

## Not Only ‘Who Decides’: The Rhetoric of Conflicts over Judicial Appointments

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### A. Public Debate as a Field of Conflict over Constitutional Reasoning

A well-known maxim of all kinds of legal realism is that the identity of judges matters a great deal. The most famous account of this tenet is the apocryphal statement attributed to Jerome Frank declaring that what matters in the law is “what the judge ate for breakfast.”<sup>1</sup> While Frank never put that in print, he did say that the “peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law;” in short, that “the personality of the judge is the pivotal factor in law administration.”<sup>2</sup> A more epigrammatic and elegant summary of this position was given by none other than Carl Schmitt, who declared that “[w]hat matters for the reality of legal life is who decides.”<sup>3</sup>

Let me be clear: I am sympathetic to legal realist approaches and the methodological pluralism that they encourage (sometimes bordering on outright methodological heterodoxy). Nevertheless, I believe that the statements quoted above and the way of thinking that they express can introduce in our analyses of constitutional adjudication an excessive focus on the role of individuals, rather than on the social processes and interactions that subtly converge to structure constitutional reasoning. Call me a methodological collectivist, if you want.<sup>4</sup>

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<sup>1</sup> Brian Leiter, *American Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 249, 259 (Dennis Patterson ed., 1996).

<sup>2</sup> JEROME FRANK, *LAW & THE MODERN MIND* 119–20 (2008).

<sup>3</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 34 (1985).

<sup>4</sup> Methodological collectivism “holds that collective phenomena are explanatorily prior to facts about individuals,” which means that “[f]acts about society cannot be reduced to the decisions, attitudes, and dispositions of individuals,” whom “behave in culturally sanctioned ways” in “most of their activities.” NICHOLAS BUNNIN & JIYUAN YU, *THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY* 432 (2004).

These considerations triggered my interest in looking at the conflicts surrounding the appointment of constitutional judges, focusing not so much on the characteristics of particular candidates but on the debates that they give rise to. Who are the actors in these conflicts? What arguments do they employ? What are their agendas? What is at stake in these disputes? I believe that these questions transform public debate on judicial appointments into a fruitful field for understanding the multiple forms that the interaction between law and politics takes. If we confront these questions with a broad understanding of what 'politics' and 'law' are, we will realize that they involve much more than what is specifically in discussion; that is, much more than who gets to rule from the bench and who gets to decide.

Focusing on this issue requires that we consider, at least briefly, some preliminary questions about the intentional foundations of social action. Why do people engage in public debates? And what goes on in them? To the first question—which requires me to shift briefly to methodological individualism—I would suggest that people do it for both *expressive* and *instrumental* reasons. People want to express their beliefs just for the sake of expressing them—for the sake of being true to themselves. Also, they do so to prevail over people with different beliefs, not only because of the “natural baseness of human nature” as Schopenhauer thought<sup>5</sup>—although undoubtedly it plays an important part—but also because a very important prize is at stake: the *hegemony*.

What do I mean by hegemony? I use this term to refer to the control of social values, of the values that shape the public and private institutions that matter the most in our lives. These values are important, because they provide vital guidance to the day-to-day operations of our institutions.<sup>6</sup> That is what goes on in public debates, generally speaking. Hegemony—not solely narcissistic self-expression or triumphalism—is why people who care about the society they live in care about these debates and invest their resources in them: attention, time, skills, money, and so on.

There are, to be sure, different levels at which social values can become the object of a struggle. From a wide-ranging perspective, we can see Christianity, liberalism, modernity, the rule of law, to name a few, as (idealized) layers of values that overlap in the West. Like veritable tectonic plates, these values sometimes reinforce each other and sometimes collide. More local tensions also exist, that provide the scenario for our particular struggles. And within these battles, our ways of explaining the world—our theories—become vital tools of confrontation and engagement. Gramsci, to whom the theory of hegemony and the analysis of politics as a battleground owe so much, warned us against

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<sup>5</sup> ARTHUR SCHOPENHAUER, *THE ART OF ALWAYS BEING RIGHT* 24 (2004).

<sup>6</sup> “Social organization operates inside of a cultural milieu: An institution can think only inside of the categories that culture provides.” JEFFREY ALEXANDER, *THE CIVIL SPHERE* 69 (2006).

“the regressive tendency to treat so-called theoretical questions as if they had a value in themselves.”<sup>7</sup> For him, every truth “owes its effectiveness to its being expressed in the language appropriate to specific concrete situations.”<sup>8</sup> That is the case, this paper maintains, with respect to theories of constitutional reasoning, which are deployed in public debates to fight for modeling the role of constitutional courts.<sup>9</sup>

Approaching the issue of constitutional reasoning and adjudication in this way actually broadens the legal realist insight that we began with. In constitutional democracies, where the sovereign is collective rather than individual and several procedures and entitlements—or *rights*—structure the exercise of sovereignty, “who decides” is more a function of social processes than a question of finding a specific individual. And these processes matter a great deal. Commenting on the legal realist caricature with which I began, one judge has argued that people in his trade “exercise their powers subject to very significant constraints,”<sup>10</sup> including the opinion of colleagues and the political system. Public opinion, as some scholars have begun to observe,<sup>11</sup> matters for the exercise of judicial authority, as does public discourse, which creates the *cultural milieu* for the exercise of judicial authority.<sup>12</sup>

A focus on public debates surrounding constitutional reasoning can have a myriad of possible thematic subjects. It could concentrate on discussions triggered by particularly controversial decisions, for example. It could also consist of a study of public discussions evaluating particular jurisprudential theories such as originalism or specific lines of cases such as those dealing with freedom of speech. As I said, in this paper I will study debates prompted by the nomination and appointment of constitutional judges and, within this corpus, I will focus on the arguments made by people other than the appointee about the consideration that judges ought to give to extra-legal elements in their judicial function. My interest in this specific problem stems from the fact that constitutionalism constitutes an area of law where the boundaries between what is legal and what is extra-legal are particularly porous rendering, as a whole, the struggle for hegemony more visible. And

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<sup>7</sup> ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 436 (1971).

<sup>8</sup> *Id.* at 438.

<sup>9</sup> I speak of constitutional courts in a general way, not limiting myself to those adjudicative bodies that go by that name or to those courts that only review the constitutionality of legislation and administrative action.

<sup>10</sup> Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993).

<sup>11</sup> See, e.g., Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239 (2011).

<sup>12</sup> For a recent and thorough study of the public debate context of a specific and important decision, see LINDA GREENHOUSE & REVA SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (2010), and the accompanying paper, Linda Greenhouse & Reva Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 100, 105 (2011).

while debates about specific legal concepts such as property, criminal liability, or marriage offer other interesting sites for contemplating the subterranean struggle between conflicting social interests and worldviews, tracing the discussion at the more general level used here can provide a general rhetorical framework for those investigations.

I have chosen two different cases extracted from two different jurisdictions: the United States and Chile. These two examples, belonging to different legal traditions, will show remarkable similarities and interesting differences with respect to the terms of the public discussion on how constitutional judges should exercise their authority.

### **B. Justice Sotomayor and Judicial Empathy**

In the United States, the most visible discussion in recent times of the relation between legal and extra-legal consideration in judging was prompted by Supreme Court Justice Sonia Sotomayor at the time of her nomination by President Barack Obama. It was not, however, initiated intentionally by her; instead, it was an earlier remark included in a lecture delivered in 2001 at Berkeley that triggered the debate. In that address, Justice Sotomayor—then a judge at the United States Court of Appeals for the Second Circuit—shared these reflections with her audience:

I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address . . . . Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her

experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.<sup>13</sup>

Justice Sotomayor's figure is particularly interesting, as she is somehow the crossing point of several polemics and discussions surrounding the question of whether judges need to resort to extra-legal considerations in the exercise of their judicial functions. I will first take a look at some antecedents of her remark, and then I will review the contemporaneous context of her appointment.

Justice Sotomayor's nomination for a Supreme Court seat has an interesting prehistory, so to say, with regard to her arguments. Justice Sotomayor's seat was occupied between 1956 and 1990 by Justice William J. Brennan, Jr., an outspoken progressive who believed that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."<sup>14</sup> For that reason, Justice Brennan argued, "[w]hen Justices interpret the Constitution, they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."<sup>15</sup> Justice Brennan, a firm believer in the idea of a "living Constitution,"<sup>16</sup> thought that, in order to discover the proper meaning of open-ended constitutional clauses, the judge would have to look beyond the four corners of the constitutional text—he would have to look into the dynamics of social mores.

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<sup>13</sup> Sonia Sotomayor, *Lecture: 'A Latina Judge's Voice'*, NEW YORK TIMES (May 15, 2009), <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>. Justice Sotomayor has used that sentence or similar variations, reports the press, in speeches delivered in 1994, 1999, 2002, 2004 and 2001. See Dana Bash & Emily Sherman, *Sotomayor 'ise Latina' quote used on multiple occasions*, CNN (June 5, 2009), <http://politicalticker.blogs.cnn.com/2009/06/05/sotomayor-wise-latina-quote-used-on-multiple-occasions/>.

<sup>14</sup> William Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

<sup>15</sup> *Id.* at 434.

<sup>16</sup> While this catchword is associated with contemporary American jurisprudence, it is far from a recent creation. Walter Bagehot used it in 1873 in the introduction to the second edition of his treatise on the English Constitution, where he observed that "[t]here is a great difficulty in the way of a writer who attempts to sketch a living Constitution,—a Constitution that is in actual work and power. The difficulty is that the object is in constant change. An historical writer does not feel this difficulty: he deals only with the past; he can say definitely, the Constitution worked in such and such a manner in the year at which he begins, and in a manner in such and such respects different in the year at which he ends; he begins with a definite point of time and ends with one also. But a contemporary writer who tries to paint what is before him is puzzled and perplexed; what he sees is changing daily." WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 193 (Paul Smith ed. 2001).

But the prehistory does not end there. President George Bush seized the opportunity created by Justice Brennan's retirement to express a different jurisprudential ideal. President Bush, indeed, appointed Justice David Souter to fill the vacancy left by Justice Brennan declaring: "I have selected a person who will interpret the Constitution and, in my view, not legislate from the Federal bench."<sup>17</sup> President Bush issued this statement as a way to steer clear of what had become, by then, the most explosive topic of Supreme Court politics: abortion rights and *Roe v. Wade's* standing as precedent.<sup>18</sup> The implicit assertion behind his words was that, as Justice Souter would rule based on the law and not on partisan commitments or ideological preferences, the integrity of the law would be preserved and his decisions would be authoritative for everyone.

The issue of how to interpret the laws, and more specifically the Constitution, has elicited a controversy that in contemporary America roughly parallels the division between progressivism and conservatism.<sup>19</sup> Perhaps that explains why Justice Sotomayor's remarks became quite controversial immediately after being unearthed during her nomination.<sup>20</sup> They resounded with the reasoning offered by President Barack Obama on the role of judges, inviting the same criticisms he had received.<sup>21</sup>

What has Obama said on this point? Since becoming a presidential candidate, Obama has structured his public discourse around the theme of judicial empathy. Speaking to a Planned Parenthood convention in Washington, 17 July 2007, then-Senator Obama criticized Chief Justice John Roberts for describing his role as that of an umpire. Obama said that

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<sup>17</sup> TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 105 (2005).

<sup>18</sup> More specifically, President Bush gave that answer to correspondent Helen Thomas of United Press International, who asked him about Justice Souter's views on abortion and affirmative action. The dialogue between President Bush and the journalists portray the idea of judges interpreting rather than legislating as a sort of mantra; almost a shelter from where to hide from press scrutiny.

<sup>19</sup> See, e.g., Robert Post & Reva Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25 (Jack Balkin & Reva Siegel eds., 2009): "Progressives used to conceptualize the Constitution as "living law," as a "living charter" "capable of growth." Believing that the Constitution was responsive to evolving social needs and to ideals of fundamental justice, they acted in the 1960s and 1970s to end school segregation, to secure fundamental fairness in the criminal justice system, to enforce the separation of church and state, and to recognize gender equality in work and family. By the 1980s, conservatives had united Americans estranged by these changes into a political movement that sought to roll back the rulings of the Warren and Burger Courts. Conservatives accused Congress of overreaching and the Court of legislating from the bench in ways that betrayed the founder's Constitution."

<sup>20</sup> See MEG GREENE, SONIA SOTOMAYOR: A BIOGRAPHY 163 (2012): "Even as supporters took every opportunity to again emphasize Sotomayor's public record, her detractors focused more on statements made by Sotomayor while not sitting on the bench. One of them was the infamous 'Wise Latina' remarks made by Sotomayor in 2001."

<sup>21</sup> Justice Sotomayor distanced herself from the President, and arguably from her own earlier arguments, during her nomination hearings. That, however, falls beyond the scope of this paper.

The issues that come before the Court are not sport; they're life and death. And we need somebody who's got the heart, the empathy to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges.<sup>22</sup>

And after making public Justice Souter's decision to retire from the Supreme Court at the conclusion of the 2008–2009 term, President Barack Obama declared that for his replacement he would

seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook; it is also about how our laws affect the daily realities of people's lives, whether they can make a living and care for their families, whether they feel safe in their homes and welcomed in their own nation.<sup>23</sup>

Even though Obama confronted his second Supreme Court appointment avoiding the word "empathy," he still declared that he would look for someone with "a keen understanding of how the law affects the daily lives of the American people."<sup>24</sup>

Obama's perspective, however, was not without its critics. During the presidential campaign, Northwestern University professor Steven Calabresi declared that "Obama's emphasis on empathy in essence requires the appointment of judges committed in advance to violating" the federal judicial oath of administering justice "without respect to persons" and doing "equal right to the poor and to the rich."<sup>25</sup> And when President Obama was about to announce his Supreme Court nomination to replace Justice John Paul Stevens, University of Chicago professor Richard Epstein declared that instead of "targeting

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<sup>22</sup>Adam Liptak et al., *On the Issues: Supreme Court*, N.Y. TIMES, available at <http://elections.nytimes.com/2008/president/issues/judges.html>.

<sup>23</sup>Barack Obama, *Remarks on the Retirement of Supreme Court Justice David H. Souter*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 604 (2009).

<sup>24</sup>Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 26, 2010, at A12.

<sup>25</sup>Steven Calabresi, *Obama's 'Redistribution' Constitution: The Courts are Poised for a Takeover by the Judicial Left*, WALL ST. J., Oct. 28, 2008, available at <http://online.wsj.com/article/SB122515067227674187.html>.

his favorite groups,” Obama “should follow the most time-honored image of justice: the blind goddess, Iustitia, carrying the scales of justice.”<sup>26</sup>

### C. Minister Bertelsen and Democratic Commitments

The appointment of Catholic conservative constitutional law professor Raúl Bertelsen to the Constitutional Tribunal of Chile became an opportunity for the discussion of the role of ideological membership in constitutional adjudication when a group of scholars questioned his appointment. In this way, they also questioned the hegemony of a conservative branch of constitutionalism that remains loyal to the project of the Military Junta and its 1980 Constitution, still in place.

The controversy began with a manifesto signed by 15 law professors declaring that “[b]esides technical skills, people in whose hands the Republic puts the defense of the Constitution must have demonstrated their loyalty to the [democratic] principles that inspire it;” a requisite that becomes doubtful in the case of Bertelsen because he “actively participated in drafting the 1980 Constitution and in the formulation of the legislation enacted between 1983 and 1989 in order to preserve the institutions of the military regime.”<sup>27</sup> The signing professors called Bertelsen to resign so that the Senate could vote for another Justice.

The conservative and influential newspaper *El Mercurio* reported the existence of this manifesto without allowing these academics to speak for themselves—it published it in edited form, describing it as a “liberal assault on the Constitutional Tribunal.”<sup>28</sup> One of the signers, Rodrigo Correa, responded through a letter to the editor stating that the signers of the manifesto “do not subscribe any current of thought” but rather were animated by their “commitment to representative democracy and a conviction on the importance of constitutional law.”<sup>29</sup> This argument represented an attempt to deny the partisanship of their initiative, claiming for themselves the scientific neutrality that they had claimed Bertelsen lacked. In a further letter, signers Atria, Bascuñán, and Correa insisted on their original point, arguing that “the generality of many constitutional precepts results in that their interpretation is highly influenced by the conceptions that constitutional judges have of the Constitution,” and that it was the responsibility of the senators to be convinced, in

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<sup>26</sup> Richard Epstein, *Beware Of Empathy*, FORBES, May 5, 2009, available at <http://www.forbes.com/2009/05/04/supreme-court-justice-opinions-columnists-epstein.html>.

<sup>27</sup> Fernando Atria et al., IRRESPONSABILIDAD POLÍTICA, Nov. 18, 2005 (unpublished document, on file with author).

<sup>28</sup> *Arremetida Liberal en el TC*, EL MERCURIO, Nov. 20, 2005, at A 2.

<sup>29</sup> Rodrigo Correa, *Nombramiento de Bertelsen II*, EL MERCURIO, Nov. 29, 2005, at A2.



an informed and public way, that the conceptions of the nominees “are compatible with the role of defender of the Constitution.”<sup>30</sup>

The manifesto prompted various reactions in the form of successive letters to the editor in *El Mercurio*. One professor from the Universidad Católica de Chile condemned “the signers of that letter” for regarding “themselves as upholders of the national conscience and even as attestors of the actions of whomever performs activities in public or private institutions;”<sup>31</sup> and, invoking his status as a former student of Bertelsen, declared that “it outrages those of us who know professor Bertelsen that some say that he lacks commitment to the Constitution.”<sup>32</sup>

Showing a partial agreement with the original manifesto, a group of professors from Universidad Austral de Chile argued that the problem was one of form, rather than of substance given that, in their opinion, the Senate had acted “in haste and secrecy, without creating the space for a public deliberation on the professional qualifications and the constitutional commitment of the individuals proposed as Justices of the Constitutional Tribunal.”<sup>33</sup> In contrast, a professor from Universidad de Los Andes—the Opus Dei-founded university where Bertelsen still teaches—qualified the manifesto as “highly problematic” because “it entails a claim by the complainers to a certain capacity of constitutional ‘tutelage,’ parallel to that of the legitimate constitutional authorities.”<sup>34</sup> Furthermore, he argued, it was inconsistent with the normalcy of constitutional reforms in a democratic society to expect a unanimous allegiance to them, and therefore to expect the resignation of Bertelsen merely for not subscribing to the 2005 constitutional reform.

Another Universidad Católica professor wrote to say that the 2005 constitutional reform had enhanced the participation of Congress in the selection of the members of the Tribunal, “allowing the expression of the various philosophical and juridical ways of thinking of our country;” and that for that reason, “it shouldn’t create outrage that the Senate had chosen a conservative-leaning professor, Mr. Raúl Bertelsen, and a jurist from the progressive world, Mr. Hernán Vodanovic.”<sup>35</sup> Moreover, he contended, “Bertelsen is a constitutionalist of great prestige,” whose “numerous and valuable publications attest to

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<sup>30</sup> Fernando Atria, Antonio Bascuñán, Rodrigo Correa, *Tribunal Constitucional*, EL MERCURIO, Nov. 29, 2005, at A2.

<sup>31</sup> Juan Terrazas, *Nombramiento de Bertelsen*, EL MERCURIO, Nov. 29, 2005, at A2.

<sup>32</sup> *Id.*; Of course, this person failed to see that what the group of constitutional law professors had questioned was Bertelsen’s commitment to a *democratic* understanding of the Constitution, not his commitment to the idea of a Constitution nor to the constitutional text as it stands.

<sup>33</sup> Daniela Accatino et al., *Nombramiento de Bertelsen I*, EL MERCURIO, Nov. 24 2005, at A2.

<sup>34</sup> Hugo Herrera, *Nombramiento de Bertelsen II*, EL MERCURIO, Nov. 24 2005, at A2.

<sup>35</sup> Patricio Zapata, *Nombramiento de Raúl Bertelsen*, EL MERCURIO, Nov. 24 2005, at A2.

his competence.”<sup>36</sup> In a similar vein, a group of four professors “from different universities, leanings, and beliefs about the principles that inspire the Constitution”<sup>37</sup> wrote to declare their shared belief that “professor Bertelsen is a serious academic, perfectly prepared to be a Minister of the Constitutional Tribunal” and whose writings “evidence his long-standing concern with Constitutional Law.”<sup>38</sup> Conversely, they criticized the signers of the manifesto for arrogating to themselves “such degree of intellectual clarity, moral superiority, or democratic legitimacy from the classroom, that takes them to contend that their opponents—even those serious and technically competent, such as Mr. Raúl—should leave the institutional system.”<sup>39</sup>

These epistolary exchanges created a struggle over the definition of what it means to have the professional qualifications to serve as a judicial guardian of the Constitution and, more importantly, a conflict over what are the core values of constitutionalism: Fidelity to the text—a field where Bertelsen was unimpeachable as part of one of its drafting groups and as a prestigious scholar—or to the democratic ideal. In this struggle, the signers of the manifesto had the losing hand. The way that the press reported their manifesto—edited and labeled as a liberal assault on the Tribunal—denied them control over their own narrative. While some of the signers published new letters clarifying their points, the reactions by other academics—except for the letter by Universidad Austral de Chile professors—mischaracterized their claims. The original letter never questioned the commitment of Bertelsen to the 1980 Constitution, but rather to the repeal of its authoritarianism and constrained concept of democracy. Nor did the writers of the letter expect a commitment on the part of Bertelsen to a mere textual amendment, but rather an open discussion on his part on whether he recognized the 2005 constitutional amendment as operating a fundamental political change within the constitutional order. To insist on the professional credentials of Bertelsen, as most law professors did, missed the point of the criticism and to accuse the signers of the manifesto of being intolerant or self-righteous amounted to an ad hominem dismissal of their point. Through all these mischaracterizations, the law professors rebuking the criticism towards Bertelsen reiterated the strategy employed by *El Mercurio*: Depriving the signers of the manifesto of the opportunity to have their voice heard and their arguments taken seriously.

The reasons for this narrative imbalance are contextual and historical: Within the structure of prestige and power characteristic of the Chilean scholarly establishment, Bertelsen enjoys a position of dominance;<sup>40</sup> no matter how reasonable his critics’ points were, they

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<sup>36</sup> *Id.*

<sup>37</sup> Francisco Zúñiga et al., *Respaldo a Bertelsen*, EL MERCURIO, Nov. 27, 2005, at A2.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> In August 2011, Bertelsen was elected by his colleagues as the President of the Constitutional Tribunal.

could not overcome the sociological walls that protected him. For this reason, Bertelsen did not have to worry—his most effective answer was to ignore their complaint. *El Mercurio* merely amplified this power structure by editing the criticism and classifying it as it did—as a liberal insurgency. The academic defenders of Bertelsen, on their part, acted in defense of unstated but recognizable collegial standards: the appeal to long careers, personal friendships, master-disciple relations, high numbers of publications, and so on. These arguments effectively foreclosed the discussion of Bertelsen's commitment to the democratic ideal—an engagement that, in principle, any public servant should be willing to undertake. And so, while the signers of the manifesto argued that Bertelsen's jurisprudence seemed to be responsive to political views that the Chilean constitutional order had repudiated, their colleagues shut them down invoking notions of collegial integrity that seemed to close the door from the inside.

#### **D. *Autonomy and Responsiveness* as Tropes of Constitutional Polemics**

I have offered short excerpts of public discussions about how should judges deal with extra-legal considerations—particularly, with the dynamics of social mores—in the exercise of their judicial function. I believe that these extracts evidence the existence of two paradigmatic answers to this question: one of them tries to defend the substantive values of the law by policing the distinction between the legal and the extra-legal; the other tries to better serve the social purposes of the law by playing down that distinction. I suggest calling these two propositions *autonomy* and *responsiveness*, respectively.<sup>41</sup> Each of these tropes or recurrent themes of constitutional rhetoric and polemics is grounded on a different understanding of the law itself that leads to a different standing vis-à-vis society. For *autonomy*, the law contains a distinct immanent rationality that ought to structure society. For *responsiveness*, the law ought to extract its substance from social expectations, needs, and priorities, serving them as a means to an end. And so, while Justice Brennan, President Obama, Justice Sotomayor, and President Correa *et al.* put forward discourses that emphasize the need of the judiciary to respond to social expectations and needs, President Bush, Epstein, Calabresi, and most of the defenders of Bertelsen vindicate an understanding of the law as distinct and separate from social morality.

These two tropes of constitutional polemics represent recurrent positions of intradisciplinary ethics: that is, recurrent questions about how to perform a certain activity with respect to seemingly extraneous or external needs. This dilemma, certainly, is not exclusive to the law. Should religious organization revolve around the worship of God,

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<sup>41</sup> I draw this usage from PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION* (1978); however, I understand these concepts and their interaction differently than they do. Nonet and Selznick conceive autonomous and responsive law as distinct forms of organizing the interaction between law and society, often stages in a developmental process. Instead, I see autonomy and responsiveness as competing rhetorical ideals of law.

emphasizing its theological distinctiveness, or should it focus on providing moral guidance and spiritual support to the people, stressing its pastoral serviciality?<sup>42</sup> Should academics be sensitive to social sentiments about the orientation or content of their work, or should they exclusively yield to the concerns of other scholars and experts in their fields?<sup>43</sup> This kind of question arises in any field that claims to contain a distinctive nucleus—be it methodological, ethical, conceptual, or the like—that comes structurally in contact with elements that do not belong to the field; or, as systems theory would put it, in any system that interacts with its environment.

Of all legal fields, constitutional practice and theory is perhaps the one where the contrast between these two tendencies or positions is most intense, and the stakes of this confrontation are highest. Public officers and legal scholars seek to ground the basic law on deep collective commitments and fundamental political values such as democratic consent or communal identity, which consequently shape their theories of constitutional interpretation. While democratic consent and communal identity tend to overlap at the stage of legal enactment—we approve of those laws that represent us as a people—once this moment has passed these values tend to diverge, particularly in the context of adjudication. And so, high courts called to resolve constitutional disputes intertwined with political, social, and moral conflicts can be summoned to preserve the integrity of law from its extra-legal corruption,<sup>44</sup> to identify the social ethos that breaths legitimacy into the constitutional text,<sup>45</sup> or even to concoct complex mixtures of both aims.<sup>46</sup>

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<sup>42</sup> See HAROLD BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

<sup>43</sup> See MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009).

<sup>44</sup> See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 5 (1990) (asserting that “the common, everyday view of what law is” implies that “the judge is bound to apply the law as those who made the law wanted him to.”); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 7 (1993) (conceptualizing the role of the Supreme Court as a mechanism “to preserve the considered judgments of the mobilized People from illegitimate erosion by the statutory decisions of normal government.”).

<sup>45</sup> See, e.g., Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 27 (2005) (observing that “Article III, not Article V, has been the great vehicle of constitutional development, and the work of Article III judges cannot be viewed in isolation from social movement politics,” a process that takes place “through the party system” and “through altering public opinion, and particularly elite public opinion.” (*id.* at 30.)).

<sup>46</sup> For an idiosyncratic case, see RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). He argues that legal practitioners “instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments,” *id.* at 3; and describes the “neutrality thesis,” i.e. the belief “that a Supreme Court justice can reach a decision in a difficult constitutional case by some technical legal method that wholly insulates his decision from his own most basic convictions,” as a “thesis which no one with any experience in constitutional law really believes.” *Id.* at 313. He goes on to say that because the crucial clauses of the Constitution “can often be read in different ways,” “any particular justice’s interpretation will be dominated by his convictions” about the issues at stake. *Id.* at 314. Still, he distances himself from the position of “[s]ome judges” that it is “their duty” “to interpret these moral phrases according to their own views.” *Id.* at 337.

Let me raise a final question. Should we expect any of these sides to win the struggle once and for all? The answer is a definite no. At the discursive level, both *autonomy* and *responsiveness* work because they satisfy different concerns that are a part of Western legal traditions. None of them is wrong, or right for that matter; they both express important truths of workable legal systems. A different question is, to be sure, whether people embracing those ideals succeed in their own local struggles to conquer the hegemony that I began this paper referring to. In some cases, victories and defeats are clearer to perceive; that is the case of the Chilean discussion, where a more responsive ideal of law seems to be an outcast within the internal legal culture, sweeping the discussion of democratic commitments out of the boundaries of the legal profession. The grip of autonomy, in that case, fastens the relevance of a Constitution enacted during a Military Regime through a fraudulent plebiscite. In the United States, instead, the fluidity of the discussion reflects the competing commitments of a legal profession that is aware of the multiple points of uncertainty in the law but that still remains dubious about how to fill those spaces up.