

## A Plea for a Hint of Empiricism in Constitutional Theory: A Comment on Cesare Pinelli's *Constitutional Reasoning and Political Deliberation*

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Professor Cesare Pinelli's "Constitutional Reasoning and Political Deliberation" raises several crucial questions about the respective modalities and qualities of decision-making processes in courts and legislatures. As I cannot do justice to all the very pressing questions Pinelli's paper raises and to all the topics he addresses, I will endeavor to comment upon some points, which, in my opinion, deserve closer examination. I would like to emphasize three related aspects of constitutional scholarship and try to advocate very tentatively the exploration of new perspectives. All of my contributions to this debate can be gathered under the banner of a broad notion of "empiricism," as they all try in several of their own ways to get "back to earth" and focus on the concrete practices of legal actors. My aim is not to press for the substitution of legal sociology for legal and political philosophy, but, thanks to Pinelli's contribution, to suggest that some elementary empirical facts should be taken into account in philosophical reflection.<sup>1</sup> First, it seems that less general idealism and more scrutiny of our political societies is necessary to address the topic of constitutional reasoning. Second, the question of "rights" in legal discourse and legal reasoning should be addressed with the full awareness of how much this term is fraught with ambiguities. The study of these ambiguities may be very promising to elucidate some features of the "ideology" of our contemporary constitutional systems. Third, one should realize how much insisting on the specificities of courts to deal advantageously with fundamental social matters could prove misleading, and eventually self-defeating.

### A. A Plea for Contexts<sup>2</sup>

As Pinelli makes clear, Jeremy Waldron's contentions regarding the advantages of having parliaments, rather than judges, face and decide our societies' "matters of principle" are based on some idealization. Conversely, it should be noted that the same criticism

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<sup>1</sup> See also Arthur Dyevre, *Reassessing the Case for Judicial Review: Judges as Agents and Judges as Trustees*, 3–4 (CEPC/MPIL, Working Paper, 2012), available at [http://works.bepress.com/arthur\\_dyevre1/3/](http://works.bepress.com/arthur_dyevre1/3/).

<sup>2</sup> Alluding to Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997).

frequently applies to the authors who express the reverse claim and praise courts for being the only proper or the best “fora of principle.” Similar approaches of selective optimism and pessimism result in “fallacies of asymmetry,”<sup>3</sup> which consist in portraying one side of the compared objects in the most unfavorable way, and the other side in the most favorable way. From an abstract theoretical point of view, there is hardly any reason to consider *a priori* that the best of judges sitting in the best of constitutional or supreme courts would be very different from the best of legislators, working in the best of legislatures, and would not achieve as successful a protection of “constitutional basic goods,”<sup>4</sup> however these basic goods are defined according to the speaker’s preferences, as its counterpart in the judiciary. Departing from any *ad hoc* presuppositions, one can only be led, from an empirical point of view, to reject so sharp dichotomies as those proposed by Alexander Bickel. According to him:

[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs.<sup>5</sup>

Several among the greatest of constitutional judges—such as John Marshall, Charles Evans Hughes, William Howard Taft in the United States; Enrico de Nicola in Italy; and Robert Badinter in France—testify to the empirical porosity of the legal and the political spheres. Undoubtedly, there have been very good judges and very bad members of legislative assemblies. But the reverse is also true; one president of the Italian constitutional court, Giuseppe Branca, admitted, for example, to have “exchanged” or “bought” the vote of his colleagues for a collection stamp,<sup>6</sup> Justice James C. McReynolds on the United States Supreme Court being so fierce an anti-Semite as to refuse shaking Louis Brandeis’ and

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<sup>3</sup> Juan Carlos Bayón, *Democracia y derechos: problemas de fundamentación del constitucionalismo*, in CONSTITUCIÓN Y DERECHOS FUNDAMENTALES, 67 (Jerónimo Betegón et al. eds., 2004), available at [http://www.upf.edu/filosofiadeldret/\\_pdf/bayon-democracia.pdf](http://www.upf.edu/filosofiadeldret/_pdf/bayon-democracia.pdf). See also Mark Tushnet, *A Goldilocks Account of Judicial Review?*, 37 U.S.F. L. REV. 63 (2002).

<sup>4</sup> ALAN BRUDNER, CONSTITUTIONAL GOODS (2004).

<sup>5</sup> ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (1962).

<sup>6</sup> See CARLA RODOTÀ, STORIA DELLA CORTE COSTITUZIONALE 47 (Saggi Tascabili Laterza ed., 1999). I am indebted to Raphaël Paour for this information.

Benjamin Cardozo's hands and even talking to them,<sup>7</sup> etc. As some studies relying on elements from inside the courts show, legislatures truly do not have any monopoly in logrolling, bargaining, pork-barrel politics, etc.<sup>8</sup>

Considering the fact that, most of the time, constitutional judges are part of the same social, economic, intellectual, etc. coalition as most politicians, one can hardly be sure that there are so many differences between their reasoning regarding rights and policies as one might expect. As Robert Dahl put it concerning the United States Supreme Court, a court remains fundamentally "a part of the dominant national alliance."<sup>9</sup> One can hardly take for granted, let alone for a statistical reality, that judicial rulings contribute, more than ordinary legislation, to the advancement of basic values. Undoubtedly, several rulings by constitutional judges represent landmark cases for what is commonly regarded as the advancement of basic rights. *Brown v. Board of Education*<sup>10</sup> comes to mind first. But similar famous rulings—such as the *Bokros* case in Hungary,<sup>11</sup> the *Makwanyane*,<sup>12</sup> *Grootboom*,<sup>13</sup> and *Treatment Action Campaign*<sup>14</sup> rulings in South Africa—cannot conceal the fact that judicial "self-inflicted wounds" are not exceptional: The litany of *Dred Scott v. Sandford*,<sup>15</sup> *Lochner v. New York*,<sup>16</sup> *Korematsu v. United States*,<sup>17</sup> *Bowers v. Hardwick*<sup>18</sup> offers obvious examples. But this does not account for what one may regard as many other obvious miscarriages of constitutional justice: The ruling of the Conseil constitutionnel of the Ivory

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<sup>7</sup> See, e.g., James C. McReynolds, The Oyez Project at IIT Chicago-Kent College of Law, [http://www.oyez.org/justices/james\\_c\\_mcreynolds](http://www.oyez.org/justices/james_c_mcreynolds) (last visited May 13, 2013).

<sup>8</sup> See THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., 2001); EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

<sup>9</sup> Robert A. Dahl, DECISION-MAKING IN A DEMOCRACY: THE SUPREME COURT AS A NATIONAL POLICY-MAKER, 6 J. PUB. L. 279, 293 (1957).

<sup>10</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>11</sup> See, e.g., Kim Lane Scheppelle, DEMOCRACY BY JUDICIARY (OR WHY COURTS CAN SOMETIMES BE MORE DEMOCRATIC THAN PARLIAMENTS), <http://law.wustl.edu/harris/conferences/constitutionalconf/ScheppellePaper.pdf> (last visited May 13, 2013).

<sup>12</sup> *State v. Makwanyane* 1996 (3) SA 391 (CC) (S. Afr.).

<sup>13</sup> *S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

<sup>14</sup> *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

<sup>15</sup> *Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>16</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>17</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>18</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Coast allowing President Wade to run for a third election in spite of the two-term limitation provided by article 27 of the Constitution,<sup>19</sup> the Venezuelan Tribunal Supremo de Justicia's ruling forbidding the execution of a decision by the Interamerican Court of Human Rights,<sup>20</sup> or the French Conseil constitutionnel's recent invalidation of the statute prohibiting sexual harassment.<sup>21</sup> Even such a seminal decision as *Marbury v. Madison* grossly infringes one of today's most fundamental rights, namely article 6.1 of the ECHR. "Are we so influenced by an historical accident—the Warren Court years—in the judicial models that we assume, that we have elevated this to an *institutional* characteristic?"<sup>22</sup>

I do not imply that anyone addressing the problem of the respective legitimacies of courts and parliaments for the advancement of basic social values ignores the very fragmentary elements I mentioned. But just like the question just quoted above, my main claim is to stress that these facts should induce constitutional scholars to give a new, complementary orientation to their studies. Ample theoretical debate in legal and political philosophy shows that theoretical discussions cannot offer definitive evidence for the superiority of either the judges or the legislators. One of the major merits of Waldron's writings and of the literature that has seriously addressed whether to "take the constitution away from the courts"<sup>23</sup> is precisely to have shattered any hope to reach a final answer. As a pure conceptual inquiry seems to be inappropriate to substantiate such claims, one should address an empirical inquiry, at least with a view to complement the former. The elements I mentioned suggest that no definitive general answer will follow. And this is precisely the point I want to make: My feeling is that one should be very cautious in contending that judges are better or worse than legislators. Similar claims can only be made within the context of an empirical case study—i.e. a specific country or a specific geographic, cultural, or historical area—with respect to a specific topic and with respect to specific criteria of what it means to be "good."<sup>24</sup>

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<sup>19</sup> Conseil constitutionnel [CC] [Constitutional Court] decision Nos. 3/E/2012 & 14/E/2012, Jan. 29, 2012 (Ivory Coast).

<sup>20</sup> Tribunal supremo de justicia [TSJ] [Supreme Tribunal of Justice], Sala constitucional, Expediente No. 11-1130, Oct. 17, 2011 (Venezuela), available at <http://www.tsj.gov.ve/decisiones/scon/octubre/1547-171011-2011-11-1130.html>.

<sup>21</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-240QPC, May 4, 2012 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-114585.pdf>.

<sup>22</sup> Laura Underkuffler, *Moral Rights, Judicial Review, and Democracy: A Response to Horacio Spector*, 22(3-4) L. & PHIL. 335, 342 (2003).

<sup>23</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

<sup>24</sup> See also Dieter Grimm, *Constitutional Adjudication and Democracy*, 33 ISR. L. REV. 193, 195–196 (1999) ("There is neither a fundamental contradiction nor a necessary connection between constitutional adjudication and democracy. Judicial review has a number of democratic advantages. But it also creates some democratic risks.

The stakes of any investigation following these principles would be to uncover a more exact picture of how good judges and legislators respectively are, avoiding sweeping assertions such as those which have become familiar in several sectors of the constitutional academy. Thus I would advocate more modest, local, and contextualized studies, as they are the precondition for any well-grounded generalization.

### B. Rights Talk Once More

Hohfeld's *Fundamental Legal Conceptions*<sup>25</sup> has established that one should be very careful when using the language of rights. I would also like to call to mind one of Hans Kelsen's main teachings in the field, not of the institutional design of constitutional review to which he also greatly contributed,<sup>26</sup> but of legal theory. One of the basic tenets of his ambition was to understand the totality of the legal phenomena through the concept of the "basic legal proposition,"<sup>27</sup> which resulted in the conceptual elimination of the notion of a subjective right.<sup>28</sup> He replaced it with the notions of a legal norm and of a bundle of legal norms for any traditional legal concept. From this perspective, distinguishing legal actors who deal with "rights" and those who deal with other legal entities is meaningless. For a normativist, all this necessarily boils down to creating legal norms. One cannot ignore more recent legal theoreticians' efforts to moderate Kelsenians' reductionist standpoint and to underline the variety of "legal sentences,"<sup>29</sup> such as Dworkin's insistence on legal principles, as opposed to legal rules.<sup>30</sup> Nevertheless, Kelsen's insight might prove useful to cope with several problems that are at the heart of Pinelli's article. In Kelsen's terms:

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Consequently, the question whether or not a country should adopt constitutional adjudication is not one of principle, but one of pragmatics." See also Juan Carlos Bayón, *Derechos, democracia y constitución*, 1 DISCUSIONES, 65, 88 (2000).

<sup>25</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., Greenwood Press 1978) (1913).

<sup>26</sup> See Hans Kelsen, *La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 197 (1928); HANS KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN? (1931); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. OF POLITICS 183 (1942).

<sup>27</sup> HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZ (1911).

<sup>28</sup> See, e.g., HANS KELSEN, REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK 51-72 (Matthias Jestaedt ed., Scienta Verlag 2008) (1934), translated in HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: TRANSLATION OF THE FIRST EDITION OF THE "REINE RECHTSLEHRE" OR PURE THEORY OF LAW 37-53 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

<sup>29</sup> See, e.g., MANUEL ATIENZA & JUAN RUIZ MANERO, A THEORY OF LEGAL SENTENCES, (Ruth Zimmerling trans., 1998).

<sup>30</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

If the concept of subjective right . . . is stripped of every ideological function, . . . then what always emerge are, quite simply, legal contentions between human beings, more precisely, between material facts of human behavior, which are linked together by—that is, as the content of—the legal norm.<sup>31</sup>

This helps understand how useful Pinelli's remarks may prove to understand the functioning of some aspects of what one could call the "ideology" of modern constitutional systems.

This is especially true of the answer Pinelli gives to the question: "Do legislators primarily deal with rights as such? Do they reason about rights?"<sup>32</sup> According to Pinelli, rights are not at the forefront in the parliamentary debates. If one sticks to Kelsen's view, this is not related to anything substantive from the ontological point of view, but only from a difference in the ways legal provisions are respectively expressed. Whatever their wording, they can necessarily be reduced to the form of legal norms. The fact that "parliamentary procedures are not structured with a view to give voice to claims regarding rights"<sup>33</sup> nevertheless appears as a promising way to contrast the parliamentary and the judicial fora. The fact that they cannot be accounted for in ontological terms leads one to suggest other practical reconstructions. Traditionally, legal problems can only be submitted to judges provided several procedural conditions are met (e.g. ripeness, mootness, etc.). The litigants must especially prove they have some *standing*. The typical way to express this standing is precisely claiming to have some "right"—whatever precise meaning it can have according, for example, Hohfeld's typology—which some other party has infringed or failed to recognize. As a consequence, it is all the more natural for judges to use the vernacular of rights in their day-to-day work. But this appears only as some by-product of the specific and contingent configuration of the channels through which judges are called to act and to produce norms. When questions can be referred to constitutional judges by public institutions instead of individuals, or by any individual whatsoever independently from any standing to sue (*actio popularis*), constitutional judges are not so prone—because they are not so compelled by procedural structures—to talk about rights.

Moreover, legislators who have to speak for the whole community, and not only for the litigants, seem characteristically to be more prone to use more collective terms. Nevertheless, if, once again, one tries to test these traditional representations of judges and legislatures against empirical data, one cannot help but realize that the distinction

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<sup>31</sup> KELSEN, *supra* note 28, at 71 (German version), 52 (English version).

<sup>32</sup> Cesare Pinelli, *Constitutional Reasoning and Political Deliberation*, 14 GERMAN L.J. 1171 (2013).

<sup>33</sup> *Id.*

between the two types of discourses is more blurred than traditional idealizations suggest. Even though it might not be their everyday fare, it is not exceptional for legislatures to carry very detailed principled debates on the constitutionality of their actions, and especially on their compatibility with rights.<sup>34</sup> On the contrary, even though judges are not necessarily what “sociological jurisprudence” would have liked them to become, it is by no means unusual for judges to pay attention to the “social and economic outcomes”<sup>35</sup> of their rulings, not only for themselves and their institutional position, but also in a more general fashion. Let me mention one example. According to Mauro Cappelletti, two *idealtypen* of constitutional judges can be identified according to the effect of their rulings. Whereas an American tradition regarded judicial decisions as recognitive and therefore annulled unconstitutional norms *ex tunc*, i.e. retroactively, an Austrian tradition regarded judicial decisions as constitutive, so that the abrogation of an unconstitutional norm had to be regarded as a derogation, which produced *ex nunc* effects.<sup>36</sup> In practice, judges have long ago rejected this strict dichotomy. Even though they more or less explicitly adopt one system,<sup>37</sup> they in fact use a complicated range of *ex tunc*, *ex nunc*, and *pro futuro* sentences. Is not the concern for the consequences of their rulings the basic criterion according to which constitutional judges determine the temporal effect of their sentences of invalidity? On the one hand, judges refrain from retroactively quashing an old statute: They can hardly afford to abolish the very numerous contracts which may have been concluded according to its provisions or, if a tax law is concerned, they cannot afford to suddenly deprive the State of any income related to the collection of the particular tax. On the other hand, judges refrain from only prospectively quashing a criminal statute, for this would not benefit persons who may have been condemned previously according to its unconstitutional provisions. This very common reasoning, which is necessarily present in any ruling by a constitutional judge, is purely grounded on consequentialist considerations. The examples above show that this mode of reasoning is not as alien to them as might appear at first sight. This statement in turn leads me to qualify some of Pinelli’s contentions.

In another respect, Pinelli is perfectly right in highlighting to what extent legal reasoning is connected with “ways of (legal) worldmaking,”<sup>38</sup> to borrow from Nelson Goodman.<sup>39</sup> But I

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<sup>34</sup> See, e.g., J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 *LAW & SOC. INQUIRY* 127 (2004).

<sup>35</sup> Pinelli, *supra* note 32.

<sup>36</sup> MAURO CAPPELLETTI, *IL CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPARATO* 105–115 (1968).

<sup>37</sup> Guillaume Tusseau, *Le pouvoir des juges constitutionnels*, in 3 *TRAITÉ INTERNATIONAL DE DROIT CONSTITUTIONNEL* 169–206 (Michel Troper & Dominique Chagnollaud eds., 2012).

<sup>38</sup> NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978).

<sup>39</sup> Pinelli, *supra* note 32.

would suggest taking this process more seriously in the analysis of rights talk. According to a pragmatist view, “a difference must make a difference.”<sup>40</sup> Following Kelsen, if using the vernacular of “rights” does not make any difference for legal ontology, other routes are to be explored in order to account for the differences this vernacular could make, especially from the ideological point of view. The pervasiveness of the *rights mindset*, which has to be correlated to the growth of judicial power worldwide, and the necessity for people who want to go to the court to speak the appropriate language, can raise some concern.

The rights mindset has been criticized for its tendency to debase important social values such as collective deliberation, solidarity, and the capacity for accommodation. According to Mary Ann Glendon’s classical analysis:

A tendency to frame nearly every social controversy in terms of a clash of rights . . . impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations . . . promotes unrealistic expectations and ignores both social costs and the rights of others. A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic obligation.<sup>41</sup>

Insisting on the dimension of “legal worldmaking,” the spread of rights talk also leads to the fact that, progressively, political concern and social demand can only be expressed in legal terms. As Jeremy Bentham showed long ago, thus foreshadowing the Marxist critique of hegemony,<sup>42</sup> this implies resorting to the specific knowledge of a specific class of professionals, namely lawyers.<sup>43</sup> Such a phenomenon results in a form of what Gunther Teubner and Andreas Fischer-Lescano call “cannibalizing epistemes.”<sup>44</sup> Indeed, the mindset of those Bentham ironically called “Judge and Co.”<sup>45</sup> must necessarily be adopted by those

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<sup>40</sup> See WILLIAM JAMES, PRAGMATISM 35, 35–54 (Dover Thrift Eds. 1995) (1907).

<sup>41</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE, at xi (1991).

<sup>42</sup> Guillaume Tusseau, JEREMY BENTHAM: LA GUERRE DES MOTS (2011).

<sup>43</sup> See also Pierre Bourdieu & Richard Terdiman, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987).

<sup>44</sup> Gunther Teubner & Andreas Fischer-Lescano, *Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS: LEGAL PROTECTION IN A DIGITAL ENVIRONMENT 17, 17–45 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008).

<sup>45</sup> See, e.g., JEREMY BENTHAM, *Justice and Codification Petitions*, in 5 THE WORKS OF JEREMY BENTHAM 481, 512 (John Bowring ed., William Tait 1838).

who want to express any economic, political, or social concern. It is by no means evident that judges are more apt than legislators to promote rights or, more exactly, to promote what rights stand for in terms of social demands. Using the legal vernacular to frame human, political, economic, social, etc. change, progress, or reform is not neutral, but rather necessarily subservient to the interests of the legal class. As a consequence, any claim about the qualities of judges and their would-be specific reasoning from the point of view of achieving these ends must in itself be taken carefully. It should be assessed through specific cases.

To sum up, there is nothing self-evident in the fact that courts deal with rights, whereas legislatures deal with policies or deal with rights through the lens of a consequentialist evaluation for the achievement of a policy. All the same, this representation, which appears to be only the construct or the by-product of specific institutional devices, cannot be outright discarded. In order to understand the machinery of law, it is crucial to understand that it is part of the ideological apparatus of the law as a form of social control.

### C. Philosophers Kings?

Pinelli avoids one of the (sometimes unsuspected) defects of a large portion of constitutional scholarship. Indeed, in several attempts to underline the specificities and the qualities of legal argumentation in the judiciary, as opposed to those in the legislature, commentators make grandiloquent contentions such as Rawls' picturing the judges as the embodiment of public reason:

Public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone. Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their ground consistent and fit them into a coherent constitutional view over the whole range of their decisions. The role of justices is to do precisely that and in doing it they have no other reason and no other values than the political.<sup>46</sup>

Such a representation of the impact of judicial reason-giving is not fully convincing. The fact that judges are bound to give reasons for their action is not to be necessarily taken as good. First, the ideology of "transparency" is a recent phenomenon in our societies.

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<sup>46</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 235 (1993).

Previously, the legitimacy of power tended to rely on secrecy and on the *arcana imperii*.<sup>47</sup> As a consequence, praising judges for the way they decide must accordingly be perceived as a contextual phenomenon, which is not good in itself, but only according to several historically situated norms. Second, what is the concrete form of constitutional reasoning and its respective qualities? Regardless of Waldron's critiques, which are taken into account by Pinelli, I would like to underline the fact that, for example in France, some authors have criticized the scarcity of the Conseil constitutionnel's practice of reasoning, thus possibly calling into question its very usefulness.<sup>48</sup> In the same manner, one can doubt the usefulness of several highly divided motivations, resulting in rulings that prove nearly impossible to understand. In the U.S. Supreme Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>49</sup> offers a classical example of this phenomenon. Another case in point is *County of Allegheny v. ACLU*, where the syllabus of the case painstakingly concludes:

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, post, p. 492 U. S. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, post, p. 492 U.S. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 492 U. S. 646. KENNEDY, J., filed an opinion concurring in the judgment in part

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<sup>47</sup> See, e.g., Jean-François Kerléo, *La transparence en droit. Recherche sur la formation d'une culture juridique* (Oct. 5, 2012) (unpublished Ph.D. dissertation, University Jean Moulin Lyon 3).

<sup>48</sup> See, e.g., Denis Baranger, *Sur la manière française de rendre la justice constitutionnelle. Motivations et raisons politiques dans la jurisprudence du Conseil constitutionnel*, 7 *JUS POLITICUM*, (2012), available at <http://juspoliticum.com/Sur-la-maniere-francaise-de-rendre.html>; ARTHUR DYEVE, *France: Patterns of Argumentation in Constitutional Council Opinions*, in *CONSTITUTIONAL REASONING IN COMPARATIVE PERSPECTIVE* (forthcoming), available at <http://ssrn.com/abstract=2026396>.

<sup>49</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

and dissenting in part, in which REHNQUIST, C.J., and WHITE and SCALIA, JJ., joined, post, p. 492 U. S. 655.<sup>50</sup>

One can hardly see what benefit results from similar examples of judicial reason-giving, from the point of view of moral and political deliberation, and for the advancement of basic rights.

This representation of constitutional judges as the voice of reason is undoubtedly of the utmost importance to understand and explain how a constitutional culture works, i.e. once again, to understand and explain legal ideology. But the representation lacks credibility as a justification on a moral or political plane. As Luther Martin said before the Convention of Philadelphia, “[A] knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher . . . degree to the Judges than to the Legislature.”<sup>51</sup> If one follows Joseph Raz, for whom “[t]here is no reason to think that anyone or any institution can claim expertise in the very abstract basic principles of morality,”<sup>52</sup> it is possible to cast doubt on any proposition stating that judges are the adequate actors to deal with matters of principle. Moreover, as was also feared by James B. Thayer, judicial review can precisely become all the more necessary as it already exists. Following a process of self-fulfilling prophecy, members of political institutions who know that their choices will possibly be reviewed by judges could stop paying attention to important rights-concerns: “If we are wrong, they say, the courts will correct it.”<sup>53</sup> As an illustration, George W. Bush, signing the *Bipartisan Campaign Reform Act* of 2002 declared:

Certain provisions present serious constitutional concerns. . . . I . . . have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under law.<sup>54</sup>

As a consequence, the alleged inadequacy of parliaments in this respect could not so much be a cause or a justification for the existence and role of judges, as a result of them. Other

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<sup>50</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 577 (1989). I am indebted to Mathilde Cohen for this example.

<sup>51</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 76 (Max Farrand ed., Yale Univ. Press 1966) (1911).

<sup>52</sup> Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 167 (Larry Alexander ed., 1998).

<sup>53</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARVARD L. REV. 129, 155–156 (1893).

<sup>54</sup> Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503 (Mar. 27, 2002).

political authorities refrain from passing statutes on controversial issues, such as the death penalty or same-sex unions, hoping that judges will do the job.<sup>55</sup> Others pass laws hoping that the judges will quash them, as in France in 1982, when a statute establishing affirmative action for women in the ballot was declared unconstitutional, to the real satisfaction of many legislators who had not dared to oppose it.<sup>56</sup> These facts imply a general comment as to the dynamics of the relations between judges and the legislatures: Even though one or the other empirically appears to do a better job, this can change and must be replaced in the general context of a living constitutional culture. Besides, one can notice the following paradox: Authors are all the more prone to praise judges and their specific qualities in the field of the rights protection as they are to precisely ask the judges to exceed the traditional limits of their functions, and to fulfill the traditional function of legislatures, as devisers of general social policies.

This leads to a last source of puzzlement. It is indeed possible to wonder—in a crude and provocative way, it is true—whether the overabundant debate on the respective legitimacies of judges and legislatures for the enforcement of legal rights, with its increasingly abstract aspect, is not progressively overshadowing the most important issue. Indeed, from the point of view of political theory, the crucial issue is that of the justice of the institutions. The justice of a social system can only be envisioned with respect to a specific theory of justice, a specific political culture, a specific level of economic development, a specific history etc., i.e. in a nutshell, a specific empirical context. As no one is innocent, my hunch is that neither is the social nor doctrinal process by which we progressively tend to forget this simple truth.

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<sup>55</sup> Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 35 (1993); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON & ORG. 33 (1986); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371 (1986).

<sup>56</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 82-146DC, Nov. 18, 1982 (Fr.) (Loi modifiant le code électoral et le code des communes et relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales). See Daniele Lochak, *Les hommes politiques, les 'sages' (?) . . . et les femmes (à propos de la décision du Conseil constitutionnel du 18 novembre 1982)*, DROIT SOCIAL 131 (1983).