IN SEARCH OF A MEANING AND NOT IN SEARCH OF THE MEANING: JUDICIAL REVIEW AND THE CONSTITUTION IN TIMES OF PLURALISM

MIGUEL POIARES MADURO*

This Article revisits the traditional debate on the role of courts in relation to the constitution. It highlights how this debate often ignores the nature of constitutionalism itself. It is argued that, first, traditional theories of judicial review fail to fully recognize and engage with the pluralist character of constitutionalism and, second, that constitutionalism is incompatible with the single institutional preferences expressed by those different theories of judicial review. This argument is linked to a conception of constitutionalism that does not limit its role to taming politics and entrenching certain values so as to protect them from ordinary politics. Instead, constitutionalism is also about making politics possible and productive. This conception of constitutionalism has important consequences for the role of courts and the nature of constitutional interpretation. Constitutions are more about framing the search for meaning in a political community than the revelation of a meaning that has been previously set into constitutional rules. The Article concludes by putting forward a model of discursive interpretation that, it is argued, better fits the role to be played by courts in light of the current nature of constitutionalism.

INTRODUCTION

The good thing about being asked to write a piece for the Symposium honoring Neil Komesar is that I do not need to write something especially for it. Since I have met Neil and engaged with his work, comparative institutional analysis has become an integral part of

* Professor, Director of the Global Governance Programme, European University Institute.

all my legal analysis. To write about law, for me, always explicitly or implicitly involves writing about comparative institutional analysis. But if I will not have the burden of having to write something especially for this Symposium, I would like to write something special for Neil. He is a friend and a mentor. The best analytical mind I know. He stated the obvious: institutions, not only goals, matter; and choosing between institutions should depend on a comparison between the different institutional alternatives. But no one had yet articulated the obvious! The greatest minds are those who state what is obvious only after it is articulated by them. I would be very happy if what follows would come to be regarded as obvious.

This Article is both about comparative institutional analysis and an application of comparative institutional analysis. It is a development of my work on courts and judicial review, particularly in the European Union (EU). However, it is also a development of my longstanding interest in the less explored dimensions of comparative institutional analysis, including the following questions: How does comparative institutional analysis relate to broader normative questions on the nature of constitutionalism, democracy, or fundamental rights? How are courts to use comparative institutional analysis? Should comparative constitutional analysis replace or be incorporated into the models of legal reasoning and deliberation employed by courts? If the latter is the case, then how? Who decides who decides and how are institutions to be trusted to choose between themselves and other institutions?

I. COURTS AND THE CONSTITUTION

The role of courts has always been at the center of legal debates, but courts have also become increasingly central to the arbitration of political and social disputes in contemporary political communities. The constitutionalization of political life has promoted the judicialization of political disputes. Constitutionalism does not necessarily require constitutional review[1] but the latter has become a regular feature of contemporary constitutionalism. Be it in the traditional American model of judicial review or in the Kelsenian model of a constitutional court, courts are at the center of the constitution. As a consequence, a longstanding and profoundly engaging debate has taken place on the proper role of courts in interpreting the constitution and shaping political and social life. The debate includes a discussion on the legitimacy of

1. For defenses of political constitutionalism, see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); and MARK TUSHNET, WHY THE CONSTITUTION MATTERS (2010).

judicial review and the proper balance of power between the judiciary and the political process.

I have always been dissatisfied with the terms of this debate. First, it is too often put simply in terms of methods of constitutional interpretation, ignoring deeper assumptions about the nature of constitutionalism that shape the methods proposed but are not clearly articulated or justified. A recurrent problem with many of the proposed methods of constitutional interpretation is that they ignore the true nature of constitutionalism.

Second, the debate on judicial review does not reflect what is actually taking place both in the lawmaking processes and in the courts. This is immediately visible in the common treatment of institutions as single-rationality agents. In fact, the reason of both legislatures and courts is a product of the reason of different lawmakers and judges and the forms of deliberation through which those different reasons are aggregated into a rule or judicial decision. How law is interpreted by courts, for example, is as much a product of the nature of their deliberative process and composite rationality as it is of the understanding of the law and hermeneutics. Courts have a composite rationality, but this is often ignored in theories of judicial review or interpretation. Theories on judicial review or methods of interpretation must seriously engage with theories of deliberation. This requires taking courts seriously as institutions. They are not simply conduits for normative commands but institutions that aggregate preferences in a different way than, for example, the political process or markets. This must be a part of any serious theory of judicial review.

The primary purpose of this Article is to revisit the traditional debate on the role of courts in relation to the constitution through highlighting how this debate often ignores the nature of constitutionalism itself. My twofold argument will be that, first, traditional theories of judicial review fail to fully recognize and engage with the pluralist character of constitutionalism and, secondly, that constitutionalism is incompatible with the single institutional preferences expressed by those different theories of judicial review.

This argument is linked to a conception of constitutionalism that does not limit its role to taming politics and entrenching certain values so as to protect them from ordinary politics. Instead, constitutionalism is also about making politics possible and productive. It does not only limit disagreement, it also allows, regulates, and accommodates disagreement and pluralism. This conception of constitutionalism has important consequences for the role of courts and the nature of constitutional interpretation. Constitutions are more about framing the search for meaning in a political community than the revelation of a meaning that has been previously set into constitutional rules.

In this light, the indeterminacy of law and its impact on legal interpretation is not simply a consequence of a gap between text and meaning or even, broadly, law and its context of application. The indeterminacy of constitutional law, in particular, is an intended result of constitutionalism in creating a deliberative space for competing interpretations of the common good to be regulated and arbitrated through rational discourse. These competing interpretations assume, in turn, a form of an institutional competition in interpreting the constitution, in particular between courts and the political process.[2] This institutional competition requires comparative institutional analysis to be at the center of constitutional law and judicial review. I will conclude by briefly highlighting how this understanding of constitutionalism and the role to be played by comparative institutional analysis requires a form of legal reasoning that I define as discursive interpretation.

I situate this revisiting of judicial review and constitutional interpretation in the current context of increased constitutional pluralism. I believe it forces us to rethink theories of judicial review and constitutional interpretation in a way that promotes a better understanding of constitutionalism in general.

The views expressed in this Article are not limited to EU constitutionalism. However, it is in the context of the latter that I have developed my understanding of constitutional pluralism and studied its impact on judicial review and constitutional interpretation. Even if I believe that much of what I will say in the following pages is valid for other constitutional contexts, most examples are drawn from the European Union constitutionalism ("European constitutionalism") and the European Court of Justice.

II. THE JUDICIAL ROLE AND CONSTITUTIONAL PLURALISM

Courts employ a variety of methods of interpretation: text, legislative history, context, purpose, and telos are among those most used in judicial decisions. Moreover, legal reasoning is filtered through the canons of practical reasoning, highlighted by the classical recourse to syllogism. It is through this arsenal of professional techniques accepted by the legal community that judges construct the legal arguments upon which they justify their judicial decisions. This is the standard "language" of the community of judicial discourse and adhering to it lays

2. Some of these aspects are discussed in this Article, but they would require a broader discussion of the nature of constitutionalism and constitutional pluralism. As such, this Article is to be read as a draft paper in light of its insertion in a broader book project on constitutional pluralism on which I am currently working.

the first step in the objectivization of the process of interpretation.[3] However, this same "language" can be used to construct rather contrasting legal arguments, depending on how those methods are used, the weight to be given to each of them, and what systemic normative preferences guide their application.[4] Moreover, it is well known that there are elements inherent in the law itself that feed some discretion into the process of legal interpretation. Textual ambiguity or conflicting rules are two well-known examples.[5] This indeterminacy creates what could be called a normative gap in the process of interpretation of legal rules.[6] This normative gap, I will argue, is not only a function of the limits of language and constitutional law. It is inherent in the nature of constitutional law and instrumental to the pursuit of its goals.

This normative gap increases with constitutional pluralism. The expression "constitutional pluralism" may be novel for an American audience but it has become a part of the jargon of European constitutionalism.[7] Usually, constitutional pluralism identifies the phenomenon of a plurality of constitutional sources of authority, which create a context for potential constitutional conflicts between different constitutional orders to be solved in a nonhierarchical manner. More

---

3. *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–45 (1982).

4. That is why I consider that an articulation of the systemic normative preferences that a particular interpreter attributes to the legal order in which it operates is a necessary condition of the objectivation of the interpretative process. Without it, the gap between the rhetoric of the classic methods of interpretation and the reality of judicial decisions would be a fertile and safe space for unaccountable subjectivity.

5. For three examples of the interpretation in case law, see NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 213–28 (1978).

6. *Id.* at 100–28 (discussing second order justifications); *see also* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (Ruth Adler & Neil MacCormick trans., 1989).

7. Aside from my own work, see, for example, THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007); THE TWILIGHT OF CONSTITUTIONALISM? (Petra Dobner & Martin Loughlin eds., 2010); Gráinne de Búrca & J.H.H. Weiler, *Introduction* to THE WORLDS OF EUROPEAN CONSTITUTIONALISM 1, 3 (Gráinne de Búrca & J.H.H. Weiler eds., 2012); Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 85, 96–100 (Matej Avbelj & Jan Komárek eds., 2012); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258, 273–74 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Mattias Kumm, *The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 216, 216–20 (Julie Dickson & Pavlos Eleftheriades eds., 2012); and Kaarlo Tuori & Suvi Sankari, *Introduction* to THE MANY CONSTITUTIONS OF EUROPE, at ix (Kaarlo Tuori & Suvi Sankari eds., 2010).

broadly, pluralism also refers both to the multiplication of competing legal sites and jurisdictional orders, and to the expansion of relevant legal sources. This context affects the role of courts and the character of judicial adjudication and interpretation. The pluralism of constitutional claims and legal sources is not, however, the only source of increased pluralism in constitutionalism. One can identify different dimensions of constitutional pluralism.

Taking the European Union as an example, we can identify five main sources of pluralism. First, there is a plurality of constitutional sources within the EU constitutional order itself. EU constitutional law is a product of state and EU constitutional sources. A well-known example regards the protection of fundamental rights as general principles of law that the European Court of Justice recognized on the basis of the common constitutional traditions of the member states.[8]

Second, the acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional. In fact, sometimes it has even been resisted by national constitutional courts. This confers to EU law a contested or negotiated normative authority.[9]

Third, the EU legal order is a decentralized and asymmetric legal order: it is a "disorder of . . . orders."[10] Its rules are implemented, interpreted, and applied through different state courts and legal orders. These correspond to different legal, social, and political contexts of application that may impact the meaning that EU rules end up having in each of those legal orders.

Fourth, constitutional pluralism is linked to political pluralism and, in the EU's constitutional pluralism, to an almost radical form of political

---

8. Case 11/70, Int'l Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 1134.

9. This is the hard core and starting point of traditional constitutional pluralism analysis in the context of the EU. *See* Samantha Besson, *From European Integration to European Integrity: Should European Law Speak with Just One Voice?*, 10 EUR. L.J. 257, 257–60 (2004); Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MARKET L. REV. 351, 351–53 (1999); Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501, 501–02 (Neil Walker ed., 2003); Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND, *supra* note 7, at 67 [hereinafter Maduro, *Three Claims of Constitutional Pluralism*]; Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 336–39 (2002) (which, however, already presented a broader picture of constitutional pluralism); Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony* 3 (The Jean Monnet Program, Working Paper No. 10/05, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934067.

10. Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L J. CONST. L. 373, 376 (2008).

pluralism. In the EU, conflicting political claims are often supported by corresponding claims of polity autonomy: a particular political idea is supported also as the expression of the political identity of a particular political community.

Fifth, constitutional pluralism is a result of the increased communication and interdependence between the EU and other supranational or international legal orders—a phenomenon where the EU legal order is faced with challenges similar to state legal orders. Increased economic and political integration has led to a multiplication of international legal regimes and jurisdictional fora. This complexity creates risks of fragmentation[11] but also increased appeals for judicial bodies to actively promote integration and coordination between different legal orders. This integration also increases the risks of jurisdictional conflicts. These conflicts may not necessarily be legal in formal terms, but they are so de facto. Conflicts generate instances of what we could label as interpretative competition and adjudication. Courts sometimes compete on the interpretation of similar legal rules. Other times they compete on the quality of the judicial outputs they provide to similar legal questions (with consequences, for example, for the jurisdictional choices of mobile legal actors). This context also gives rise to possible externalities (where the decision made in a certain jurisdiction has a social and an economic impact, albeit not a binding legal impact, in another jurisdiction).[12]

Finally, there is also an increased crossfertilization of legal concepts. This is so for two reasons. First, the growing transnational character of economic litigation and legal services means that lawyers tend to circulate legal arguments and legal strategies among different legal orders. Second, the circulation of legal ideas through networks of academics, lawyers, and judges entails a miscegenation of legal cultures.[13]

---

11. *See* Chairman of the U.N. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (by Martti Koskenniemi), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf.

12. For example, the prohibition in a certain legal order of a merger between companies that also operate in other jurisdictions.

13. Neil Walker has described this legal openness to external legal arguments as one of sympathetic consideration. *See* Walker, *supra* note 10, at 383–85. On the impact of the networks of lawyers and judges, see Anne-Marie Slaughter, *A Brave New Judicial World*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 280 (Michael Ignatieff ed., 2005); John F. Stack, Jr. & Mary L. Volcansek, *Introduction* to COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY 3, 5 (Mary L. Volcansek & John F. Stack, Jr. eds., 2005); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 367–73 (1997); and Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1122 (2000).

My intention here is not to discuss pluralism but to highlight how it impacts the role of courts, and in particular, judicial review. Pluralism increases the centrality of courts in contemporary political communities. Both political pluralism and the pluralism of legal sources increase normative pluralism: the possibility that a plurality of valid and competing legal claims can be derived from the existent sources of law. This places courts at the center of many political disputes within a political community but also between political communities. However, as I have argued in the past, there is nothing fundamentally new in the relationship between constitutionalism and pluralism.[14] The new forms of pluralism simply render more clear the true nature of constitutionalism. In doing so, new forms of pluralism provide an opportunity to revisit the relationship between courts and the constitution.

Constitutional pluralism impacts the institutional position of courts and the adequacy of their model of legal reasoning. Both political and legal pluralism translate into normative and interpretative pluralism. In other words, courts are increasingly required to arbitrate among normative claims that are equally substantiated in formal terms, either by virtue of conflicting rules or by virtue of normative conflicts that are internal to the rules themselves. This may be because the political community has committed itself to competing legal orders (state, supranational, and international), or because within a particular legal order there are different instances of normative production, or simply because agreement is so difficult to achieve in the process of producing legal rules that they are bound to reflect competing normative claims. The textual ambiguity of rules is, in this case, a simple reflection of a deeper normative ambiguity. This is often the case in the EU. The nature of decision making in the EU often entails a political pluralism which is reflected in conflicting normative preferences being entrenched in strong bargaining positions. This makes it particularly difficult to reach a clear normative agreement. As a consequence, such rules could often be characterized as "incompletely theorized agreements,"[15] for instance, agreements reached on the basis of different normative assumptions. These rules are the product of a complex political bargain where, to a certain extent, there was an agreement not to agree. The resulting decisions are bound to lead, intentionally or not, to a delegation of final decision-making authority to courts. This is not necessarily negative: a political community may legitimately decide to exclude certain issues from the passions of the political process and "delegate" them to more

14. *See* Maduro, *Three Claims of Constitutional Pluralism*, *supra* note 9, at 68.

15. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1998) (but the expression is used here for a rather different purpose).

insulated institutions. Similarly, political communities can decide to agree on very broad principles without articulating solutions to conflicts that will necessarily occur in the practical application of those principles. This may be necessary to prevent collective action problems. The transaction and information costs of reaching a final and specific agreement on certain rules are reduced by deferring them to the judiciary through the concretization of certain principles whose universal potential we trust. Such principles allow agreement on delicate and controversial political questions by politically deferring their arbitration to a judicial solution based on universally agreed-upon principles.

In order to preserve the coherence and integrity of the legal order in the context of the plurality of legal sources and the increased existential (and not simply textual) normative ambiguity of existent legal rules, courts are also required to perform an integrative role of these different legal sources and normative claims. All of this creates a paradox. As stated, pluralism increases the centrality of courts and often leads to the increased delegation by political actors of politically and socially sensitive decisions to courts. But this same context of pluralism also tends to increase both the contestability of judicial decisions and the rigidity of their outcomes (because the political process is less capable of overcoming them). The only way to deal with this paradox is to upgrade our understanding of the role of courts in a democratic political community. Courts themselves have to adapt the nature of their legal reasoning and the understanding of their role in judicial review. To a large extent, as stated before, this judicial role precedes constitutional pluralism (or at least the articulation of such pluralism within constitutionalism). But the current reality makes it even more urgent to revisit both the models of legal reasoning and the theories of judicial review in which it is supported.

III. REVISITING THEORIES OF JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

When discussing the role of courts, the usual point of departure is their methods of interpretation. Interpretation can perhaps be suggestively described as the software of courts. In a narrow sense, interpretation can be understood simply by reference to the methodologies employed in the interpretation of legal rules: the types of legal arguments used by courts, their techniques of exegesis of the text, and the rules of logic that make legal reasoning a form of practical reasoning. However, as mentioned before, debates about legal interpretation often assume a broader dimension linked to the proper role of courts in a democratic society. In this broadest sense, interpretation will be a function of hermeneutics, and also of the institutional

constraints and normative preferences that determine judicial outcomes in light of an existent body of rules. Interpretation here is at the intersection of the debates, not only about different methods of interpretation (or forms of legal reasoning), but also about broader questions about the proper role of courts in a democratic society. The concrete interpretation to be given to legal rules is therefore a product of legal reasoning and of the institutional constraints and normative preferences that determine the role of courts in a given political community.

Discussions on judicial review are therefore usually merged with discussions on the methods of constitutional interpretation and legal reasoning to be employed by courts. But the latter often depart from an unarticulated, systemic understanding of the role of courts in the political community in which they operate. I believe we should start by making the existence of such choices transparent.

Looking at a variety of views on legal reasoning and the role of courts, we can identify at least three different ways of dealing with the interpretative space left to courts in a constitutional order. I am less concerned here with the specifics of the normative claims and more concerned with the institutional preferences that underlie the different approaches. In fact, if often presented as theories of constitutional interpretation or constitutional justice, they express, above all, different institutional preferences regarding the role to be played by courts and other institutional alternatives in giving meaning to the constitution.

A. Institutional Authority

First, one can simply assume that the normative gap inherent in the process of interpretation should be filled by courts. This is legitimated by the institutional authority of courts. Interpretation renders law objective by reason of the meaning attributed to particular norms by courts; it is the courts' interpretative authority that renders law objective and not vice versa. To a certain extent, this never-quite-articulated theory of interpretation and constitutional justice has largely dominated the practice of constitutional review in Europe. Any normative gap of constitutional rules is construed as a delegation to courts. Constitutional review is the process through which courts exercise their exclusive authority of interpretation. This approach emphasizes the power of courts to give meaning to constitutional law, at the expense of the political process.

This constitutional practice is theorized in rather different ways by some versions of legal positivism, legal realism, and critical legal studies. They all recognize, at either a normative or empirical level, that courts do have the authority to fill the normative gaps of the constitution.

What varies is that, for some, such authority derives from the construction of the legal system as complete and fully insulated from outside arguments, meaning that the existence of normative gaps is itself denied, while for others such authority is a given of the institutional position that courts have acquired in a particular legal system. This is not to imply that under such theories there are no constraints imposed on courts. But what they have in common is the conception of those constraints as external to the process of legal interpretation. Paradoxically, by conceiving the process of judicial interpretation as either a pure act of will or a fully bounded act of knowledge concerning the existing rule, such different theories empower courts at the expense of the political process.

Such approaches to constitutional review are challenged because they keep outside of judicial reasoning other relevant constitutional dimensions and arguments on determining the appropriate levels and forms of judicial review. That there are other relevant dimensions of constitutional interpretation, in particular those concerning the relationship with the political process, is obvious because indeed all courts end up developing mechanisms of self-restraint. The institutional and legitimacy limits of courts are defined by the fact that if courts would fully use the discretion inherent in the process of interpretation they would soon lose the authority necessary to support the use of that discretion. As a consequence, even courts that implicitly assume such a conception of the process of interpretation and their authority end up developing mechanisms of self-restraint. Often, they are not articulated in the form of theories of judicial deference but, instead, appear in the form of procedural filters, narrowly tailored decisions, or limitations of the effects of judicial decisions. Sometimes the resistance to the internalization and articulation of the other dimensions of constitutional interpretation in judicial reasoning leads to apparently inconsistent judicial outcomes. This is more often a product of the fact that variations in the degree of judicial scrutiny remain unarticulated in the case law.

B. Formal Constructivism

A second approach to constitutional review argues that the normative gaps identified in constitutional interpretation ought to be filled by the political process. The most typical version of this is found in the arguments for a formal interpretation of the constitutional rules. This kind of formalism does not need to assume that the text of legal rules provides all the answers and leaves no margin for interpretation. They often admit that is not the case and that it is precisely for that reason that courts must develop methods of interpretation narrowing their own discretion and protecting that of the political process. We can define this

approach as formal constructivism. These theories adopt formal methods of interpretation even to artificially govern areas that could be considered as involving substantive judicial discretion in light of the legal text. The argument is that formalism is what best constrains courts. These theories require, most often, an objective meaning of the norm that is static in time. If the text itself is not clear, then such meaning is to be found in the historical context of its enactment,[16] the intent of the legislator, a holistic interpretation of the language employed,[17] a rule-bound combination of plain meaning and agency deference,[18] or any other purportedly objective and formal meaning (external to the interpreter's preferences). Formal constructivism currently appears to be the dominant conception of constitutional review in the United States.

There are different possible criticisms of this approach. A usual criticism is linked to its artificial character and the extent to which that allows manipulation of the justification process: norms often do reflect multiple meanings and to artificially limit the burden of justification inherent in the process of interpretation to one such meaning may increase judicial discretion and not limit it.[19] Formal constructivist theories of interpretation recognize the need to define the criteria for the artificial delimitation of substantive discretion, but such criteria are themselves subjective. Justice Antonin Scalia, for example, recognizes that his own brand of originalism is both difficult to apply in practice (because it requires consideration of a wealth of historical materials) and it must be understood in a moderate manner (so as not to lead to interpretations that, in his own words, would become "a medicine that seems too strong to swallow").[20] But it is obvious that both these variables are liable to introduce a great degree of discretion back into the process of interpretation.

Equally important is that these theories also limit the scope of arguments to be employed by courts. They close the constitution by

16. For an example of Justice Antonin Scalia's originalism, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); and Antonin Scalia, *Foreword* to ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43 (Steven G. Calabresi ed., 2007). On the attempt to reconstruct "living constitutionalism" with ideas of originalism, see JACK M. BALKIN, LIVING ORIGINALISM 277–78 (2011).

17. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–802 (1999).

18. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230 (2006) [hereinafter VERMUELE, JUDGING UNDER UNCERTAINTY]; ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 175–78 (2011).

19. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 11 (2004) (with a similar critique).

20. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57, 861 (1989).

appealing to formal arguments. But, as I will argue below, this is contrary to constitutionalism itself. This highlights the basis for my primary objection to formal constructivist theories: their underlying conception of constitutional law. Even if we were to accept the feasibility and objective character of a formal construction of the process of interpretation to limit "judicial activism," there is an underlying question that needs to be answered: why should the political process always be presumed to be superior to the judicial process in giving meaning to substantive areas of discretion of constitutional law? Such theories do not choose formalism because they necessarily believe it to be the best method of ascertaining or giving meaning to the law (in particular constitutions) but because they believe that it is the method that most effectively leaves the meaning of the constitution to be determined by the political process and not the courts. They assume the exact opposite institutional preference to the previous set of theories. To simply invoke democracy as the basis for this institutional preference is not enough. If it were, then constitutional review itself should be put into question. The relevant question is when should the political process be preferred to courts in light of the constitution?

This question is equally valid for another theory aimed at limiting the judicial role so as to empower the political process: judicial minimalism as argued by Cass Sunstein.[21] Courts should show deference to the political process by narrowing the scope and depth of their judicial decisions. They should decide only issues specific to the cases actually before them without laying down broad rules for future application. As Chief Justice John Roberts of the United States Supreme Court put it, "[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."[22] Judicial minimalism may, however, also be a simple product of the constraints of deliberation. Particularly in courts without dissents it is usual for judges to agree on minimalist decisions, keeping disagreement on questions of principle while agreeing on how to resolve the particular case.

These approaches prefer the meaning of the constitution to be determined by the political process and not courts. But such general presumption in favor of the political process in interpreting constitutions

21. *See* CASS R. SUNSTEIN, *Preface* to ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix-xiv (1999).

22. Joan Biskupic, *The Immigration Ruling: A Hint on Healthcare?*, CHI. TRIB. (June 26, 2012), http://articles.chicagotribune.com/2012-06-26/news/sns-rt-us-usa-court-immigrationbre85p190-20120626_1_arizona-immigration-immigration-status-drive-out-illegal-immigrants (quoting Chief Justice John Roberts's June 2006 commencement address at Georgetown University).

is itself a product of a systemic understanding of the constitution[23] and the legal order—one that must be justified.[24]

C. Functional Approaches

The third approach to constitutional review entrusts courts with a specific constitutional mission, involving a particular normative goal, that ought to guide them in interpreting and applying the constitution. Both the legitimacy and the role of courts in constitutional review are determined by a particular function entrusted to them by the constitution. Legal positivism, which recognizes the existence of hard cases,[25] fits into this category as well as other theories that are more exclusively focused on the legitimacy of judicial review. Some theorists make a clear-cut distinction between the validity of judicial decisions and their appropriateness or correctness. The first would be an objective process while the latter would be largely subjective and have to be legitimated by the adherence of courts to a particular normative theory of the common good (substantive, procedural, or even consequentialist). To a certain extent, these theories appear to distinguish between the methods of interpretation to be employed by courts (which would determine the extent of indeterminacy of the rule) and the theories of constitutional justice or judicial adjudication that ought to guide them in the areas of judicial discretion ascertained by that indeterminacy.

Adopting different variations of this approach, some defend judicial review by explaining that it enables the values in natural law to be realized in a largely positivist legal system.[26] Others identify constitutional justice with a set of constitutional values (in particular human rights or human dignity) inherent in the constitutional document interpreted as a living one.[27] Others still focus on a more procedural

---

23. Let me note that, paradoxically, departing from such systemic understanding is in contradiction with a formalist conception of interpretation. *Cf.* SUNSTEIN, *supra* note 21, at 210.

24. Some of these authors (notably Adrian Vermeule) do put forward some arguments highlighting what they perceive to be the institutional malfunctions of courts. *See, e.g.*, VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 18, at 3, 122–32. However, even if we were to fully accept their portrait of courts, that portrait would need to be compared with the institutional malfunctions of the political process. Neil Komesar has consistently noted this problem of single institutional analysis in legal scholarship. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5–7 (1994); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 20, 181–82 (1994) [hereinafter KOMESAR, LAW'S LIMITS].

25. *E.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

26. *See, e.g.*, MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, at viii, 41–42 (1971).

27. *See, e.g.*, DWORKIN, *supra* note 25, at 147–49.

conception of the constitutional role of courts to secure the proper functioning of the democratic process by correcting representative malfunctions.[28]

While I see in many of these theories a closer approximation to the reality of judicial deliberation and the nature of constitutionalism, I am reluctant to fully embrace any of them. The reason for this is twofold: first, most theories still tend to conceive of the judicial role as the product of a fixed variable, independent from variations in the political process and other alternative institutions; when they do not (as in John Hart Ely's)[29] they are single institutional (the choice becomes the product of variations in a single institution and not on the variations in the alternative institutions). Second, I am reluctant to associate courts to a particular constitutional goal distinct from that of the political process.

It is not the pursuit of a particular set of goals or functions that differentiates the constitutional role of courts with respect to the political process. Many judicial decisions further the same goals that the political process ought to pursue and the following question emerges: Why should we trust courts, at the expense of the political process, in pursuing them? Other judicial decisions can, indeed, be reconstructed as furthering goals that are different from those that the political process intended to achieve. But the latter set of goals can often also be perceived as constitutionally legitimate, and in these instances, one must inquire why the courts' pursuit of a certain constitutional goal should always trump the preferences of the political process pursuing equally legitimate constitutional goals. As with the previous set of theories, the question of institutional choice emerges. In fact, what distinguishes courts from the political process is not that they are attributed different constitutional goals, but that they are different institutions. As I will argue in the next Part, the constitution creates alternative institutions so that the meaning of the constitution does not become frozen in time or the monopoly of some institutions and can be articulated over time by a simultaneously competing and collaborative process among those institutions.

IV. JUDICIAL REVIEW AND THE OPEN AND CLOSED CHARACTER OF CONSTITUTIONALISM

The constitution is open. It is open, in the first place, as to its addressees. The constitution is neither addressed only to courts nor to the political process. It is addressed to the members of the political

28. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102–03 (1980).

29. *See id.*

community.[30] The reality is that courts and the political process (as well as other institutional alternatives) compete and collaborate in giving meaning to the constitution. The relevant difference between courts and the political process is institutional and not goal oriented. Institutional variations offer different participation settings and make some institutions more likely than others to further certain constitutional goals. But while it is true that this must be taken into account for the purposes of institutional choice, it does not impose a general institutional preference in favor of courts or the political process in interpreting the constitution.

The constitution is open also by virtue of its universal ambition. Theories which attempt to close the constitution are in tension with the universalist claims usually associated with constitutionalism. Constitutional norms derive their superior authority from their purporting to reflect universal principles intended to bound us under a kind of prospective veil of ignorance.[31] Agreement on such general principles is meant to be an agreement on the universal potential of such principles abstracting from their concrete historical meaning. Consider the following: When we enshrine in a constitution the principle of equality, are we adopting it with the content that it has in that particular moment in time (those that are treated equally at that time in history) or are we adopting it, in the light of its universal character, abstracting from that particular meaning in time? This openness of constitutional law should not be artificially closed even if the argument must also be made that one should not automatically presume that such openness is addressed to judges.

---

30. For a similar conception, see PETER HÄBERLE, EL ESTADO CONSTITUCIONAL [THE CONSTITUTIONAL STATE] 3–7 (2001), *available at* http://biblio.juridicas.unam.mx/libros/libro.htm?1=14; and Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

31. This may also be presented as an instrument of the commitments inherent in constitutionalism highlighted by JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 92–93 (2001). Such commitment does not simply entail that constitutional norms must have a meaning which is not dependent on a changing political will but that such commitment is not fully ex ante specified. As stated by Jed Rubenfeld:

> This openness in constitutional law is sometimes condemned for imparting too much uncertainty into our basic legal order and for conferring too much discretionary power on the judges who interpret that order. But this openness is part of what it means to live by self-given commitments over time. It is part of the nature of commitment that its full entailments can never be known until they have been lived out, and lived under, for an extended period of time.

Id. at 188.

The open character of the constitution also results from the deeper relationship between pluralism and constitutionalism. Pluralism is inherent in constitutionalism.[32] In fact, constitutionalism guarantees and regulates such pluralism: a pluralism of interests and visions of the common good that is reflected in the paradoxes of constitutionalism,[33] including its balance between democratic deliberation and constitutional rights. Constitutionalism creates the framework for a meaningful and rational discourse on a pluralist and democratic political community. Democracy requires a common language of deliberation and this, in a context of pluralism, is what the constitution provides. Constitutional rules normally provide the basis for rational democratic discourse. They provide a common platform on the basis of which political conflicts assume the nature of competing rational arguments about the interpretation of shared values and not the character of power conflicts. Rational discourse through the constitution is the guarantee of a minimally shared identity and the stabilizer of the political community in a context of pluralism. But constitutionalism is also supported by an institutional pluralism that channels and arbitrates that rational discourse: different institutions that guarantee that no set of interests acquires a dominant role and that any definition of the common good can be, at any moment, reassessed and contested. Such pluralism of rights and institutions ensures the simultaneous expression and arbitration of the sociological and political pluralism of the political community.

This said, the constitution also needs closure. Permanent openness would disrupt its regulation of pluralism in the political community. To provide social peace, stability, and rationalized political disputes, it must also close certain debates and authoritatively resolve certain disputes. Closure is also linked to the entrenchment that is necessary for universality (and its link to equality and the rule of law) and inclusiveness (by preventing domination by a contextual majority). Finally, closure is required by the relationship between constitutionalism and democracy. As I have argued, constitutionalism makes possible for pluralism to be ordered through democracy but, in order to fulfill the idea of self-government, a unified and closed political space is required. This entails, in turn, an ultimate source of political authority. State constitutionalism in its modern form made that political authority reside

32. *See* Miguel Poiares Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, *in* GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: VOLUME I: INTERNATIONAL AND REGIONAL ORGANISATIONS 227, 250 (Douglas Lewis ed., 2006).

33. *Id.* at 227–28.

in the people.[34] The people are both the site and source of pluralism and the unified entity upon which rests ultimate political authority.[35]

Constitutional supremacy and entrenchment are usually justified by attributing to the constitution a particular relationship with the people. Judicial supremacy would, instead, be the consequence of its enforcement of constitutional rules whose higher value would result from that special relationship with the people achieved in the constitutional moment.[36] But this narrative can easily be reversed. Constitutional supremacy can, at least as convincingly, be presented as a product of judicial supremacy, in that it was the courts' search for supremacy that originally led them to conceive of the constitution as higher law.[37] In fact, a remarkable similarity between the U.S. and EU constitutional orders is that, in both instances, courts acquired powers of judicial review, in the absence of an express reference in their founding documents (the United States Constitution and the EU treaties), by attributing to those documents a unique and higher normative authority, one that can be opposed to their respective political processes.

This is not to say that those courts usurped their authority. It is instead a confirmation of the nature of constitutional law that I have argued for. It also highlights the extent to which the link between constitutionalism and entrenchment is exaggerated. The constitution is not about entrenching a specific political contract agreed upon at a point in time. It is about creating a framework for rational, intersubjective, and inclusive democratic deliberation in a context of pluralism. Entrenchment is an instrument of the closure that is also required for a successful constitution, but the constitution is better understood as being both open and closed. In this light, the constitution provides the framework necessary for a political community to search for meaning instead of imposing a historically agreed upon meaning on it.

Constitutions are therefore the subject of competing interpretations by different institutions. Two questions emerge in this context. First, who arbitrates, and how, between such competing interpretations and institutions? Second, when different interpretations are possible, what

---

34. *Id.* at 235.

35. *See id.* at 234–35. This is also linked to a conception of constitutionalism as providing a comprehensive social ordering. Nico Krisch has recently labeled foundational constitutionalism as the dominant form of constitutionalism to emerge from political modernity; one where a comprehensive and foundational constitutional settlement constitutes the basis for the realization of both public and private autonomy. NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 47, 51–52 (2010).

36. *See* BRUCE ACKERMAN, WE THE PEOPLE 1: FOUNDATIONS 71–72 (1991); BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 311 (1998).

37. *See* Guilherme Vasconcelos Vilaça, Law as Ouroboros 4–5 (2012) (unpublished Ph.D. dissertation, European University Institute) (on file with author).

guarantees the objectivity of the process of legal interpretation? This requires both institutional choices and a model of legal reasoning which is capable of infusing legal interpretation with objectivity in a context of pluralism. Even when theories of judicial review and legal reasoning have addressed some of these questions they have done so without effectively recognizing such pluralism.

V. INSTITUTIONAL CHOICE AND DISCURSIVE INTERPRETATION

In this final Part, I argue that the nature of constitutionalism and judicial review, particularly in a context of pluralism, requires two things from our model of legal reasoning. First, to incorporate institutional choices into the process of interpretation (recognizing institutional choice as meta-interpretation) and make use of comparative institutional analysis. Second, that interpretation is a discursive process, that such discursive character is crucial for the objectivization of the process of interpretation and, finally, that such a discursive nature requires preference to be given to certain forms of legal argumentation. I will do this by reference to the European Court of Justice.

What has been said so far makes clear that the first question of interpretation is one of institutional choice.[38] In the same way that we should not presume the political process always has a superior legitimacy to courts we, equally, should not presume courts are always superior to the political process in giving meaning to the law. There is, in fact, a competition between courts and the political process but, increasingly, also among courts in giving meaning to the law.

This requires courts to build into their process of interpretation of the law institutional and systemic dimensions. In fact, interpretation always departs from an institutional choice: that the court is the institution in a better position to give meaning to the law in that specific case. This is so even if such choice is also a product of the other dimensions of interpretation in a permanent reflexive process. The institutional dimension of the judicial role is closely dependent on the systemic understanding of the legal order in which courts operate. That is why the metaquestion of interpretation can only be properly addressed by departing from the systemic preferences we attribute to the legal order. These preferences shape, or ought to shape, the institutional choices of courts in deciding, for example, the extent to which they should second-guess the choices of the legislature or defer to other jurisdictions. But, conversely, the institutional constraints of courts and the

38. This can be presented as a manifestation of the institutional choices present in the law and that Neil Komesar has highlighted with his work on comparative institutional analysis. *E.g.*, KOMESAR, LAW'S LIMITS, *supra* note 24, at 3–4.

institutional context in which they operate also determine the systemic preferences they attribute to their particular legal order and the weight they will give to different legal arguments. This requires courts to develop criteria for institutional comparison and judicial deference on the basis of the constitution and, particularly, its ideal of a rational, free, intersubjective, and inclusive deliberation. In this context, Neil Komesar's comparative institutional analysis, with its focus on participation,[39] becomes the natural method for courts to employ when deciding the metaquestion of interpretation in constitutional law.

Courts' institutional choices will also be a product of their competition with other institutions in giving meaning to the law. Constitutional meaning is not the monopoly of courts, not even when expressed in judicial decisions. First, what courts decide is a product of their institutional constraints as much as it is a product of what is brought to them and how is it brought. Second, whatever courts will decide will always be, at least in part, appropriated and reinterpreted by a large community of social actors who will translate the meaning of the constitution into practice.[40]

This institutional competitive dimension of legal interpretation and judicial adjudication highlights the discursive nature of interpretation. The rules, decisions, and interpretations given by courts are taken over and used by other institutions and a broader legal community with meanings that may not always be consistent with those originally intended by courts. The law is not the exclusive property of courts. Judicial decisions do not singly command the use of law, but are subject to transformation by other actors. Courts are also the most effective when their decisions are more susceptible of internalization to other institutions' and actors' decision-making practices.

This discursive character in the interpretation of law assumes particular relevance in the context of the EU legal order because of its decentralized, pluralist, and polycentric nature. In a context of this type we need a model of legal reasoning that recognizes the context of pluralism in which courts operate, requires courts to articulate the systemic and institutional impact of their decisions, and engages courts in a dialogue with the other institutions that compete in giving meaning to the law. We need discursive interpretation.

Only a discursive form of interpretation is fit for a context of constitutional pluralism. By discursive interpretation I mean a model of legal reasoning that embraces institutional choices, is open to an institutional discourse with the legal community and the institutional alternatives to courts, and promotes the potential for institutional

39. *E.g.*, *id.* at 189.

40. In a similar sense, see Post & Siegel, *supra* note 30, at 26–29.

internalization of judicial decisions. All this, without putting into question the values of coherence and integrity of the law that are part of the search for objectivity in legal interpretation. In other words, discursive interpretation must be both interpretation as communication and interpretation as integration.

While the discursive nature of interpretation can be seen as subjectivizing it, it also objectivizes it. This is because it is that community of discourse that provides the standard for judicial justification. The latter, as stated by Owen Fiss, "is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules."[41] In reality, the constraints of this community and its language become embedded in the interpretative process and this corresponds to the idea of interpretation as the cultural software of judges. It is in this way that such constraints are not external but internal to the process of interpretation.

But objectivity is also promoted by the requirement built into the process of justification of fitting individual judicial decisions into a systemic understanding of the legal order. This is where interpretation as communication meets interpretation as integration. That systemic understanding is not simply a product of the adoption of a particular normative theory. In the first place, it must be the result of a systemic reconstruction of that legal order in light of its entire body of rules and its normative history (notably the path created by past judicial decisions). In the second place, it is constructed, as highlighted above, in discourse with other actors and institutions. This systemic fitting leads me to believe that a judge must simultaneously act as an architect, a narrator, and a historian. First, lawyers should approach a legal rule in the same way that architects approach a new building: they must identify the *genius loci* (the spirit of the place, the context) in which they will be intervening. A rule only makes sense in its context: the context of the legal system to which it belongs, but also the economic, political, and social context in which it was adopted and the one in which it is going to be applied. Its meaning only becomes clear once the text and its ambiguities are contrasted, compared, and reconciled with its context. But that process, as with an architect intervening in a space, also leads the court to change that context.

But a judge also needs to be a narrator faithful to a story to which she is only contributing a chapter. The need to guarantee the coherence of the legal order, which is the pillar of equality under the law, may require a judge to put aside her preferred interpretation of the law in favor of a precedent or a well-established line of cases in the

41. Fiss, *supra* note 3, at 745.

jurisprudence of the court.[42] Each decision is only a chapter of a book whose plot judges do not really control but must remain faithful to. It is in this respect that judges must put forward a new interpretation of a legal rule as a natural development of past jurisprudence; a credible new chapter of the narrative of the legal order. Even when it innovates, a new interpretation must be consistent and coherent with the conception of the legal order that emerges from the body of past decisions, as in a story where a sudden twist may initially surprise us, but on second thought, appears as a foreseeable development of the previous episodes and the characters' traits. It is for this reason that the interpreter must also be a historian. She must identify continuity and change in the case law.

In this light, the discursive forces generated by pluralism can be used to further the integrative force of the law and not disintegration. But how can we open legal reasoning to the communication requirements of discursive interpretation while at the same time respecting the integrative force of the law? Though I will not be able to develop this point in detail, I believe some methods of interpretation are more apt than others to perform the communicative and integrative roles of discursive interpretation. Perhaps the primary examples are teleogical (or purposive) reasoning and systemic reasoning, including the close relation between both. In EU law, for example, the purpose-driven interpretation of legal rules also refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the European Court interprets a rule in the light of the broader context provided by the EU legal order and its "constitutional telos." We can talk therefore of both a teleological and a metateleological reasoning in the court.[43]

Judges both communicate through and are constrained by the reasoning necessary to demonstrate the particular goal of a legal rule and how it fits into the overall normative systemic preferences of their legal order.[44] By articulating the normative goals of rules and their connection to the overall value system of their legal order, courts also set the stage

---

42. *See* RONALD DWORKIN, LAW'S EMPIRE 88, 229–32 (1986).

43. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 16–17, 207–08, 359 (2004). For a more general discussion of the legal reasoning of the European Court of Justice, see JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE (1993).

44. Joxerramon Bengoetxea, Neil MacCormick, and Leonor Moral Soriano talk of a teleology that is bounded "by the need to connect the texts to values that belong to the whole constitutional enterprise, not just to a judge's own idiosyncratic world view and personal value system." Joxerramon Bengoetxea, Neil MacCormick & Leonor Moral Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, *in* THE EUROPEAN COURT OF JUSTICE 43, 45 (Gráinne de Búrca & J.H.H. Weiler eds., 2001).

for a substantive discussion. Instead of presenting interpretation simply as a product of their interpretative authority, they can then recognize that it involves choices that are highlighted in their reasoning, even if they are ultimately attributed to the legal system itself. While teleological reasoning favors a debate among alternative normative and institutional preferences in the interpretation of the rule, a simple appeal to text would hide those alternatives and preclude a debate among them. Teleological and systemic reasoning foster the conditions necessary for communication with the plurality of actors of the community of judicial discourse while preserving the integrative force of the law. In this way, they become the best vehicle for the introduction of comparative institutional analysis into the constitutional reasoning of courts.