratic politics. In a democratic polity the participants of the political process recognize to each other a set of rights; and are willing to use the state’s monopoly of force against those who try to eliminate those rights. Without abandoning conflict, the politics of a democratic polity gives up by definition the possibility of annihilating someone’s political opponents (which of course does exempt the democratic polity of the

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<sup>21</sup> So seems to think Hegel, if we consider his criticism of Kant’s propositions for a perpetual peace: “Kant proposed a league of sovereigns to settle disputes between states, and the Holy Alliance was meant to be an institution more or less of this kind. But the state is an individual, and negation is an essential component of individuality. Thus, even if a number of states join together as a family, this league, in its individuality, must generate opposition and create an enemy.” G. W. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, Cambridge University Press (1991), 362. In any case, Hegel does not seem to value the project of a perpetual peace, which he thinks would produce stagnation in the “ethical health of nations.” *Ibidem*, at 361.

practical need of punishing sedition severely); a democratic polity should be seen then as a “concrete order,” as an institutional system that adopts certain systems of governance and decides to shape them under the principle of inclusion and fill it with certain specific rights. There is certainly no practical contradiction in other existing systems like an authoritarian polity; but what must be clear is that they have chosen different paths, with put them in tension and opposition with democratic polities. Democratic politics, to be sure, takes inclusion as far as possible, recognizing the members of the political community the right to take part in it even when their very same presence confronts sharply the prevailing consensus, the consensus of others. This is why the mythical hero of democratic politics is the dissident, symbolized by Prometheus,<sup>22</sup> the rebel by definition whose act of disobedience was to take the fire to humankind. And the ensuing right to demur is a promise –or threat, depending from which point of view is judged– of change in the holders of power. Democratic politics exploit to its maximum the possibilities of both democracy and politics, allocating power through mechanisms that, as Arrow’s impossibility theorem and other social choice theory devises prove, are inherently unstable. Instability is a permanent possibility for politics democratic, one that certainly distinguishes it from, e.g., authoritarianism. But this works within the logic of democratic politics as a reinforcement of the system; since electoral outcomes are never definitive, democratic politics can obtain loyalty not only from the current majorities but

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<sup>22</sup> Etymologically Lucifer –the *light bringer*- seems to be the equivalent of Prometheus. This is truly interesting if we keep in mind that, as Weber put it, “those who threw in their lot with power and force as means were making a pact with diabolical powers.” MAX WEBER, COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 201 (2008).

also from the electoral losers, who know that eventually they can augment their power through persuasion, mobilization, and other political tools.

### *Homogeneity/equality*

It would be easy to read Schmitt's praise of homogeneity as a call for ethnic cleansing and take him as the legal theorist of concentration camps. But not only this would mistake Schmitt (who was not an anti-Semite) and his theories (that were never imbricated with racism);<sup>23</sup> also, it would amount to a simplistic dismissal of that which his political theory can tell us under a functional reading.

Since the times of Aristotle, who insisted in the importance of a large middle class for the stability of the polis, political theorists of all persuasions have observed that without

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<sup>23</sup> "Initially, it appeared highly unlikely that Schmitt would have any association with Nazi legal institutions or theoretical developments. Given his earlier ideas and recent political background, even his professional future seemed in doubt (with the Nazi rise to power). He had displayed not the least sympathy, or even toleration, for the ideology or politics of the Nazi movement, which he had humorously referred to at one point as 'organized mass insanity.' None of his Weimar works had proposed totalitarian dictatorship or the revolutionary transformation of society. His Weimar writings had all been directed at ensuring the stability of the German state and Weimar constitutional system. In stark contrast to the central importance the Nazis attached to biological racism and anti-Semitism, his political theory was not racial and his writings and personal relationships were free of anti-Semitism. He had very close and devoted Jewish friends, associates, and students. While Schmitt ranked among the most frequently cited political and legal thinkers in Weimar, the Nazis totally neglected his work; his ideas had contributed nothing to their ideology or movement." Joseph W. Bendersky, *Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context*, in CARL SCHMITT, *ON THE THREE TYPES OF JURISTIC THOUGHT*, Praeger (2004), 15.

some kind of similarity among the citizens, the political experiment is unviable. While some of them have called it equality, others like Schmitt have preferred to call it homogeneity. And while I personally prefer to speak of equality, the issue remains that a polity whose members are radically different from each other is seriously impaired in its possibilities of success. In fact, the narrative of civil wars is often that of sectional differences that go well beyond what the people find tolerable, a particularly variable boundary. The antebellum period is, in this regard, particularly telling since it allows us to see the process through which something that today is unanimously considered abominable –i.e., slavery– became the light that elicited passionate and, yes, idealistic vindications from both sides in a confrontation that at some point became unbearable. Interestingly, enmity and heterogeneity reveal in these extreme moments their internal and unstable opposition, which as I said Schmitt seems to have resolved by denying the possibility of politics within the nation state.

For sure, homogeneity –or equality, for that matter– can be understood as the search for unity at any cost, as a mean in itself. Heterogeneity is, as Hannah Arendt puts it, a characteristic feature of the human condition;<sup>24</sup> and as a consequence, uncertainty is too. Erich Fromm singles out the aversion towards uncertainty and heterogeneity as the seed of an authoritarian fear of freedom.<sup>25</sup> But at the end of the day, just as the painting that

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<sup>24</sup> One of the constants of Arendt's political thought is her remarking on "the fact of the plurality of men, one of the fundamental prerequisites of political life." HANNAH ARENDT, *BETWEEN PAST AND FUTURE*, Penguins Classics (2006), 73.

<sup>25</sup> See ERICH FROMM, *THE HEART OF MAN*, Harper & Row (1964); and ERICH FROMM, *ESCAPE FROM FREEDOM*, Holt Paperbacks (1994).

Kant mentions in one of his works expressed it ironically, the only perpetual peace available for us is the peace of the cemetery;<sup>26</sup> ours is a world of contingency and uncertainty. It is a question beyond doubt that Carl Schmitt's understanding of homogeneity was central in his pre-war political positions, which leaned towards a conservative authoritarianism associated among others with Franz von Papen.<sup>27</sup> That does not taint the concepts of homogeneity or enmity irremediably; just as a constitution is compatible with authoritarianism, homogeneity and enmity are compatible with competitive democratic politics and an enthusiastic acceptance of diversity; indeed, they are theoretically advantageous for proving an explanation of the concrete political order of democratic politics.

Moreover, if heterogeneity and a significant degree of uncertainty in social relations are deeply human characteristics at any time or place, in a democratic polity dissent (a concrete expression of them) plays a central role. The premodern unity in the concept of the good, sustained by the social cement of religiosity, is not available anymore; disagreement is the realm where democratic politics is bound to live. Conversely, conflictless unity as a political project is nothing but a chimera or a pathology. Naïve

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<sup>26</sup> IMMANUEL KANT, *TO PERPETUAL PEACE*, Hacklett Publishing (2003), 5.

<sup>27</sup> So, "as the political and economic turmoil intensified in the early 1930's, Schmitt feared increasing Nazi power. For this reason, he supported Chancellor Kurt von Schleicher, to whom Schmitt served as a constitutional advisor, in his attempt to prevent a Nazi acquisition of power in January 1933, by instituting an *Ausnahmezustand* (state of emergency) and banning both the Nazi and the Communist parties." Joseph W. Bendersky, *Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context*, in CARL SCHMITT, *ON THE THREE TYPES OF JURISTIC THOUGHT*, Praeger (2004), 15.

chimera, for it disregards the deep disagreements that fragment contemporary society; dangerous pathology, precisely because by ignoring the legitimacy of that dissension, it breeds the seed of authoritarianism –ready to get rid of dissenters.<sup>28</sup>

### *Passions and the need of conflict*

Undoubtedly, there will always remain a good reason for people within any society to overcome some conflicts and cooperate between them. Among these reasons we can count various kinds of interests. Interests, both common and sectional –we cannot fail to remember that there are conflicting interests between members of the same society– can provide a basis for a politics of negotiation and compromise. However, this is not enough to bring conflicts to an end since politics is not restricted to the mere administration of interests; it involves the display of moral arguments and the recognition or creation of identities through concrete oppositional alignments that, for better or worse, are ultimately incommensurable and mutually irreducible. A politics of common interests can provide grounds for important agreements, a merit that cannot be neglected: but ultimately it cannot dissolve the reality of adversarial and dissentient conflict.

Conflicts seem to be insuppressible from human life, inseparable from the coexistence of people. Probably the explanation of this is that through conflicts we release the tensions and anxieties that living together necessarily imposes over individuals, that which Freud

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<sup>28</sup> “It is the uneasiness with difference, above all, that prompts the dislike of politics and the fantasy of abolishing it. The abolition is unlikely to be achieved, however, except by repressing both difference and conflict, which would require a highly coercive politics.” MICHAEL WALZER, *POLITICS AND PASSIONS: TOWARD A MORE EGALITARIAN LIBERALISM*, Yale University Press (2005), 106.

called the discontent of civilization.<sup>29</sup> Building and maintaining a society through the disciplining of upbringing, the constant enforcement of boundaries, the use of symbolic and sometimes real violence to hold together the system, generates a great deal of frustration and uneasiness that needs to find a conduit. The Greek tragedy understood the presence of these psychological energies, which were liberated by that genre “through pity and fear accomplishing the catharsis of such emotions.”<sup>30</sup> Many other social practices, like sports and more generally games, are also rooted in this need for channeling out the energies of conflict.

The field of human psyche and the political sphere is a wide topic that cannot be covered in these pages. But it seems safe to relate it with the fact that we get involved in politics because and inasmuch we are affected by it, that is to the extent that it captures our affects. We fight for that we love and against that we hate, and we are open to sacrifice ourselves for that in which we believe; sacrifices that can go from dedicating our time to civic and political duties that are largely unrewarded,<sup>31</sup> up to giving up our lives for the

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<sup>29</sup> “In consequence of this primary mutual hostility of human beings, civilized society is perpetually threatened with disintegration. The interest of work in common would not hold it together; instinctual passions are stronger than reasonable interests. Civilization has to use its utmost efforts in order to set limits to man’s aggressive instincts and to hold the manifestation of them in check by psychological reaction-formations.” SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENT*, W. W Norton & Company (2005), 104-105.

<sup>30</sup> ARISTOTLE, *POETICS*, Loeb Classical Library (1996), 47-49.

<sup>31</sup> This is the sense of sacrifice that Bruce Ackerman employs on talking of the private citizen, he who conducts his life as a simple citizen but is able to participate in the electoral process even if it does not seem

political community.<sup>32</sup> Politics obtains our attention by touching our passions and emotions;<sup>33</sup> and as long as it does so, democratic politics gains an endless source of legitimacy. The stability and rootedness of a political system in a given society will depend, to a certain extent, on its capacity to detect and exploit the social, economic, and moral conflicts more important to the majority of that society and give them institutional representation and management. That is, the good health of the political system depends in fundamental ways on the *clarity* and *saliency* of political conflicts. The objective must not only be that political conflicts obey the deep social, economic, moral and historical cleavages that sustain politics in a concrete community; but also that these conflicts and their importance are clearly perceived by the citizens. A vibrant, healthy and mature public sphere is not the one that rejects conflicts in favor of national unity or consensus; but the one that understands that the purpose of democratic politics is to institutionalize conflicts and to give them a periodical channel of expression. Democracy, through

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on calculus to be strictly profitable or even necessary. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, Harvard University Press (1993), 230.

<sup>32</sup> “Political identity is linked to a willingness to sacrifice: not contract, but love; not safety, but sacrifice.” PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE*, Princeton University Press (1998), 64.

<sup>33</sup> “The excitement of the competition, the sense of possible victory, the fear of defeat –all these press people to take on tasks they would otherwise be reluctant to perform.” MICHAEL WALZER, *POLITICS AND PASSIONS: TOWARD A MORE EGALITARIAN LIBERALISM*, Yale University Press (2005), 101.

institutional structures and political rights, establishes a system whose strength lies in its instability.<sup>34</sup>

Passions play then a central role in politics, in capturing the attention of citizens and providing legitimacy to the political process and the constitutional order. In this sense, legitimacy means something very specific: when people feel that the political process is using the conflicts that they care about as an important input, they feel that it's being responsive to them. This puts a 'democratic' or inclusive burden on political structures that want to obtain this legitimacy of responsiveness: not only 'all the voices' but also 'all the voice tones' are in principle to be considered, no matter how passionate they are.<sup>35</sup> I believe that politics is an autonomous sphere that is not governed by epistemic or technical hierarchies but that has its own internal rationality grounded on antagonistic alignments. Therefore, although democracy has an important deliberative dimension (by which rational arguments about ends and means are presented and balanced and the process is deemed to have transformative capacities on the views of the participants), that deliberative dimension conflicts with the demands of rhetoric inclusiveness. Knowledge, enough said, conveys a claim to power based; the Romans gave to this the name of

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<sup>34</sup> Conversely, the interplay between moral disagreement (expressed in different concepts of the good), identity politics, and the interests, seem to explain in a dynamic and contextual way the adversarial alignments into coalitions, parties, tendencies and movements that prevail within a political system

<sup>35</sup> "To the extent that norms of deliberation implicitly value certain styles of expression as dispassionate, orderly, or articulate, they can have exclusionary implications. Such a focus on a narrow deliberative style, moreover, ignores the important role other forms of communication play in furthering inclusive democratic outcomes." IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY*, Oxford University Press (2002), 6-7.

*auctoritas*, wisdom socially recognized.<sup>36</sup> As Jerome Frank<sup>37</sup> and Fred Rodell<sup>38</sup> remarked insistently, the law and particularly constitutional law are particularly torn by this tension—some Constitutional Courts resembling a contemporary version of the Platonic Philosopher Kings—, which often derives in a stringent exclusion of ways of reasoning and arguing that are alien to legal professional parlance. Constitutional rhetoric tends to be an embodiment of epistemocracy,<sup>39</sup> the government by the knowledgeable.

To sum things up, democratic politics recognize the role that passions play in capturing the attention of the citizenry. On its turn, it achieves this goal by means of a dynamic process of conflict and adversarial alignments that are shaped by the prevailing disagreements. As such, democratic politics is an expression of self-government whose legitimacy as responsiveness is not rivaled by any other system of government in human history; giving democracy a warrant for deference that constitutionalism often declines.

### *The role of the Constitution in democratic politics*

If constitutional law aspires to regulate the political process in a way that makes good use of its responsiveness, it needs to accommodate the moral fragmentation of contemporary societies; the adversarial alignments that irremediably divide them in friends and enemies; and the passions that engage the citizenry in politics by making them feel that

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<sup>36</sup> HANNAH ARENDT, *What is Authority?*, BETWEEN PAST AND FUTURE, Penguin Classics (2006), 91 ff.

<sup>37</sup> Jerome Frank, *The Place of the Expert in a Democratic Society*, 16 PHILOSOPHY OF SCIENCE (1949), 3-24.

<sup>38</sup> FRED RODELL, *WOE UNTO YOU, LAWYERS!*, Pageant Press (1957).

<sup>39</sup> I borrow the term from JACQUES RANCIERE, *ON THE SHORES OF POLITICS*, Verso (2007), 35.

there is something at stake in the political. The prize of responsiveness comes at the price of democratic deference; but sometimes, constitutional theorists seem unwilling to keep their side of the bargain. A glance at the way that some constitutional theorists confront political conflict will give further proof of the unsatisfactory understanding that constitutionalism has about its object of regulation. Generally speaking, constitutional theories tend to treat political conflict by restraining it, disregarding it, idolizing it, or institutionalizing it.

*Restraining politics: the “antievolutionary constitution”*

One possible view on the interaction between written constitutions and political process portrays them as a *restraint on the political process*. Constitutions are expected to restrict the range of options available to the political process<sup>40</sup> and to achieve that purpose by embedding severe limits to democracy.<sup>41</sup> Politics is seen as a threat, a poison that “invariably tries to dominate another discipline, to capture and use it for politics’ own purposes.”<sup>42</sup> Thus the need for the constitutional theorist to painstakingly deny any deep connection between his discipline and politics; politics is a temptation to be avoided, and

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<sup>40</sup> As Hayek puts it, “the aim of the Constitution was largely to restrain legislatures.” FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY*, Routledge (2007), 163.

<sup>41</sup> The image of constitutional constraints as mechanisms of self-binding used by some theorists has been challenged by Jeremy Waldron, who remarks that as such constitutions are not an example of self-restraint but of constrain on others. See JEREMY WALDRON, *LAW AND DISAGREEMENT*, Oxford University Press (2001), 270- 275.

<sup>42</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*, Free Press (1997), 1.

even though constitutional philosophies might have political results, they “should never have political intentions.”<sup>43</sup>

In this view, constitutionalism is plain *restriction of democracy* for the sake of *limited government*. One spokesman of this view asserts that constitutions work by “limitation of the means available to a temporary majority for the achievement of particular objectives by general principles laid down by another majority for a long period in advance.”<sup>44</sup> Another one summarizes this idea as the constitution whose “whole purpose is to prevent change.”<sup>45</sup> Thus, constitutional interpretation requires fidelity to the “whole antievolutionary purpose of a constitution,”<sup>46</sup> by means of a reading of its text that defers to the original understanding of its provisions and it. In other words, the natural expression of this approach is the interpretive method of *originalism*.

Hannah Arendt provides us with interesting keys for understanding the perils of this jurisprudential current. She criticizes the tendency in philosophy to look for “theoretical foundations and practical ways for an escape from politics altogether” singling out this attempt as an effort “to make sure that the beginner would remain the complete master of what he had begun, not needing the help of others to carry it through.”<sup>47</sup> Indeed, treating the drafters or the ratifiers as the owners of the constitution excludes us, contemporary

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<sup>43</sup> BORK, *supra*, at 177.

<sup>44</sup> HAYEK, *supra*, at 158.

<sup>45</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION*, Princeton University Press (1998), 40.

<sup>46</sup> SCALIA, *supra*, at 44.

<sup>47</sup> HANNAH ARENDT, *THE HUMAN CONDITION*, University of Chicago Press (1998), 222.

citizens, from the project of constitutionalism; a constitutional philosophy that if prevailing, would give the citizens no good reasons to yield to an unresponsive apparatus of governance.

*Disregard of politics: “neo-constitutionalism”*

Thomas Jefferson criticized in his time that “the opinion seems to be that Blackstone is to us what the Alcoran is to the Mahometans, that everything which is necessary is in him, and what is not in him is not necessary.”<sup>48</sup> Paraphrasing this saying we could say that neo-constitutionalism, a constitutional label of European birth but American roots,<sup>49</sup> consists in the opinion that everything that is necessary is already contained within the constitution, and what is not in it is unconstitutional. Some critics of it emphasize that it understands the constitution as “‘a *juristisches Weltenei*,’ as Ernst Forsthoff has untranslatably called it: A kind of juridical genome that contains the DNA for the development of the whole legal system.”<sup>50</sup> Indeed, if we looked for answers to the problems of social life in the constitution in this way, then the rest of the legal system and

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<sup>48</sup> Letter from Th. Jefferson to J. Tyler, May 26, 1810. In MERRILL D. PETERSON (ED.), *THE POLITICAL WRITINGS OF THOMAS JEFFERSON*, The University of North Carolina Press (2002), 161.

<sup>49</sup> Neo-constitutionalism sees the constitution as “an aggregation of values capable of continuously remodeling legal relationships and to position itself as a ‘pervasive’ point of reference for the legal experience.” Stefano Civitarese, *The Discredit of Legal Positivism in the Italian Doctrine of Public Law: Some Critical Remarks* 9 (Available at SSRN: <http://ssrn.com/abstract=1026026>). The author remarks that neo-constitutionalism “most likely has in the Ronald Dworkin image the main point of reference.” *Id.* n. 27.

<sup>50</sup> MATTIAS KUMM, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 *German L. J.*, 341: 344 (2006).

even the political process would become irrelevant.<sup>51</sup> The central debate would be to decide whose interpretation of constitutional provisions will be authoritative, a problem resolved with expediency by Dworkin: “in American system judges —ultimately the justices of the Supreme Court— now have that authority.”<sup>52</sup> Under this foundationalist approach, as Ackerman calls it, “the whole point of having [constitutional] rights is to trump decisions rendered by democratic institutions that may otherwise legislate for the collective welfare.”<sup>53</sup> Just as the previous constitutional approach to political conflict gives way to the interpretive method of originalism, in this case the disregard of politics can be associated or exemplified with Ronald Dworkin’s *moral reading* of constitutional law.

### *The Altar of politics: constitutional nihilism*

The two previous approaches, despite being active part of debates in contemporary democratic polities, seem to be drawing their inspiration in a different model: guardianship, the “perennial alternative to democracy” as Dahl puts it. Indeed, leaving the task of governing to the *Dead Hand of the Past* or to the *Judicial Philosopher Kings*

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<sup>51</sup> Robert Alexy summarizes Bockenforde’s criticism of this tendency in this way: “The parliamentary legislature loses all autonomy. Its function is exhausted in the mere establishing of what has already been decided by the constitution. The democratic political process would largely lose all significance.” ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS*, Oxford University Press (2002), 389.

<sup>52</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION*, Harvard University Press (1997), 2.

<sup>53</sup> ACKERMAN, BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, Harvard University Press (1993), 11.

seems to reflect the view that ordinary people “are clearly not qualified to govern themselves.”<sup>54</sup> They seem to give way to authoritarianism, understood as the tendency “to give up the independence of one’s own individual self and to fuse one’s self with somebody or something outside of oneself in order to acquire the strength which the individual self is lacking.”<sup>55</sup> Furthermore, they represent an effort to run away from politics. As Hannah Arendt remarks, it has been always a great temptation to renounce politics “in the hope that the realm of human affairs may escape the haphazardness and moral irresponsibility inherent in a plurality of agents.”<sup>56</sup>

However, instead of being skeptical towards politics we might decide to be skeptical towards constitutional law to the extreme of denying the existence of constitutionalism as a discipline on its own merits. More than any other area of law, constitutional law is said to be ‘politics by other means.’ If originalism and Dworkin’s jurisprudence incarnated the first two approaches, this one tends to be associated with Critical Legal Studies.<sup>57</sup>

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<sup>54</sup> ROBERT DAHL, *DEMOCRACY AND ITS CRITICS*, Yale University Press (1991), 52.

<sup>55</sup> ERICH FROMM, *ESCAPE FROM FREEDOM*, Henry Holt and Company (1994), 141. Fromm’s literature is a useful framework for understanding the rejection of political conflict as an escape from the uncertainties of our human condition.

<sup>56</sup> HANNAH ARENDT, *THE HUMAN CONDITION*, University of Chicago Press (1998), at 220.

<sup>57</sup> It has been pointed out that “Schmitt can be thought to be an initiator (albeit not recognized or known as such) of contemporary developments such as Critical Legal Studies on the Left and the Law and Economics movement on the Right.” Tracy B. Strong, *Foreword* xix, in CARL SCHMITT, *POLITICAL THEOLOGY*, University of Chicago Press (2006).

Perceiving the underlying political strains that stretch a constitution, a valuable attitude sometimes referred as ‘skepticism,’ should not culminate in a nihilistic denial of its object of study. Constitutionalism, the synthesis of constitutional practice and constitutional theory, is a meaningful tradition that can bring together political conflict, self-government and social peace. Wholesale disposal of it would be foolish. I incline towards sharing the belief that “law in general, and constitutional law in particular, is a relatively autonomous part of our culture;”<sup>58</sup> which is why I do not try to get rid of constitutionalism but merely to emphasize the need to reconcile it with the conflictual nature of politics. Without constitutionalism, its void would have to be filled with a bare call for political action that, as Unger puts it, would lead “the radical indeterminist into an intellectual and political desert, and abandon him there alone, disoriented, disarmed, and, at last, corrupted– by powerlessness.”<sup>59</sup>

*Institutionalizing conflict: constitution as political grammar*

If the only available alternative were a constitutionalism unresponsive to disagreements, partisan alignments, and passions, then it would be an unattractive project for democratic minds. It would have probably been replaced by some other organizational structure; after all, constitutionalism is a rather recent creation in the history of political organization. If this has not happened is because of the flexibility and responsiveness that constitutions as a political devise of governance have evidenced throughout history, characteristics essential for regulating a so changing reality as politics is.

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<sup>58</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, Harvard University Press (1993), 39.

<sup>59</sup> ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?*, Verso (1996), 121.

If constitutions have been so flexible and responsive, there must be a characteristic in them or a particular way in which people have treated them that helps us to better understand this phenomenon. If we are interested in understanding how constitutions have worked in the hands of the citizenry and their political leaders in such a way to enhance democratic and responsive self-government, we would have to interrogate the constitutional phenomena at the level of things as they have happened, not at the level of how they were originally planned or they are idealized. In this sense, it would be a search at the phenomenological level.<sup>60</sup> A political reading of the constitution can renew the understanding of constitutionalism, shedding light on what is precisely the function that constitutions perform in order to live up to the requirements of democratic politics. In this sense, I suggest that in democratic politics a constitution institutionalizes conflicts by offering the participants of the political process a common language that allows them to disagree without talking past each other; that is, working as a political grammar.

When the constitution –an apparatus of governance– works as political grammar, it is not expected to eliminate or resolve moral disagreements, to dissolve partisan alignments, or to outlaw the passionate commitments of the people; on the contrary, it is because the participants of the political process use it to enable the expression of such conflicts by providing them with ‘syntactic rules’ and ‘semantic contents.’ The metaphor here works in the following way: we speak of syntactic rules to refer to the capacity of the constitution to structure procedurally the political process. This procedural, syntactical

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<sup>60</sup> Phenomenology is, among other things, “a philosophy which puts essences back into existence, and does not expect to arrive at an understanding of man and the world from any starting point other than of their ‘facticity.’” MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION*, Routledge (2007), vii

role of course is not restricted of course to procedures strictly speaking; other entitlements that we might want to call substantive, like freedom of speech or due process of law, also work as functional rules that shape the political process. When we speak of semantic contents, conversely, we refer to the contents of the constitution from the point of view of their field of reference; of what do the participants of the political process understand by them. Now, while the syntactic function of the constitution might be comparatively clear and sometimes even undisputed –no one would deny, for example, that presidential elections are held every four years according to Article II Section 1 of the Constitution and Title 3 of the U.S. Code–, the semantic function of it is particularly unstable and disputed because, as so-called post-structuralist philosophy emphasizes, the signified of any given sign is separated from its signifier; i.e., “meaning is not immediately *present* in a sign.”<sup>61</sup> This feature of language, that determines their semantic instability, accounts for the ‘creative’ aspect of languages that Chomsky describes as their property of providing “the means for expressing indefinitely many thoughts and for reacting appropriately in an indefinite range of situations.”<sup>62</sup> Undoubtedly, to speak of the radical instability of the semantic contents does not amount to deny their existence; the key question to ascertain their (current) meaning is to question about their use: “what do the words of this language *signify*?– What is supposed to shew what they signify, if not the kind of use they have?”<sup>63</sup> In this sense, the emphasis that this grammatical approach

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<sup>61</sup> TERRY EAGLETON, *LITERARY THEORY*, University of Minnesota Press (1996), 111.

<sup>62</sup> NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, The MIT Press (1965), 6.

<sup>63</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, Wiley-Blackwell (1991), 5.

puts in identifying the use that is given to signs by their user coincide with Schmitt's focus on the Hobbesian question: "What matters for the reality of legal life is who decides."<sup>64</sup> To assume that meanings are given is to adopt an approach to language, to say the least, pre-modern. Now, since language is self-referential and recursive,<sup>65</sup> the boundary between the syntactic and the semantic is rather weak, and –this is very important– leans towards the latter. Since, unlike natural languages, modern constitutions provides its users with an incomparable opportunity to make their rules explicit by writing them down, all the instabilities that in natural languages pertain to the semantic dimension, in a constitution these syntactic rules can become themselves the object of semantic disputes and dissension. In other words, to recognize freedom of speech or due process of law to the users of the constitution, we must first know what does that mean. The same thing happens with other clauses of the constitution that have a more structural role, like the proper understanding of the vesting clauses of Articles I, II, and III. But, it must be noted, it is not possible for the more stable syntactic role to jump into the semantic without losing its stability; it is not possible to deduce semantics from syntax, just as it is not possible to derive an 'ought' from 'is.'<sup>66</sup> This is why, as I have been

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<sup>64</sup> CARL SCHMITT, *POLITICAL THEOLOGY*, University of Chicago Press (2006), 34.

<sup>65</sup> "Every proposition can itself become the object of new proposition. Once said, the proposition inevitably has a double-character: it conveys a representational content and can itself be the object of a representation." PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE*, Princeton University Press (2005), 50.

<sup>66</sup> Of course, in the same manner, it is not possible to have a purely neutral 'is;' descriptive language is also affected by the lean towards instability that I have described. So, when philosophers maintain that it is not

insisting, procedures or technologies do not guarantee outcomes. Schmitt, insightfully, perceived this problem asserting that “Neither a political question nor a political answer can be derived from purely technical principles and perspectives.”<sup>67</sup>

The instability of certain legal concepts has been always recognized. Schmitt himself remarked in his time that “[f]rom all sides and in all areas of legal life, so-called general clauses surge forward in a way that wipes out every positivistic ‘certainty’: these include indeterminate concepts of all kinds, references to extralegal criteria, and notions such as common decency, good faith, reasonable and unreasonable demands, important reason, and so on.” Hart said that his own version of positivism accepted the possibility that “the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values,”<sup>68</sup> which has been understood by his followers to mean at least that “many constitutions and federal charters have clauses that on their face appear explicitly to make morality a condition of legality,” including among these “the ‘due process’ and ‘equal protection’ clauses of the United States Constitution, and its prohibition of ‘cruel and unusual’ punishments.”<sup>69</sup> This shows that the instability of semantic contents in the constitution is a phenomenon widely recognized. But in

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possible to derive normative force from a pure description I think that they are totally right; but the trap is to believe that this implies that the ‘is’ that sciences ascertain are free of normative assumptions.

<sup>67</sup> CARL SCHMITT, *The Age of Neutralizations and Depoliticizations* (1929), THE CONCEPT OF THE POLITICAL, The University of Chicago Press (2007), 92.

<sup>68</sup> H.L.A. HART, *Postscript*, THE CONCEPT OF LAW, Oxford University Press (1997), 250.

<sup>69</sup> JULES COLEMAN, THE PRACTICE OF PRINCIPLE, Oxford University Press (2003), 109.

including not only the semantic dimension of the constitution but also its syntactic function and remarking how does that very categorization that I make is subject to dissolution by the self-referential nature of language, I am intending to call into question the easiness with which we exclude from legal uncertainty those contents of the constitution –and, perhaps, of the legal system– that are not general clauses. If the explanation to this instability of meaning is the separation of signifier and signified announced by post-structuralism, then we should probably assume that uncertainty and the possibility of disagreement –that is, legal indeterminacy– is transcendently written, in the Kantian sense of the word, in the heart of the constitutional apparatus of governance.

*Conclusion: The death of the author*

In the first drafts of this paper I included an extensive section dealing with some institutional features that I regarded as essential for a political reading of the constitution, among which I included enhanced political rights, at minimum degree of welfarism, majoritarian democracy, and several constraints on judicial review of legislation. But I have come to perceive that a political reading of the constitution implies a change in the theoretical emphases of constitutional theory, not to an agenda of institutional reform. A political reading of the constitution, if it claims to be a descriptive approach to the constitutional phenomena, should not be used to conceal a set of political beliefs and concrete institutional preferences. Semantics cannot be deduced from syntax. Of course, that does not mean that me, or anyone for that matter, can dispose of their political beliefs in studying the apparatuses of governance; but it does mean that the scientific commitment to accuracy demands from the scholars who work in this area that they do

not pretend to present their preferred concrete institutions as natural consequences of their philosophical frameworks.<sup>70</sup> The political struggle is precisely the arena where the issue at stake is who gets to shape the concrete institutions of a community.

Wittgenstein breaks with the essentialist tradition in philosophy, that traces back its origins to Parmenides and Plato. With him, the project of philosophy ceases to be the search of essences and starts to be the investigation of the uses of language. But abandoning the chase of the essence of concepts does not amount to deny their existence; it is not that concepts like justice, equality or liberty –usual members of the category of semantic contents of the constitution– do not exist but merely that there are different and competing uses of them; different signifieds competing in the political process for their

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<sup>70</sup> John Hart Ely's influential book, *DEMOCRACY AND DISTRUST* (Harvard University Press, 1980), is an interesting book that touches on these issues in a fascinating way. While the institutional preferences that he espouses are more or less similar to the ones favored by, say, Habermas or Rawls –perhaps with the important difference of the relevance or role assigned to judicial review, that for Habermas and Rawls might be seen as the embodiment of deliberation while for Ely has the very precise scope of protecting the political process and the minorities excluded from it–, his work is not one of philosophical justification and deduction, but one of synthesizing past decisions. Ely's work has a more concrete orientation than Habermas or Rawls, for sure, because he was a constitutional law professor; just like Foucault's approach to political theory in, among others, his Collège de France lectures printed in *SOCIETY MUST BE DEFENDED* (Picador, 2003) is also more aware of the contingency of institutions because he was a historian. But certainly this does not amount to say that only law professors and historians can produce valuable, insightful contributions to reflection on governance and the political. But it does mean that in order to do so, they should undertake a “realist approach to political philosophy” of the kind advocated by Raymond Geuss in *PHILOSOPHY AND REAL POLITICS* (Princeton University Press, 2008).

prevalence. Politics is, to some extent, a cultural war, a struggle between different understandings of the same semantic signposts that institutionalize conflicts; that is, at the same time it perpetuates these conflicts and manage them. Wittgenstein's disposal of essences in favor of uses implies, though, that there are no authentic meanings of the legal texts; such search becomes nonsensical.

This announces the death of the author, a post-structuralist *cri de guerre* that reverberates with the echo of Nietzsche's announcement of the death of God. Furthermore, the constitution, on acting as a *political grammar*, does not tell us *what to say* but gives us the tools for *expressing ourselves*. Therefore, the aspiration to establish privileged discourses remains ungrounded. This is nothing but another way to say that the constitution does not contain a preconceived concept of the good, but creates the structures –syntactic role- and terminologies –semantic role- that enables everyone to express their concept of the good in the political process. Hence constitutional interpretation loses its epistemic mission of discovering the authentic meaning of the constitution and its technical garments, becoming a contextual exercise of political argumentation that employs the constitutional language to polemicize about the course of action for society. The role of experts turns into acting as auxiliaries of social and political movements, helping them to find the vocables and tropes more suitable for expressing their political objectives. The experts must then renounce to their Platonic pretension of governing the polity as the representatives of wisdom. For sure, once the experts have relinquished their conspiratorial aspirations, their role is crucial in assisting the citizenry and the political class in the use of the syntactic and semantic apparatus.