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American Judicial Review of Legislation
in Deciding over Rights?

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MINIMALISM: AN IMPLICATION FOR AMERICAN JUDICIAL REVIEW OF LEGISLATION IN DECIDING OVER RIGHTS?

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The diverse theories of constitutional interpretation in the United States share one strong common purpose: to constrain the adjudicator. Whether is text, tradition, structure or democracy, the prevailing fear behind these reasons is the inescapable empowerment of the “least dangerous branch” that comes with judicial review. This anxiety can be explained through the analysis of the systemic and contextual factors in American constitutionalism. Furthermore, because of the constitutional structure of the United States, there is a permanent tension in judicial activity between certainty and legitimacy. Therefore, I defend a minimalistic approach for judicial review of legislation, particularly in cases dealing with fundamental rights under circumstances of disagreement.

“The spirit of liberty is that spirit which is not too sure that is right...”

Judge Learned Hand

INTRODUCTION

The debate over competing theoretical approaches to interpretation of constitutional text occupies a fundamental place in Western democracies. Each country, however, has to deal with its own practical nightmares. Although constitutional review has been entrenched longer in the United States, it is more firmly grounded in Europe.¹In fact, constitutional adjudication enjoys less legitimacy in the United States than in Europe, where special constitutional courts where created for that purpose. This situation reflects on every theory of constitutional interpretation that has been developed since *Marbury v. Madison*.²

Legal interpretation in the United States, having its roots in the common law tradition,

¹ Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT’L J. CONST. L. 633 (2004).

² 5 U.S. (1 Cranch) 137 (1803).

involves an inductive process and therefore allows greater variations than civil law adjudication. However, when interpreting the Constitution, the Judiciary has encountered not only the restraints of precedents but also, and more importantly, the objection that judicial review constitutes a “countermajoritarian” force in American society.³ Why should unelected and unaccountable judges decide what the law is? Additionally, there is no provision in the American Constitution that explicitly empowers the Judiciary to interpret it and to enforce that interpretation. Furthermore, judges have to deal with an extraordinarily brief document more than two hundred years old that uses general and broad provisions and that is extremely difficult to amend. What should be the role of judicial review in the United States?

In what follows, I focus first on the systemic and historic factors in American constitutionalism that produced the “countermajoritarian objection”. Some scholars consider as a paradox the fact that a country belonging to common-law tradition (where judges constitute a legitimate source of law) faces such a strong reluctance towards constitutional adjudication. I argue that what seems to be a paradox is actually a result of structure and history in a strong democratic system as the United States.

Secondly, I address the consequences for constitutional adjudication given the American constitutional framework. Stressing the existing tension between certainty and legitimacy in judicial activity, I concentrate on the radical effects that Article V’s amendment process produces in the constitutional dynamics. I defend the idea that the hard amending procedure blocks in a very important degree the dialogue among institutions. This is the call for minimalism. Narrow rulings, attuned to particular facts and theoretically unambitious, are the best medicine against the “gouvernement des juges”,⁴ so feared by We the People and contrary to the American principles framed in the Constitution.

More particularly, following Jeremy Waldron, I explore the idea that under circumstances

³ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

⁴ Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (1921).

of disagreement about rights, American judicial review produces an inappropriate mode of final decision-making in a free and democratic society.⁵ While it is true that minimalism requires a case-by-case inquiry,⁶ when judges must review legislation about fundamental rights where society is deeply divided, a minimalistic approach becomes a rule. Any other choice would exacerbate the constitutional system and put the legitimacy of the judicial institution in jeopardy.

I. AMERICAN CONSTITUTIONAL STRUCTURE IN A NUTSHELL

In 1787, the United States of America adopted its Constitution, concerned dominantly with the structure of the national government and the powers of its three branches: legislative, executive, and judicial. In 7 articles, the document outlines the powers each branch may exercise and how the federal system should be organized. The Constitution provides a deliberately difficult mechanism for changing its terms.⁷ From the adoption of the document to 2008, this mechanism has been exercised only 27 times. This is the oldest existing Constitution in the world and among the shortest as well.

For a foreign observer, one of the most salient features of the American Constitution is that the text details few individual rights. The Bill of Rights, added in 1791, did not even declare the most basic ones. Instead, it assumed they exist and simply tells the state to keep its hands off.⁸ Underlying this structural choice is the American conception of fundamental rights as essentially “negative rights” of the citizens against the state, predicated on John

⁵ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

⁶ Cass R. Sunstein, *Problems with Minimalism*, 58 Stan. L. Rev. 1899 (2006).

⁷ Under Article V, the amending process may begin only if two-thirds of both Houses propose an amendment or if the legislatures of two-thirds of the states call for a constitutional convention. No amendment may be adopted until it is ratified by three-fourths of the states.

⁸ Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 La. L. Rev. 1019. See, for instance, the words of the First Amendment: “Congress shall make no law... abridging the freedom of speech or of the press”. The emphasis is on the prohibition, not in the definition of the right or its limitations.

Locke's theory of pre-political, natural, and inalienable rights.⁹

Not only do the vast majority of modern constitutions include affirmative statements of civil and political rights, but they also contain economic and social guarantees (like the right to obtain employment, to receive health care and free public education). Nothing similar we find in the American Constitution. Even if it is true that the framers were building on rights as understood in the British tradition (and the constitutionalization of social and economic rights was a most foreign concept at the time), constitutional change could have been achieved, either by amendments to the document or by judicial interpretation, to include these guarantees.¹⁰ It would not be fair, however, to say that social and economic rights were not an issue in the United States. In the New Deal era, there were strong efforts to implement a Second Bill of Rights, only not through constitutional reform.¹¹ The later was not an attractive option in light of the "inevitable fact" that any such amendment would increase the authority of judges.¹² As Justice Ruth Bader Ginsburg clearly states, if the United States place economic and social security guarantees explicitly in the Constitution, "our style of constitutional review by courts would require adjustment."¹³

Then, how does judicial review fit in this government-hands-off framework? In order to shed some light on the possible answers, it is necessary to analyze the revolutionary

⁹ Rosenfeld, *supra* note 1, p. 8.

¹⁰ Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 Syracuse L. Rev. 1 (2005).

¹¹ *Id.* at p. 8. President Franklin Delano Roosevelt set forth the notion of the "Second Bill of Rights" in the State of the Union address in 1944. Roosevelt proposed no constitutional amendment, and no judicial role, but instead an effort by Congress to "explore the means for implementing this economic bill of rights".

¹² *Id.* at p. 9. This point is closely related to the American conception of constitutions as pragmatic instruments, "suited for, and not inextricable from, judicial enforcement". Sunstein argues that when presented with a proposed constitutional provision, many Americans tend to ask, "What will this provision do, in fact? How will courts interpret this provision, in fact?" This distinction between the pragmatic and the aspirational conceptions of constitutions is crucial to understand the brevity of the American document. It is important to say, however, that some nations, like India and South Africa, have done relevant efforts to enforce social and economic rights through their courts. According to the author, a more realistic explanation of the reticence of the United States towards social and economic rights suggests that American constitutional law could have come to recognize them, but "the crucial development was the election of President Nixon in 1968, which produced four Supreme Court appointments. This, in turn, lead to a critical mass of justices willing to reject the claim that these rights were part of the Constitution."

¹³ Ginsburg, *supra* note 8, p. 6.

democratic character of the American Constitution and its consequences on constitutional interpretation. Underlying this analysis is the thesis that defining the United States only as a common-law country is a radically incomplete statement of its constitutional dynamics.

A. We the People and the Judiciary

Before 1787, democratic self-government existed almost nowhere on earth and no people had ever explicitly voted on their own constitution.¹⁴ *The Federalist* papers, advocating the ratification of the document, emphasized the “popular rights” that “the people” “retain” and “reserve” and may “resume” and “reassume”, stressing popular sovereignty as a central principle of the American founding.¹⁵ Akhil Amar underlines the prominent democratic aspect in the creation of the United States in a scale that had no parallel at the time and its repercussions in constitutional enforcement.

Amar argues that the framers introduced democracy in each branch of government, implying a self-conscious conception that stood against monarchical and aristocratic structures.¹⁶ Although the word *democracy* was not mentioned in the document and the number of representatives was quite low, fixed and frequent elections as well as a powerful Congress (that the Executive could not dissolve) were two main points of the new Constitution. Direct presidential elections were not possible due to information barriers, federalism, and slavery, but it cannot be denied that the electoral rules were more populist

¹⁴ Akhil Reed Amar, *America’s Constitution. A Biography* (2005). Although the ratification votes in the several states did not occur by direct statewide referenda, the various ratifying conventions did aim to represent “the People” in a particularly emphatic way. See p. 7.

¹⁵ *Id.* at p. 11. *Federalist* No. 78, for instance, stated “the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness.”

¹⁶ *Id.* at p. 14. No constitutional property qualifications would limit eligibility to vote for or serve in Congress, nor could Congress add any qualifications by statute. Also, Article I prohibited hereditary government positions via titles of nobility. Finally, Under Articles II and III, the presidency and federal judgeships would be open to the common men in a meritocratic process. Juries and militias constituted two democratic institutions as well.

and less property-focused than ever before.¹⁷

Although modern Americans associate immediately the enforcement of the Constitution with judicial review, the framers integrated several other enforcement devices in its general system of check and balances designed to “minimize the likelihood that an arguably unconstitutional federal law would pass and take effect”.¹⁸ These choke points included the executive veto over bills that violated the President’s understanding of the Constitution, pardons and the possibility of non-enforcement. Each of the Houses was expected as well to prevent enactment if “a bill offended *its* distinct constitutional sensibility.”¹⁹ Other legal institutions, as the grand-jury refusals to indict and jury acquittals, contest the assertion that judicial review was a unique attribute of judges. Constitutional oaths and constitutional popularity presupposed that “the Constitution spoke not merely to federal judges, but rather to all branches and ultimately to the people themselves.”²⁰ In this framework, judicial review was only one more tool in constitutional enforcement, not the widely accepted monopoly that is today. Furthermore, the document itself says nothing about authorizing the federal judiciary to review the constitutionality of acts of Congress.

While Chief Justice John Marshall’s claim that the Constitution is “superior, paramount law” in *Marbury v. Madison*²¹ is unobjectionable, it is possible to accept that claim without also thinking that judicial supremacy is a must, or even that courts are authorized to strike down statutes that violate that law. Larry D. Kramer claims that for the framers, the Constitution was “a special form of popular law, law made by the people to bind their governors.”²² Constitutional principles were subject to “popular enforcement”²³ rather than

¹⁷ Id. at p. 155. Ordinary voters might not know enough to evaluate presidential candidates from faraway states and a direct national election would be very hard to administer. Regarding slavery, the electoral-college mechanism favored southern states that could factor slaves into the system.

¹⁸ Id. at p. 62.

¹⁹ Id. at p. 60.

²⁰ Id. at p. 63.

²¹ *Supra* note 2.

²² Larry D. Kramer, *The Supreme Court 2000 Term –Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001). In Kramer’s account, American constitutionalism has consisted of a struggle between two principles: popular

judicial activity. According to Kramer, constitutional limits would be enforced not through courts, but “as a result of republican institutions and the citizenry’s own commitment to its founding document.”²⁴ Judges would intervene “only when the unconstitutionality of a law was clear beyond dispute.”²⁵

More than disputing the “historical pedigree” of the judiciary, what is relevant for my purposes is to underline that, in the permanent tension between democracy and constitutionalism, the American system favors the democratic extreme. The Constitution, providing for congressional elections and prescribing a republican form of government for the states, expresses “its clear commitment to a system of representative democracy at both the federal and state levels.”²⁶ Even if it can be argued that some of the framers were quite suspicious of the exercise of power by *the People* directly,²⁷ it is undeniable that both the document and the propaganda around it strongly supported popular sovereignty and majoritarian democracy. Madison was certain that “in republican government, the legislative authority necessarily predominates.”²⁸ Even the textual order of the document, listing the judicial branch third, makes a strong democratic sense.²⁹

Contrary to legislatures, the framers provided that federal judges would have no say in the selection of the chief justice, lower federal judges would have no formal input in selecting

constitutionalism and legal constitutionalism. In the first system, “the role of the people is not confined to occasional acts of constitution making”, but includes active control over the interpretation and enforcement of the Constitution. Legal constitutionalism, in contrast, relocates final authority to constitutional adjudication in the judiciary. Kramer claims that it was popular constitutionalism the dominant public understanding at the time of the framers. See Larry D. Kramer, *Popular Constitutionalism*, 92 Cal. L. Rev. 959 (2004).

²³ Id. at p. 40.

²⁴ Cass Sunstein, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, p. 28.

²⁵ Id. at p. 28. This is very similar to James Bradley Thayer’s position that a violation of the Constitution has to be “morally certain” and “beyond any reasonable doubt”. He advocates for a *rule of clear mistake*. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

²⁶ John Hart Ely, *Democracy and Distrust* (1980).

²⁷ In *The Federalist* No. 10, Madison stated that representation would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”

²⁸ *The Federalist* No. 48.

²⁹ Amar, *supra* note 208.

Supreme Court associate justices, nor the Supreme Court could appoint or remove any lower court judge.³⁰ Furthermore, the Constitution set out important ways in which the judicial power would be subjected to political control, such as the mechanisms of appointment of justices and their possible impeachment. No wonder why the court has, or perceives itself as having, a limited amount of “political capital,” and it tends to budget its expenditure of that capital in the number and kinds of controversial decisions it renders.³¹

With this strong democratic structure, a powerful intuition grows about how this weak Judiciary should intervene in the constitutional dynamics. Is not a coincidence that popular constitutionalism has such force among American scholars. The main idea of “popular constitutionalists” is that the authority to interpret and enforce the Constitution is not deposited exclusively or ultimately in the government, but remains in politics and with “the people themselves.”³² Although this view implicitly challenges judicial review, it may vary from author to author. For instance, Jeremy Waldron rejects judicial review arguing that there is no reason to suppose that rights are better protected by the Judiciary than they would be by democratic legislatures.³³ Mark Tushnet believes that we should actually “take the Constitution away from the courts.”³⁴ Taking some distance from these interesting and provocative attacks on judicial supremacy (or even on judicial review itself), I argue that where judicial review is only one more instrument in constitutional interpretation and enforcement, the role of the courts should be soaked in prudence. Each step of the Judiciary (no matter how audacious or “beneficial”) will be under the scrutiny of “We the People”. Furthermore, in issues where society is deeply divided, the Court will necessarily lose, since half of the population will not agree with its ruling. Even if it is true that constitutional adjudication is not a popularity contest, a compelling argument, rooted in history, structure,

³⁰ Id. at p. 209.

³¹ Alexander Bickel, *The Least Dangerous Branch* (1962), at p. 116.

³² Larry D. Kramer, *Popular Constitutionalism*, 92 Cal. L. Rev. 959 (2004).

³³ Waldron, *supra* note 5.

³⁴ Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

and text, will arise: the countermajoritarian objection. “Nothing...can alter the essential reality that judicial review is a *deviant* institution in the American democracy”.³⁵

The existence of Bickel’s famous difficulty in the American context constitutes the object of heated debate. Michel Rosenfeld describes this situation as a paradox.³⁶ Rosenfeld gives two main reasons. First, the United States belongs to a common law tradition, where judges constitute a legitimate source of law. Secondly, unlike the United Kingdom or France, the United States does not have a tradition of parliamentary sovereignty. Why then the Supreme Court lacks legitimacy to invalidate Congress’ acts? The United States cannot be described *only* as a common law country. It is certain that common law has a central place in American legal tradition. However, the crucial importance of popular sovereignty in the framers’ mind should not be left unseen. The strong democratic structure described in lines above and the increasing importance of statutory law and executive regulations presents a more balanced picture. Furthermore, it is misleading to compare the Supreme Court with European constitutional courts to explain the strength of the countermajoritarian difficulty in the United States, for various reasons.

First, Europe has recently created these specialized constitutional courts, explicitly entitled to adjudicate constitutional meaning. Their functions are widely described in the Constitution itself, closely related to ease the historical anxieties derived from tyrannical legislatures such as the one that supported the *nazi* regime in Germany. The history of the Supreme Court is radically different. The Supreme Court is primarily an appellate court. Constitutional adjudication is only ONE of its tasks, and it is not even explicitly provided in the document. The role of the Supreme Court, and of the whole Judiciary, has to be understood in the conception of *checks and balances*, while the emergence of constitutional courts in Europe, originally proposed by Hans Kelsen in the 1920’s, was a response to

³⁵ Alexander Bickel, *supra* note 2, at p. 18 (emphasis added).

³⁶ Rosenfeld, *supra* note 1, at p. 12.

historical atrocities after World War II. European centralized and abstract judicial review differs greatly in its origins and scope from the American one, decentralized and concrete. Although some scholars defend the idea of an increasing convergence of the two models,³⁷ it is fair to say that in terms of the countermajoritarian difficulty, they cannot be easily compared. One crucial structural aspect gets on the way: the possibility of institutional dialogue.

B. Dialogue among branches

Everyday process of constitutional interpretation integrates all three branches of government and, ultimately, the people themselves. In the framework of popular constitutionalism, citizens may participate in different scales and means. My assumption is that they use either Article V to amend the Constitution, or they influence public officials and compel to incorporate their own constitutional understandings through institutions.³⁸

The degree of institutional dialogue among countries varies greatly. In the American framework, one factor is crucial: the amending process provided in Article V of the Constitution. Among the most difficult constitutions to amend are those of the United States and Australia. The United States requires passage by a two-thirds majority in each chamber of the federal Congress, followed by ratification by three-quarters of the 50 states legislatures. Since 49 of the 50 states are bicameral and ratification in bicameral states requires a majority vote in both chambers, a negative vote by as few as 13 of the country's 99 state legislative chambers is sufficient to defeat a proposed amendment.³⁹ What consequences does this procedure create?

Every functioning liberal democracy depends on a variety of techniques for introducing

³⁷ Francisco Fernández Segado, *La justicia constitucional ante el siglo XXI: la progresiva convergencia de los sistemas americano y europeo-kelseniano*, México, IJ-UNAM, Series Estudios Jurídicos, No. 64 (2004).

³⁸ Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006). Under Siegel's vision, the dichotomy between interpretation and lawmaking ultimately collapses.

³⁹ Dorsen, Rosenfeld, Sajo Baer, *Comparative Constitutionalism* (2003), at p. 91.

flexibility into the constitutional framework.⁴⁰ The two usual methods are, first, amendment and, second, judicial interpretation in the light of evolving circumstances and social norms. There are “intriguing or mutual compensation effects” of constitutional amendment and constitutional interpretation, and they can help to understand the relation between the judiciary and the other branches. However, that does not imply that a hard amending procedure must be followed by a strong judicial review.

According to Bruce Ackerman, “it is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change”.⁴¹ Ackerman defends the idea of a “living Constitution” that does not need Article V anymore to achieve constitutional change. I argue that this vision may generate very complex issues in terms of legitimacy and even recognition. The Supreme Court is still recovering from the accusations of judicial activism during the *Warren* era, even with the sympathy of liberal scholars. What conclusions must be drawn from the hard amending process provided by Article V? The institutional dialogue, desirable in every liberal democracy, has to be ongoing and dynamic. Even if it is true that courts are not “some bastard child standing aloof from legitimate political dialogue”,⁴² Article V constitutes a call for prudentialism.

Only four times an amendment has overruled a decision of the Supreme Court: *Chisholm v. Georgia*, the 14th Amendment’s repudiation of Taney’s lead opinion in *Dred Scott v. Sanford*, the 16th Amendment’s pointed reversal of *Pollock v. Farmers’ Loan & Trust Co.*, and 26th Amendment’s overturning of the result in *Oregon v. Mitchell*. Acknowledging that there are mechanisms of responsiveness among institutions others than Article V, the fact that the Supreme Court might block the dialogue with such a difficulty to overcome its decision, creates a strong intuition of self-restraint. The invalidation of a law is much more drastic in the United States than in other countries. Even if it was not conceived at all by the framers as

⁴⁰ Id. at p. 92.

⁴¹ Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737 (2007), at p. 4.

⁴² Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, at. p.4.

an “unchecked check”, the Supreme Court does have, in great measure, the “final word”. The argument that in its vast majority of rulings the Court is inevitably a part of the dominant national alliance and does not actually counteract the “popular sovereignty”, instead of apologetic is actually scary. Why do we need then judicial review of legislation?

Judicial review of legislation is one more tool in defending the “core” of agreement about the constitutional essentials.⁴³ This set of substantive ideals has been defined by constitutional deliberation throughout the existence of the document:

[A]ll members of the constitutional culture agree, for example, that the Constitution protects broad rights to engage in political dissent; to be free from discrimination or mistreatment because of one’s religious convictions; to be protected against torture or physical abuse by the police; to be ruled by laws that have a degree of clarity, and to have access to court to ensure that the laws have been accurately applied; to be free from subordination on the basis of race and sex.⁴⁴

With this *minimal* agreed-upon background, taken as the preconditions of a well-functioning constitutional democracy, courts can exercise judicial review of legislation with entire legitimacy. Not because they are experts on process or political outsiders.⁴⁵ Not because these issues involve a matter of principle⁴⁶ and courts are the perfect forums.⁴⁷ The reason why judicial review of legislation makes sense is simply because it is part of the institutional dialogue and constitutional deliberation. It is part of the mechanics of checks and balances. The Judiciary, in this dialogical system, is just one more tool. Its function, therefore, must be deeply related to increase reflection and debate at the local, state, and national levels. Now, the question is how this function can be effectively exercised?

Probably, the best way to answer is to address not only possibilities of the courts to

⁴³ Cass Sunstein, *One Case at a time. Judicial Minimalism on the Supreme Court* (1999), at p. X.

⁴⁴ *Id* at p. XI.

⁴⁵ This would be the position of John Hart Ely. See Ely, *supra* note 26.

⁴⁶ Bickel, *supra* note 3.

⁴⁷ Ronald Dworkin, *A Matter of Principle* (1985).

promote constitutional democratic values but, more importantly, its limitations. The awareness of the costs of error and the costs of decisions are crucial.⁴⁸ When judges have the information and the capacity to produce decent rules, they have good reason to attempt to do exactly that. But, what if judges lack the information and that capacity? This situation occurs much more frequently than one ordinarily thinks. In those cases, prudentialism is again the option. Judges can reasonably limit their decisions to particular facts for fear that broad decisions will have unfortunate systematic consequences that they cannot predict. The hard-amending process, again, should be an incentive for humility. Furthermore, why should the Court interrupt an active debate at Congress? Perhaps cautious and incremental judgments would represent a form of deference to ongoing processes that are more likely to settle the issue. Obviously, this sounds less attractive in principle to the public officials that work at the Judiciary.

The assertion defending prudentialism goes exactly in the opposite direction of Dworkin's moral reading of the Constitution. The Supreme Court is not necessarily well equipped to evaluate moral arguments, or at least not more than other branches. While Hercules indeed would know what justice is, real courts may not understand what justice requires, or may not be good at producing justice even when they understand it. When we deal with the fact that people disagree sharply about what constitutes a good outcome under the Constitution, the role of the Judiciary should not be to kill the dissonant narratives and impose its own, but to enhance dialogue at the same time that it settles the particular dispute.

This is not the currently dominant academic theory of judicial review. Dworkin insists that "is too late for the old, cowardly, story about judges not being responsible for making" moral choices, "or that it is undemocratic for them to try".⁴⁹ Lawrence Tribe considers is precisely the justices' job to make "difficult substantive choices among competing values,

⁴⁸ Cass Sunstein, *Interpretation and Institutions*, 101 Mich. L. Rev. 885 (2005), at p. 29.

⁴⁹ Ronald Dworkin, *Freedom's Law* (1996), at p. 38.

and indeed among inevitably controversial political, social, and moral conceptions”.⁵⁰ The result of such an approach is what Charles Black named “a sometime thing”, with people supporting judicial review for the few cases they cherish (like *Brown v. Board of Education of Topeka*⁵¹ or *Roe v. Wade*⁵²) and opposing it when it leads to outcomes they deplore.

Faith in judges is related with various fallacies regarding their “better position” to decide issues about fundamental rights. Jeremy Waldron argues that there is no reason to suppose that rights are better protected by judicial review than they would be by democratic legislatures.⁵³ For instance, no matter how many times scholars repeat it, a practice of judicial review not necessarily protects minorities. Judicial review cannot do anything for the rights of a minority if there is no support at all in the society for minority rights. What happens if some elite members do share some sympathy for the minority? The only argument for giving final authority to judges is that elite sympathizers in the judiciary are better able than elite sympathizers in an elected legislature to protect themselves when they accord rights to the member of an unpopular minority.⁵⁴ That is because they are less vulnerable to public anger and they need not to worry about retaliation. Therefore, they are more likely to protect the minority. However, this is not rule. As Robert Dahl points out, “it seems unrealistic to suppose that a Court whose members are recruited in the fashion of U.S. justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”⁵⁵

After these considerations calling for a prudent and humble Judiciary, I address the

⁵⁰ Laurence H. Tribe, *American Constitutional Law* (1998), at p. 584.

⁵¹ 347 U.S. 483 (1954).

⁵² 410 U.S. 113 (1973).

⁵³ Waldron, *supra* note 5. In this interesting essay, Waldron sets out four assumptions that make judicial review illegitimate: a) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; 3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and 4) persisting, substantial, and good faith disagreement about rights among the members of the society who are committed to the idea of rights.

⁵⁴ *Id.* at p. 7.

⁵⁵ Robert Dahl, “Decision Making in a Democracy: The Supreme Court as a National Policymaker”, in *Toward Democracy: A Journey, Reflections 1940-1997* (1997).

consequences for constitutional adjudication given the American constitutional framework as described and the institutional limitations inherent to the judicial role.

C. Implications on constitutional interpretation

The construction of theories pursuing to constrain the adjudicator with the countermajoritarian difficulty on mind is as old as judicial review. Significant efforts in the area of judicial prudence have been developed. Thayer developed his “rule of clear mistake” in the 18th century. Bickel’s passive virtues permit the Supreme Court *not* to resolve certain cases, by deferring the issue to the political process, like through the denial of *certiorari*. Even if it is certain that Bickel was not a minimalist, he was indeed a democrat. For Justice Louis D. Brandeis, the mediating techniques of “not doing” were “the most important thing we do”. Accordingly, Brandeis developed in *Ashwander v. Tennessee Valley Authority*⁵⁶ the avoidance doctrine, reciting the tradition Article III jurisprudence. He identified seven components of self-imposed restraint:

- 1) the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding;
- 2) the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it;
- 3) the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied;
- 4) the Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed;
- 5) the court will not pass upon the constitutionality of a statute unless the plaintiff was injured by operation of the statute;
- 6) the Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits;
- and 7) even if “serious doubt[s]” concerning the validity of an act of Congress are raised, the Court will first ascertain “whether a construction of the

⁵⁶ 297 U.S. 288 (1936).

statute is fairly possible by which the question may be avoided”.⁵⁷

Brandeis characterized judicial review of legislation as a “grave and delicate” power for use by fallible, human judges only when its use cannot conscientiously be avoided. This reluctance was based on the principle of separation of powers, which enunciates that one branch must not “encroach upon the domain of another”. His prudential approach inspired in some way Bickel’s work. However, if we cannot say that Bickel was a minimalist, Brandeis seems to defend narrow interpretation of statutes when they raise “serious constitutional problems”. He certainly urges judges to avoid making decisions regarding “unnecessary” constitutional questions. Definitely, his avoidance canon is premised on *deference* to the legislature’s role in a constitutional democracy.

This prudential understanding of the constitutional dynamics is certainly much more congruent with the document’s structure than Dworkin’s idea of judicial activity. However, it has received a lot of criticisms as well. Some of them are well founded. For example, the Court’s use of the avoidance doctrine has been inconsistent and sometimes politically driven. The same liberals that were celebrating it a few years later were praising the active Warren Court that recognized new constitutional rights. More importantly, the avoidance doctrine may cause important delay in securing fundamental rights. Narrow rulings sometimes neglect certainty and they offer little guidance. Furthermore, when the democratic process is in danger, avoiding a strong and emphatic defense is actually neglecting entirely the judicial role.

There is a permanent tension between certainty and legitimacy in judicial activity. Judges must find a balance that allows them to solve the dispute without eliminating the possibility of institutional dialogue. Is this possible? Minimalism may give some answers.

⁵⁷ Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B. C. L. Rev. 1003, (1994), at p. 7.

II. MINIMALISM AS AN IMPLICATION

A commitment to judicial minimalism is related to a general preference to narrow and shallow rulings, closely attuned to particular facts. It is willing to assume the costs of uncertainty to give space to deliberative democracy. However, minimalism does not necessarily mean “judicial restraint”, if we understand the latter as judicial general unwillingness to invalidate legislation.

A. Which kind of minimalism?

Those who favor minimalism tend to be humble about their own capacities. Minimalists prefer to rule cases than to establish rules. Cass Sunstein has defined the “core” of judicial minimalism as supporting:

[t]hat courts should not decide issues unnecessary to the resolution of a case; that courts should refuse to hear cases that are not “ripe” for decision; that courts should avoid deciding constitutional questions; that courts should respect their own precedents; that courts should not issue advisory opinions; that courts should follow prior holdings but not necessarily prior dicta; that courts should exercise the “passive virtues: associated with maintaining silence on great issues of the day.”⁵⁸

Many of these measures are inspired in Article’s III jurisprudence, the avoidance doctrine, and actually they refer directly to the “passive virtues”. Their practice ultimately leads to *narrowness* and *shallowness* in the rulings. First, minimalists try to decide cases rather than to set down rules. In this way, they prefer to rule narrowly than broadly. The argument behind is the risk of producing errors that are at once serious and difficult to

⁵⁸ Sunstein, *supra* note 43, at p. 4.

reverse.⁵⁹ In other words, the likelihood that a wide ruling misfires is often high. Secondly, minimalists try to avoid issues of basic principle. They seek to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues.⁶⁰ In this way they attempt to reach “incompletely theorized agreements”. Following Sunstein, such agreements come in two forms: agreements on concrete particulars amid disagreements or uncertainty about the basis for those concrete particulars, and agreements about abstraction amid disagreements or uncertainty about the particular meaning of those abstractions. A couple of examples may shed some light.

In the first category, people may agree to protect free speech, whether because they think it endorses democratic self-government or because it is an expression of individual autonomy. Minimalist judges do not bother in solving these theoretical disputes. They limit their rulings to protect free speech. The second category refers to the possibility that people agree in protecting equality, whether they think or not that affirmative action is a legitimate way for achieving it. Minimalist judges will rule in a way that the concrete judgment just affects the particular case, without making abstract accounts or ambitious theories that would create a rule.

These decisions reflect the judges’ awareness of their limited place in the constitutional structure. Sunstein describes this practice as “economizing on moral disagreement”, with judges refusing to rule off-limits certain deeply held moral commitments when it is not necessary to do this to resolve a case.⁶¹ In this context, judges work to ensure that decisions are made by the democratically preferred institution of government.

It is true that many times a commitment to minimalism is hard to justify. Critics often argue that it leaves too much uncertainty, when the job of the courts is to provide guidance.

⁵⁹ Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353, (2006), at p. 7.

⁶⁰ *Ibidem*.

⁶¹ Sunstein, *supra* note 43, p. 26.

Justice Scalia deeply disagrees with minimalistic decisions, even more regarding the Supreme Court. Scalia argues that not only do they introduce uncertainty, but they export decision costs to others – above all, to lower courts and litigants, who must give “effective content” to the law.⁶² Furthermore, this kind of rulings leaves judges free to exercise their discretion so as to favor their preferred causes. Sunstein defends minimalism arguing that it must be decided in a case-by-case basis. When the issue requires a high degree of predictability and when the Court has had a great deal of experience with the area, width might well be justified.⁶³ Nevertheless, when a controversy has enormous stakes, it might be a good occasion for particularly small steps.

B. Disagreement about rights

Sometimes minimalism is an inevitable response to the practical problem of obtaining consensus in a heterogeneous society.⁶⁴ Within the Supreme Court, as within other institutions, a plural community implicates incompletely specified abstractions and incompletely theorized, narrow rulings. However the uncertainty this practice may bring, minimalism is a way to “show one another mutual respect”.

Certain forms of minimalism can promote democratic goals, not only by “leaving things undecided” but also by allowing opinion to form over time and by stimulating processes of democratic deliberation. With this in mind, the case for minimalism is stronger when courts are in front of issues about constitutional rights where society is deeply divided.

Disagreement about rights arises in any democracy, since dissent is appreciated. Examples quickly come to mind: abortion, the meaning of religious toleration, affirmative action, same-sex marriage. As Waldron says, “disagreement about rights is not unreasonable,

⁶² Sunstein, *Problems with Minimalism*, 58 *Stan. L. Rev.* 1899 (2006), at p. 10

⁶³ *Id.* at p. 11.

⁶⁴ Sunstein, *supra* note 43, at p. 259.

and people can disagree about rights while still taking rights seriously”.⁶⁵ When democracy is in a state of ethical or political uncertainty, courts may not have the best or the final answers. Judicial answers may be wrong. More importantly, they may be counterproductive even if they are right. In these circumstances, judges need to adopt procedures for resolving disagreements that respect the voices and opinions of the persons whose rights are at stake.⁶⁶ This means to rule narrowly and shallowly, in a way that will promote sustained debate and reflection. That is the principle of political equality, deeply entrenched in the American Constitution. In Waldron’s own words:

If a process is democratic and comes up with the correct result, it does no injustice to anyone. But if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannizes in *this* way, whether it comes up with the correct result or not.⁶⁷

The call for minimalism, then, is not a general rule. It becomes imperative under circumstances of disagreements about fundamental rights, where judicial review would be an inappropriate mode of final decision-making. Any other choice would exacerbate the constitutional system and put the legitimacy of the judicial institution in jeopardy. In that respect, rulings should be catalytic rather than preclusive.⁶⁸ By reinforcing institutional dialogue and deliberation, courts are congruent with the highest values of the Constitution: democracy and popular sovereignty.

⁶⁵ Waldron, *supra* note 5, at p. 30.

⁶⁶ *Ibidem*.

⁶⁷ Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, Oxford Journal of Legal Studies, 13, no. 1 (1993).

⁶⁸ Sunstein, *supra* note 43, at p. 6.

CONCLUSION

In the permanent tension between democracy and constitutionalism, the American system favors the democratic extreme. The reason why judicial review of legislation makes sense is because it is part of the institutional dialogue and constitutional deliberation. The Judiciary, in this dialogical system, is just one more tool. Its function, therefore, must be deeply related to increase reflection and debate at the local, state, and national levels. This role may be achieved through minimalism. Judicial minimalism is related to a general preference to narrow and shallow rulings, closely attuned to particular facts. It is willing to assume the costs of uncertainty to give space to deliberative democracy. While minimalism must be decided in a case-by-case basis, when judges review legislation about fundamental rights where society is deeply divided, a minimalistic approach becomes a rule. This is the most congruent practice given the constitutional text, history, and structure of the United States.