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Against judicial supremacy in constitutional interpretation

Donald E. Bello Hutt

1 Introduction

1 This article rejects judicial supremacy in constitutional interpretation. Here I stipulate, as for this notion, a state of affairs where the final word in providing constitutions with meaning is entrusted entirely to the judiciary.[1] It, thus, encompasses two related things: first, that judges interpret the constitution and decide their cases according to their interpretation and, second, that the reasoning and interpretation underlying and justifying these judicial interpretations are followed and uncontested by both other institutions and citizens. This places judicial reasoning in a privileged position compared to that of the rest of agents of a polity in general, and representative institutions and/or citizens themselves in particular.

2 Judicial supremacy comes into existence due to two independent, but often concurrent features: first, the image of the judiciary as the ideal repository of constitutional interpretation and, second, the social fact that constitutional practices increasingly transfer political power to their courts, notably in matters of constitutional interpretation. The upshot of these two features is a model that has been labelled *juristocracy*.[2] This is a model that "culminates in the extreme position that (a) there is no constitutional problem that cannot be solved by the courts and (b) no constitutional problem is truly solved until it is solved by a court".[3]

3 In this paper, I criticise both scholars endorsing and legal practices exhibiting these specific features (a) and (b), and their reasons for doing so. These theorists hold conceptions of interpretation that empower judges and give little power to citizens. One might say that they exclude citizens from interpreting their constitutions. In most cases, justifications for such judicial empowerment and such consequent exclusion of citizens are *implicit*. They are the result of a long tradition in jurisprudence of directing attention to understanding and prescribing the way that judges perform their duties. An

explanation for this trend, it seems, lies in the adoption of a non-reflexive point of view which assumes that interpretation is purely judicial in character. In other cases, there is an explicit preference for the courtroom as the ideal forum for interpretations of the constitution which so rejects other agents, particularly those who broadly fall under the category of majorities. I label this second sort of accounts as *explicit*. The distinction lies in the fact that accounts of the first type take a certain theoretical, institutional and political state of affairs as given. They do not express the possible moral, political or, more generally, philosophical reasons why the perspective of judges is the one that ought to be adopted when reflecting on what constitutional interpretation is and how a constitution ought to be interpreted. Instead, accounts of the second type attempt to justify this state of affairs either via instrumental or normative considerations.

4 'Implicit' accounts are addressed and criticised in section 2. Their proponents see constitutional interpretation as an activity by way of which judges alone may discover and construct constitutional meaning whenever the constitution is ambiguous, vague or silent. Their technique consists in the application of a group of methods to cases where the law does not provide a clear answer to a concrete dispute. This way of theorising about constitutional interpretation excludes citizens from interpreting their constitution insofar as these actors are neglected as agents capable of imposing meaning on a constitutional charter.

5 Section 3 challenges 'explicit' accounts, namely, arguments that explicitly provide reasons why constitutional interpretation ought to be a matter to be dealt with by courts alone and, thus, not by legislatures or citizens. Champions of this view employ a series of instrumental and normative arguments. I consider Ronald Dworkin's response to his 'majoritarian premise' as representative of an instrumental explicit account and Alon Harel's work as an example of a normative explicit account supporting the privileged role of the judiciary in interpreting constitutions. There are two assumptions here. One regards the incapability of non-judicial agents to respect constitutional limits, while the other concerns the view that majorities are conducive to domination. I reject these arguments and finish with conclusions and suggestions for future research.

2 Implicit accounts

6 Constitutional law often confronts us with difficult cases,[4] cases that "cannot be resolved by staring harder at the ten words of [a] clause".[5] In such situations, reasonable people consider that the constitution of their country grants them rights or liberties that are not always compatible with the exercise of rights of other individuals.

7 This is a known and persistent problem.[6] The linguistic indeterminacy and the principled nature of many constitutional provisions force judges permanently to come up with methods that turn these rules into norms that can solve actual cases, sometimes in opposition to the opinion of other branches of government. This is evinced by an increasing transfer of powers to the judiciary in different parts of the world.[7]

8 A traditional view considers that, when judges decide cases, they resort to interpretation, [8] and understands interpretation to be the use of a group of rules or techniques employed by judges to determine the meaning of a word, a clause or a norm, and choose between conflicting alternative reasonable interpretations. Dworkin criticises this approach:

> [Legal theorists] are used to saying that law is a matter of interpretation; but only, perhaps, because they understand interpretation in a certain way. When a statute (or the Constitution) is unclear on some point, because some crucial term is vague or because a sentence is ambiguous, lawyers say that the statute must be interpreted, and they apply what they call 'techniques of statutory construction'.[9]

9 These techniques are resources used by judges to determine constitutional meaning. One prominent example of a taxonomy of these approaches is Bobbit's.[10] Bobbit claims that constitutional arguments are conventions adopted as part of a shared legal grammar directed at providing judges with compelling reasons that motivate their decisions. His typology, hence, includes arguments that "one finds in judicial opinions, in hearings, and in briefs", and not in other kinds alien to a judicial style of reasoning.[11] The list includes the 'historical argument',[12] the 'textual argument',[13] the 'doctrinal argument',[14] the 'prudential argument',[15] the 'structural argument',[16] and the 'ethical argument'.[17] Others include references to ordinary meaning, context, scholarly works, comparative law, etc.[18]

10 A prominent feature of these archetypes is that they are directed at aiding *a* particular kind of interpreters – judges – and at justifying *a* class of decisions – judicial decisions.[19] Consider, again, Bobbit's account as an example; the fact that he construes his typology within the context of debates about the legitimacy of judicial review is symptomatic of the influence of the role that courts have in constitutional interpretation. As it happens, he observes that this was the central issue in constitutional law in the United States up to the time when he wrote this work.[20] This – the fact that a book on interpretation addresses issues of political legitimacy – is, however, not a coincidence, but the consequence of a widespread attitude on behalf of legal theorists which confines constitutional interpretation to the judicial domain. As Pound famously put it, it is ultimately the consequence of deeming interpretation to be "purely judicial in character".[21]

11 These approaches to interpretation favour a privileged position for the judiciary in imposing legal meaning on constitutional rules. It is unquestionable that the everyday business of politics and legislation demands that different persons, agencies and organs also interpret the constitution, which contributes to the creation and settlement of practices and understandings of the way that liberties and rights are envisaged.[22] Yet, in a world where constitutional interpretation is seen as a judicial matter, judges hold the capacity to modify, overrule, reshape, and nullify the ways in which rights and liberties are conceived of. Even if citizens do influence the courts to some extent,[23] the fact remains that their influence is not dispositive, but dependent on the willingness of judges to accommodate their views to that of other actors.[24]

12 The relations between courts and other agents in determining constitutional meaning via interpretation can be captured by the distinction between judicial review and judicial supremacy. I understand *judicial review* to be a process in which courts refuse to apply or give force to an act of another agent on the basis that it is contrary to their interpretation of the constitution. Instead, the model of *judicial supremacy* posits that courts do not limit themselves to imposing meaning on a constitutional norm in a specific case, and that the meaning that they give to constitutional provisions which decide disputes authoritatively binds other agents in the future.[25]

13 In the model of judicial supremacy, judicial decisions generate obligations for other institutions which are not derived from concrete cases, but from abstract and general considerations imposing meaning on constitutional clauses. This extrinsic element of

judicial supremacy expresses the unique position of courts in interpreting the constitution.

14 This model raises problems in terms of the capacity of courts to determine constitutional meaning *vis-à-vis* other agents. Hence, the distinction does not operate as an argument against *stare decisis* or other principles that regulate internal relations between different courts, which are in need of these sorts of hierarchical elements for the sake of settlement and uniformity in the application of law in concrete cases. What is problematic, instead, is the extension of this hierarchical relation to non-judicial domains. The judicial case-by-case application of law would not be *atomised*, as it were, by the rejection of judicial supremacy. Such rejection is compatible with the nomophilactic function of higher courts of securing uniformity of interpretation of law *amongst courts*, as well as with an institutional redefinition in terms of who is to be in charge of providing definite normative settlement. According to Kramer, this

> should not entail major changes in the day-to-day business of deciding cases ... [w]hat presumptively would change is the [judges'] attitudes and self-conceptions as they went about in their routine ... responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions.[26]

15 This conception shares elements of Waldron's definitions of strong judicial review and judicial supremacy, but it also differs from them to some extent. In his view, in systems of strong judicial review, courts have the authority to decline to apply a statute in particular cases, or to modify its effects, or to declare its inapplicability (a). An even stronger form of judicial review "would empower the courts to actually strike a piece of legislation out of the statute book altogether" (b).[27] For Waldron, the distinction between weak and strong judicial review is, however, separate from the question of judicial supremacy. The latter he understands to be a condition in which courts settle important questions for the whole political system (c), where those settlements are treated as absolutely binding on all other actors (d), and where courts defer neither to the positions taken on these matters in other branches nor to those taken by themselves in the past (e).[28]

16 However, Waldron's distinction between the two categories seems unnecessary here. In fact, because strong judicial review is implied by judicial supremacy, the latter emerges as the appropriate target to argue against. First, (b), (c), (d) and (e) imply (a). Also, (b) requires the sort of authority that (c), (d) and (e) grant to courts, as striking down a piece of legislation entails an exercise of authority by a court with enough power to bind other agents of the political system (otherwise, these other agents would be in a position to continue applying the statute in spite of the opinion of the court). This is why, as has been stated in the introduction, I prefer to conceive of judicial supremacy as the view that courts can resolve any problem that they are confronted with, and that there is no conclusively solved constitutional problem until a court has settled it. This conception applies to both theoretical accounts and actual constitutional practices.

17 Why are courts held in such high regard? One possible explanation appeals to a conceptual link between adjudication and interpretation,[29] in the sense that adjudication always entail interpretation. This, however, is false, because just as there are non-interpretive ways of following rules, so there are non-interpretive ways of deciding cases. [30] Or perhaps the interpretive expertise of courts is explained by their day-to-day business of applying law.[31] It could also be because constitutional interpretation

presupposes the existence of second-order reasons and courts are better at maintaining respect for these kinds of reasons.[32]

18 All of these hypotheses share a key concern: judges should not impose their own political morality or philosophical understanding of what is the best solution to a dispute from a purely moral or political point of view. Modalities of interpretation exist precisely to avoid personal preferences dominating the reasoning of those in charge of settling conflicts, and judges are well-trained to operate in this manner. However, decisions at the ordinary-law level, where judges are likely to be constrained by the higher determinacy of the provisions governing a case, are not issued in the same sort of conversational context as decisions where constitutional norms are the ones applied.[33] The essentially thin conversational context of constitutions implies that the application of their norms to concrete cases is likely to include a set of considerations which is broader than the purely legal, judicial-like one.[34] Hence, judges' expertise and authority to interpret wanes as the polysemy of the terms with which they operate increases and their conversational context grows thinner.

19 This leaves us with the separate problem of finding reasons to choose one constitutional approach or another. Why is it better or more suited to opt for any of the methods described above? Is there any hierarchy of arguments? Does the (say) doctrinal argument have any special quality over the structuralist argument?

20 The reasons for choosing any of these constitutional approaches are hardly strictly judicial in character. No justification of a judicial nature can be provided for selecting an originalist, or responsive, or doctrinal, or pragmatist, or purposive approach, etc., because there is no universal rule pre-ordaining the manner in which constitutions should be interpreted.[35] In Sunstein's words,

> [a]mong the reasonable alternatives, no approach to constitutional interpretation is mandatory. Any approach must be defended on normative grounds – not asserted as part of what interpretation requires by its nature.[36]

21 It follows that the alleged judicial nature of the methods of interpretation is no longer a reason for supporting their final position as constitutional interpreters. This leaves us with the following quandary: if constitutional interpretation ultimately appeals to reasons that are not necessarily of the judicial kind, and if the authority of judges is sustained via their ability to use mechanisms of interpretation whose selection hinges on political, philosophical or moral standards, why should other actors not have the authority to definitely interpret the constitution? All the discussed accounts leave their reasons for this unexpressed and implicit.

22 Consequently, many accounts of constitutional law are not about what the constitution itself means, but about the "different and competing things that the [courts have] said about the Constitution".[37] Hence, Hunter writes that "interpretation of law is fundamental to the democratic system and the Rule of Law ...", that "the interpretation of the law falls within the function of the judiciary" and that "the primary role of the judiciary is to interpret the law by utilising many tools available".[38] Bobbit straightforwardly names judges "artists of our field".[39] Tate and Torbjörn have found that judges have taken for themselves prerogatives which have typically been reserved for elected representatives in such countries as Australia, France, Germany, Malta and Russia.[40] In Italy, Ferrajoli has argued that decisions determining the meaning of laws and the constitution belong to the sphere of the judiciary.[41] Hirschl also claims that

> an adversarial American-Style rights discourse has becomes a dominant form of political discourse in [Canada, New Zealand, South Africa and Israel] ... [which] has been accompanied and reinforced by an almost unequivocal endorsement of the notion of constitutionalism and judicial review by scholars, jurists, and activists alike.[42]

23 Constitutions such as those in force in Chile and Spain grant their constitutional courts powers to decide what the constitution means. According to the Chilean Constitution and to the law regulating the Constitutional Court, bills on subject matters declared to be 'organic' or 'interpretive' of the Constitution are to be sent automatically to the Constitutional Court for review.[43] Additionally, article 1 of the Spanish law regulating the Constitutional Court refers to this tribunal as the "supreme interpreter of the Constitution". Scholarship on judicial review and on the nature of constitutionalism has detected a trend towards a judicialisation of politics.[44]

24 This idealised picture of the judiciary and the correspondent discredited image of other fora partly results from the paradigmatic understanding that legal theorists hold of their discipline.[45] Consensus has it that judges ought to find ways to constrain and justify their interpretive activity without transgressing the boundaries of the separation of powers.[46] Legitimacy, it seems, is not really a problem for judges, who are to show fidelity to the constitution via the application of methods of finding constitutional meaning rather than of criticising the institutional structure in which they find themselves. Rubenfeld sums up this traditional view as follows: "never mind legitimacy; leave that to politicians and political theorists. All a constitutional judge needs to know is how to interpret the law".[47]

3 Explicit accounts

25 Section 1 discussed the problematic identification of constitutional interpretation with judicial interpretation. But the privileged position of judges in matters of constitutional interpretation also raises questions regarding the legitimacy of their authority from a political perspective. In what follows, I deal with two accounts which explicitly argue and offer reasons for adopting the perspective of judges and for advocating the privileged role of judges in interpreting constitutions. The first account offers an instrumentalist and the second a normative justification.

26 Ronald Dworkin exemplifies the instrumental account best. He explicitly considers democratic and majoritarian arguments against the supremacy of courts. Then, more extensively, I address Alon Harel's normativist account as it is probably the most novel view in defence of the interpretive privileges of judges. I refute the arguments made by both scholars and close with conclusions.[48]

3.1 Dworkin's instrumental justification

27 Dworkin argues that judges must develop a theory of law that allows them to identify rules, principles and policies, and apply them in ways whose standards show the legal practice of a community in the best light. Legal practices are "chain enterprises", where interpretation is embedded in an institutional history of "innumerable decisions, structures, conventions and practices".[49]

28 Why *judges*? What makes courts the *forum of principle*,[50] and, thus, the ideal arena of interpretation of law? Can non-judicial institutions not meet the requirements of law,

such as integrity, and interpret the constitution themselves on principled grounds? One way of assessing these questions is by examining Dworkin's depiction of what he calls *the majoritarian premise* (MP) and its rejection through a contrast with his own view, the *constitutional conception of democracy* (CCD).

29 I do not claim that the only way that Dworkin champions courts is by rejecting the MP, or that this is the most salient of these justifications or, even, that instrumentalist strategies are the only ones available to him. Rather, I want to bracket, as it were, Dworkin's discussion against the MP in order to provide an illustration of the sort of reasoning employed when jurists debate about which institutions are fit for respecting constitutional limits. The tendency is to reject majoritarian institutions, assuming that outcome-based reasons are available to judges, but not so much to majorities, and Dworkin's contrast between the MP and the CCD is pervaded by these assumptions.

30 Dworkin's statement of the MP is the following:

> [The MP] is a thesis about the fair outcomes of a political process: it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors. The premise supposes ... that it is *always* unfair when a political majority is not allowed to have its way, so even when there are strong enough countervailing reasons to justify this, the unfairness remains.[51]

31 Against this, Dworkin defends an instrumentalist account – the CCD. This account

> takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, compositions, and practices treat all members of the community, as individuals, with equal concern and respect.[52]

32 Accordingly, democracy is government subject to conditions of equal status and concern for all citizens, so when majoritarian institutions respect these constraints, individuals have good reasons to accept and follow their verdicts. However, instrumentally, when these institutions are defective, or when the democratic conditions are not met, "there can be no objection, in the name of democracy, to other procedures that protect and respect them better".[53]

33 Dworkin, however, is not completely fair in his description of the MP and its contrast with the CCD. Both the depiction and the comparison are overly narrow. The MP leaves out accounts which not only reject countermajoritarian checks, but also and equally embrace constitutionalism. That is, placing majorities at the top of the political and legal system does not imply undermining or not embracing constitutionalism. This is, however, what the MP entails when Dworkin says that the MP champions the view that it is *always* unfair when a majority is not allowed to have its way, even when there are enough objections against it. This depiction is misleading in suggesting that majoritarian democratic theories *must* claim that any deviation from the will of the people is unfair or involves a moral cost of some kind and,[54] in fact, Dworkin does not quote any scholar who would embrace this populist version of the MP.

34 The contrast proposed by Dworkin is also a false one. There is no reason to think that we must choose between a purely statistical conception of democracy, such as the one entailed by the MP, or a communal one, such as the CCD.[55] Dworkin's way of framing the discussion is, I believe, symptomatic of a trend in constitutional theory that distrusts majoritarian institutions on the basis of the results that they are likely to produce and on how such results would jeopardise constitutional precommitments,[56] in spite of the fact that instrumentalist strategies may also pull in the opposite direction. These sorts of

reasons are only a part of the full justification for institutions and principles, and do not themselves establish decisive advantages in favour of any of them.[57]

35 One may object that Dworkin claims that "[d]emocracy does not insist on judges having the last word, but it does not insist that they must not have it".[58] His view, thus, seems compatible with arrangements that give the final word to non-judicial institutions. This interpretation is at odds, however, with Dworkin's adamant defence of the courtroom as the forum of principle and of majorities as the place for policies and collective objectives, not only in the sense that judges ought not be policy-makers, but also in the sense that majorities are not as fit for respecting principles.[59] It is neither compatible with his static sense of integrity in legislation,[60] nor with his view of the court as the capital of the empire of law, with judges as its princes,[61] nor ultimately with his neglect of suggesting – let alone elaborating – other institutional arrangements compatible with the moral reading that does not give particular interpretive powers to the judiciary.

36 So, the question that now becomes relevant to our analysis of the instrumental justification of judicial supremacy is: can the conditions required by the CCD be met by some institutional arrangement that does not include judicial supremacy as part of its framework? If what matters is that these conditions are met, and courts are instrumental in achieving these ends – that is, their interpretive privileges are justified insofar as they ensure respect for constitutional conditions — then it follows that there is conceptual room for an institutional framework without judicial supremacy as long as it respects the constitutional conditions of democracy. In consequence, when faced with the question of why majoritarian institutions ought to be distrusted regarding the protection of the constitutional conditions of democracy, Dworkin's is not a complete answer. By depicting the MP too narrowly in the context of the contraposition of this premise to the CCD, Dworkin overlooks one side of the reasons that could be given to justify majoritarian political procedures and institutions.[62] This leads him to omit plausible theories of democracy that put control over policy-making in the hands of majorities while respecting constitutionalism without relying on a Herculean judiciary.

37 Normative considerations are, thus, essential to settle who is to determine the meaning of a constitution, that is to say, accounts that do not emphasise outcomes over process-related reasons.[63] As I have indicated in the introduction, my strategy will focus on Harel's normative strategy.

3.2 Harel's normative justification

38 Alon Harel has elaborated a normative defence of the privileged role of the judiciary in constitutional interpretation.[64] Under his proposal, "judicial review is designed to provide individuals with a right to a hearing or to raise a grievance".

39 "More particularly", he adds,

> judicial review is indispensable because it grants individuals opportunities to challenge decisions that impinge (or may have impinged) upon their rights, to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation.

40 The justification of judicial review is based on

> procedural features that are essential characteristics of judicial institutions per se ... [,] in the fundamental duty of the state to consult its citizens on matters of rights,

> and to consult those who complain (justifiably or unjustifiably) that their rights have been violated.[65]

41 There is a standoff with instrumentalist strategies, given that, for Harel, the right to a hearing is a constitutive element of the adjudicative process, in the sense that adjudication is, in reality, a realisation or manifestation of this right. The relationship between the two categories is a necessary – not a contingent or instrumental – one.

42 Also important for Harel is the relationship between his idea of rights and the value of their entrenchment. According to him, a society in which the legislature honours rights but in which it is not constitutionally commanded to do so is inferior to one in which the legislature is commanded to do so, because in a society of the latter kind "individuals do not live at the mercy of the legislature; their rights do not depend on the legislature's judgements (concerning the public good) or inclinations".[66]

43 Some comments are in order. My first comment starts with a question regarding the extension of the effects of the right to a hearing: are courts good at deliberating about issues of rights? Harel would supposedly answer affirmatively, but precision is called for. To restate the question: are courts good at deliberating about matters of rights in concrete cases *and* in the name of the whole society? In my terminology: is this justification of judicial review expandable to judicial supremacy?

44 Thus, restating the question is imperative, since there is a difference between addressing individual grievances and hearing those affected in a concrete case on the one hand, and checking the constitutionality of acts of other branches of the state with the effects of *erga omnes* on the other. This difference is not fully accounted for by Harel. His defence of the right to a hearing is effective as an argument for judicial review, but it is insufficient to ground judicial supremacy. The fact that judicial decisions are individualised represents both a value and a limitation of the judicial process. A value in the sense of providing individuals with a forum where they can defend their understanding of what constitutional rights mean and how they ought to be applied. A limitation in the sense that the reasoning of judges is made in a limited context, includes a non-representative sample of the population, and is constrained by a sort of second-order reasoning that they employ to justify their decisions, which prevents them from fully engaging with the moral and political issues brought before them, issues of which it is not obvious that they are well-suited to be decided in the first place.[67]

45 Even though Harel is adamant that he advocates a constrained model of judicial review,[68] he argues that considerations of predictability, coordination, certainty, etc., provide "independent reasons for granting courts' decisions a more extensive normative application".[69] The right to a hearing, then, not only justifies the reconsideration of a decision through an individualised procedure, but also grounds extending the effects of such decisions to other areas and fora.[70] This coincides with my depiction of judicial supremacy.

46 Harel's reasons for grounding the preceding claims depart, however, from the normative path that he claims to be following. If our empirical knowledge shows that courts always resolve disputes in a principled fashion, following the law and guided strictly by right-based considerations, his trust in their capacity to bring about predictability, settlement and coordination would be justified, as courts would, in that ideal world, be certainly distinct in that regard. In reality, however, things are slightly more complicated. Politics and personal biases play important roles in the judicial decision-making process,

especially at the constitutional level. It is well established that courts sometimes decide in a principled manner, sometimes attitudinally and sometimes politically.[71] If we, in fact, value courts for the sake of securing the aforementioned values, then we also have to look 'outside the law', as it were. To do so is to forgo the principled *a priori* distinction between courts and other political institutions.

47 Secondly, in the context of discussing the benefits of entrenching binding constitutional directives,[72] Harel relies on the republican theory in claiming that the special role given to judges is necessary because it is a way of preventing individuals from living at the mercy of the legislature,[73]

> not merely ... because of potentially oppressive decisions made by the majority but because even when the majority protects rights vigorously, the decision to protect these rights is discretionary. It is based on the judgements or preferences of legislatures and, consequently, it does not acknowledge the binding nature of the state's rights-based duties.[74]

48 However, Harel mistakenly equates discretion with arbitrariness; the former does not entail the latter. In fact, the distinction between the two concepts is at the very core of the conception of freedom that Harel claims to endorse. Discretionary power might be delegated to public authorities, but this does not entail that our freedom is immediately reduced because of this single fact.[75]

49 The cogency of the republican idea of freedom depends to a great extent on the possibility of offering separate accounts for arbitrary and discretionary power.[76] Every decision is discretionary and reflects one choice amongst an array of diverse options. This does not make such decisions necessarily arbitrary. Procedurally speaking, a decision is arbitrary "to the extent that it is not reliably constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned".[77] Substantively, arbitrary power is equivalent to "interference that is uncontrolled by the person on the receiving end".[78] If, as Harel emphatically defends, the privileged status of courts as interpreters hinges on their obligation to provide reasons in the context of a deliberative hearing, then he does not deny that courts indeed act with discretion. What he really values is that courts are not arbitrary, that is, that they decide as deliberative fora where grievances are heard and reasons are provided for each decision. He fails to consider that legislatures also offer reasons for their choices, that they are also constrained by procedural rules, and controlled to an extent greater than courts are, for they are subject to evaluation by the electorate. They are discretionary, but not necessarily arbitrary. The latter is conducive to domination *per se*, while the former is not.

50 There is an additional reason for rejecting Harel's argument, which is related to his use of republican freedom. He claims that democratic procedures are often detrimental to freedom because their decision to protect rights does not acknowledge the state's rights-based duties. This, however, cannot be squared with what he calls the *limitation hypothesis*, i.e., that legislatures are morally or politically constrained.[79] Put in republican terms, the limitation hypothesis entails a removal of democratic power to decide in certain ways about certain issues. If majorities break the limits imposed on them, the reasons for justifying their decisions become unavailable to them and are, thus, rendered arbitrary. But this does not mean that, within the interpretive possibilities given by morality, politics, and law, there is no discretion. The first case is detrimental to freedom, while the latter is not.

51 Finally, even if the idea that societies bound by entrenched constitutional directives are superior to societies where such entrenchment does not exist is theoretically attractive, it faces empirical drawbacks. The fact that a charter mentions fundamental rights is no guarantee of a country's commitment to respect them.[80] Unfortunately, polities can put anything they desire into their constitutional paper, which raises scepticism about the contention that entrenching rights is proof of superiority in terms of republican freedom when compared to other polities where this entrenchment does not exist. Moreover, Harel does not engage with objections against the alleged benefits of living in a "rights culture".[81] In fact, an opposite case has been made by Hirschl,[82] who has argued that processes of constitutionalisation that included the creation and entrenchment of bills of rights facilitated the recognition and protection of a negative or noninterventionist conception of rights via judicial review "at the expense of a more 'positive', collectivist conception of rights".[83] One could still claim that freedom has been recognised and protected in these cases, but this argument would have to limit itself to freedom as absence of interference. And this is not the kind of freedom that Harel relies on.

4 Conclusion

52 I have aspired to shed light on a problem arising at a point where jurisprudence overlaps with political theory: constitutional interpretation. What I have called 'implicit' accounts generally bypass the question of the nature of methods of constitutional interpretation, tacitly omitting other ways of determining constitutional meaning, and, thus, failing to consider other fora where constitutions may be interpreted with final authority. If interpretations of constitutions are limited to judicial archetypes, then the judiciary is indeed the organ that ought to interpret the constitution with final effects. I have criticised this approach by questioning the premise that interpreting the constitution is exclusively a judicial endeavour.

53 An active dialogue between political and legal theory is required for constitutional theory to merge legal and political insights. We should, thus, reconsider matters of legitimacy, participation and political inclusion. In the case of constitutional interpretation, such a dialogue has been overshadowed by a limitation of the scope of arguments available to judicial approaches and to instrumental justifications. In Bellamy's words, "the constitutional role of democratic politics has been largely ignored or dismissed in the recent legal literature. The emphasis is always on constraining or regulating political power".[84] Deliberation and the quality of constitutional debates in other fora may not have received as much doctrinal attention as its judicial counterpart has, but this tendency needs to be reversed and not augmented by denying these fora the capacity to engage in constitutional dialogues in a principled fashion.

54 In turn, the 'explicit' accounts I have considered fail to provide conclusive arguments on their own grounds. By addressing Dworkin's theses, I have questioned the instrumental benefits he sees in giving judges higher interpretative privileges. Other sorts of reasons are needed to justify political practices, as instrumental approaches will always have to face the consequences of their own arguments. Defending judges or any other institution based on the quality of the outcomes that they produce becomes less compelling when confronted with 'bad' decisions. Procedural and normative reasons are, thus, ultimately necessary to provide a full account of the legitimacy of the authority of any institution.

55 This is why I have considered Harel's normative defence of the interpretive competences of the judiciary. His strategy, although well orientated, fails, however, because the theoretical assumptions underpinning his account run short of justifying judicial supremacy. Moreover, I have shown that Harel misapplies republican liberty to determining the roles of legislatures and the judiciary. In conclusion, neither the instrumental nor the normative explicit account supporting a strong judiciary that I have considered here justifies that choice.

56 The argument has been a negative one and it leaves open the discussion on institutional alternatives to judicial supremacy. What follows, then, from denying courts the final word in constitutional interpretation? The literature offers alternatives that, although not strictly centred on the issue of interpretation, suggest that popular participation can play a dispositive part in constitutional issues. Different proposals or combinations of them suggest that there is room for the involvement of citizens in constitutional politics in a principled fashion which is coherent with the rejection of judicial supremacy. Consider, for example, Ackerman and Fishkin's Deliberation Day,[85] citizens' councils, public reconsideration of judicial decisions or what Donnelly calls "the people's veto",[86] constitutional juries,[87] popular legislative initiatives, citizens' consultative councils,[88] deliberative polls,[89] and deliberative *mini-publics* in general,[90] etc. Although not specifically concerned with constitutional interpretation, these examples show, to different degrees, that citizens can participate in politics and make decisions by themselves. Also, there are examples of institutional devices, which are *prima facie* compatible with the non-supremacist view of courts. Consider, for instance, the Canadian Constitution's *notwithstanding* clause, or the declaration of incompatibility incorporated into the United Kingdom's 1998 Human Rights Act. Both devices transfer political power from their courts to other agents in constitutional matters. Notwithstanding, the desirability of these means should not be taken for granted, as they deserve an analysis beyond the scope of this essay.

57 For now, it suffices to say that, irrespective of their form or features, alternatives favouring popular interpretations of constitutions should strive to answer at least seven types of questions that suggest avenues for future research in legal and political theory.

58 First, these theses require the elaboration of principled arguments in favour of a more direct type of democracy than the one required by accounts and legal systems where judicial supremacy is the norm.

59 Second, popular constitutionalists should offer arguments justifying if and why it is important to consider empirical issues, such as which fora will, most likely and overall, fare better at protecting rights, liberties and so on. It is not immediately clear that non-judicial institutions will produce reasonable outcomes more consistently over time, even if the argument presented here is accepted.

60 Third, popular constitutionalists should reflect on the relationships between citizenry and representative institutions, the two instances where popular constitutionalism is likely to be implemented – which of the two dimensions of *demos* is more entitled and/or generally preferred to be entrusted with the task of interpreting constitutions with final authority?

61 Fourth, regarding the relations between political legitimacy and moral and/or rights-based justice, popular constitutionalists must answer the question of which category carries a heaver weight and should, thus, be preferred in cases where they conflict.

62 Fifth, the claim that insufficient attention is paid to non-judicial methods of interpreting constitutions invites reflection on other possible sorts of mechanisms. Further research on popular constitutionalism may well unearth or develop mechanisms suitable for providing meaning to constitutions.

63 Sixth, coming up with such methods would raise additional questions about the distribution of labour between legal and political theorists. It would probably generate discussions about the proper province of jurisprudence more generally. For example, should legal scholars care about methods of popular constitutional interpretation, or should they leave that to political theorists? Conversely, should political theorists worry about legal theory at the level of interpretation? Conceivably, these are false dilemmas, but they should nonetheless be taken seriously.

64 Seventh, once the preceding questions have been reasonably answered, concrete institutional proposals should materialise. These queries open the door to more positive accounts.

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BIBLIOGRAPHY

Bruce ACKERMAN & James FISHKIN, 2004: *Deliberation Day*. New Haven & London: Yale University Press.

Robert ALEXY, 2005: Balancing, constitutional review, and representation. *I·Con. International Journal of Constitutional Law* (2005) 3 (4). 572–581.

Fernando ATRIA, 1999: Legal Reasoning and Legal Theory Revisited. *Law and Philosophy* (1999) 18 (5). 537–577.

Joel BAKAN, 1989: Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought. *Osgoode Hall Law* (1989) 27(1). 123–193.

Jack BALKIN, 2001: Bush v. Gore and the Boundary Between Law and Politics. *Yale Law School Faculty Scholarship Series* (2001) 251. 101–152.

S. A. BARBER, & J. E FLEMING, 2007: *Constitutional Interpretation: The Basic Questions*. Oxford: Oxford University Press.

Randy BARNETT, 2011: Interpretation and Construction. *Harvard Journal of Law and Public Policy* (2011) 34. 65–72.

Gregory BASSHAM, 2014: Freedom's Politics: A Review Essay of Ronald Dworkin's Freedom's Law: The Moral Reading of the American Constitution. *Notre Dame Law Review* (2014) 72(4). 1235–1276.

Richard BELLAMY, 2007: *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.

Richard BELLAMY, 2011: Political Constitutionalism and the Human Rights Act. *I·Con. International Journal of Constitutional Law* (2011). 86–111.

Richard BELLAMY & Cristina PARAU, 2013: Introduction: Democracy, Courts and the Dilemmas of Representation. *Representation* (2013) 49(3). 255–266.

Raoul BERGER, 1977: *Government by Judiciary. The Transformation of the Fourteenth Amendment*. Cambridge-London: Harvard University Press.

Mitchell BERMAN, 2009: Originalism is Bunk. *New York University Law Review* (2009) 84(1). 1–96.

Alexander BICKEL, 1986: *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (second edition). New Haven and London: Yale University Press.

Phillip BOBBIT, 1982: *Constitutional Fate: Theory of the Constitution*. Oxford University Press.

Curtis BRADLEY & Neil SIEGEL, 2014: Constructed Constraint and the Constitutional Text. *Duke Law Journal* (2014) 64. 1–69.

Quim BRUGUÉ, Joan FONT & Ricard GOMÁ, 2001: Consejos Consultivos en Barcelona: Un balance. *Ciudadanos y decisions políticas*. Ed. Joan Font. Barcelona: Ariel. 111–24.

Tomás BUSTAMANTE BOHÓRQUEZ, 2006: La interpretación constitucional. *Universitas estudiantes* (2006) 3. 123–156.

Simone CHAMBERS, 2003: Deliberative Democratic Theory. *Annual Review of Political Science* (2003) 6. 307–326.

Thomas COLBY & Peter SMITH, 2009: Living Originalism. *Duke Law Journal* (2009) 59. 239–307.

Pamela CONTRERAS, 2005: Interpretación constitucional: un régimen especial. *Revista derecho y humanidades* (2005) 11. 311–321.

Javier COUSO, 2004: Judicial Review in Chile. *Democratization and the Judiciary*. Eds. Siri Gloppen, Roberto Gargarella & Erin Skaar. Portland: Frank Cass. 70–91.

Robert DAHL, 1967: *Pluralist Democracy in the United States: Conflict and Consent*. Chicago: Rand McNally & Company.

Marcelo DASCAL & Jerzy WRÓBLEWSKI, 1988: Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law. *Law and Philosophy* (1988) 7. 203–224.

Michael X. DELLI CARPINI, Fay LOMAX COOK & Lawrence JAKOBS, 2004: Public Deliberations, Discursive Participation and Citizen Engagement: A Review of the Empirical Literature. *Annual Review of Political Science* (2004) 7(1). 315–344.

Ronald DWORKIN, 1982: Law as Interpretation. *Critical Inquiry* (1982) 9(1). 179–200.

Ronald DWORKIN, 1996: *Freedom's Law*. Cambridge: Harvard University Press.

Ronald DWORKIN, 2010: *Taking Rights Seriously*. New Delhi: Universal Law Publishing.

Christopher EISGRUBER, 2001: *Constitutional Self-Government*. Cambridge, Massachusetts & London: Harvard University Press.

Timothy ENDICOTT, 1994: Putting Interpretation in its Place. *Law and Philosophy* (1994) 13. 451–479.

Richard FALLON Jr., 1987: A Constructivist Coherence Theory of Constitutional Interpretation. *Harvard Law Review* (1987) 100(6). 1189–1286.

Richard FALLON, 2015: The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation. *The University of Chicago Law Review* (215) 82. 1235–1308.

Luigi FERRAJOLI, 2006: *Garantismo*. Spanish transl. by Andrea Greppi. Madrid: Trotta.

Luigi FERRAJOLI, 2008: *Democracia y garantismo*. Madrid: Trotta.

James FISHKIN, 1997: *The Voice of the People. Public Opinion and Democracy*. New Haven: Yale University Press.

Archon FUNG, 2003: Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences. *The Journal of Political Philosophy* (2003) 11(3). 338–367.

Victor GARCÍA TOMA, 2005: El tribunal constitucional, la interpretación constitucional y las sentencias manipulativas interpretativas (normativas). *Anuario de derecho penal*. Ed. José Hurtado Pozo. 173–210.

Ernesto GARZÓN VALDES, 1993: *Consenso, racionalidad y legitimidad*. Madrid: Centro de Estudios Políticos y Constitutionales.

Jeffrey GOLDSWORTHY, 2003: Raz on Constitutional Interpretation. *Law and Philosophy* (2003) 22. 167–193.

Jeffrey GOLDSWORTHY, 2011: The Limits of Judicial Fidelity to Law: The Coxford Lectures. *Canadian Journal of Law and Jurisprudence* (2011) 24(1). 305–325.

Riccardo GUASTINI, 2015: A Realistic View on Law and Legal Cognition. *Revus. Journal for Constitutional Theory and Philosophy of Law* (2015) 27. 45–54. https://revus.revues.org/3304/. DOI: 10.4000/revus.3304.

Jürgen HABERMAS, 1996: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. English transl. by William Rehg. Cambridge, Massachusetts: M.I.T. Press.

Alon HAREL, 2014: *Why Law Matters*. Oxford: Oxford University Press.

Alon HAREL & Tsvi KAHANA, 2010: The Easy Core Case for Judicial Review. *Journal of Legal Analysis* (2010). 227–256.

Ran HIRSCHL, 2004: *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Cambridge, Massachusetts: Harvard University Press.

Richard HODDER-WILLIAMS, 1996: *Judges and Politics in the Contemporary Age*. London: Bowerdean.

Tina HUNTER, 2005: Interpretive Theories: Dworkin, Sunstein, and Ely. *Bond Law Review* (2005) 17 (2). 78–101.

András JAKAB, 2013: Judicial Reasoning in Constitutional Courts: A European Perspective. *German Law Journal* (2013) 8. 1215–1278.

H. JEFFERSON POWELL, 2008: *Constitutional Conscience: The Moral Dimension of Judicial Decision*. Chicago: University of Chicago Press.

Peter JONES, 1994: *Rights*. London: Palgrave Macmillan.

Hans KELSEN, 2005: *Pure Theory of Law*. New Jersey: The Lawbook Exchange.

Larry KRAMER, 2004: *The People Themselves: Popular Constitutionalism and Judicial Review*. Oxford: Oxford University Press.

Edouard LAMBERT, 1921: *Le Gouvernment des judges at la lutte contre la législation sociale aux Etats-Unis- L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois*. Paris: M. Giard & Cie.

Grant LAMOND, 2014: Precedent and Analogy in Legal Reasoning. *The Stanford Encyclopedia of Philosophy*. Ed. Edward Zalta. URL: https://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/

Anna LAW, 2010: *The Immigration Battle in American Courts*. Cambridge: Cambridge University Press.

Frank LOVET, 2010: *A General Theory of Domination and Justice*. Oxford: Oxford University Press.

Cormac MAC AMHLAIGH, 2016: Putting political constitutionalism in its place. *I·Con. International Journal of Constitutional Law* (2016) 14(1). 175–197.

Andrei MARMOR, 1992: *Interpretation and Legal Theory*. Oxford: Clarendon Press.

Andrei MARMOR, 2014: *The Language of Law*. Oxford: Oxford University Press.

Stephen MACEDO, 1999: Introduction. *Deliberative Politics. Essays on Democracy and Disagreement*. Ed. Stephen Macedo. New York & Oxford: Oxford University Press. 3–14.

Nicholas PAPASPYROU, 2008: *From the Commitment to Legitimacy to the Pursuit of Justice: An Essay on the Normative Structure of Constitutional Interpretation*. Retrieved from SSRN. DOI : 10.2139/ssrn.1111781.

Philip PETTIT, 2012: *On the people's terms: a republican theory and model of democracy*. Cambridge University Press.

Philip PETTIT, 2015: The republican law of peoples: A restatement. *Domination and global political justice: Conceptual, historical, and institutional perspectives.* Eds. Barbara Buckinx, Jonathan Trejo-Mathys and Timothy Waligore. New York: Routledge. 37-70.

Richard POSNER, 2005: *Law, Pragmatism and Democracy*. Cambridge-London: Harvard University Press.

Robert POST, 1990: Theories of Constitutional Interpretation. *Faculty Scholarship Series* (1990) 209. 13–41.

Roscoe POUND, 1907: Spurious Interpretation. *Columbia Law Review* (1907) 7(6). 379–386.

John RAWLS, 1996: *Political Liberalism*. New York: Columbia University Press.

Joseph RAZ, 2009: *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press.

Jed RUBENFELD, 1998: Legitimacy and Interpretation. *Constitutionalism. Philosophical Foundations*. Ed. Larry Alexander. Cambridge: Cambridge University Press. 194–234.

Antonin SCALIA, 1997: *A Matter of Interpretation. Federal Courts and the Law*. New Jersey: Princeton University Press.

Frederick SCHAUER, 1993: The Occasions of Constitutional Interpretation. *Contemporary Perspectives on Constitutional Interpretation*. Boulder: Westview Press. 29–45.

Frederick SCHAUER, 2004: Judicial Supremacy and the Modest Constitution. *California Law Review* (2004) 92(4). 1045–1068.

Jeffrey SEGAL & Harold SPAETH, 2002: *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Walter SINNOT-ARMSTRONG & Susan BRISON, 1993: A Philosophical Introduction to Constitutional Interpretation. *Contemporary Perspectives on Constitutional Interpretation*. Eds. Walter Sinnot-Armstrong & Susan Boulder Brison. Westview. 1–25.

Lawrence SOLUM, 2010: The Unity of Interpretation. *Boston University Law Review* (2010) 90. 551–578.

Alec STONE SWEET, 2000: *Governing with Judges*. Oxford: Oxford University Press.

Cass SUNSTEIN (29 August 2014): There Is Nothing that Interpretation Just Is. Available at SSRN. http://dx.doi.org/10.2139/ssrn.2489088/.

Neal TATE & Vallinder TORBJÖRN, 1995: *The Global Expansion of Judicial Power*. New York and London: New York University Press.

Lawrence TRIBE, 1988: *American Constitutional Law* (second edition). Mineola, New York: The Foundation Press.

Michel TROPER, 2006: Constitutional Interpretation. *Israel Law Review* (2006) 39(2). 35–50.

Jeremy WALDRON, 1999: *The Dignity of Legislation*. Cambridge: Cambridge University Press.

Jeremy WALDRON, 2003: Legislating with Integrity. *Fordham Law Review* (2003) 72(9). 373–394.

Jeremy WALDRON, 2006: The Core of the Case Against Judicial Review. *The Yale Law Journal* (2006) 115. 1346–1406.

Jeremy WALDRON, 2007: Lucky in Your Judge. *Theoretical Inquiries in Law* (2007). 185–216.

Jeremy WALDRON, 2009: Judges as Moral Reasoners. *I·Con. International Journal of Constitutional Law* (2009) 7(1). 2–24.

Jeremy WALDRON, 2011: Do Judges Reason Morally? *Expounding the Constitution: Essays in Constitutional Theory*. Ed. Grant Huscroft. Cambridge: Cambridge University Press. 38–64.

Jeremy WALDRON, 2015: Judicial Review of Legislation. *The Routledge Companion to Philosophy of Law*. Ed. Andrei Marmor. New York: Routledge. 434–48.

Keith WHITTINGTON, 2004: The New Originalism. *Georgetown Journal of Law & Public Policy* (2004) 2. 599–613.

Keith WHITTINGTON, 2007: *Political Foundations of Judicial Supremacy. The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton: Princeton University Press.

Keith WHITTINGTON, 2010: Is Originalism too Conservative? *Harvard Law Review of Law and Public Policy* (2010) 34(1). 29–41.

Keith WHITTINGTON, 2011: On Pluralism within Originalism. *The Challenge of Originalism: Theories of Constitutional Interpretation*. Eds. G. Huscroft & B. W. Miller. Cambridge: Cambridge University Press. 70–86.

Keith WHITTINGTON, 2013: Originalism: A Critical Introduction. *Fordham Law Review* (2013). 375–406.

Ludwig WITTGENSTEIN, 2009: *Philosophical Investigations.* 4th ed. English transl. by G. Anscombe, P. Hacker & J. Schulte. Oxford: Willey-Blackwell.

NOTES

1. I use the term interpretation roughly as the imposition of meaning on an object. With few exceptions (Solum 2010; Fallon Jr, 2015), this is a common usage in the literature (Marmor 1992: 32; Raz 2009: 250; Fallon Jr. 2015: 1234–1235; Guastini 2015: 46). Regarding the limits separating interpretation from explanation or understanding on the one hand, and interpretation from creation on the other, this article remains silent. Further specification depends upon the meaning of "meaning", that is, on whether it refers to an author's intentions, coherence, linguistic determination, structure, etc. (all potential candidates for determinations of meaning). This too remains beyond the scope of this essay.

2. Hirschl 2004.

3. Tomkins 2010: 3.

4. Dworkin 2010: 81.

5. Post 1990: 14.

6. Atria 1999: 537.

7. The American case is known for its process of constitutional review (Lambert 1921; Kramer 2004). In Europe, it is a post-World War II phenomenon. After the War, constitutional courts were established in Austria (1945), Italy (1948), the Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and, after 1989, in the post-Communist Czech Republic, Hungary, Poland, Rumania, Russia, Slovakia, the Baltics, and in several states of former Yugoslavia (Stone Sweet: 2000, 31). In Latin America, Guatemala was the first country to establish a constitutional court (1965), followed by Chile (1971), Peru (1979), Colombia (1979), Ecuador (1996), and Bolivia (1994). Other countries, most notably the United Kingdom, have historically not embraced the American-style constitutional review. However, reforms have granted increasing amounts of power to their courts, the enactment of the Human Rights Act in 1998 being the most distinctive case of this evolution. New Zealand, which was until recently considered to be "one of the last bastions of the Westminster system of government", introduced the New Zealand Bill of Rights Act, which marked "an abrupt change in the balance of power among the judicial, legislative, and executive branches of government" (Hirschl 2004: 24).

8. Lovett 2015: 4.

9. Dworkin 1982: 181.

10. In favour of this assertion, see Barber & Fleming 2007: 67; Law 2010: 42; Jefferson Powell 2008: 133; Whittington 2011: 77; and Bradley & Siegel 2014: 25.

11. Bobbit 1982: 6.

12. Bobbit 1982: 7; Berger 1977: 366; Whittington 2004; Colby & Smith 2009; Berman 2009.

13. Bobbit 1982: 7; Scalia 1997; Barber & Fleming 2007: 68.

14. Bobbit 1982: 7; Lamond 2014.

15. Bobbit 1982: 7, 60.

16. Bobbit 1982: 7, 74; Hunter 2005: 79.

17. Bobbit 1982: 93–120.

18. Jakab 2013: 12–33.

19. For examples of scholars categorising constitutional arguments under the same assumption, see Fallon Jr. 1987; Tribe 1988; Bakan 1989: 123–27; Post 1990; Schauer 2004; Contreras 2005: 320; García 2005: 189; Bustamante 2006; Papaspyrou 2008: 8–9; and Jakab 2013.

20. Bobbit 1982: 3.

21. Pound 1907: 381.

22. Sinnot-Armstrong & Brison 1993: 2; Waldron 1999: 5.

23. Dahl 1967: 155; Kramer 2004: 970.

24. Segal & Spaeth 2002: 5.

25. Similarly, Whittington 2007: 7.

26. Kramer 2004: 253.

27. Waldron 2006: 1354.

28. Waldron 2006: 1354.

29. Dascal & Wróblewski 1988: 216; Marmor 1992: 44.

30. Endicott 1994: 454; Wittgenstein 2009: § 201.

31. As suggested by Harel & Kahana 2010: 258 and Harel 2014: 157.

32. As suggested by Schauer 1993: 32 and Bellamy 2007: 28.

33. Marmor 2014: 149.

34. Marmor 2014: 149.

35. Kelsen 2005: 352.

36. Sunstein 2014: 1.

37. Barber & Fleming 2007: 4; Tocqueville 2003: 315.

38. Hunter 2005: 79.

39. Bobbit 1982: 94.

40. Tate and Torbjörn 1995.

41. Ferrajoli 2006: 96.

42. Hirschl 2004: 1.

43. Couso 2004: 72–3.

44. See, for example, Waldron 1999; Hodder-Williams 1996: 38–44; Macedo 1999: 6; Bellamy 2011; Bellamy & Parau 2013: 256; and Mac Amhlaigh 2016: 175.

45. Waldron 1999.

46. Hodder-Williams 1996: 124.

47. Rubenfeld 1998: 205.

48. The two accounts selected do not exhaust every possible instrumental and/or normative defence of judicial supremacy. Other authors, such as Bickel, Tribe, Rawls, Raz, Eisgruber, Habermas, Alexy, etc., could have been included here. However, they deserve separate examinations, and focusing on Dworkin and Harel allows me to keep the analysis manageable.

49. Dworkin 1982: 193; Fish 1982: 202.

50. Dworkin 1981.

51. Dworkin 1996: 16–7.

52. Dworkin 1996: 17.

53. Dworkin 1996: 17.

54. Bassham 2014: 1267.

55. Bassham 2014: 1267.

56. For example, Hamilton 1948; Garzón Valdes 1993; Jones 1994; Dworkin 1996; Bellamy 2007: 92–107 (although without embracing these views); Ferrajoli 2008.

57. Waldron 2006: 1372, 1379–86; 2015: 444; Bellamy 2007: 27, 164–5; Mac Amhlaigh 2016: 180.

58. Dworkin 1996: 7.

59. Dwrokin 1978: 82; 1981: 517–18.

60. Waldron 2003: 373.

61. Dworkin 1990: 407.

62. Dworkin 1996: 34.

63. Waldron 2015: 444.

64. Harel 2014: 191, 199.

65. Harel 2014: 192.

66. Harel 2014: 148.

67. Waldron 2007; 2009; 2011.

68. Harel 2014: 193.

69. Harel 2014: 215.

70. Harel 2014: 216.

71. Segal & Spaeth 2002; Goldsworthy 2011.

72. Harel 2014: 151-152.

73. Harel 2014: 151. For a description of freedom as non-domination, see Skinner 1998: 27; 2002: 247; 2008: x; Larmore 2001; Lovett 2010: 119; and Pettit 2015: 50.

74. Harel 2014: 152.

75. Lovett 2014: 11-2.

76. Larmore 2001: 239; Lovett 2014: 11-2.

77. Lovett 2014: 11.

78. Pettit 2012: 58.

79. Harel 2014: 169.

80. Loewenstein 2000: 151-56.

81. Harel 2007: 49.

82. Hirschl 2004: 16.

83. Hirschl 2004: 102.

84. Bellamy 2007: 141.

85. Ackerman and Fishkin 2004.

86. Donnelly 2012: 159.

87. Gosh 2010.

88. Brugué, Font & Gomá 2001.

89. Fishkin 1997.

90. Chambers 2003; Delli Carpini, Lomax Cook & Jakobs 2004; Schkade, Sunstein & Hastie 2010; Fung 2003.

ABSTRACTS

Rejecting judicial supremacy in constitutional interpretation, this paper argues that understanding the interpretation of constitutions to be a solely legal and judicial undertaking excludes citizens from such activity. The paper proffers a two-pronged classification of analyses of constitutional interpretation. *Implicit accounts* discuss interpretation without reflecting on whether such activity can or should be performed by non-judicial institutions as well. *Explicit accounts* ask whether interpretation of constitutions is a matter to be dealt with by courts and answer affirmatively. I criticise both camps. Implicit accounts fail to explain why constitutional interpretation is purely judicial in character. Explicit accounts do not provide enough reasons why the judiciary is allegedly the ideal institution to give constitutions meaning with final authority, both in instrumental and normative terms. The paper closes by suggesting avenues for future research.

INDEX

Keywords: constitutional interpretation, judicial review, judicial supremacy, constitutional meaning

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