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**Constitutional adjudication and the 'dimensions' of judicial activism.  
Legal and institutional heuristics**

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# Constitutional adjudication and the 'dimensions' of judicial activism.

## Legal and institutional heuristics

Leonardo Pierdominici

### Abstract

The dominant approach to constitutional law, and even more so to constitutional theory, has historically been judicial review-centered. Constitutional scholarship has often seemed “*strong on positions and weak on analysis*”, based on “*foundationalist*”/organic theories of judicial review, trying to justify or to reject the practice *in toto* and dictating its parameters. Behind such strong positions, and behind the search for “*first-best principles*” of legitimacy, one can see a series of latent and intractable tensions, inherent in traditional constitutional theories of interpretation and adjudication: these tensions are the consequences of the unavoidably creative function of the judicial role. A pragmatic, second-best inquiry must probe the *degree* of such creativity, focusing on the questions of *mode*, *limits*, level of *acceptability* of law-making through the courts, and issues of institutional performance and systemic effects of adjudication.

In light of all this, the paper will provide a taxonomy of the different types of criticisms that constitutional theory has raised regarding what we can broadly describe as the democratic legitimacy concerns of constitutional review. These are often lumped together under the concept of 'judicial activism', ranging from the very existence of judicial review, the different forms of conceptualizing the proper role of judicial interventions and the different modalities of constitutional adjudication.

The paper will deal both with American and Continental historical constitutional theories as well as the most recent trends of Comparative Institutional Analysis. The objective is to sketch a useful framework and some heuristic devices for the study of courts, different kinds of constitutional adjudication, and the spaces of discretion which are thereby implied.

### Key-words

Judicial review, Constitutional theory, Judicial activism, Comparative Institutional Analysis

# Constitutional adjudication and the 'dimensions' of judicial activism.

## Legal and institutional heuristics.

Leonardo Pierdominici\*

The dominant approach to constitutional law, and even more so to constitutional theory, is undoubtedly judicial review-centered. The debates on the role of courts in constitutional legal orders, on the related process of adjudication, and on the proper balance of power between the judiciary and the political process have filled libraries for centuries, with an overwhelming body of literature on almost every imaginable aspect of the so-called domain of 'judicial policymaking'. This is true for the United States as well as other legal orders, including continental European orders, despite deep-rooted cultural differences. The general attempt is to construct - directly or indirectly - organic theories of judicial review, trying to justify it or to reject it, and dictating its parameters.

At the level of principle, the eternal question of the legitimacy of the constitutional jurisdiction appears to be of fundamental importance in all modern democratic legal orders, establishing a structural link between the theory of the constitution, on the one hand, and the theory of constitutional interpretation, on the other. This has historically drawn a sort of osmotic *continuum* of the characterizing factors and called for systemic criteria in the study of them.<sup>1</sup> But it has also led to a kind of '*foundationalist*' structure of constitutional scholarship,<sup>2</sup> in a sort of continuous effort to discover a general and unified principle that can provide the basis for judicial decisions: and it seems to me that most of the leading constitutional theories - regardless of their favour or disfavour for judicial role - share this vocation.

Numerous diverse approaches to this popular research topic have been proposed by scholars, ranging from different historical and methodological premises. In the last years and in the resulting works of systematization, these have been persuasively grouped under three typical '*families of*

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<sup>1</sup> L. Mezzetti, *Teoria della Giustizia Costituzionale e Legittimazione degli Organi di Giustizia Costituzionale*, 1, *Estudios Constitucionales*, 307 (2010)

<sup>2</sup> D.A. Farber, *Legal Pragmatism and the Constitution*, 72, *Minnesota Law Review*, 1331 (1987-1988)

*theories of judging*', namely the socio-political, the legal-positivist, and the normative-prescriptive.<sup>3</sup> Of course, all these varieties and their work of systematization have come at the expense (or at the risk) of some generalizations, sometimes even at the expense of some form of 'naïve legal realism':<sup>4</sup> an undeniable difficulty to be considered, but also a price to pay in comparative theoretical studies, facing the methodological necessity, at a certain point, of drawing '*abstract forms of reference*',<sup>5</sup> or rather, in our field, defining a kind of '*prototype of courts*'.<sup>6</sup> Regardless - for now - of the different scientific insights and different tools used in the research, one can say that the common denominator of most modern accounts on the work of the various '*least dangerous branches*'<sup>7</sup> seems to be the search for a realistic approach, at least in intention. Scholars have emphasized that, nowadays, the '*repudiation of Montesquieu*'<sup>8</sup> and the '*expansion and legitimacy of constitutional justice*' are both to be regarded as historical truths, in parallel with the growth of the judicial role in modern societies. They have spoken of necessary developments in increasingly complex systems of checks and balances, which face, generally speaking, "*a proliferation of legislative regulation*"<sup>9</sup> and a variation in the role itself of the legislative source.<sup>10</sup> They have depicted powerful legislatures and bureaucracies needing a judiciary subject to a commensurate expansion in power, for a proportionate, coherently expanded system of checks and balances; and the related, arising '*distrust*'<sup>11</sup> of the political branches of government would be reflected not only in the growth of judicial power, but also in the modification of the very nature of the judicial tasks.<sup>12</sup>

The '*revolt against formalism*'<sup>13</sup> and the transformation of the role of the state (and of the law itself) in post-modern welfare systems have represented two basic phenomena of the second postwar orders, probably two of the first really global legal phenomena. Undoubtedly, they have created a very different model of the judicial bodies' role, and this is particularly true for supreme and constitutional tribunals, increasingly central to the arbitration of political and social disputes in

<sup>3</sup> A. Dyevre, *Making Sense of Judicial Lawmaking: a Theory of Theories of Adjudication*, EUI Working Paper MWP no. 2008/09

<sup>4</sup> B.D. Lammon, *What We Talk about When We Talk about Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83, St. John's Law Review, 229 (2009)

<sup>5</sup> G. de Vergottini, *Diritto costituzionale comparato*, vol. I, 15 (Padova 2004, Cedam)

<sup>6</sup> M. Shapiro, *Courts: A Comparative And Political Analysis*, (Chicago 1981, University of Chicago Press)

<sup>7</sup> the obvious reference is to the historical reflections of Alexander Hamilton, under the pseudonym Publius, in *The Federalist No. 78*, 465 (New York 1961, Clinton Rossiter ed.)

<sup>8</sup> M. Cappelletti, *Repudiating Montesquieu?: The Expansion and Legitimacy of Constitutional justice*, 35 Cath. U. L. Rev. 1, 10-18 (1985)

<sup>9</sup> M. Cappelletti, *Giudici legislatori?*, 127 (Milano 1984, Giuffrè)

<sup>10</sup> O. Bachof, *Grundgesetz und Richtermacht*, (Tübingen 1959, Mohr) - available also in Spanish, as *Jueces y Constitución*, (Madrid 1963, Taurus)

<sup>11</sup> A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 34 (New Heaven 1986, Yale University Press, 2d ed.)

<sup>12</sup> "*One symptom*" - surely the strongest - "*of this distrust is the post-World War II trend of adopting bills of rights, on both national and transnational levels*" (in any case "*inevitably couched in vague, elusive terms*"), according to M. Cappelletti, *Giudici legislatori?*, *supra* note 9, at 128

<sup>13</sup> M. White, *Social Thought in America: The Revolt Against Formalism* (New York 1949, Viking)

their political communities. It has been usual to argue that both in common law and civil law countries 'the veil has been lifted', calling for realist and pragmatist<sup>14</sup> studies, discovering new dynamics of interpretation, and going far beyond the mechanic-logical-deductive processes declared by judges bound by the legal text. A supposedly sharp contrast between *interpretation* and *law-making* has been highlighted not only, as is well known, by continental thinkers, but already by Jeremy Bentham and, subsequently, by other common law scholars: it was thought to mirror the supposedly broader, sharper boundaries between the powers of the *trias politica*, although nowadays all these boundaries are increasingly blurring, subject to extensive rethinking. The constitutionalization of political life has promoted the judicialization of political disputes. Therefore, in its new broader context, judicial interpretation is widely regarded as '*unavoidably creative*', even in the case '*of apparently simple or direct language, in which legislative intent may have been expressed*'.<sup>15</sup>

The inherent, mighty problem of the democratic legitimacy of judicial law-making is not negated, in this fluid context, by these modern streams of thought. In general terms, it is simply not considered to be a 'fatal' issue,<sup>16</sup> involving *ex se* the democratic character of an order and of a country, and an issue to be studied as such, in a limited way. From our perspective, as explicitly suggested by Cappelletti,<sup>17</sup> an analysis of judicial creativity only begins with this awareness. Taking for granted the unavoidably creative function of judicial interpretation, the inquiry must refer to the *degree* of such creativity, as well as to the questions of the *mode*, the *limits*, and the level of *acceptability* of law-making through the courts. "*(I)n the real political world it is senseless to carry on examinations of any branch of government in simple terms of the voice of the majority or 'democratic' and 'undemocratic' labels. There are undoubtedly many instances in which the policy decisions ... reflect and/or result from majority sentiment, but there are many instances in which they do not*".<sup>18</sup> In assessing mode, degrees, limits, alternative strengths and weaknesses, new basic questions arise, both as premises and consequences, about the institutional capabilities of the judiciary and of the political process, vis-a-vis societal goals.<sup>19</sup> As a result, we simultaneously move from and towards a new assessment of the traditional distinction "*between 'reason', the realm of*

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<sup>14</sup> T.J. Miles, C.R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008); Daniel Farber, *Legal Pragmatism and the Constitution*, 72, Minnesota Law Review, 1331 (1988); or, in Europe, K. Hagel-Sorensen, U. Haltern, H. Koch, J.H.H Weiler (eds.), *Europe: The New Legal Realism*, (Kopenhagen 2010, Djøf Publishing)

<sup>15</sup> Sir Garfield Barwick, *Judiciary Law: Some Observations Thereon*, 33 Current Legal Problems, 239, 241 (1980)

<sup>16</sup> In the words of Lord Devlin, *Judges and Lawmakers*, 39 MLR 1, 41 (1976)

<sup>17</sup> M. Cappelletti, *Giudici legislatori?*, *supra* note 9, at 129

<sup>18</sup> M. Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review*, 24-25 (Englewood Cliffs, N.J 1966, Prentice-Hall)

<sup>19</sup> M. Shapiro, *Courts: A Comparative And Political Analysis*, *supra* note 6; N.K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Michigan Law Review, 660 (1988)

*adjudication, and 'will', the realm of politics*”,<sup>20</sup> in search of a feasible and acceptable balance. It is through this broadening process of interpretation that the boundaries between the legislative and the judicial branches (set more or less clearly by the constitution) are continuously reshaped.

Some of the most modern legal theories, defined as 'neo-realist' in a recent mapping exercise,<sup>21</sup> start precisely and directly from this point. It is particularly interesting to consider here the position of Neil Komesar and his 'comparative institutional' analysis,<sup>22</sup> whose main features, with regard to the theories of judicial review, stem precisely from a sense of discontent with grand theoretical foundations and which call for a pragmatic appraisal of concrete institutional capabilities in decision-making. His more general lesson, already proved influential for other new theoretical appraisals of constitutional adjudication,<sup>23</sup> comes directly from his comparison with traditional constitutional theories. The main suggestion is to abandon debates at a high level of abstraction, by raising questions about the nature of interpretation, making large claims about democracy, legitimacy, and constitutionalism, mainly by following a 'master principle' of constitutional authority, being moral philosophy, societal consensus or original intent. All these approaches, in his opinion, have important and useful ideas to offer, and can provide useful heuristic and analytical tools. However, they embody – in his lawyer-economist's jargon – the 'Nirvana fallacy' of juxtaposing the picture of an idealized judge (Hercules or a more conservative colleague) with the real-world judge, who actually operates “*as part of a decisionmaking committee staffed by multiple actors*”.<sup>24</sup> In short, from an institutional viewpoint, the important questions about judicial review (as well as about any other decision-making institution<sup>25</sup>) are not in the form of first-best principles,<sup>26</sup> but in the form of second-best enquiries about institutional performances and systemic effects: and “*a second-best assessment of institutional issues might, in some cases, be not only necessary but indeed sufficient to resolve conflicts over interpretative theories, simply because the assessment might lead people with different views on the theoretical issues to agree on the appropriate practises*”.<sup>27</sup>

It is probably no coincidence, but - instead - is evidence of an evolution in the debate, that

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<sup>20</sup> C. Sunstein, *Politics and Adjudication*, 94 *Ethics* 126, 126 (1983)

<sup>21</sup> V. Nourse, G. Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Order?*, 95, *Cornell Law Review*, 61, 85 (2009)

<sup>22</sup> In general N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 53 (Chicago 1994, The University of Chicago Press)

<sup>23</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, 101, *Michigan Law Review*, 885 (2003); E.L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109, *Harvard Law Review*, 1393 (1995); J.A. King, *Institutional Approaches to Judicial Restraint*, 28, *Oxford Journal of Legal Studies*, 409 (2008)

<sup>24</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, *supra* note 23, 904

<sup>25</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22

<sup>26</sup> Or “*choice of social goals and values*”, in the words of Komesar

<sup>27</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, *supra* note 23, 915

some scholars even see institutional analysis as a new common ground and the “*basis of a new synthesis of scholarly discourse about law*”.<sup>28</sup> Several major constitutional theories set the stage – knowingly or unknowingly - for comparative institutional analysis, often just starting, as mentioned, from an analysis of judicial review. The more we distance ourselves from the ideas of purely rational decisions, ideal institutions, clearly defined boundaries, optimal solutions, the more we need a realistic understanding of institutional capabilities and inter-branch dynamics. I think that the guidance of Komesar in this realm of “*highly imperfect alternatives*” can provide particularly valuable insight.

I will organize my reflections on this 'law and politics' debate, seen through the lens of the constitutional judicial role in a society, around a concept which is to some extent the spectre haunting it:<sup>29</sup> the concept of '*judicial activism*'. This brief analysis starts from the realization of a persistent presence in both the public and the scientific debates; and it is built precisely around the use and misuse of this 'notoriously slippery term',<sup>30</sup> born only relatively recently (if compared with the sensitivity of the problem itself), and intended to crystallize the anxieties and the variety of critical views on the interrelated, underlying matters.

My assumption is that the phrase 'judicial activism', however typical of a particular context such as the American one<sup>31</sup> and even though occasionally regarded as a gross, not strictly dogmatic or even legal category,<sup>32</sup> can be comparatively exported<sup>33</sup> and used as helpful tool for reflection by the constitutional justice scholar. If properly substantiated, it may represent (and to some extent make concrete) the latent and often intractable tensions inherent in traditional constitutional theories of judicial review. It can also serve precisely as the external, common thread of these. Moreover, it may also represent the inherent tensions which a comparative institutional analysis undertaken from the perspective of a constitutional adjudicator entails, including many of the 'Institutionalists'<sup>34</sup>

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<sup>28</sup> E.L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, *supra* note 23, 1393

<sup>29</sup> Or, changing image, at least its 'stone guest'

<sup>30</sup> F.H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 *University of Colorado Law Review* 1401, 1401 (2002)

<sup>31</sup> T. Koopmans, *Courts and Political Institutions*, 51 (Cambridge 2003, Cambridge University Press)

<sup>32</sup> J. Bengoetxea, *Legal Reasoning and the Hermeneutic Turn in the Law - Remarks on the European Court of Justice*, in U. Neergard, R. Nielsen, L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model - Theoretical and Methodological Perspectives*, 279 (Kopenhagen 2010, Djøf Publishing)

<sup>33</sup> Some early, interesting examples are K.M. Holland (ed.), *Judicial Activism in Comparative Perspective* (New York 1991, Palgrave Macmillan); C. Landfried (ed.), *Constitutional Review and Legislation. An International Comparison*, (Baden-Baden 1988, Nomos Verlagsgesellschaft); A. Stone-Sweet, *Governing with Judges* (Oxford 200, Oxford University Press)

<sup>34</sup> According to the definition of V. Nourse, G. Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Order?*, *supra* note 21

reflections, primarily Komesar, on judicial review. The paper will thus follow these two sources of inspiration.

The phrase 'judicial activism' has popular origins. Recent works<sup>35</sup> concerning the term and its conceptualization have emphasized its first recorded use in a magazine article meant for a general audience, written by a non-lawyer,<sup>36</sup> as a symbol of an intrinsic '*-ism difficulty*' in definition. The same scholars have, however, insisted on the utility of a conceptual and historical analysis of 'judicial activism', since it has already become a tool that is too widespread in making critical reviews of judges' behaviour to be ignored or avoided. This, the authors believe, should yield clearer perceptions of judicial behaviour and “*might reduce destructive schisms between expert and non-expert discussions of judicial role*”.<sup>37</sup>

Various exercises of categorization have been proposed: their usefulness, like all comparative 'ideal types', needs to be tested when applied to the study of a single peculiar order. As already mentioned, the risk of *acontextual*<sup>38</sup> research in this field, where several context-specific factors cross each other 'politically', seems particularly strong. On the other hand, it also seems necessary to clear the field of those overly 'politicized' approaches that have made the term laden with a clearly pejorative connotation, automatically linked to a certain political vision: in other words, the problem needs to be assessed on a value-free level, in order to avoid 'judicial activism' from simply being used to mean 'a decision one does not like'.<sup>39</sup> This initial, basic difficulty in the transition from popular/political jargon to a legal conceptualization is also the reason why it seems better to make a judicious use of these works and their attempts to clarify this issue. Rather than making an abstract use of them for quantitative, statistical inquiries,<sup>40</sup> it seems more appropriate to take advantage of the aforementioned works by considering them as attempts to outline composite models and composite categories: one can then collect around them a number of issues raised by the study of the function of the judiciary in constitutionalist climates, at least the most sensitive ones relating to the variety of ways in which courts can impact society. This seems, in fact, to be the same concern that has inspired, *ex ante*, the recent works of those scholars who, belonging to different environments and moving from different cultural backgrounds, have proposed '*multi-layered*'/'*multi-dimensional*' models of activism. Facing an historical lack of clarity, it has seemed

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<sup>35</sup> Craig Green, *An Intellectual History of Judicial Activism*, 58, 5, Emory Law Journal, 1195 (2009); Keenan D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism*, 92 Cal. L. Rev. 1441 (2004)

<sup>36</sup> Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, Fortune, Jan. 1947

<sup>37</sup> Green, *supra* note 35, at 1195

<sup>38</sup> L.M. Seidman, *Acontextual Judicial Review*, (July 30, 2010), Georgetown Public Law Research Paper No. 10-48. Available at SSRN: <http://ssrn.com/abstract=1651300>

<sup>39</sup> W.P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 University of Colorado Law Review, 1217 (2002)

<sup>40</sup> Barry Friedman, *Taking Law Seriously*, 4 Persp. On Pol. 261, 262 (2006); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C.L. Rev. 685 (2009), <http://lawdigitalcommons.bc.edu/bclr/vol50/iss3/2>



better to avoid the search for a clear-cut definition based on a single criterion,<sup>41</sup> and to benefit from recognising the variety of meanings, the variety of expressions of 'activism'. Each of these meanings should be assessed separately, as a single question about the function of the judiciary and as a facet of the debate on the 'third branch of government' in its role as a “*participant in a network of interaction with other social, political and institutional players*”.<sup>42</sup> It also seems better to rely on exercises of broad categorization, free from excessive particularism, which can best fulfil this function.

In the light of these reflections, rather than using the dozens of strict parameters for evaluation identified in one of the most recent works on the matter,<sup>43</sup> I will adopt one of the first, classic works of 'multi-layered' categorization as a paradigm - Bradley Canon's work on his 'six dimensions of judicial activism'<sup>44</sup> - which represents both a careful survey of the extensive previous literature<sup>45</sup> and a basis for subsequent attempts by scholars.<sup>46</sup> The structure of the paper will thus mirror these 'six dimensions', trying to sketch, despite the limitations of space, the historical questions of constitutional theory that are begged and their institutional implications. I will analyse the role and the work of constitutional courts in the light of the majoritarian principle, their scope of action and the specificity of their interventions, the theoretical and practical availability of alternative policymakers, and their interpretative fidelity and stability. In each of these dimensions we can see spaces in which a prototypical 'activist' court can move, spaces that can be sometimes discretionally used and even filled, spaces that can be usefully studied both from a legal and an institutional point of view.

In trying to shape, through these heuristic devices, useful ideal types that are applicable to most patterns of study, we must remember to assess some base arguments about the function of the judiciary in constitutional frameworks. The first argument follows the classic vision of the judiciary as the branch that is allotted the power to resolve legal disputes by applying existing law and superior parameters, and - in advance and facing different degrees of complexity - by determining

<sup>41</sup> See Richard Posner, *The Federal Courts: Challenge and Reform*, 314, 318 (Cambridge, MA 1996, Harvard University Press); G. Schubert, *A Functional Interpretation*, in David Forte, ed., *The Supreme Court: Judicial Activism vs. Judicial Restraint*, 17 (Lexington, MA 1972, Heath); Aharon Barak, *Judicial Discretion*, trans. by Yadin Kaufmann, 148 (New Haven, CN 1989, Yale University Press)

<sup>42</sup> M. Cohn and M. Kremnitzer, *Judicial Activism: A Multidimensional Model*, 18 *Canadian Journal of Law and Jurisprudence*, 333-356, 334 (2005)

<sup>43</sup> *Ibid.*

<sup>44</sup> B.C. Canon, *Defining the Dimensions of Judicial Activism*, 66 *Judicature* 236 (1983)

<sup>45</sup> Six dimensions derived “*from a review of both the polemical and evaluative literature pertaining to judicial activism, including some literature that does not use the term itself, but in which the underlying factors of policy change or illegitimate authority are clearly evident*”: *ibid.*, at 239

<sup>46</sup> Explicitly cited, among the others, by A. Barak, *The Judge in a Democracy*, 269 (Princeton, NJ 2006, Princeton University Press); M. Cohn and M. Kremnitzer, *Judicial Activism*, *supra* note 42; W.P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, *supra* note 39

which laws and parameters are applicable. The second argument considers the judiciary operating in the public sphere as a participant in a network of actors comprising other government branches, individuals and civic bodies, i.e. in constitutional pluralistic environments. We know that constitutional scholars have suggested different models of institutional interaction, from a formal or informal 'judicial supremacy' to the concept of 'democratic dialogue',<sup>47</sup> from the notion of 'shared or interdependent sovereignties'<sup>48</sup> to the American theory of 'constitutional unsettlement'.<sup>49</sup> Under the third perspective, the role of courts in constitutional arrangements is viewed as one that expands beyond the protection of political processes to an active and massive role in the protection of constitutionally sanctioned core values. This latter phenomenon, in marked expansion, has been traced by scholars to the particularities of our historical juncture, and has recently been extensively studied in both physiological and positive aspects as well as in critical ones.<sup>50</sup>

In the awareness of such classic and new challenges in the 'law and politics' debate, we can now turn to a more accurate and methodical analysis, developing the aforementioned 'multi-dimensional' model chosen for this study and looking for clearer meanings of the 'activism' of judicial branches.

### 1.1 Majoritarianism

Majoritarianism is probably the most frequent and, so to speak, automatic criterion used in assessing courts' activism, a kind of 'conditioned reflex' in the criticism of judicial behaviour.

The classic argument - so basic as elementary - suggests that when a constitutional court exercises judicial review, it substitutes another public policy for that enacted by elected representatives in legislative bodies. It is assumed that, in so doing, judges are contravening the will

<sup>47</sup> K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto, ON 2001, Irwin Law.); J. Webber, *Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)*, in W. Sadurski, ed., *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, 61 (The Hague 2002, Kluwer Law)

<sup>48</sup> N. Bamforth, *Ultra Vires and Institutional Interdependence*, in Christopher Forsyth, ed., *Judicial Review and the Constitution*, 111 (Oxford 2000, Hart Publishing, 2000); R. Clayton, *Judicial Deference and 'Democratic Dialogue': the Legitimacy of Judicial Intervention under the Human Rights Act 1998*, Pub.L. 33 (2004)

<sup>49</sup> L.M. Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven, CN 2001, Yale University Press)

<sup>50</sup> R. Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75, 2 *Fordham Law Review*, 721 (2006); R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *Annual Review of Political Science*, 2008; M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, in 2 *Giurisprudenza costituzionale*, 1643 (2006)

of the political branches and, by extension, the will of the majority itself. Such an action is often criticised from the perspective of democratic theory, wielding the sword of an alleged intrinsic 'illegitimacy' of the practice. What kind (and degree) of 'illegitimacy' are we talking about? What kind of institutional balance is shaped by the position of a hierarchically superior constitution to be enforced even against the will of the contingent majority? These questions can perhaps receive reassuring answers nowadays, at least in politically homogeneous legal orders where there are no crucial structural divergences between judicial bodies and legislatures, and when the actions of the courts do not take up any clear contrasting positions against the active politics of the moment. However, in most cases, in circumstances where tension between political actors arises, an unwelcome judgment inevitably provokes complaints of an 'invasion of the field' and accusations of misuse of a political role which is considered to be inconsistent with the constitutional jurisdiction.

This difficult, yet not precarious, balance is probably the best updated and pondered explanation of Bickel's famous and profoundly influential *counter-majoritarian difficulty*.<sup>51</sup> His landmark description of the “*countermajoritarian*” and “*deviant*” role of judicial review<sup>52</sup> was, in fact, the unveiling of an intrinsic *difficulty* which needs to be understood, approached and minimized, and not the denunciation of a plain inconsistency, of something presumptively at odds with democracy. Although often misconceived or taken out of context, his reflections represented the clear statement of the ontological premises of a fair analysis, and part of a preponderant *pars construens*, suggesting several interpretative paradigms and trying to balance framers' will and social change, case by case approach and principles, ultimately judicial review and democracy. The answer to the basic question of whether or not judicial review could nonetheless be democratically legitimate, at least if practised or constituted in a particular way, has seemed and seems already to be defined: being aware of this intrinsic difficulty and its consequences, judicial insulation from the *popular will* (elections) allows the judiciary to be faithful to the *sovereign will* (the constitution), and it is therefore an asset to be defended.

Of course, it is also true that whatever Bickel actually meant by the phrase in the specific historic context in which he was working, it has now taken on a life of its own. It has become a profoundly influential starting point for those who critically examine the relationship between democracy and constitutional judicial review, although other voices have denounced the inadequacies of a simplistic adherence to its framework. This branch of criticism is based on a typical, and rather simple, 'single-institutional' perspective. One of the underlying assumptions here

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<sup>51</sup> A. Bickel, *The Least Dangerous Branch*, *supra* note 11, at 16

<sup>52</sup> “*The root difficulty is that judicial review is a countermajoritarian force in our system. . . . When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens*”, *ivi*

seems to be “*the prevailing notion that government institutions act rationally to achieve their goals*”;<sup>53</sup> and the question raised about these institutions involves their legitimacy - “*that is whether their actions correspond with the common good*”.<sup>54</sup> Critics think that, presumably, the 'common good' will be advanced by the political branches in a democratic system, “*at least in the absence of particularized distortions like discrimination*”,<sup>55</sup> because these institutions are controlled by the populace. Most courts, and particularly constitutional courts, are believed to be more problematic because they are not directly subject to the electoral process or the supervision of any elected official, but only to words written in a statute, a group of previous decisions, or a constitution.

Within a more comprehensive perspective it has been pointed out<sup>56</sup> that this idea rests, firstly, on unwarranted empirical assumptions about the 'majoritarianism' of legislative action and the 'countermajoritarianism' of courts. It also rests on unwarranted theoretical assumptions about the relationship between democracy and majoritarianism itself: “*virtually all sophisticated approaches to democratic theory do not simply equal democracy with majoritarianism*”,<sup>57</sup> although this is sometimes forgotten or disregarded when discussing judicial review. If not theoretical works, at least several empirical studies concerning a variety of different legal orders<sup>58</sup> have pointed out the possible twofold problem of the simplistic challenge in question, which overstates at the same time the countermajoritarian nature of courts and the majoritarian nature of legislatures. The conventional contests that are common when evaluating judicial review often turn out to be unsupported by the contextual evidence: “*critics of judicial review comparing legislatures passing legislation resulting from the constructive deliberation of knowledgeable citizens versus an entirely unaccountable (and disproportionately old and affluent) small group of lawyers, or supporters of judicial review comparing crude interest aggregators with no interest in constitutional values in the political branches with judicial 'forums of principle'*”<sup>59</sup> do not seem to provide today's functioning of representative democracies with believable representations.

Here, comparative institutional analysis tries to go even further and seeks to study the dynamics in the formation of majoritarian and counter-majoritarian structures. Constitutionalism is presented as a 'paradoxical'<sup>60</sup> two-edge concept, balancing between 'the fear of the many' and 'the

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<sup>53</sup> E.L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, *supra* note 23, at 1397

<sup>54</sup> *Ivi*

<sup>55</sup> *Ivi*

<sup>56</sup> S.Lemieux and D.Watkins, *Beyond The Counter-Majoritarian Difficulty: Lessons From Democratic Theory*, 41 *Polity* 30–62 (2009)

<sup>57</sup> *Ibid.*, at 30

<sup>58</sup> E.g. T. Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in K.Ward, C.Castillo (eds.) *The Judiciary and American Democracy*, 140 (Albany 2005, State University of New York Press)

<sup>59</sup> S.Lemieux and D.Watkins, *supra* note 56, at 34

<sup>60</sup> M. Poiaras Maduro, *Europe and the Constitution: What if this is As Good As It Gets?*, in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge 2003, Cambridge University Press)

fear of the few', thus advancing and limiting power at the same time. This strong 'two-force model' is valid not only in 'deciding who decides' and allocating authority, but also in reading the variety of institutional relationships and the consequent political malfunctions. The model studies political decision-making both in terms of input (“*minoritarian and majoritarian influence*”,<sup>61</sup> “*interaction of stakes with the high costs of participation*”<sup>62</sup>) and in terms of output processes (“*countervailance*” and the possibility of “*majoritarian and minoritarian bias*”<sup>63</sup>); highlights the important factors, such as the 'per capita stakes' and their distribution across various interest groups, as well as the costs of political participation; tries to indicate the conditions under which one or the other version of political behaviour is likely to be the most relevant. Within this perspective, constitutional judicial review both represents and involves an institutional choice between 'massive and complex' structures - the political process and the judicial process. In this sense, the sort of symmetry assumed in the counter-majoritarian framework is disavowed; and allegations of activism made about the courts are returned for additional investigation on input and output dynamics.

Furthermore, it is highlighted that all liberal democratic systems have other significant 'countermajoritarian' elements than courts, including bodies within the political branches themselves:<sup>64</sup> “*judicial review is only one of many 'undemocratic' institutional choices*” in modern constitutional orders. This is indeed a clearly growing phenomenon, generally typical of those same 'welfare systems' described by Cappelletti and mentioned previously. In our ever increasingly complex legal orders, the structure of delegations is becoming broader, and is not limited to the judicial bodies. Few would argue that all these mechanisms are necessarily 'deviant', and such an answer seems to work well and to become typical,<sup>65</sup> turning the alleged vice into a virtue: the insulated, countermajoritarian nature of institutions (including courts) can be a positive feature, because it can be a solution for them to better - and independently - perform their duties. Courts are uniquely well situated to protect the rights of individuals or disadvantaged groups against an excessively powerful majority, as well as to resolve federal disputes<sup>66</sup> or inter-branch conflicts.

According to this more positive account, judicial review is clearly not a 'deviant' institution but one that upholds fundamental democratic values: not *notwithstanding*, but precisely *because of* its deviant potential. As already mentioned, not only has Bickel himself concluded that judicial review could be legitimated because the courts could serve as '*fora of principle*' and reason,<sup>67</sup> which

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<sup>61</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 67

<sup>62</sup> *Ibid.*, at 133

<sup>63</sup> *Ibid.*, at 75 ff.

<sup>64</sup> *Ibid.*, at 266

<sup>65</sup> S. Noveck, *Is Judicial Review Compatible with Democracy?* 6 *Cardozo Pub. L. Pol. & Ethics J.* 401 (2008)

<sup>66</sup> Not without facing similar objections, see A. Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 *University of Toronto Law Review* 109 (2010)

<sup>67</sup> Using the modern, well-known terminology of R. Dworkin, *A Matter of Principle* (Cambridge, MA 1985, Harvard

would inject higher constitutional values into the interest aggregation and bargaining process of legislative politics. But, following this line of justification, we also arrive at the most recent American debate on the '*policentric*', and not '*juricentric*', approach to the legitimacy of the courts,<sup>68</sup> updating the debate in the light of the crisis of political representation and the transformations of democracy, and leading to a recent redefinition of the role and the “*value of judicial review in the modern era ... as a catalyst ... to debate as a polity some of the most difficult and fundamental issues*” that confronts the polity as a whole, forcing it “*to work to reach answers to these questions, to find solutions, often compromises, which can find broad and lasting support*”.<sup>69</sup> A countermajoritarian court can make it possible for a democracy to become more deliberative, especially in light of a supposed lack of representativeness and democratic deficits, by engaging in dialogue<sup>70</sup> and 'institutional comity'.<sup>71</sup> “(T)he countermajoritarian nature of judicial review is not a '*difficulty*' but an '*opportunity*'”<sup>72</sup>: almost every contemporary theoretical or empirical assessment of judicial review (whether framed in positive or negative terms) seems to have moved away from the premise of treating institutions as engaged in zero-sum struggles for power.

It seems clear today that the radical underlying assumption of the 'countermajoritarian difficulty' as the only way of conceptualizing the legitimacy of judicial power distorts many aspects of the practice of judicial review, oversimplifies the relational models of inter-branch dynamics of every real legal order, and (as shown) is not consistent with the original ideas that gave rise to the debate. This is not to say, again, that judicial review and other forms of judicial policymaking are normatively unproblematic. But a *difficulty* is something intrinsic and axiomatic, not to be solved once and for all: the tensions between majoritarianism and other democratic values are endemic to democratic-pluralistic constitutionalism,<sup>73</sup> and the counter-majoritarian role of the courts pertains more to their constitutional '*position*' than to their action. A constitutional framework which provides for a central role of the courts is typical nowadays, in spite of the well-known continental differences. However, it is not necessitated: it is a choice, and not the only possible structural choice, as noted by strong, radical critics of judicial review.<sup>74</sup> As a choice, it obviously brings with it

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University Press)

<sup>68</sup> C.J.Parker, *Assessing the New Judicial Minimalism*, 100 *Columbia Law Review*, 1454-1537 (2000); R.L.Brown, *Accountability, Liberty and the Constitution*, *Columbia Law Review*, 546 (1998)

<sup>69</sup> B. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, 16 (New York 2010, Farrar, Strauss & Giroux); widely known, similar reflections can be found in R. Alexy, *A Theory of Constitutional Rights* (Oxford 2002, Oxford University Press)

<sup>70</sup> B. Friedman, *Dialogue and Judicial Review*, 91 *Michigan Law Review* 577 (1993); C. Bateup, *The Dialogic Promise. Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 *Brooklyn Law Review*, 1109 (2006); M. Van Hoecke, *Law as Communication* (Oxford 2002, Hart)

<sup>71</sup> J.A. King, *Institutional Approaches to Judicial Restraint*, *supra* note 23, at 427

<sup>72</sup> J. Ferejohn, P. Pasquino, *The Countermajoritarian Opportunity*, paper presented at the Conference: Rational Choice and Constitutional Law, held on Friday, September 24, 2010 at the University of Chicago Law School

<sup>73</sup> G.E. White, *The Arrival of History in Constitutional Scholarship*, 88 *Virginia Law Review* 485, 543 (2002)

<sup>74</sup> M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999, Princeton University Press); Jeremy

a number of benefits, as well as a number of problems.

One has to be aware of the inherent 'countermajoritarian difficulty' in order to pursue any kind of sophisticated analysis in the field. 'Countermajoritarianism' can be understood as a heuristic, posing a stylized question – exceptional though it might be – and provoking a general inquiry into the appropriate sources of authority for judicial decision-making. However, it seems there can be no 'activism' just because of a theoretical role, of an assigned position. It would seem that if we want to try to define 'judicial activism', we must turn our attention to the other dimensions of the activity of the courts and to other dimensions of their inter-branch relations.

## 1.2 *Substance/democratic process distinction*

Another traditional line of criticism rests on considerations that seem to assess, again, more the position than the effective action of the courts, or at least both dimensions. It is often argued, with different arguments from country to country and in the wake of a historic American debate, that there is greater justification for court policymaking in some areas than in others: and that the only concrete boundary that can be traced in this regard is between judicial interventions in substantive policy areas and judicial interventions ensuring minimal “*representation-reinforcement*”<sup>75</sup> requirements. In this light, an activist court would be the one that directly affects substantive policies, such as those “*which make economic policy, regulate the non-political-process activities of institutions or groups, or impinge people's careers, lifestyles, morals, or religious values*”.<sup>76</sup>

As well as the whole debate on activism and the 'countermajoritarian' analysis,<sup>77</sup> this is another lesson on the relationship between courts and political institutions that comes from the United States. In the historical *footnote four* of the *Carolene Products* case, Justice Stone offered a classic identification of those preferred areas: “*legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation*” and “*(legislation) which tends seriously to curtail the operation of those political processes ordinarily*

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Waldron, *The Core of the Case Against Judicial Review*, 115 Yale Law Journal 1346, 1406 (2006)

<sup>75</sup> J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 181 (Cambridge, MA 1980, Harvard University Press)

<sup>76</sup> B.C. Canon, *Defining the Dimensions of Judicial Activism*, *supra* note 44, at 245

<sup>77</sup> T. Koopmans, *Courts and Political Institutions*, *supra* note 31

to be relied upon to protect (discrete and insular minorities)”.<sup>78</sup> It is notorious that, bearing in mind these suggestions, the US Supreme Court has followed an expressed “preferred position” doctrine for about a decade, subjecting laws impinging on the political process to greater judicial scrutiny. Further, it has built its complex and plural reasoning of the following years on a rhetoric reminiscent of it.

The academic debate has proposed some persuasive solutions to the countermajoritarian difficulty in light of the facilitation of the representation of minorities, of “*clearing the channels of political change*” and democratic participation in general. Elegant '*process-related reasons*' such as that proposed by John Hart Ely, defending constitutional judicial review in its ability to open or keep open the participation processes compressed or blocked in the political sphere, are still common ground for many of the prominent contemporary theories. It would be both a countermajoritarian/competing interest and a fundamental tenet of contemporary constitutional systems that political minorities have the basic right not to suffer undue pressures in their own spheres of core freedom, and that they have an opportunity through open communication and the democratic political process to eventually become a majority. Judicial intervention protecting or enhancing these tenets, developing or even altering policies that affect the political processes, upholding, widening and equalizing basic opportunities, can be accounted as more justified than other decisions affecting other types of public policy.

The “*footnote four philosophy*”<sup>79</sup> has served as the genesis for the so-called 'substance/democratic process distinction'. Having abandoned the perspective of a countermajoritarian zero-sum game, a systemic understanding of the legal orders in which courts operate is developed through the study of the ability of different institutions to 'supply different legal goods'. The traditional circuit of representation allows political institutions to best protect certain interests; and, again, the insulated constitutional 'position' of courts allows and legitimates them to protect other (sometimes conflicting, often superior) interests, as well as the internal coherence of the legal order itself. Through this line of thinking, a clear distinction has been drawn between the "*political legitimacy*" and "*democratic legitimacy*" of judicial review: the alleged equation of the two concepts can be read as the implicit basis of almost all the previous critical issues.<sup>80</sup> Even if judicial review is relatively lacking specifically *democratic legitimacy*, its *political legitimacy* - which is a broader concept - can have multiple sources; and one good reason for citizens to respect political decisions with which they disagree is that those decisions issue from institutions that are well

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<sup>78</sup> *United States v. Carolene Products Company*, 304 U.S. 144, at 152-153 (1938)

<sup>79</sup> B.C. Canon, *Defining the Dimensions of Judicial Activism*, *supra* note 44, at 244

<sup>80</sup> As noted by R.H.Fallon, *The Core Of An Uneasy Case For Judicial Review*, 121 Harvard Law Review 1693, 1699 (2008)



designed to safeguard minimal social rules and core individual rights. If judicial review reduces the likelihood that important rights and basic rules will be infringed, then it may actually enhance, rather than undermine, a governmental regime's overall political legitimacy. Vice versa, an activist court, if it were intrusive, would undermine both these features.

This influential current of thought does not deny the inherent difficulties that are raised with the intrusion of courts into substantive policies. It does, however, emphasize the best adequacy of third, independent bodies to correct - if requested by the parties themselves - matters related to citizens' opportunities for input into the policymaking system, even if this occurs through a different kind of policymaking. In its early expressions, constructed in the light of the mid-century American experience, this theory focused on several evident and sensitive issues involving (among others) freedom of expression, the franchise, conduct of elections, the nature of representation.

Quite obviously, however, a clear distinction between judicial decisions relating to the integrity of the democratic political process and others affecting more substantive policy areas is not always easy to draw: indeed, it is chiefly this area of dispute that renders this 'process-related' argument an important element in a discussion of activism. The fact is that this argument seems persuasive – it is, indeed, the most consistent with the constitutional mandate of the courts - but it leaves open, again, important problems of definition. The distinction, put to the test of legal interpretation, can be proved as having very blurred boundaries. Not only can many of the spheres of political action be somehow traced back to the opening of channels of political participation; but also the negative definition, by a kind of process of exclusion, *a contrario*, does not seem to provide any firm and reliable results. Moreover, another famous critical review, by Laurence Tribe,<sup>81</sup> insisted that Ely and the 'proceduralists' have not managed yet to escape substantive constitutional law by championing political process, because the priority they give to process really amounts to a substantive value that posits, in effect, that more process and wider participation are always preferable and beneficial to the polity.<sup>82</sup>

Komesar's 'participation-centered approach' also rejects the underlying simplistic allocation of societal issues - “*render unto the political process that which is the political process' (substance) and render unto the courts that which is the courts' (process)*”.<sup>83</sup> Comparative institutional analysis teaches us here that this neat split of issues, along with the underlying idea that judicial review can take place without any judicial value judgments being made, “*is based on a basic misconception*”.<sup>84</sup> Courts and political branches are alternative societal decisionmakers, with different institutional

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<sup>81</sup> L.H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale Law Journal 1063 (1980)

<sup>82</sup> See M.C. Dorf, *The Coherentism of Democracy and Distrust*, 114. Yale L.J. 1237, 1257-58 (2005)

<sup>83</sup> N. Komesar, *A Job for the Judges*, *supra* note 19, at 665

<sup>84</sup> *Ibid.*, 666

features, deciding matters differently. But this does not mean, as the 'substance/ democratic process distinction' suggests, that they operate on different issues. “*Judicial review is judicial reconsideration of an issue already decided by another societal decisionmaker. When that reconsideration leads to invalidation of the governmental action, the courts are remaking societal policy*”,<sup>85</sup> the same societal policy already assessed by the competing institution. Ely's belief that reaction to the (various) forms of political malfunctions should be important in defining the judicial role is the first element in an analysis of the allocation of decisionmaking powers. However an appropriate analysis also requires consideration of the ability of the judiciary to make, or remake, societal decisions: and such questions of relative institutional ability cannot be hidden behind oversimplistic and falsely reassuring dichotomies. The essence of Ely's theory is therefore 'single-institutional': “*each institution is disqualified from a realm of activity by its imperfections without regard to the limitations of the other institution in the same realm*”.<sup>86</sup> Such a schematic assessment of the variety of political malfunctions and of the ability to address them cannot be an adequate substitute for institutional comparison;<sup>87</sup> nor can it be a mask behind which to hide substantive judicial decisions.

### 1.3 *Specificity of policy*

According to a traditional reading, consistent with a certain formal vision of their constitutional mandate, courts step into public policy only to nullify laws, in their capacity as “*negative legislators*”. Such intervention is constitutionally pre-ordained to leave legislators or administrators, as positive actors, free to pursue different approaches to a given problem, with the awareness and in light of the judicial choice. This view is the closest to the static design of a *trias politica*, and is coherent with Kelsen's traditional architecture.<sup>88</sup> From a functional viewpoint, the division of powers seems relatively clear, calling the judiciary to a kind of *actio finium regundorum* of the discretion of the political powers. Thus, the space that is left open by the constitution for

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<sup>85</sup> *Ivi*

<sup>86</sup> N. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51, University of Chicago Law Review, 366, 405 (1984)

<sup>87</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 207: “*the tough challenge of comparative institutional analysis cannot be avoided by supposing that the reviewer is making a different type of decision than is the reviewed*”

<sup>88</sup> H. Kelsen, *General Theory of Law and State*, 269 (Cambridge 1945, Harvard University Press)

political decisions, within its framework of superior 'rules of the game', may not be filled by courts, and these are not called upon to anticipate or design any legislative measures but to review them after having been taken. A clear departure from these minimal functional rules would constitute evidence of an activist approach by the courts.

An expanded conception of judicial role was already criticized by continental scholars like Edouard Lambert in the early 1920's, studying the weight of the jurisprudential *formant*<sup>89</sup> in the US legal order, and coining the successful, rhetorical phrase “*gouvernement des juges*”.<sup>90</sup> However, the original Kelsenian constitutional project, despite being the basis for a structural division of tasks and for many modern experiences of constitutional justice, is also not perfectly comparable with the becoming of contemporary 'welfare systems',<sup>91</sup> from the second half of the century onwards. The change is clear in this case. As it has been noted,<sup>92</sup> the classic distinction between positive and negative roles relied almost entirely on the absence, within the structural sphere of constitutional law, of enforceable human rights. Moreover, Kelsen himself explicitly warned of the 'dangers' of bestowing constitutional status on human rights, which he equated with natural law, because a rights jurisprudence would inevitably lead to the obliteration of the distinction between the negative legislator and the positive legislator. “*If in the past fundamental rights were valid only within the law, today the laws are valid only within the context of fundamental rights*”;<sup>93</sup> and, in Kelsenian terms, “*(T)hrough their quest to discover the content and scope of the natural law, constitutional judges would, in effect, become super-legislators*”,<sup>94</sup> shattering traditional separation-of-powers dogmas.

Facing these historical conceptualizations and trying to update them in line with the new structural features of the debate, we inevitably blur the boundaries between *interpretation* and *creation*, as Cappelletti masterfully highlighted. Nowadays, a common perception between several scholars is that in recent years, in a wide range of legal systems (even profoundly different one from the other), courts have also increasingly played the role of positive policymakers, wielding precisely the sword of human rights. Interventions to plainly nullify unconstitutional policies still seem to be the current rule, but they are coupled with a series of more complex interventions commanding 'positive government agencies' to undertake certain policies, sometimes with attention to minute

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<sup>89</sup> According to the categories of R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 *The American Journal of Comparative Law*, 1 (1991)

<sup>90</sup> E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (Paris 1921, Marcel Giard & Cie)

<sup>91</sup> Again following M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford-New York 1989, Clarendon Press)

<sup>92</sup> M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization*, 147 (Oxford 2002, Oxford University Press)

<sup>93</sup> O. Bachof, *Grundgesetz und Richtermacht*, *supra* note 10, at 41

<sup>94</sup> M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization*, *supra* note 92, at 147

details, or specifying particular behaviours that the government agencies need to follow in pursuit of an existing policy. As Canon put it,<sup>95</sup> “(i)n some celebrated cases, courts have virtually taken over the management of school systems, prisons, and hospitals”: an emphatic sentence that clearly refers to numerous well-known US Supreme Court's judgments on abortion,<sup>96</sup> police interrogations,<sup>97</sup> obscenity,<sup>98</sup> which did not simply strike down laws but rewrote them “*in chapter and verse*”.

“Positive policymaking by the judiciary could be the wave of the future, but it will not arrive without considerable criticism”:<sup>99</sup> the key to activism, in this emerging facet of the debate, seems to be just that 'specificity of policy' criterion, understood as precisely the ultroneous and discretionary dimension of the judicial decision.

To what extent is this phenomenon ascribable purely to the activity (or the activism) of courts? Proponents of positive policymaking reply that constitutions contain commands as well as prohibitions and that courts are obliged to enforce the former when other agencies cannot or will not. A growing number of scholars has emphasized that the presence of elastic, open-ended clauses (which fall under the suggestive definitions of '*unbestimmte Rechtsbegriffe*'<sup>100</sup> or '*incompletely theorized agreements*'<sup>101</sup>) is a familiar phenomenon with constitutional provisions and regulatory standards in administrative law, and is increasingly bound to lead (in the form of an excessive deontic content and 'intentional indefiniteness') to a delegation to courts of the final decisions on such issues.

In this regard, the reflections of the Institutionalists on the conception of fundamental rights are particularly interesting. Komesar, I think, does not just criticize those major paradigms of scholarship which examine constitutional law solely from the vantage point of constitutional values and goals, and which often emphasize “*the disinterested, contemplative, and neutral nature of judicial decisionmaking*”, with true “*institutional generalizations*”.<sup>102</sup> In his works one can see, at least, the hint of a theory of the role - the *institutional* and *instrumental* role - of fundamental rights in a constitutional order. Discerning that a goal, a principle, a value, or an interest is socially important per se tells us nothing about what law and public policy should be, since “*goal choice is never sufficient to define law and public policy choice*”.<sup>103</sup> Fundamental rights are a “*curious*

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<sup>95</sup> From his usual US centered viewpoint, B.C. Canon, *supra* note 44, at 245

<sup>96</sup> *Roe v. Wade*, 410 U.S. 113 (1973)

<sup>97</sup> *Miranda v. Arizona* 384 U.S. 436 (1966)

<sup>98</sup> *Miller v. California*, 413 U.S. 15 (1973)

<sup>99</sup> B.C. Canon, *supra* note 44, at 245

<sup>100</sup> Literally, “*undefined legal concepts*”

<sup>101</sup> C.R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 Social Research 1 (2007)

<sup>102</sup> N. Komesar, *Taking Institutions Seriously*, *supra* note 86, 425

<sup>103</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 257

doctrine”,<sup>104</sup> resulting in “semantic fictions”<sup>105</sup> and feeding “lyrical discussions”.<sup>106</sup> “Judges are enamored of the notion”,<sup>107</sup> but ‘fundamentalness’ “cannot be taken seriously as a means of defining the judicial role”.<sup>108</sup> “If fundamental means important or basic, then the doctrine would give the most central societal decisionmaking to the judiciary, not the legislature. In a complex and vast society like ours, that would likely mean that the judiciary would operate on a scale way beyond its existing physical capacity and with an authority totally inconsistent with our basic notions”.<sup>109</sup> The features described here are precisely those of a delegation. Again, however, we have to consider the real, second-best, institutional dimension of such an allocation of responsibility for determination, and not the static position of goals and social aspirations. Rights are institutional choices in the service of social goals, and their validity in serving those goals depends on the validity of the underlying institutional choices.<sup>110</sup>

Thus, firstly, among the list of values which are traditionally enshrined as fundamental, we have to consider both presences and absences, as already suggested by Ely.<sup>111</sup> We see included subjects, often in the aforementioned elastic, open-ended style; and we have subjects, often more practical subjects,<sup>112</sup> which are excluded. Ely suggests that those excluded subjects can concern ‘substance’, and dismisses such listmaking as going beyond the capacity and legitimate authority of the judiciary. Komesar explains that those subjects are not excluded from the list of fundamental values “because they are unimportant ... (I)f anything, they are excluded because they are too important”:<sup>113</sup> that is, the relative institutional abilities of the political branches vis-a-vis those of the judicial process are thought to favour the former. The traditional argument is therefore reversed: the issue is not that the judiciary should closely scrutinize the action of the political process because a certain right is fundamental, but that “where there is greater perceived need for judicial scrutiny then a right will be characterized as fundamental”.<sup>114</sup>

In terms of the modalities of judicial intervention, a proper institutional analysis cannot be undertaken whilst ignoring that “each claim of constitutional invalidity presents a different set of demands on the resources of the judiciary”.<sup>115</sup> Through an analysis of some historical US Supreme

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<sup>104</sup> N. Komesar, *A Job for the Judges*, *supra* note 19, at 717

<sup>105</sup> *Ivi*

<sup>106</sup> *Ibid.*, at 720

<sup>107</sup> *Ibid.*, at 674

<sup>108</sup> *Ibid.*, at 665

<sup>109</sup> *Ivi*

<sup>110</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 48

<sup>111</sup> J.H. Ely, *Democracy and Distrust*, *supra* note 75, at 59

<sup>112</sup> *Ivi*: “watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't fundamental”

<sup>113</sup> N. Komesar, *Taking Institutions Seriously*, *supra* note 86, 438

<sup>114</sup> *Ibid.*, at 438-439

<sup>115</sup> *Ibid.*, at 377

Court's decisions,<sup>116</sup> Komesar explains how cases vary in number and complexity of judicial determinations needed for their complete resolution. When a court 'declares a right', it must face “*the task of defining that right and the associated remedy*”.<sup>117</sup> “*In some instances, it can define the right in clear terms and offer a remedy that involves little continuing judicial action. Other instances require the court to define a right in general terms, and either clarify it gradually in future litigation or provide a remedy that involves continuing judicial supervision – even continuing appellate supervision*”.<sup>118</sup> This often means that less required future judicial activity can mean more judicial activism.<sup>119</sup>

The transformation of our legal orders and of the modalities of public intervention has sometimes been intentional and preordained and sometimes not, but it clearly leads to an increasing shift of positive policymaking power to insulated institutions. It seems clear, from a critical perspective, that the opening of such spaces can be an opportunity to pursue intrusive, active, teleologically-oriented policies. It remains to be determined - and this is not simple - whether or not a composite body like a tribunal can have its own global policies pursued and, therefore, its ability to coherently pursue them, in the form of 'many-mind arguments'.<sup>120</sup> Certainly some historical experiences have given rise to suspicion and persuasive reconstructions. On other occasions, scholars may have abused similar arguments, tracing complex dynamics back to a single fictitious rationality.<sup>121</sup>

As far as the concrete case study is concerned, similar questions can only receive specific, empirical answers. This is sometimes the source of accurate casuistic, historical, behavioural analyses, while for some others it is the realm of a certain various 'courts and politics' literature<sup>122</sup> which can be particularly effective in some cases, and simply seem naïve in others.

Nevertheless, regardless for now of the possible responses and modalities of an empirical study, the expansion of discretionary spaces available to courts has re-ignited the theoretical debate.

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<sup>116</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

<sup>117</sup> N. Komesar, *Taking Institutions Seriously*, *supra* note 86, 377

<sup>118</sup> *Ivi*

<sup>119</sup> N. Komesar, *Law's Limits. The Rule of Law and the Supply and Demand of Rights*, 162 (Cambridge 2001, Cambridge University Press)

<sup>120</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, *supra* note 23; in general L.A. Kornhauser and L.G. Sager, *Unpacking the Court*, 96 *Yale Law Journal*, 82 (1986)

<sup>121</sup> As observed by M. Poiares Maduro, L. Azoulai, *Introduction. The Past and Future of EU Law*, in M. Poiares Maduro, L. Azoulai (eds), *The Past and Future of EU Law. The classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Oxford 2010, Hart Publishing) at 1; or by A. Grimm, *Judicial Interpretation or Judicial Activism? the Legacy of Rationalism in the Studies of the European Court of Justice*, CES Working Paper Series No. 176, 2010

<sup>122</sup> B. Rehder, *What is Political about Jurisprudence*, Max Planck Institute for the Study of Societies, discussion paper 07/05 (2007)

The popular new trends of 'judicial minimalism'<sup>123</sup> are some of the last meaningful examples of this awareness, preaching a measured institutional approach by judicial bodies that minimize their own imprint on the law by meticulously assessing “*one case at a time*”, ruling on narrow and shallow grounds, eschewing broader theories, and altering entrenched legal practices only incrementally.

#### 1.4 *Availability of an alternative policymaker*

There is another frequently echoed theme in the assessing of courts' activism, which is also a key to the macro-policy issues analysed above. It is a topic that I have in part already taken into account, since it can be seen as a corollary of the previous 'specificity of policy' argument, and as a complementary dimension. But, quite obviously, this theme lies at the core of the Institutionalists' arguments.

In the opinion of critics, courts should exercise self-restraint in the face of other agencies' attempts to develop policies for pressing and sensitive problems. Such arguments are usually phrased as “*how well courts are equipped vis-a-vis a legislature or an administrative agency to make intelligent policy in any given area*”.<sup>124</sup> The connection with the functional analysis is clear, since the procedure and rules are different for courts and legislatures, and are fitted to the constitutional functions they perform. “*Legislative procedure allows broad participation, public discourse, and a wide set of arguments, and its results are easily revisible whereas judicial procedure only admits narrow participation and legal arguments, restricts the general public to a spectator's role, and is difficult to revise*”.<sup>125</sup>

Thus, this dimension (whether it be complementary or fundamental) pertains to the 'availability of an alternative policymaker',<sup>126</sup> and the activism of a court would not be much based on the merits of its decisions themselves, but precisely on the results of a kind of competitive and *comparative* institutional analysis.

Canon introduces this idea by citing a historical witticism by Justice Stone (from 1936):

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<sup>123</sup> C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA 1999, Harvard University Press )

<sup>124</sup> B.C. Canon, *supra* note 44, at 246

<sup>125</sup> D. Grimm, *Comment*, in C. Landfried (ed.), *Constitutional Review and Legislation. An International Comparison*, *supra* note 33, at 170

<sup>126</sup> Borrowing the phrase from Lief H. Carter, *When Courts Should Make Policy: An Institutional Approach*, in J. A. Gardiner (ed.) *Public Law and Public Policy* (New York 1977, Praeger) at 141

“Courts are not the only agency of government that must be presumed to have the capacity to govern”.<sup>127</sup> In fact, everything seems to be condensed here: the central question is to what extent another agency could make a policy similar to that found in the judicial decision, intervening in the same area. And then, briefly said: what is the legitimacy of a court in arrogating the powers in question, and in assuming the role of substitute? Komesar's large body of work starts from a similar perspective, but with an essential preliminary notation: “(C)onstitutional judicial review cannot be everything. In the larger constitutional scheme, it cannot be much. It is a very scarce resource”,<sup>128</sup> and no approach to institutional choice can ignore scarcity and cost. “The adjudicative process, in particular, is tiny and fragile when compared with alternatives like the market and the political process. Structural elements make it impossible to expand the scale of the courts at the rate of the expansion of the other institutions. These implications of scarcity combined with other implications of institutional analysis lead to fascinating (if disturbing) trends”.<sup>129</sup>

In terms of trends, it seems that traditional constitutional scholars have focused their attention, essentially, on two interrelated questions. Firstly, does another agency have more expertise and access to information to make policy than the supreme or constitutional court in question? Secondly (and more in general), does another agency have the authority to make policy and, if so, is it politically or practically feasible for it to do so?

As for the first aspect, of course the 'information deficit' represents the other side of the coin of judges' relative social insulation. It is a natural consequence of one of the distinctive structural elements of the adjudicative process.<sup>130</sup> From this perspective, judges can lay claim to no particular proficiency in substantive policy areas, either in terms of specialized knowledge or of specialized staff for in-depth research on non-legal aspects of the issues posed in many cases. However, the ability of judges to learn about and understand a given substantive area affects the tractability and costs of judicial review of that area, and this ability can vary widely among substantive areas. As Canon emphasizes,<sup>131</sup> “the information processing system accompanying judicial decision-making is not generally conducive to informed policymaking”. The single case at stake can stem from a particular event or situation that may or may not generally represent the policy dilemma; furthermore, the very nature of traditional legal reasoning encourages lawyers, understood here as a whole 'interpretative community', to stress formal and technical aspects rather than facts illuminating the social consequences of alternate policy choices. “While social science data are occasionally included in briefs or opinions, more often lawyers and judges give little systematic

<sup>127</sup> *United States v. Butler*, 297 U.S. 1, at 87 (1936) (dissenting opinion)

<sup>128</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 250

<sup>129</sup> N. Komesar, *Exploring the Darkness. Law, Economics and Institutional Choice*, *Wisconsin Law Review*, 435 (1997)

<sup>130</sup> According to the reflections of N. Komesar, *Imperfect Alternatives*, *supra* note 22

<sup>131</sup> B.C. Canon, *supra* note 44, at 246



*attention to a decision's impact*".<sup>132</sup> this statement seems particularly true and particularly problematic at an apical, constitutional level. It is clear, on the other hand, that not all judicial decisions call for expertise or complex data: sometimes the information needed is simple and the crucial question is one of values. From an abstract point of view, judges are as competent as anyone else to make such choices. As seen, in these cases we will come face to face with some supporters of 'minimum scrutiny'/self-restraint doctrines (also with elegant and complex reasons of inter-institutional balance<sup>133</sup>) and certain supporters of the courts as natural '*fora of principles*' and reason.<sup>134</sup> What is sure is that the more uncertain the judiciary is about how to resolve an issue, and the more it needs to learn about the subject matter in question, the greater will be its inclination to adopt a resolution couched in flexible terms so as to be delimited in subsequent litigation, until the most extreme expression of diffidence, the 'political question doctrine'.<sup>135</sup> If this trend is not observed, allegations of activism increase.

In fact, the concept of the 'political and practical likelihood' of action deals with potentially alternative policymakers which are left uncertain of the extent of their legal authority, and implies an inquiry into the presence of several possible or probable policies and, moreover, into the likelihood of the adoption of policies that are more or less coincident, or rather totally divergent, by different institutions. Furthermore, it is important to assess the impact of the possible alternative decision on the political and institutional balance as a systemic whole,<sup>136</sup> and to determine to what extent the judicial decisions can be conceived as outcomes of social debate and political pressure on courts. In the end, both types of judicial decisions, hypothetically coincident and divergent, could be considered as deserving of censure, as long as they fall into the (vague) category of '*political questions*'. This is a label sometimes used by courts themselves (discretionally) to avoid facing tasks of clear and sensitive discretion; for some others it represents the first chapter of indictment from a critical perspective based on 'judicial activism'.

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<sup>132</sup> B.C. Canon, *supra* note 44, at 247

<sup>133</sup> E.g. M. Tushnet, *Taking the Constitution Away from the Courts*, *supra* note 74

<sup>134</sup> Again, as the most prominent scholar, R. Dworkin, *A Matter of Principle*, *supra* note 67

<sup>135</sup> for a 'functional analysis' see: F. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75, *Yale Law Journal*, 517 (1966); N. Komesar, *Taking Institutions Seriously*, *supra* note 86, at 381

<sup>136</sup> The "degree of inter-branch tension" suggested by R. Posner, *The Federal Courts: Challenge and Reform*, *supra* note 41, at 314, 318 and, similarly, by G. Schubert, *A Functional Interpretation* in David Forte (ed.) *The Supreme Court: Judicial Activism vs. Judicial Restraint*, *supra* note 41, at 17

## 1.5 *Interpretative fidelity*

Despite having started from macro-assessments of the 'judicial activism' debate, after a complex and structural analysis one arrives at a point at which an evaluation of the more internal dimensions of judicial activity is necessary. Even an inquiry on apparently remote matters such as that carried out so far, including an assessment of technical and political expertise of courts, will lead us, eventually, to the study of models of legal reasoning and interpretation employed by courts. Whether we examine technical decision-making or the value choices of courts, we need an analysis of the 'language' judges speak in taking these decisions and making these choices. By adopting an institutional perspective we discover, nonetheless, that even behind a seemingly formalist “*process of reasoned, public justification according to a set of legal and moral standard*”,<sup>137</sup> basic and structural choices are hidden.

A study of the legal reasoning of courts is an inquiry into the 'logic' of their judicial decision making. This concerns the kind of arguments given by judges, the relationship between the reasons and the decisions, and the adequacy of these reasons as a support for the decisions. From a critical perspective, typical of our inquiry, it is sometimes said that judges do not always reveal the real reasons for their decisions, and that the reasons they do present are no more than *rationalizations* for the results they reach,<sup>138</sup> derived from the requirements of the constitution itself. This claim is presumably intended to suggest that it is necessary to take into account factors that lie outside explicitly given reasons, in order to explain why a case is decided in a certain way: and probably, such a *realist* analysis can be addressed by each of the criteria already suggested to give depth to the concept of 'judicial activism'.

In contrast, other criteria involving legal interpretation are commonly suggested as *direct expressions* of misused judicial discretion. Such criteria have been the object of a long-standing and engaging debate, probably as old as the constitutional norms to which they relate; and due to their inherent complexity, it is difficult to summarize the begged questions in a few lines. In this context, at the expense of some simplification, I will therefore only analyse their supposed connection with the phenomenon of activism, trying to adopt an institutional perspective.

That the 'interpretative fidelity' category comes into the discussion is no surprise, since it is part, again, of a kind of a common critical perception of the role of courts (perhaps the same that we see in the 'absolutization' of the countermajoritarian criterion discussed above). This dimension would measure courts' “*actual or inferential construction*”<sup>139</sup> of constitutional provisions, and would

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<sup>137</sup> J.A. King, *Institutional Approaches to Judicial Restraint*, *supra* note 23, at 427

<sup>138</sup> M.P. Golding, *Legal Reasoning*, 2-3 (Peterborough 2001, Broadview Press)

<sup>139</sup> B.C. Canon, *supra* note 44, at 242

lead to an 'activist' perception when a certain interpretation does not accord with the *ordinary meaning* of wording of the provision and/or with the *known, consensual intentions* or goals of its drafters.<sup>140</sup> The use of such prudent adjectives by Canon seems very wise, in this context; it is also, however, a measure of the difficulty of establishing precise limits in the domain of constitutional interpretation, setting a clear threshold between the equally confused boundaries of *interpretation* and *creation*.

Now-traditional studies of constitutional theory tell us that there are judges and scholars who, to a greater or lesser extent, believe that it is possible to measure the interpretative fidelity of courts' decisions. John Hart Ely's milestone "Democracy and Distrust"<sup>141</sup> opens with a discussion of this philosophy, renamed '*interpretivism*', and of its common "*allure*" in the context of the American literature. I think that the comparative debate on 'judicial activism' is one of the best examples of how this '*interpretivist*' perception is common to a wide range of constitutional studies. Words and phrases, after all, do have some meaning, and drafters of constitutional provisions did have intentions and goals. When these last appear to be transgressed, dissenting justices and legal scholars often protest vigorously and engage in a considerable semantic analysis or historical research. Sometimes the issues are (and remain) hard to resolve, but sometimes an historical hindsight reveals 'interpretative infidelity'.<sup>142</sup>

These are, in a nutshell, the questions at stake. It seems to me that the approach adopted here facilitates the research, because rather than looking for solutions (if they exist), an abstract inquiry into activism can limit itself to emphasizing the inner criticality of such questions and any consequent potential deviations. While conceding the necessity for discretion in applying vague phrases to specific situations, critics of activism on this dimension argue that *the* Constitution is not *a* constitution if it can be altered at the will of five or nine judges in the course of a lawsuit (to echo Bickel's emphatic words). Although it is a basic law "*intended to endure for ages to come*",<sup>143</sup> it does not follow that a constitutional court can ignore the very words of the document. Special amending processes are explicitly provided, if particular provisions prove unpopular or dysfunctional. Supporters of a certain discretion argue here that a court's main function is the smooth application of a 'living' document, often framed in a distant past, to modern problems which may require new meanings for old provisions. It is the 'spirit of the law', they think, rather than the exact wording of the framers' time-bound intentions, that is important.

Comparatively, the judges' arsenal of professional techniques and legal arguments for the

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<sup>140</sup> *Ivi*

<sup>141</sup> J.H. Ely, *Democracy and Distrust*, *supra* note 75, 1 ff.

<sup>142</sup> Historical American examples are *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944)

<sup>143</sup> *McCulloch v. Maryland* 17 U.S. 316 (1819)

application of norms is often similar, while, apart from some specific contemporary experiences, constitutional texts do not normally provide specific guidance. The courts' judicial discourse is shaped through the employment of some textual methods, such as the plain literal and the contextual one, and some extra-textual methods, such as the historical and the teleological. However, such common 'language' - composed of the same 'tools' - can be used to construct rather different, sometimes contrasting, arguments. The guiding preference in this work of interpretation and application is often an institutional choice and, at the same time, is the reason for external charges of 'activism'.

With regard to wording and textual methods, the term 'activist' will be applied to “*any decision that appears to clearly contradict any constitutional provision in terms of the ordinary meaning of its wording, or any decision that is contrary to the logical implications of two or more provisions considered together*”.<sup>144</sup> Clearly this includes, along with gross alterations of textual meaning, those decisions that typically effectively create new constitutional provisions by finding them, through a contextual, sometimes strained or illogical interpretation of language, in pre-existing provisions. This last is certainly a more realistic example, surely involving some degree of judicial discretion. Constitutional history contains a large number of such informal 'additions', which have sometimes generated little controversy for the truth,<sup>145</sup> and sometimes a long critical debate.<sup>146</sup> many Courts' 'amendments' are welcome, but they are not less activist for this (indeed, they share this characteristic with actual policy proposals). From an institutional perspective, constitutional theories highlighting the “*disinterested, contemplative, and neutral nature of judicial decisionmaking*”,<sup>147</sup> and proposing for this reason that a court should not hesitate much to 'find' a constitutional right of some kind “*if it is presented with convincing (to the judges) philosophical arguments for that right, at least if the right 'fits' with the rest of the legal fabric*”,<sup>148</sup> are making an (indeed simplistic) institutional argument. They suppose, *a contrario*, the legislative process as driven by passion and (unspecified) self-interest, and propose to substitute a more contemplative judiciary for the legislature. “*Societal decisionmaking thereby gains, to be sure, contemplation and reason, but it loses a basic measure of public will, desire, and reaction available in the legislative process*”.<sup>149</sup> Courts may not understand what 'justice' requires, or may not be good at producing justice even when they understand it. In these circumstances, their understanding of the constitution

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<sup>144</sup> B.C. Canon, *supra* note 44, at 243

<sup>145</sup> E.g. the 'discovery' of a 'right to a healthy environment' in the Italian Constitution

<sup>146</sup> We can think to the 'creation' of the 'equal protection component' of the American Fifth Amendment

<sup>147</sup> N. Komesar, *Taking Institutions Seriously*, *supra* note 86, 425 ff., analyzing the work of H. Wellington, *The Nature of Judicial Review*, 91 *Yale Law Journal* 486, 494 (1982); M. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. Law Review*, 278, 293-94 (1981)

<sup>148</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, *supra* note 23, at 939

<sup>149</sup> N. Komesar, *Taking Institutions Seriously*, *supra* note 86, at 430

is partly a product of their evaluations about their own distinctive role as a social institution. It is reasonable to believe that judges are not well-equipped to engage in theoretically ambitious tasks, without also believing that political theory is itself problematic or useless.

Looking at the extra-textual methods, we face the tensions and challenges due to the essence of the constitution as a document with both a crucial strong source and precise, long-standing purposes. Especially at a certain stage of the American debate, some prominent authors (such as Bork,<sup>150</sup> Scalia,<sup>151</sup> and Rehnquist<sup>152</sup>) have stressed the point of the “framers' original intentions” as the only canon of interpretation available for the judges to reconcile their structural lack of democratic legitimacy with reference to the “original” will of “the people”. Their approaches were somewhat different, but have come to profoundly affect the global debate (perhaps more than the actual activities of the courts). Any kind of open, evolutionary interpretation would be, in their view, inevitably exposed to subjective views and, in particular, to judges' political options: while Bickel formulated the 'countermajoritarian difficulty' on the (realist, Holmesian) assumption that a creative component was inherent in the judicial function, the 'originalists' have used the argument of the lack of democratic legitimacy to raise, again, the idea that it was up to courts only to 'find' the right, as pre-existing essences. The search for an objective meaning, static in time, linked to an 'original intent theory'<sup>153</sup> or rather to an 'original meaning',<sup>154</sup> is in the end the expression of an explicitly felt need to limit judicial discretion. Whether agreeing or not with this urgency, a certain instrumentality in setting the criterion seems clear: because of inadequate discussion, poor records or conflict in the evidence, it is by no means always easy to ascertain a clear intention of the framers. Comparative institutional dimensions are in fact again trivialized here. Not only, through such an approach, the different kinds of delegations contained in the constitutions get confused (firstly, the purposeful delegations and the inadvertent ones, the product of mistakes, constraints on language and prediction, and the workings of aggregate decisionmakers<sup>155</sup>). But also, in terms of institutional choice, no one in the present generation would need to choose among social decision-makers, since those choices have already been made by the framers, clearly settled in their 'original position' or suggested by their 'original intent'.<sup>156</sup> This fails to recognize, for example, that the framing of open-ended clauses is sometimes an intentional exclusion of certain issues from the

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<sup>150</sup> R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Indiana Law Journal*, 1 (1971)

<sup>151</sup> A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997, Princeton University Press)

<sup>152</sup> W.H. Rehnquist, *The Notion of a Living Constitution*, 54 *Texas Law Review*, 693 (1976)

<sup>153</sup> Which holds that interpretation of a written constitution is (or should be) consistent with what was meant by those who drafted and ratified it

<sup>154</sup> Closely related to textualism, it is the view that interpretation of a written constitution or law should be based on what reasonable persons living at the time of its adoption would have declared the ordinary meaning of the text to be

<sup>155</sup> N. Komesar, *Back to the Future – An Institutional View of Making and Interpreting Constitutions*, 81, *Northwestern University Law Review*, 192 (1987)

<sup>156</sup> N. Komesar, *Imperfect Alternatives*, *supra* note 22, at 262

bargaining political process in favour of the insularity of third bodies. Nonetheless, albeit to different degrees, a large number of critical commentators commonly categorize as activist those decisions seen as interpreting a provision contrary to 'their' supposed reasonably clear and consensual intentions of its writers. More specific illustrations can be found in some typical cases. Firstly, we can consider those decisions applying a provision to a situation existing at the time of the provision's adoption, where it is clear that the drafters did not intend it to apply. The history of the US Supreme court gives us some notorious historical case studies, analysed by several scholars<sup>157</sup> dealing with the question. Secondly and more commonly, however, there are those decisions which apply constitutional norms to situations where the drafters did not and could not anticipate any application. It is easier here to exemplify, by finding hints in almost every constitutional environment. The most widely known case is, of course, the US Court's extensive interpretation of the Fourteenth Amendment's 'due process clause'.

### 1.6 Interpretative stability

Several supreme courts and constitutional courts hold, in addition to a '*nomopoietic*' function, a broad '*nomophylactic*' one. They are also φυλακες, '*guardians*', of the uniform interpretation of the law and of the coherence of the legal order to which they belong. In fulfilling this function, they indirectly protect and promote equality before the law. For this reason, when examining the dimension of courts' interpretative stability, one should look both inward and outwards: at stake are both the coherence of tribunals with their own arguments, their own reasoning, their own established line of cases shaping a narrative of the legal order, and the consistency and certainty in the relations between the powers of the state and the individual citizens.

'Interpretative stability' is an important element in the debate over the merits of activism, although it is often unrecognized as such and its components are often poorly articulated. In general, from an institutionalist viewpoint,<sup>158</sup> it studies the 'management' by the courts of their case-

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<sup>157</sup> E.g. the classic American case study *Home Building and Loan Association v. Blaisdell et al.*, 290 U.S. 398 (1934), the so called "Minnesota moratorium case", cited both by B.C. Canon, *supra* note 44, at 244 and A. Bickel, *The Least Dangerous Branch*, *supra* note 11, at 106

<sup>158</sup> M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 *Law in Transition Quarterly*, 134 (1965); *Id.*, *Toward a Theory of Stare Decisis*, 1 *J. Legal Stud.* 125, 133-134 (1972); Herbert M. Kritzer, *Anticipating the New Institutionalism: The Pioneering Work of Martin Shapiro*, in N. Maveety (ed.) *The Pioneers of Judicial Behavior*. (Ann Arbor 2003, University of Michigan Press)

law and its development. It measures the degree to which a court decision either retains or abandons precedent or existing judicial doctrine, studying the dynamics of the relationship between the obligation to *stare decisis* and the legal reasoning of the court itself. After all, a common perception in reading some classics of American constitutional theory and constitutional history is that in some phases the Supreme Court (especially – but not only - the Warren Court) has been criticized more for the frequency and scope of its radical alterations of prior jurisprudence than for the anti-majoritarian nature of its decisions.<sup>159</sup>

The presence of previous case-law and the formal or informal tie to respect for precedents can be at the same time a constraint for the work of the courts and an opportunity for new discretionary activity. Firstly, a certain discretionary power of management of case-law seems to lie in the choice of the cases to be treated. Where a formal power of *certiorari* is not provided, courts have in any case obtained, through various techniques and different interpretations of the concepts of *standing* and *justiciability*, important spaces of discretion. An analysis of the use and misuse of such spaces, in the *ex ante* selection of the *jurisprudential narrative* of a legal order, is undoubtedly part of the debate on 'activism', given the possible instrumentality of such choices. In any case, the most dramatic *caesura*, the most dramatic instance of interpretative instability, obviously occurs when a court explicitly overrules one of its own earlier decisions. A loss of legal certainty is directly implied; in addition, several methodological questions, with strong practical consequences, arise. The first questions are in terms of transparency: judges usually are straightforward about such shifts, with explicit statements of overruling; sometimes they are indirect or reticent, creating even more uncertainty and further complicating the interpretative framework. Moreover, a court can also weaken a precedent, more or less radically, again without formally overruling it; or, conversely, it can enhance a precedent by expanding its interpretation, applying it to a new legal area, or giving it hitherto rejected or unforeseen implications. In deciding what a precedent means, it seems that a court should pay attention to comparative institutional considerations too, at least in terms of judicial fallibility (“*judges might not know what they are doing*”<sup>160</sup>) and dynamic effects, which courts are often not in a good position to anticipate.

“*In point of fact, precedents may also entail more freedom for the interpreter, insofar as they deflect the interpreter from the text, from the intentions of its authors, directing it towards the web of precedents*”:<sup>161</sup> a court remains more or less free to depart from its own precedents or, more often, to distinguish a case, when there is a need to adapt both text and case law to a changing context. Of

<sup>159</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miranda v. Arizona* 384 U.S. 436 (1966) are the most typical references

<sup>160</sup> A. Vermeule, C.R. Sunstein, *Interpretation and Institutions*, *supra* note 23, at 947

<sup>161</sup> S. Acierno, *The Role of the European Court of Justice in a Pluralist Context*, in J. Baquero Cruz, C. Closa Montero (eds.), *European Integration from Rome to Berlin: 1957-2007* (Bern 2009, Peter Lang Publishing Group) at 258

course, some reduction or growth in scope and reasoning naturally occurs. It is normal that, over time, subsequent decisions may put some limits on a precedent's applicability, or vice versa may find new patterns of application, perhaps by analogy. But when a precedent is drastically weakened, say by a single subsequent decision which greatly restricts its scope, possibly compromising its logic, the ideal of interpretative stability is equally weakened. And most importantly, sometimes one can find an instrumental use for such processes, which is probably one of the most frequent accusations of the discretion of the courts: for example, this can be seen in the widespread case of *step-by-step* introductions of new doctrines and policies (in the way that, somewhat banally, commonly goes by the name of 'judicial agenda'<sup>162</sup>).

A final, perhaps obvious, remark on this point links the dimension of 'interpretative stability' even more closely with most of the other criteria already examined, and seems to close the circle of our reflections. The parameter by which the stability in question is measured may not necessarily be a precedent, meant as a previous judicial decision on the same matter. Another baseline is the concept of the '*ongoing interpretation*' of the constitution, intended as the "*inferential interpretation of constitutional meaning drawn from longstanding and/or widespread laws and practices*".<sup>163</sup> Despite the apparent vagueness of this concept, its meaning is clear, and consistent with the evolving debate on activism as a whole. The mode, degrees and acceptability of judicial discretion should be evaluated in light of the diversity of voices within the plural constitutional community, taking into account different perspectives and different interpretations, trying to combine legal and political analysis. This also allows for a better assessment of the general external perception of the role of the court itself, fundamental ingredient of their legitimacy. The evaluation of this 'external component', its weight and its value, remains the biggest issue underlying the entire 'judicial activism' debate, and perhaps hindering the possibility of its sure dogmatic definition. However, it underlines the necessary correlation - in direct proportionality - of the constitutional justice organs with the social consensus itself on the constitution.

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<sup>162</sup> Perhaps this can be described as an 'original sin', being a common accusation also to Justice Marshall and to the historical introduction of judicial review of legislation in the US. On the legitimacy of strategic action by the courts one can recall the controversy between A. Bickel and Herbert Weschler, on which see G. Gunther, *The Subtle Vices of the 'Passive Virtues' – A Comment on Principle and Expediency in Judicial Review*, 64 Columbia Law Review 1 *passim* (1964)

<sup>163</sup> B.C. Canon, *supra* note 44, at 242



*Some very brief concluding remarks*

'Judicial activism' means different things to different people. It seems that a 'multidimensional' approach, like the one I have tried to adopt throughout the paper, can represent the most effective attempt to conceptualize the related discussion, or at least to provide a taxonomy of the critical perceptions on judicial decision-making. The result is a brief journey through some well-recognised problems of constitutional theory, highlighting the latent and often intractable tensions inherent in them.

A pragmatic discussion in this perspective starts acknowledging the function of judicial interpretation as often creative, sometimes even unavoidably creative. Firstly, it is necessary to identify the spaces, the 'dimensions', in which such a role is placed; and then, as already pointed out, the inquiry must turn to the *degree* of creativity, and to the questions of the *mode*, the *limits*, and the level of *acceptability* of law-making through the courts. The first stage is therefore heuristic, while the second is clearly empirical and casuistic.

Often, however, leading constitutional theories add to their reflections a clear normative option on the work of courts, and this obviously orientates any subsequent investigation. As I tried to explain, what is interesting in institutional analysis, and in Komesar's works in particular, is the focus on second-best enquiries about institutional performance and systemic effects, rather than about first-best principles. 'Judicial activism' is about tensions between decision-making bodies, each with its own characteristics and neither of which is working in an institutional vacuum. If it is true that, after the definition of a heuristic framework, “(t)he case for constitutional judicial review varies from one setting to another”,<sup>164</sup> understanding “what factors determine or should determine this variation” is more related to a kind of “not indifferent” but “agnostic” position, than to a constitutional scholarship which is “strong on positions and weak on analysis”.

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<sup>164</sup> N. Komesar, *Slow Learning in Constitutional Analysis*, 88, *Northwestern University Law Review*, 212, 219 (1993)