CHAPTER 4

POPULAR SOVEREIGNTY, THE RULE OF LAW, AND THE "RULE OF JUDGES" IN THE UNITED STATES

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1 INTRODUCTION

Between 1764 and 1776, a conception of the constitution came to prevail in the United States, which represented a real turning point with respect to pre-modern constitutional thought. The constitution would no longer be understood as an assemblage of laws, customs, and traditions, but would instead be considered as a fundamental plan of government, based on a corpus of systematic written norms. The constitution thus assumed a normative character and was no longer merely descriptive. The very word *constitution* came to be used for the first time in those years with its present-day meaning, and the power of the constitution was clearly placed over and above the power of the ordinary legislator.[1] The awareness of the difference between ordinary laws and constitutional laws stood out as one of the most significant changes in the elaboration of the concept of constitution. Further inventions of US constitutional history included the creation of constituent assemblies, the popular ratification of constitutions, the legal acknowledgement of fundamental rights, the introduction of procedures for amending the constitution, and the institution of judicial review of legislation. On the basis of these innovations, essential to the history of modern constitutionalism, was the attempt to clarify the implications of the idea that the constitution was an act of self-determination by the sovereign people. It is this idea, which is the basis of the tension between politics and law in modern constitutionalism,[2] that gives law its central position in how the political identity of the United States was constructed and the cult of law took root, becoming a veritable civil religion. The idea of "rule of law" consequently underwent a significant twist: in order to be able to speak of "rule of law" and not of "rule of men", it was not enough that the fundamental rights of the citizen be removed from the arbitrary will of the legislator, but it now became necessary for the law to be seen as a derivation of popular sovereignty. In the republican conception[3] of the period of the founding of the United States, legal certainty was considered

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as a necessary value, but no longer sufficient. Going beyond Montesquieu's idea of liberty as the absence of fear guaranteed by certain, fixed laws in defence of civil rights, the rule of law in the United States came to be considered as the guarantee of a liberty understood first of all as republican self-determination. And liberty presupposed, at least originally, a close connection between political rights and civil rights.

The twentieth-century re-evaluation of the concept of "rule of law" mostly removed the republican implications from the notion of the rule of law, basing it rather on reference to a law of spontaneous production, administered by the Courts of Justice. This implies, for example in Hayek and Oakeshott, a depreciation of parliamentary legislation as a source of law and at the same time a reduction of the constitution to its role as guarantor, exercising restrictions on political power. Law thus appears completely autonomous from politics, capable of self-reproduction and self-legitimization. The United States is considered a paradigmatic example of this modern-day tendency, which seems to imply risk of a shift from the supremacy of constitutions to the supremacy of constitutional courts. This tendency is stronger in the United States than elsewhere due to a peculiarity of the US constitutional tradition: the existence of diffuse control over the constitutionality of the laws, namely the possibility for courts, and ultimately for the Supreme Court, to assume the function of interpreter of the constitution. The Supreme Court became empowered to review, declare unconstitutional, and thus invalidate both the decisions of Congress and those of the legislative powers of the states, on the basis of motivations which extended to the substance of the legislative acts under examination.

The introduction of the "judicial review of legislation", which is –generally considered to go back to the ruling of *Marbury v. Madison* (1803) by Judge John Marshall,[4] resulted in the assigning of considerable powers to the Supreme Court. It is enough to consider, on the one hand, the interpretative margin left by the vagueness of certain constitutional clauses (e.g. formulations such as "due process" and "equal protection of the laws") and, on the other hand, the impossibility of recourse to ordinary legislative procedures to modify the decisions of the Supreme Court, for the extent of its powers to become quite clear.[5] If the unique character of the institution of constitutional review in the United States is the basis of the pre-eminent position held by the Supreme Court, it is necessary nevertheless to recognize that the current situation is above all connected with a change in the Court's perception of its own role.

The prevalent interpretation of the constitution as a model of "constitution-as-guarantor" recognizes, from the very beginning of US history, a pre-eminent role controlling the constitutionality of civil rights laws. In the light of this interpretation, from the time of its introduction (1791) the Bill of Rights, through its defence by the judiciary, has guaranteed US citizens the exercise and enjoyment of fundamental rights.[6] This reading of US constitutional history, however, is at best partial. It is enough to recall that not only Afro-Americans and Native Americans, but also women, Mexican guest workers, and immigrants of Asian origin – i.e. all those who did not have access to citizenship – were excluded until almost the mid twentieth century from the principle of equality before the law, one of the cornerstones of the rule of law.[7] But, it is perhaps even more important to remember that until the introduction of the XIV amendment (1868) the US constitutional system allowed no room for an interpretation of the Bill of Rights that was binding not only for the federal government but also for the states, to which the US federal system delegates most matters of day-to-day importance to citizens (such as from schooling to welfare services and to the family).[8]

The activism of ordinary courts and of the Supreme Court in the defence of individual rights and above all of the rights of minorities is part of the US history of the twentieth century, a history closely connected to the role that the United States took on at the international level in the battle against the spread of totalitarianism in Europe.[9] The real turning point in this direction is represented by a famous footnote in *United States v. Carolene Products Co*., decided in 1938. It suggested – as Ely puts it – that "the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national and racial minorities and those infected by prejudice against them".[10] If there is no doubt about the advantages US citizens have derived from this change in the perception the Supreme Court has of its own role (it is enough to think of the judgment in *Brown v. Board of Education of Topeka* in 1954, which marked the end of the system of racial segregation), it is equally true that the constitutional debate over the role of the judiciary and the relationship between the "judicial review of legislation" and democracy had never been so intense as in the post–World War II period.

The following pages provide a historical outline of the twists and turns in the US tradition of the rule of law over more than 200 years of constitutional life. My historical reconstruction underlines the connection between the rule of law and "rule of the people" which has existed from the beginning of US constitutionalism. This connection seems to have

been to some extent neutralized, even if never denied, both by the difficulty of recourse to the power of constitutional revision, given the muddled nature of Article V, and by the power of being sole and ultimate interpreter of the constitution that the Supreme Court assumed with the ruling *Marbury v. Madison*. The connection which US legal culture continued to maintain with the tradition of common law – despite the Revolution and the recognition of the positive character of the written constitution – contributed to facilitating this process of neutralization of popular sovereignty. On the other hand, the more recent crisis of the tradition of common law is not extraneous to the difficulties which the Supreme Court encounters in the attempt to legitimize its own role.

This historical reconstruction will be followed by an analysis of the main positions which have emerged within the contemporary theoretical debate, whose key issues are the neutral character of judicial interpretation and how the supremacy of the judiciary affects the political system. Attempts to re-establish the neutrality of judicial interpretation aim at preserving the idea that the real existence of the rule of law is tied to the impartial administration of law by the courts. The reflection on the effects of the supremacy of the judiciary is instead connected to the aim of re-legitimizing the political process and rereading the significance of the rule of law in the light of the complexity of the constitutional structure.

2 THE "RULE OF LAW" AND THE "RULE OF THE PEOPLE" IN THE REPUBLICAN THOUGHT OF THE "FOUNDING FATHERS"

The attempt, already undertaken by Edmund Burke in the eighteenth century, to place US constitutionalism in a tradition of historical continuity with respect to the British Constitution has overshadowed the innovations implicit in the writing of the constitution introduced by the American Revolution. The same can be said to have occurred in the retracing of the constitution back to the tradition of the colonial charters. The notes written by Benjamin Franklin in the margins of *Thoughts on the Origin and Nature of Governments* (1769) by Allan Ramsey, however, allow a new reading of the continuity between colonial charters and the constitutions of the revolutionary period. Criticizing Ramsey's assertion that considering the colonial charters as *Pacta conventa* was an absurdity, Franklin stressed that Ramsey's mistake was in overlooking the fact that the colonial charters of Pennsylvania and the Carolinas had actually had John Locke and Algernon Sidney among their inspirers.[11] The link which Franklin established between Locke and Sidney and, on the other

hand, between the colonial charters and the idea of contract, sheds light on one of the central areas which connect, in the 1760s and 1770s, the most important figures of the American Revolution to the radical English culture of the seventeenth century. The use of Locke and Sidney to explain the significance of the "true" English Constitution was recurrent in the revolutionary pamphlets. In most cases, knowledge of the radical English thinkers of the seventeenth century by the Americans was due above all to the reception of Locke's and Sidney's ideas present in the writings of the Real Whigs – of authors like John Trenchard, James Gordon, and James Burgh, destined to have a popularity and influence in the United States unknown in England.[12]

In the theoretical elaborations of the Real Whigs, the cult of the "ancient constitution" – as guided by insights already present in the reflections of Locke and Sidney[13] – had been the object of a rereading which is crucial to understand the constitutional reflections of the period of the Revolution in the United States. The value of the English Constitution was traced back, in fact, not to its antiquity, to its immemorial foundations, but to the fact that rational examination revealed in it the presence of the fundamental principles of the law of nature. John Adams, Thomas Jefferson, and many other eighteenth-century North American thinkers could consider themselves as the heirs of the various Lockes and Sidneys in the attempt to reveal the "true" meaning of the English Constitution. Their battle took place on a legal-constitutional terrain, but in the name of a vision of the English Constitution which implied a drastic break with the past, since it asserted unequivocally the principle of popular sovereignty.

The US constitutional debate of the eighteenth and early nineteenth centuries was made even more complex by its revolving around two different conceptions of republicanism, which in turn were connected to two different visions of popular sovereignty. With reference to the conceptual categories elaborated by Philip Pettit, we could speak of a "populist republicanism" (based on a line of thought which, starting from Aristotle extends to Hannah Arendt) and of a "classical republicanism" (associated with the line which goes from Cicero to Machiavelli).[14] The first republican type is, for Pettit, "inherently populist" for it considers people's political participation as a fundamental good. In the perspective of populist republicanism, Pettit maintains, the people should rely on their representatives and public officials only when it is strictly necessary.[15] Populist republicanism is founded on a positive conception of "the people", often using the notion uncritically as representative of a homogeneous public. Populism, on the other hand, alongside the defence

of the interests and the common sense of the ordinary citizen, cultivates an attitude of suspicion towards every form of hierarchy and "expertocracy" (i.e. "rule by experts").[16]

On the other hand, "classical republicanism" underlines the element of trust between the people and their elected representatives. In particular, as Pettit writes, this second republican tradition "sees the people as trusting the state to ensure a dispensation of non-arbitrary rule".[17] Unlike the Aristotelian tradition, classical republicanism does not present an edifying image of the ordinary citizen. Individuals are seen as corruptible beings, the bearers of different and conflicting interests. The political process results in filtering opinions through the selection of representatives, while citizens' participation in political affairs is above all their means of preventing the degeneration of the government into a form of tyranny, which is harmful to individual freedom.

The thought of Jefferson and the anti-Federalists can be traced back to the populist conception of republicanism, whereas the constitutional thought of John Adams and the Federalists can be placed within the classical republican vision.

In the radical populist interpretation of Jefferson and Thomas Paine, since the constitution was the expression of the sovereign people, nothing could prevent the people from undertaking periodic constitutional revisions. Central to Jeffersonian constitutionalism was the idea that a republican government must rely on the people's sovereignty as a check on the exercise of power, through instruments such as a written constitution and the brief duration of mandates (and therefore frequent recourse to elections). This vision held implicit, on the one hand, the autonomy of civil society with respect to government, and, on the other, suspicion with regard to every concentration of political power. Considering "self-love" as the main passion of the human being, populist constitutionalism sought not to balance but to reduce political power, through representation and the separation of powers at different levels and in different branches. Jefferson saw the function of the Bill of Rights and the Supreme Court in this context: the former was supposed to place a check on the possibilities of interference by the federal power in the autonomy of the individual states, and the second was supposed to function within the limits of a strict application of the text of the law. If the judiciary could not be reduced to a mere machine, to a technical organ held to a strict application of the text of the law, the judges' power would in fact, according to Jefferson, be able to distort the democratic logic, becoming an inappropriate power within a republican government.[18]

The perspective of John Adams and the Federalists was different. In his *Defence of the Constitutions of Government of the United States of America* (1787–1788), Adams distinguished the republicanism of the French, towards which went the sympathies of Jefferson, from that of the Americans. The French, English, and Americans used the same word "republic", but, Adams maintained, they were not thinking of the same thing. For the French and the English, "republic" was synonymous with democracy or representative democracy: governments that "collect all authority into one centre, and that centre is the nation",[19] or rather a sole assembly, chosen in periods determined by the people and invested with complete sovereignty. For the Americans, instead, the defeat of royal absolutism could not give way to the absolutism of democratic majorities. Adams looked with horror at the omnipotence of a democratic regime governed by irrational passions, which would lead to the rise of new demagogic aristocracies. The republic was, the rule of the people, but the "people" had no existence if not in virtue of their conformity to the fundamental laws and to the principles of justice: the "people", and not a mere "multitude", existed when will and reason converged. Only in this sense could "rule of the people" coincide with the rule of law and contrast with the "rule of men". In order to keep the will of the rulers faithful to the principles of the rule of law, Adams proposed a system of checks and balances that was conceived of as a real instrument of control over passions, and which would channel them in a direction that was not socially harmful. Adams did not deny the value of popular sovereignty but, as the Federalists would also do,[20] he tended to overlook the question of the constituent power, to neutralize its revolutionary results on the political–institutional level.

James Madison would continue in the spirit of Adam's approach and insist on the virtues of checks and balances and of a representative system that, through large electoral districts and the multiplication of political groups, would permit the selection of a qualified political elite, able to resist demagogic temptations and escape the pressures of particularistic and local interests.[21] The filter of the representative system and the constitution of a political body of "optimates" were necessary, according to Madison, in order to maintain the neutral character of political decisions, subtracting them from the passions that resided in the popular mind and which otherwise could induce the people-multitude *to harm themselves*.[22] Madison was opposed to attributing a special role of defence of individual rights either to the Bill of Rights or to the Supreme Court. It was the system of checks and balances, the separation of powers,

the creation of large electoral districts, the dialectics between the federal state and the federated states, that he relied upon to neutralize passions and interests, to restrain and channel them in order to bring as much reason as possible to the deliberative process of the majority. Only a law which could be supported with general, neutral arguments could, in his opinion, guarantee the existence of a government perceived as a "rule of law" and not "of men". For Madison, the Supreme Court did not have a privileged role as interpreter of the constitution and its powers had to be limited to the control over manifestly unconstitutional legislative acts.[23] Only the subsequent introduction by Judge Marshall of the "judicial review of legislation", which cancelled the distinction between unjust acts and unconstitutional acts, determined the hierarchical superiority of civil rights over political rights, creating a barrier against the power of democratic self-determination.

3 THE JUDICIAL REVIEW OF LEGISLATION

The distinction between legislative power and constituent power, present in the thought of the "Founding Fathers", could be understood not as "an elitist attempt at limiting popular will in the name of an ideal notion of law", but instead as an instrument to preserve "the 'reserve of power' implicit in people's sovereignty, in the sovereignty of a people whose will could not be represented *in toto* because it is constituted by the sum of single individuals endowed with inalienable rights".[24] The overlapping between rule of law and rule of the people could be interpreted, i.e. as a connection between self-government and the primacy of law. This possibility, however, was to remain purely theoretical at the federal level, due to the freezing of popular sovereignty brought about de facto, on the one hand, by the muddled procedure of constitutional revision foreseen by Article V of the constitution, and, on the other, by the interpretation of rule of law contained in the famous judgment in *Marbury v. Madison* by Judge Marshall, which introduced the judicial review of legislation.[25] From this perspective, it is important to recall the political context in which Judge Marshall produced that judgment.[26] It was, in fact, right in the middle of a heated political struggle, initiated in 1800 by the election of Jefferson to the presidency, between the Republican Party and the Federalist Party over the significance of the American Revolution. Marshall's verdict indirectly represented the response of the Federalists, still entrenched in their positions of power within the courts of justice, to the Jeffersonian interpretation of democracy, to that idea of "permanent revolution" which seemed to refer to the continuity between elections and

revolution, on which Jefferson had constructed the significance of his own victory, presenting it as a "second revolution".

The risk that the Jeffersonian position might undermine the constitutional structure at its foundations, as the Federalists believed, emerges from some of the central statements in Jefferson's first inaugural address, where he enumerated the essential principles of the US government, avoiding any reference to the rule of law, underlining that the safeguarding of the people's right to elections was "a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided". He declared his support for "absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force".[27]

Against the majoritarian conception of democracy, put forward by Jefferson, in the sentence *Marbury v. Madison* Marshall proposed the removal of constitutional law from the political sphere. In that sentence, it was recognized that the people had "an original right to establish for their future government, such principles, as, in their opinion, shall most conduce to their own happiness". The "exercise of this original right", however, as was specified immediately afterwards, ought not to "be frequently repeated". Once they had been established, those principles had to be considered fundamental, "permanent". The constitutional principles, approved by the people, had affirmed the limited character of the legislative power in such a way that an act of the legislature contrary to the constitution had to be considered null and void. If, in the case of conflict between ordinary laws, the courts were obliged to decide what the law was, the same criteria had to apply in the case of conflict between ordinary laws and constitutional laws.[28] In this way the sentence *Marbury v. Madison* made the judicial power – understood as the virtual representative of the constituent people – responsible for the achievement and defence of the fundamental principles of the constitutional order. At the same time, that sentence took away the role of interpreter of the constitution from the legislative power, giving rise to a permanent legal restraint on the power of the majority, analogous to that exercised on individuals by ordinary laws.[29]

During the nineteenth century, the Supreme Court tried repeatedly to respond to its critics and to attacks against it, trying to reproduce within US jurisprudence the aseptic, detached image of the judge of common law.[30] The appeal to the tradition of common law performed a dual function: it checked the radical pressures which could derive from Locke's theory of the contract[31] and legitimized a vision of law which – contrasting with the public vision originally connected to the writing of

the constitution itself – was now presented as a privileged sphere of that "artificial" reason which only the judge possessed, in virtue of his specific professional training and expertise. The entire sphere of economic–contractual relations was excluded from the sphere of political decision-making and submitted to the competence of judiciary action. The consequences of this went well beyond economic–contractual relations. It is enough to recall that in the ruling *Dred Scott v. Sandford* in 1857 the Supreme Court established – on the basis of the clause of due process provided for by the Fifth Amendment[32] – that the ownership of slaves was entitled to the same protection as any other type of property ownership.[33]

4 THE LIBERAL CONCEPTION OF THE RULE OF LAW DURING THE NINETEENTH CENTURY

For the entire nineteenth century and beyond, until the New Deal, two constitutional models contended for predominance.[34] The first – prevalent until the years immediately following the Civil War – was founded on the conviction that fundamental rights could be better protected by the clear-cut separation between state powers and the powers of the federal government. The Bill of Rights was therefore used for this entire period (in the way, moreover, the anti-Federalists and Jefferson himself had conceived of it at the time they had proposed it) as an instrument against the extension of federal power and never against the states, never to verify if rights were actually enjoyed by citizens under the republican constitutions of the individual states.[35] The second model became prevalent in the period stretching roughly from the last decade of the nineteenth century to the turning point of the New Deal, following the introduction of the Fourteenth Amendment, with which, for the first time, the supremacy of federal citizenship over state citizenship was affirmed.[36] This model was the result of the particular interpretation that the Supreme Court gave to the clause of due process. Having to establish, in the light of the new amendment, which rights were so fundamental as to require protection at the federal level, the Supreme Court, according to a conception of the state as "night watchman" and neutral arbitrator in socio-economic conflicts, constitutionalized the theory of freedom of contract. In the attempt to return questions which were increasingly assuming a socio-political character[37] to the sphere of private law, the Supreme Court in those years opposed the introduction of the regulation of working hours or labour conditions for vulnerable workers, such as children.[38] The defence of the theory of freedom of

contract undertaken by the Supreme Court immediately appeared paradoxical, for it was sharply at odds with the intensifying social conflict deriving from the transformation of the US economy by the creation of great concentrations of industrial and financial enterprises.

The ideological nature of judgments, openly taking sides in favour of laissez-faire, such as in the famous *Lochner v. New York* in 1905,[39] undermined the image of judicial power as neutral and impartial. The doctrine of common law, which had inspired the jurisprudence of the Supreme Court for the entire preceding century, had to face the criticism of the realist, pragmatist movement, which swept away the certainties of the doctrine of natural law.[40] The idea of common law as the objective, impartial expression of a spontaneous state of things, the reflection of a reality to be saved from the distorting interventions of the legislator, was superseded by a law that was no longer perceived as something given once and for all, but instead as something that could be constructed and interpreted, suitable for regulating and directing reality in a normative sense. The idea of a "living constitution", supported by a historicist, evolutionary approach to law, was substituted for the metaphor of the constitution as a "machine", inspired by a mechanistic-Newtonian vision.[41]

5 THE EXPLOSION OF THE TENSION BETWEEN POLITICS AND LAW

The crisis of the nineteenth-century legal paradigm, founded on the tradition of common law, had important effects on US constitutional law in the first decades of the twentieth century. The first result was a new tension between constitutionalism and democracy, between the powers of the Supreme Court and the autonomy of the states, in the same way as between the powers of the Court and those of the federal government. This tension was to become more acute as the central state not only re-enforced its prerogatives and exercised its power of policy-making over national politics in the social and economic spheres, but also took on a more credible democratic appearance with the end of slavery and the introduction of women's suffrage. The ever-clearer perception of the problematic character of the "counter-majoritarian" power exercised by the Supreme Court created pressure in the first decades of the twentieth century for the adoption of the principle of self-restraint – i.e. a greater deference of the judiciary towards the legislative power.

After 1938, however, the Supreme Court managed to carve out a new space of action for itself, transforming itself from defender of property

rights to guarantor of other civil rights and defender of minorities. The decisions of the Court introduced at least two new constitutional trends. The first was orientated towards the defence of certain "preferential rights", considered so because they are inherent to the human personality, such as the freedom of expression and the right to privacy. The second was inspired, however, by the idea of equal protection and aimed at securing equal access to fundamental social services for all, through a scrupulous scrutiny of the criteria of eligibility, with the aim of avoiding discriminatory measures.[42] Both of these models led not only to Supreme Court judgments that were strongly intrusive with regard to majority of political decisions, but also to the Court's assumption of a role as an actual co-legislator. Through the partial incorporation of the Bill of Rights into the Fourteenth Amendment and an extensive interpretation of constitutional formulas, the Supreme Court, in fact, produced, in the post–World War II period (and in particular during the Warren period, 1953–1969) a series of new rights, not explicitly foreseen by the constitution (e.g. the right to privacy or the right to abortion).

All this greatly shook the principles of the liberal "state under the law". The nineteenth-century conception of the constitution as rule of law rested on the authority of a law which was apparently neutral and apolitical. The constitutional practice of the twentieth century went above and beyond both the dividing lines between public law and private law, and between law and politics. The recognition of an irremovable element of interpretative judicial discretion and the activism of the Supreme Court have required a rethinking of the role of judicial interpretation of the constitution, as well as of the actual significance, virtues, and limits of the rule of law.

6 ATTEMPTS TO REFORMULATE THE NOTION OF CONSTITUTION AS RULE OF LAW

Some of the positions expressed in the contemporary constitutional debate in the United States are a development and a re-elaboration of legal realism. They are, a consequence of the new consciousness of the indeterminate character of law and its inapplicability in mechanistic terms. Among the heirs of the realist critique of legal formalism, the movement of *Critical Legal Studies*[43] has assumed an important position. For this movement, the liberal conception of the rule of law and the formalist vision of law on which it rests are the expression of the desire to arrive at a justification of law that places it outside disputes

over the basic foundations of society.[44] According to *Critical Legal Studies*, i.e. the defence of legal formalism goes back, implicitly, to the idea that the form of law is able to reflect an objective and intelligible moral order, removed from the precarious, conflictual dimension of politics.[45] For *Critical Legal Studies*, this image of law is fictitious: incoherence and indeterminateness are the actual characteristics of laws, and derive from the very way in which laws are produced. They are not emanated, observes Roberto Mangabeira Unger, by an immanent moral rationality, but instead are the result of conflicts, clashes, and compromises among social groups endowed with differing positions of power, bearers of contrasting interests and opinions, and the traces of which remain in the ambiguities of the legislative text. From the thesis of the indeterminacy of legal rules, *Critical Legal Studies* derives that of the political nature of law and judicial activity. Any attempt to determine the best possible interpretation of the constitution, in such a way as to determine the goals that the system legitimizes and permits to be achieved legally, hides an ideological operation, according to *Critical Legal Studies*. In the interpretation of law, the judge always exercises a discretional power, selecting from among the many points of view left open by the law the one which is closest to his own subjective preferences. The need of liberal legalism to determine a single correct rule for the application of law and the impossibility of obtaining this result mark, for *Critical Legal Studies*, the failure of the rule of law.

If *Critical Legal Studies* undertake a direct attack on the idea of rule of law, openly stressing the ideological character of judicial deliberation, various contemporary approaches to the study of US constitutional law attempt a re-evaluation of the idea of "rule of law" through the formulation of theories of interpretation aimed at providing judicial decisions with objective foundations. The outcome of this operation is conditioned by the choice of what in the constitution is to be considered fundamental: its character as a written text, its original intention, the inspiring principles of the constitutional tradition, or the popular will as expressed in constituent periods. From these elements, the judge should be able to deduce general rules under which to subsume the particular case. In each of these cases, even though on the basis of diverse conceptions of the rule of law, there is the attempt to lead the judge beyond politics, or better, beyond a judicial function which performs de facto a legislative role. Here I will examine, in particular, the proposals of Antonin Scalia, Ronald Dworkin, and Bruce Ackerman.

7 ANTONIN SCALIA AND THE RULE OF LAW AS RULE OF RULES

The formalistic conception of the rule of law recognizes the existence of general rules, the coherent, stable application of law, the non-retroactivity of law, and the separation between the organ responsible for the production of legislation and administration, as an intrinsic value of the legal system. The existence of a legal system endowed with such characteristics is said to make the actions and behaviour of rulers predictable and therefore to increase the freedom of the citizen, freeing him from the fear and insecurity that come from living under an arbitrary government. According to the formalistic conception of the "rule of law", the capacity of the legal system to stabilize social expectations favours individual autonomy and human dignity, since it allows individuals to plan their lives. The role of the rule of law in this perspective is purely negative: to minimize the dangers deriving from the arbitrary exercise of political power. In applying the law, the judge must act according to criteria of impartiality and neutrality, without engaging in judgements tied to some substantive conception of justice. When the judge goes beyond the strict application of the norm, he transforms the "rule of law" into the "rule of men", allocating to himself an arbitrary power.

The constitution can be considered an extension and an improvement of the idea of "rule of law", or rather of the principle that the government must act with respect to pre-established legal restraints. The constitution thus becomes, within a formalistic conception of the rule of law, a set of rules aimed at limiting power. The value which is privileged by this reading of constitutionalism is normative stability, considered an essential condition for the citizen's autonomy.[46]

According to Antonin Scalia, today one of the major exponents of a conception of rule of law as the rule of rules, or rather of a formalistic vision of the "state under the law",[47] the tendency of the common law judge to make reference not to the text but to the intention of the legislator, or to some other criterion external to the text of the law, is bound to open the doors to judicial arbitrariness, and to supplant and betray the will expressed by democratic majorities. In Scalia's "originalist" interpretation,[48] a "rule of law" and not "of men" should respect the objective meaning of the text of the law and not go looking for the subjective intention in it presumably expressed by the legislator: "It is the law that governs, not the intent of the lawgiver."[49] The recourse of the judge to the subjective intention of the legislator, extracted perhaps from the acts of the legislative commissions or from parliamentary

discussions, is according to Scalia, one of the ways US judges most frequently assume the illegitimate role of co-legislators.

Passing from the interpretation of ordinary laws to that of constitutional norms, the distinguishing element among the various constitutional theories is, for Scalia, the difference between the search for the *original* meaning and the search for the *current* meaning. A "textualist" judge sticks to the original meaning of the text. He can, if he finds it opportune, consult the opinions expressed during the convention of the "Founding Fathers", but only if that enables him to determine the meaning which the text of the constitutional norm had at the moment of its drafting. In his opinion there is no relevance, and there must not be any relevance, in either the original intention of the constituents, or in the meaning which a contemporary reader could give to the text. The search for the "current" meaning is typical of those judges who intend to transform the constitution into a "living constitution", into a constitution which is flexible and adaptable to change. Behind the apparent virtues of flexibility, the notion of "living constitution" conceals, according to Scalia, the danger of arbitrariness by the judiciary and of the indeterminacy of the law. What the constitution meant yesterday it might no longer mean tomorrow. It will not be up to the democratic legislator to decide if it will be so or not, but to a body of judges not democratically elected. This reading of the constitution, which for Scalia is the result of the influence of the system of common law in the sphere of constitutional interpretation,[50] takes for granted that the constitution cannot and must not resist the pressures of social change. Scalia maintains that it loses sight of the ultimate goal of the constitution as a rule of law: to prevent future generations from being able to alter the restraints established by the preceding generations.[51] The argument of flexibility is, from the perspective of textualism, a disguised legitimization of the tendency of US judges to follow the open and arbitrary character of the tradition of common law in constitutional interpretation. It conceals the risk that the constitution ends up meaning simply what judges from time to time believe it should mean.

The negative effects of the legal culture underlying this approach are indicated by Scalia with reference to the education and professional training of judges, the criteria for their selection, and, more generally, in relation to the possible impact of that legal culture on the political system. In US law schools the study of constitutional law is centred not so much on the text of the constitution, as on the cases and decisions of the courts of justice.[52] In the procedures for the selection and confirmation of federal judges, moreover, what is given importance is above all the

ideas which the judges profess, or claim to profess "regarding a whole series of proposals for constitutional evolution".[53] A judicial power which is thus exposed on the political level is bound, according to Scalia, to become a slave to the changing tastes of public opinion. Its capacity to perform the function of guaranteeing the rights of minorities would be seriously threatened and the democratic resources of the US Republic would risk being dissipated.[54]

Scalia's critique of the tradition of common law attacks in particular – as Mary Ann Glendon has observed[55] – the degenerative tendencies which it has manifested in the judicial decisions of the last few decades, such as diminishing attention to the rigorous application of the principle of *stare decisis*. The appeal to textualism, however, despite its motivation by appreciable intents and arguments, does not appear to be an adequate answer to the difficulties a judge must face when applying ordinary law, let alone the dictates of the constitution. Scalia's opposition between a rigorous application of the norm and an arbitrary judicial decision seems too extreme.[56] The search for the original meaning of the text, however, leaves open the problem of the gap between its interpretation and its application: once the original meaning of a norm has been determined, there remains the question of what it entails with relation to the specific case. The originalist perspective, moreover, raises difficult theoretical questions about the justification of a historical interpretation of the constitution. It is legitimate to ask oneself, indeed, for what reason the current generations should feel bound by the meaning which the "Founding Fathers" gave to the text of the constitution more than 200 years ago. For what reason, for example, should the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishment", be interpreted not on the basis of what US citizens today consider "cruel", but instead on the basis of the moral perception of the epoch in which that amendment was first written[57]? The binding nature of a constitution does not seem to derive, as the originalist perspective would have it, from the authority of the convictions professed by the "Founding Fathers". If anything, it is tied to the ability of different generations to identify themselves with the text of the constitution, through subsequent reappropriations of its meaning.[58]

8 DWORKIN: THE JUDGE AS INTERPRETER OF CONSTITUTIONAL PRINCIPLES

Dworkin, too, tries to recover a *hard nucleus* of the constitution in order to construct a "government of law" and not "of men". The way chosen to reaffirm the idea of a "rock-solid, unchanging constitution",[59] however,

definitively abandons legal formalism: it is not the text of the constitution but rather the principles of constitutional morality that are the objective anchor of Dworkin's substantive conception of the rule of law.

Dworkin's philosophy of law would be difficult to understand – as Duncan Kennedy suggests – without taking the twofold necessity from which it arises into account: on the one hand, to provide a theoretical justification for the contribution made by the Supreme Court to certain important liberal reforms achieved in the second half of the twentieth century; and, on the other hand, to show how this contribution did not undermine the idea of "rule of law". The legitimization of judicial power within the liberal conception of the rule of law is tied, indeed, to the possibility for the judge to act correctly not in purely moral terms, but also in legal terms.[60] The idea of the Court as a "forum of principles" is the solution which Dworkin arrives at through a reformulation of the idea of "rule of law" which seeks to explain within the constitutional system why the judiciary may not obey the legislative power when rights are in question.

In the formalistic conception of the rule of law, the judge has to deduce from the normative texts the rules within which to subsume particular cases. The conception of the constitution as a set of rules admits of normative lacunae. In "hard cases", when faced with a lacuna, the judge seems to have no alternative than to resort to his subjective preferences or evaluations. This element of discretion is precisely why positivist legal scholars suggest an attitude of prudential deference from judges towards policies decided by the legislator. Dworkin distances himself from this notion of the rule of law: the constitution is not a set of rules but rather a set of fundamental principles. The "constitution of principles", as opposed to "the rule-book" conception of the constitution, proposes a substantive notion of the rule of law: it offers substantial criteria of justice for criticizing a society whose laws do not guarantee the rights entailed by a coherent interpretation of the constitution. This substantive conception of the rule of law provides judges with a power of verification and control which seems meant to allow a much wider interference in the activity of the legislative power. Two major risks could emerge: first, an absolute arbitrariness on the part of the judge and, secondly, an upsetting of the democratic logic. Dworkin seeks to demonstrate how his theory avoids both dangers.

If democracy is equivalent to "government of the people", Dworkin maintains that it is, however, possible to distinguish "two kinds of

collective action". The first can be considered as deriving from some statistical function of the behaviour of individuals as, for example, when "the foreign exchange market drove down the price of the dollar". In this case, it is not possible to verify a coherent aim of the group of individuals which affects the state of the monetary market. The second form of collective action, instead, has a community character: it derives from a concerted action in which the individual actions converge and merge. "We, the People", the people from which the constitution emanates, is not a "statistical" entity and neither can its will be made to coincide, Dworkin maintains, with the will of the majority. In Dworkin's interpretation of republican liberalism, "We, the People" is a political community "of principle", which takes form as a moral person in the expression of the constitution.[61]

Dworkin in fact understands the constitution as the expression of the moral identity of a "community of principle", a community, i.e. whose members choose to be regulated by common principles, and "not just by rules hammered out in political compromise". For them, Dworkin adds, politics is "a theatre of debate about which principles the community should adopt as a system, which view it should take of justice, fairness and due process".[62] Hypothesizing that the community can act as an entity that is distinct from the persons who compose it, Dworkin's personification of the community is the premise which allows him to claim that the community, acting as an individual, would choose, as a principle of personal ethics, coherence in time. Secondly, Dworkin maintains that the constitution can be seen as a text, or a narration, written by a single author. These two statements justify the view that the attitude of the judge towards the system is similar to that of the interpreter towards a work of literature.

The legal practice is an interpretative practice, and as such – Dworkin admits – it is profoundly political. Dworkin, however, in order to preserve the legitimacy of judicial review, seeks to demonstrate that the nature of the judicial process cannot be reduced to a matter of personal political preferences. Dworkin's appeal to hermeneutic theory is not intended, in fact, to amplify the space for interpretations ad infinitum, but is meant, on the contrary, to demonstrate that it is always possible for the judge to arrive at a "right answer" or rather at a correct, and therefore objective, interpretation in the light of the overall meaning of the constitutional document.[63]

The interpretative practice, Dworkin maintains, does not leave an absolute, arbitrary power in the hands of the judge. The judge must indeed keep to precise interpretative rules. He is bound by the principle

of "integrity", or rather by the need to provide interpretations that are coherent with a system of principles which is defensible in the light of the entire structure of the constitution and of preceding constitutional interpretations. Judges, writes Dworkin, must "regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must care to see that what they contribute fits with the rest".[64] Judges cannot propose an interpretation of the constitution that suits their personal convictions, no matter how attractive it might be. To decide if a theory offers the best justification of the existing law, some limits are established by the "dimension of fit", others by the "dimension of value", which involves moral (or political) argument. According to Dworkin, in the interpretation of clauses such as that of the equal protection of the law it is impossible to offer an interpretation that is independent of some political theory on what should be understood by equality. In this case also, however, the judge cannot resolve these problems of morality by making reference to his own personal political choices or to more general questions of policy. What distinguishes him from the legislator is precisely that the judge must interpret the documents faithfully, whereas the legislator can and, for Dworkin, in general does act in a way that will achieve a particular political result rather than with regard to consistency with constitutional principles.

Compared with formalistic visions of the rule of law, Dworkin's theory has the merit of not removing the connection which exists between politics and law at the level of constitutional interpretation. His justification of the Supreme Court's power of judicial review proposes, however, a new form of dualism: *judicial politics* should move within a space that is not contaminated by *parliamentary politics*, which, according to Dworkin, is normally precluded both from the possibility of deciding in view of the common interest, and from the ability to interpret the principles of constitutional morality correctly.

It is perhaps worth remembering, in contrast with Dworkin's substantive conception of the rule of law, that over the span of US constitutional history the Supreme Court has scarcely adhered to the principle of integrity – i.e. to an interpretation which is coherent with the entire constitutional structure and with preceding constitutional interpretations. Dworkin himself, choosing for his ideal judge the name of Hercules, appears to be conscious of the distance existing between reality and his theory. What is truly problematic is the relationship of opposition which Dworkin delineates between constitutionalism of rights and democracy. Rights act as a power which is permanently in opposition to

democracy, not only in its form as parliamentary democracy, but also in that of constituent democracy, so that Dworkin himself goes so far as to assert the uselessness of resorting to the process of constitutional revision for the definition of new rights.[65] For Dworkin the path of constitutional amendments can be disregarded, given that new rights ("unenumerated rights", not provided for, i.e. by the constitution or Bill of Rights) can be more easily recognized and defended on the ground of a better judicial interpretation of the clauses of due process and equal protection. According to Dworkin, in the interpretation of these clauses the very sense of the distinction between enumerated rights and unenumerated rights is missing. Here, we are dealing with general principles of political morality, the application of which cannot depend on the meaning of words but instead must depend on the meaning that a majority of judges decides to attribute to the constitutional ideals of freedom and equal citizenship.

For Dworkin, the law should act as a "means of social integration".[66] However, it is difficult for it to fulfil this task if – as Habermas points out – only the professional ability of judges, whose thought remains closed like a monologue within the courts, is relied upon for the rational reconstruction of the law.[67] A judiciary power which claims, in virtue of its presumed independence from the pressures of public opinion, autonomously to defend individual rights against their possible violation by the political power, risks creating social restraints which citizens will deem arbitrary. The sense of duty that should accompany the birth of every new right cannot find roots outside of processes of recognition activated by democratic decision procedures.[68] In Dworkin's liberal constitutionalism, it is the Court that has the duty of moral deliberation: it is the place where, through the application of the principle of integrity, the moral values expressed by the constitutional tradition are reconstructed in a coherent vision by the judge. In this way an opposition is outlined between the deliberative role of the Court and the prudential role – the mere registration of existing preferences – of the democratic process. On the basis of this opposition, Gutmann and Thompson see a sort of "deductive institutionalism",[69] which rests on the differing nature of the incentives offered to the legislator and to the judge. The argument is simple: since they must aim at electoral consensus, legislators will tend to make choices in the light of the preferences of their own electors; the judge, on the other hand, in order to have his own professionalism recognized, will be more careful to argue his decisions in terms of principle. It is, as Gutmann and Thompson have pointed out, a weak argument. It could be observed, in fact, that legislators are often pushed to making

decisions of principle precisely because they are aiming at widespread consensus, while the judge, because of the need to focus his attention on a particular case, runs the risk of pronouncing judgments which do not take their social impact into account. From a normative perspective, the implications of the opposition between legislative power and judicial power point to the prospect of a situation in which parliamentary politics is reduced to a mere system of aggregation of preferences.[70]

9 ACKERMAN: RULE OF LAW AND CONSTITUENT POWER

The vision of the constitution as the "rule of rules" proposed by the "originalist" interpretation of Judge Scalia left open a fundamental question: why should the subsequent generation feel bound by the will expressed by the "constituent fathers"? Dworkin answers this problem in terms of moral theory: the constitution is the nucleus of commitments of principle around which there develops the identity of a political community acting as a moral person. Dworkin's solution is attractive for its capacity to conciliate stability and flexibility, but is founded on the opposition between democracy and constitutionalism: the fundamental nucleus of principles embodied in the constitution is removed from public political discussion and guarded by an elite of judge–philosophers. Ackerman outlines a solution to the problem of the temporal gap left open by originalism, asserting that the constitution sets up a rule of law that binds the ordinary legislator, but cannot bind the source of its own legitimization – i.e. the constituent power. Every generation, as Jefferson maintained, must be able to rewrite the fundamental principles of the rule of law if it does not intend to accept those of the preceding generations. Between one generational change and another, the Court acts as guarantor of the will expressed by the constituent people. The obligation which the people have towards the constitution does not derive, therefore, either from the fact that the constitution is "there", or from the fact that it is "just": it derives from the commitment of the people of the United States to self-government.[71]

Against the customary interpretation of the US Constitution as a typical example of "constitution-as-guarantor", Ackerman proposes a reading of US constitutional history stressing the areas in which the most has been made of the role of popular sovereignty. According to Ackerman,[72] the constitution has left the power of self-determination with the people, outlining a sort of dualist democracy. It is a democracy in which politics runs along two tracks: a higher law-making track, typical of constitutional politics, and a lower law-making track, typical

of ordinary politics. In normal times, decisions are left to the government and to elected representatives, while the citizen is not asked for more than a limited commitment: to go to vote and pay taxes. In exceptional moments, however, the constitution allows the people to act as a constituent power. Ackerman's dualist democracy distinguishes, in this way, between two different levels of political rationality: the choices of ordinary politics are entrusted to the compromises and to the logic of the clash of interests in pluralist democracy, while the determining choices for defining the political identity of the nation require the capacity of political leaders to reactivate participation and mobilize consensus.

The utilization of the rationality expressed by popular sovereignty in the moments of constitutional politics and the doubt about the capacity of the legislative process to express the common interest have important consequences for the role which Ackerman assigns to the Supreme Court. During periods of normal political administration, when interest groups prevail, the Supreme Court is called upon to take on the role of "guardian" of the values of the constitution, to act as the interpreter of the public reason expressed by the constituent people.

With his two-track theory, Ackerman denies the existence within US constitutional history of a tension between the power of parliament and the power of judges to invalidate, through the judicial review of legislation, decisions taken by the people's representatives. Alexander Bickel has defined this tension as a "counter-majoritarian difficulty".[73] According to Ackerman, the error of monist theories of democracy (including that of John Ely[74]), from which the idea of a "counter-majoritarian difficulty" derives, is in conceiving of the legislative power as representative of the popular will and democracy as a synonym for the sovereignty of parliament. Unlike in the British tradition, in the US democratic system Ackerman maintains that the "will of the People" and "parliamentary sovereignty" do not coincide. The voice of the popular will makes itself heard only in the moments of constitutional politics. For this reason, according to Ackerman, control over the constitutionality of the laws, far from being inconsistent with the majority principle, performs a democratic function of great importance: it has the responsibility for defending the constitutional results of the particular moments in which the people, normally eclipsed, are present on the public scene.

The dualist theory of democracy is proposed as capable of respecting the democratic sensitivity of the monists and of offering at the same time an alternative to the theories of rights. Contrary to democratic monists, rights foundationalists fear the abuses of the legislative against individual rights and defend the possibility of removing rights from the

vicissitudes of political controversies, relying on the courts for their defence. The dualist theory of democracy shares the lack of trust towards transitory majorities, but does not conceive of rights as demands which, for their intrinsic nature, precede and limit the power of the popular will, expressed in "the higher law-making track." According to Ackerman, the constituent people preserve the possibility of reforming or rewriting the fundamental rights contained in the Bill of Rights. If one day, Ackerman supposes, the wave of religious fanaticism which has swept the Arab world should arrive in the West and set off a polemical reaction in the United States, leading to the revision of the First Amendment[75] and to the introduction of a new amendment in which Christianity is elevated to State religion, a judge of the Supreme Court would have the duty to consider such an amendment as an integral part of the constitution. In Ackerman's opinion, the plausibility of this interpretation is supported by the silence of the constitutional text: while the German Constitution explicitly excludes the constitutional revision of fundamental rights, that of the United States is silent in this regard and that is because, unlike in Germany, in the United States the author maintains that "it is the People who are the source of rights".[76] "In this sense, the dualist's constitution is democratic first, rights protecting second".[77]

Being aware of the difficulty of basing this thesis on a textual interpretation of the constitution, Ackerman conceives of the recourse to the constituent power of the people as an "implicit resource" of the constitutional system. Neither Reconstruction, the period in which, at the end of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were introduced, nor the New Deal appealed to a regular application of the procedures of constitutional revision provided for by Article V of the constitution.[78] In particular, with the Presidency of Franklin Delano Roosevelt, the United States undertook a modern procedure of constitutional revision, consisting in the promulgation of "amendment analogues." Through the strength which he derived from popular consensus and from the support of the Democratic majority in Congress, in order to enact the reforms of the New Deal Roosevelt persuaded the Supreme Court to alter the rulings which had characterized the "*Lochner* Era". To that end, the President made use of the practice of "transformative appointments". In substance the constitutional "revolution" promoted by Roosevelt did not produce written constitutional amendments but instead was accomplished through a new interpretative practice by the Court, facilitated by the nominations of new judges who were more favourable to Roosevelt's policies.

It is above all this impossibility of writing down the transformations introduced by the modern procedure of constitutional revision which assigns to the Supreme Court a role that risks going beyond the techno-bureaucratic tasks Ackerman would attribute to it. It is up to the Court to interpret the will of the constituent people expressed through the channels of constitutional politics. It is the Court which must ascertain that there has come about one of those exceptional moments in which the people or its leaders have thrown the switch which permits a shift from the track of normal politics to that of constitutional politics. It is again the Court that must determine the specific content expressed by the constituent politics and must bring about, finally, a synthesis which makes this content coherent with the preceding constitutional tradition. In theory, only the constituent people can decide which rights are fundamental for defining its own political identity. But as a matter of fact, without a revision of Article V, which allows the will of the national citizenry (and not the will of the states) to amend the constitution, the Court can always transform itself into something different from the simple custodian of the principles of the rule of law established by the constituent people. If, moreover, as Waldron observes:

> [O]nce the people begin disagreeing among themselves about how to interpret their own past acts of higher law making, it is unclear why any particular interpretation of that heritage should be able to trump any other simply because it is endorsed by five judges out of nine.[79]

In other words, it is not clear why the answer of the Supreme Court should prevail over the alternative interpretations offered by the democratically elected representatives of the people.

10 THE IRREDUCIBILITY OF THE CONSTITUTION TO JUDICIAL RULE OF LAW

Against attempts to refound the judicial rule of law through a theory of interpretation which ensures its neutral character, there are efforts by some authors in the direction of a democratic constitutionalism, or rather a constitutionalism which does not take Constitution and political democracy to be in opposition. The rule of law in adjudication is, according to this perspective, one of the values which a constitutional system seeks to promote, but it is not the only one. If, for Ackerman, the constitution is democratic in that it is the emanation of the constituent people, other authors have sought a connection between democracy and constitutionalism, underlining not so much the popular origin of the

constitution as its being aimed at creating a democratic government. In these theories, there is an emphasis on the need for a constitutional democracy to allow room for dialectics among powers and democratic decisions. From this perspective, the only legitimate function of the judicial review of legislation is that of supporting the democratic process. It is possible to read in this sense the views of Sunstein, which call for a re-evaluation of the republican perspective present in the *Federalist*. Sunstein proposes an interpretation of Madison in which attention is no longer put only on the struggle among factions guided by the search for selfish self-interest: individuals are not moved only by economic motives, but also by a purely political passion which consists in the will to affirm one's own opinions.[80] Madison's political philosophy adapts in this way liberal elements and republican elements, referring back to a republicanism which is close to the Machiavellian tradition. It is a perspective which Sunstein distinguishes both from civic humanism and from democratic pluralism.[81]

In Sunstein's opinion, Madison had insisted on the possibility of a "virtuous politics" without, however, yielding to overly optimistic assumptions about human nature.[82] In this liberal-republican conception, participation was no longer the supreme good, and neither was freedom principally definable as self-government. According to the "Founding Fathers", Sunstein writes:

> We might understand the Constitution as a complex set of precommitment strategies, through which the citizenry creates institutional arrangements to protect against political self-interest, factionalism, failures in representation, myopia, and other predictable problems in democratic governance.[83]

The constitution performed a function of guarantor against every form of arbitrary government principally because it required the government to "provide reasons that can be intelligible to different people operating from different premises".[84] The constitution, therefore, guaranteed a rule of law in that it ensured a legislation which could be perceived as neutral and therefore able to obtain a general consensus.

The ordinary political process, by virtue of its capacity to produce principled decisions, recovers a central position in this vision, which entails a reconsideration of the role of the Supreme Court within the constitutional plan. In the theories of "rights foundationalists", but also to a certain extent in approaches such as those of Amar and Ackerman, in which the judiciary acts as a temporary substitute for the will of the constituent people during periods of normal politics, the Supreme Court exercises great power as a check on legislative organs. Sunstein's approach

reduces the discretionary power of the Court, bringing it back within the plan for the balance of different powers designed by the "Founding Fathers". From the option for a deliberative conception of democracy comes the limitation of the activism of the Supreme Court to two main types of cases: when the rights at stake are crucial in the functioning of the democratic process and when there is the danger that certain minority groups do or will not receive equal treatment within the political process.[85]

The deliberative function taken on by the Supreme Court in the twentieth century through the exercise of the power of judicial review is looked upon with suspicion by Sunstein for two reasons. The first is that constitutional judgments operate by removing the controversial issues to which they respond from the political arena. This operation, as stressed by Holmes,[86] can reinforce a political system, to the extent that it manages to neutralize the struggle among inflexible factions: one can think, for example, of the peace-making effect of having placed religious questions outside the terrain of political struggle. On the other hand, however, the problem arises of the democratic nature of institutions that divert issues which are perceived as potential sources of social division outside of the public arena.[87] Sunstein maintains that "under such a system, democratic processes would operate only when the stakes were low, and the largest issues would be resolved behind the scenes or by particular groups".[88] The second reason is connected to the idea that "in all well-functioning constitutional democracies, the real forum of high principle is politics, not the judiciary – and the most fundamental principles are developed democratically, not in courtrooms".[89] According to Sunstein, the pluralism of contemporary societies seems to obtain better guarantees from a constitutional system in which the controversial issues are not delegated to a restricted group of judges operating on the basis of highly abstract theories, such as to block rather than stimulate the intervention of the democratic deliberative process.

It is worth citing the example of abortion. When in 1973 the Supreme Court decided with *Roe v. Wade* to make abortion a constitutional right, it removed a hot issue from the sphere of political deliberation, but the effects of this decision have been, in the opinion of many, just as controversial on the political level. There are reasons to believe that that ruling has sharpened, instead of neutralizing, the conflict between pro-choice and pro-life forces. In a case like this, in Sunstein's opinion, the Supreme Court should have acted so as to favour a reopening of the dialogue in the political sphere instead of closing the discussion.

What Sunstein writes about *Roe v. Wade* sheds light on his attempt to restore a complex, articulated image of constitutionalism, which values its structural component. A "minimalist" Court, which acts on the basis of "incompletely theorized agreements" – i.e. seeking a ground where for each specific case it is possible to reach a general agreement, without arguing in depth the fundamental principles which may motivate the choice – would respect the pluralism of contemporary societies and be in line with the need to keep a dialectical relationship among the various powers in both their horizontal and vertical separation. In this latter hypothesis, the states' autonomy would be guaranteed within a federal system intended to allow a wide range of political solutions and experiments.[90]

The strictly liberal conception of constitutionalism, stressing its character as guarantor, tends to reduce it to a set of rights that can at any moment be defended and claimed in the halls of justice.[91] In this way it depreciates the active role of citizens and the filtering function of the political process. Furthermore, it ends up by eating away at the root sources of social solidarity and consensus which are necessary for correct, effective functioning of the democratic system. Instead, in Sunstein's republican interpretation, constitutionalism goes well beyond legal certainty and the judicial protection of rights.[92] But this does not mean that the fundamental nature of rights is abandoned: they are instead interpreted either as preconditions or as the result of a correct political process. Sunstein's liberal-republican constitutionalism, although safeguarding the value of the rule of law, nevertheless does not consider it the only or the principal virtue of a political system; it aims, rather, at a dialogue among the constitutional powers which is useful in making the political process more effective and in minimizing its pathologies.

11 CONCLUSIONS

Dworkin, Ackerman, and Sunstein have an important merit: in different ways, they have tried to reckon with the republican interpretation of the rule of law which animated the constitutionalism of the "Founding Fathers", or rather with the idea that the constitution, to the extent that it refers back to a law which the citizen is able to identify with, has much more to do with building the identity of the political community than with legal certainty. Yet, the intersection between civil rights and political rights, which derived from the idea of the constitution as an emanation of popular sovereignty, disappears beyond the horizon of the republican

liberalism of Dworkin, where – as we have seen – it is not only the ordinary political process that is depreciated but even the recourse to the procedures of constitutional revision. Ackerman's theory of dualist democracy is more attentive to the risks which arise from the task, attributed to the courts, of periodically reconstructing constitutional identity, even if it is through an expansion of the protection of rights. Ackerman restores full dignity to the principle of popular sovereignty, but he seems to conceive of it as being capable of producing rationality and consensus only when it is expressed in the form of constituent power. It is likely that, especially in a constitutional system over 200 years old, a more frequent resort to constitutional revision could avoid the need for introducing significant innovations outside the procedures provided for by the system. Ackerman's republican-populist perspective ends up, however, by depreciating "normal politics", whether as a moment of creating and reproducing institutional consensus, or as an instrument for guaranteeing rights and resolving social conflicts.

"Normal politics", due to its deep roots in public life, allows legislators to make an evaluation of the impact of their own decisions on the day-to-day life of citizens, something which is not possible during the moments of "constitutional politics", when public issues are addressed in a highly abstract manner. This same capacity for evaluating the impact of their decisions is, to a large extent, also denied the courts of justice, for various reasons: the concentration of judicial activity on individual cases; the technical training of judges; their restricted social origins besides their character, which is not representative of the different components of society. The courts' difficulty in foreseeing and managing the systemic effects of their decisions, as well as collecting information on relevant social issues, should encourage an in-depth consideration of the making the defence of rights the exclusive responsibility of the courts of justice.

The effects of the courts' intervention in issues of affirmative action and abortion on the political system of the United States can be considered exemplary of the contradictory consequences of judicial politics. The constitutionalization of abortion has radicalized the conflict between pro-abortion and anti-abortion advocates, and has created at the same time a paradoxical situation:[93] a change in the jurisprudence of the Court – possible also through the simple practice of "transformative appointments", i.e. the appointment of new judges – could overturn the current situation and take away women's right to abortion. At that point, the way of ordinary legislation would be precluded and the only recourse open to legislators would be the complicated procedure of constitutional

revision. No less contradictory are the effects of the Court's actions on the question of minority rights. The actions of the Court in this case appear to have served to conceal the limits of the welfare measures adopted to date in the United States and, above all, to avert attention from the social, economic, and cultural aspects of the ethnic and racial issues.[94]

The judiciary can be an important support for the political process, but the courts should not substitute themselves for collective discussion within the public arena. In political debate it is not only agreement on collective ends that is achieved, but also the choice of the means to pursue the agreed-upon objectives, a choice no less relevant and no less charged with tension. The role of guarantor of individuals' and minorities' rights which the Supreme Court took on during the second half of the twentieth century has contributed to directing political groups towards the judicial solution of political conflicts. The reasons which have pushed and continue to push in this direction are easily discernable, considering the fact that action via the judiciary reduces the number of actors involved in the decision-making process and is in general quicker in the solution of controversial issues than is the legislative procedure.[95] Issues of a political nature, prone to public discussion, tend to be put forward in terms of demands to be made exclusively through the judiciary, with a considerably distorting effect: citizens are encouraged to think that the recognition of rights can be achieved independently of any type of political action or decision.

NOTES

1. On this subject there are different interpretations: Gordon Wood (*The Creation of the American Republic*, Norton (NY): North Carolina Press, 1972), for example, maintains that the first constitutions were written by the ordinary legislator, putting off until 1780 – i.e. until the drafting of the Constitution of Massachusetts – the moment in which awareness of the difference between an ordinary legislative process and a constituent process emerged in a clear and explicit manner. I agree, here, with the conclusions reached in the most recent work by Kruman, who corrects Wood's thesis: cf. M.W. Kruman, *Between Authority and Liberty. State Constitution Making in Revolutionary America*, Chapel Hill/London: The University of North Carolina Press, 1997. On changes in the conception of the Constitution in the United States, see also G. Stourzh, "Constitution: Changing Meanings of the Term from Early Seventeenth to Late Eighteenth Century", in T. Ball and J.G.A. Pocock (eds), *Conceptual Change and the Constitution*, Lawrence (KS): University Press of Kansas, 1988, pp. 35–54.
2. On the tension between politics and law in modern constitutionalism, cf. P.P. Portinaro, "Il grande legislatore e il futuro della Costituzione", in G. Zagrebelsky,

P.P. Portinaro, and J. Luther (eds), *Il futuro della Costituzione*, Torino: Einaudi, 1991, pp. 5–6.

3. On the US republican tradition there are a great number of works. Among the most important works, see B. Bailyn, *The Ideological Origins of the American Revolution*, Cambridge: Cambridge University Press, 1967; G. Wood, *The Creation of the American Republic, 1776–1787*; J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton (NJ): Princeton University Press, 1975. For a re-evaluation of the modern, innovative character of US republicanism and its roots in John Locke, in contrast with the readings of Pocock, Bailyn, and Wood, see I. Kramnick, *Republicanism and Bourgeois Radicalism. Political Ideology in Late Eighteenth-Century England and America*, Ithaca/London: Cornell University Press, 1990; T.L. Pangle, *The Spirit of Modern Republicanism. The Moral Vision of the American Founders and the Philosophy of Locke*, Chicago/London: The University of Chicago Press, 1990; J. Appleby, *Liberalism and Republicanism in the Historical Imagination*, Cambridge (MA): Harvard University Press, 1993; P. Rahe, *Republics Ancient and Modern. Classical Republicanism and the American Revolution*, Chapel Hill/London: The University of North Carolina Press, 1992; M.P. Zuckert, *Natural Rights and the New Republicanism*, Princeton (NJ): Princeton University Press, 1994; J. Huyler, *Locke in America. The Moral Philosophy of the Founding Era*, Lawrence (KS): University Press of Kansas, 1995; J.P. Young, *Reconsidering American Liberalism. The Troubled Odyssey of the Liberal Idea*, Boulder (CO): Westview Press, 1996.
4. John Marshall was the Chief Justice of the Supreme Court from 1801 to 1835. His jurisprudence was fundamental for the consolidation of the interpretative criteria of the Constitution. The introduction of the judicial review of legislation is attributed to the judgment which he expressed in the case of *Marbury v. Madison*. The case which led to that decision was determined by the refusal of Jefferson and by his Secretary of State, James Madison, to confirm the nominations to the office of Justice of the Peace, among them that of John Marbury, made by President John Adams at the expiration of his term (for this reason also called "midnight nominations").
5. Against the decisions of the Court there is only the difficult and seldom used recourse to constitutional amendments. It should be remembered, moreover, that art. V of the Constitution makes the states and not the federal powers the protagonists in the procedures for constitutional revision. In order to be valid, amendments must be ratified by three-quarters of the states, something which, considering the differing demographic densities of the individual states can produce effects that are paradoxical from a democratic perspective.
6. With the exception of the *Dred Scott* case (1857), with which the Court sanctioned the legitimacy of the exclusion of Afro-Americans from the enjoyment of the rights of citizenship, the Court rarely used the Bill of Rights to nullify acts of the federal legislature until the end of the nineteenth century. Only after the Second World War – and not differently from what took place in the other Western democracies – did the Court mature a particular sensitivity towards questions of personal freedoms and civil rights. For stimulating reading on the use of the language of rights in US history, which underlines the impact of the reaction to totalitarianism on the twentieth-century conception of rights, see R.A. Primus, *The American Language of Rights*, Cambridge: Cambridge University Press, 1999.

7. For a reading on US citizenship which is attentive to its internal contradictions, see R.M. Smith, *Civic Ideals. Conflicting Visions of Citizenship in US History*, New Haven (CT)/London: Yale University Press, 1997.
8. Through the clause in the XIV amendment which prohibits any state from enacting "any law which shall abridge the privileges or immunities of citizens of the United States", the rulings of the Supreme Court in the twentieth century undertook a partial incorporation of the first ten amendments, thus asserting the validity of the contents of the Bill of Rights with regard not only to the federal government, but also to the governments of the individual states; cf. R. Primus, *The Language of Rights*, passim.
9. Cf. R.M. Cover, "The Origins of Judicial Activism in the Protection of Minorities", *Yale Law Journal*, 91 (1982), pp. 1287–316.
10. J. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge (MA): Harvard University Press, 1980, p. 76.
11. Cf. C.A. Houston, *Algernon Sidney and the Republican Heritage in England and America*, Princeton (NJ): Princeton University Press, 1991, p. 233. For the influence of Sidney on the drafting of the Constitution of Pennsylvania, cf., ibid., pp. 232–3.
12. On the influence of the "real", "independent", or "true whigs" on US constitutional history during the revolutionary period, see C. Robbins, *The Eighteenth Century Commonwealthman*, Cambridge (MA): Cambridge University Press, 1959; T. Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution*, Indianapolis (IN): Liberty Fund, 1998; B. Bailyn, *The Ideological Origins of the American Revolution*; R.E. Toohey, *Liberty and Empire, British Radical Solutions to the American Problem, 1774–1776*, Lexington (KY): The University Press of Kentucky, 1978; D.N. Mayer, *The Constitutional Thought of Thomas Jefferson*, Charlottesville (VA)/London: The University Press of Virginia, 1997, chap. II; C.B. Thompson, *John Adams and the Spirit of Liberty*, Lawrence (KS): University Press of Kansas, 1998, chap. IV.
13. On the possibility of retracing this turning point in English constitutional thought to Locke and Sidney, cf. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law. English Historical Thought in the Seventeenth Century*, New York: W.W. Norton, 1967, pp. 236–9. On the break made by Locke with respect to the paradigm of common law, cf. D. Resnick, "Locke and the Rejection of the Ancient Constitution", *Political Theory*, 12 (1984), 1, pp. 97–114; J.R. Stoner, Jr., *Common Law and Liberal Theory. Coke, Hobbes, and the Origins of American Constitutionalism*, Lawrence (KS): University Press of Kansas, 1992, pp. 137–51.
14. With regard to the different families within the republican tradition, see M. Geuna, "La tradizione repubblicana e i suoi interpreti: famiglie teoriche e discontinuità concettuali", *Filosofia politica*, 12 (1998), 1, pp. 101–32.
15. P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford: Clarendon Press, 1997, p. 8.
16. Cf. J.M. Balkin, "Populism and Progressivism as Constitutional Categories", *The Yale Law Journal*, 104 (1995), in particular pp. 1945–6.
17. P. Pettit, *Republicanism. A Theory of Freedom and Government*, p. 8.
18. D.N. Mayer, *The Constitutional Thought of Thomas Jefferson*, p. 257; but see in general chap. IX: *A Solecism in a Republican Government. The Judiciary and Judicial Review*.

19. J. Adams, "Defence of the Constitutions of Government of the United States of America", in J. Adams, *Works*, vol. 4, Boston (MA): Little, Brown, 1851, p. 504.
20. The influence of the reflections of J. Adams on Federalist thought is asserted by C.B. Thompson, *John Adams and the Spirit of Liberty*, passim.
21. For an interpretation from a republican perspective of the thought of the Federalists, see D.F. Epstein, *The Political Theory of the Federalist*, Chicago/London: The University of Chicago Press, 1984; G.W. Carey, *The Federalist Design For a Constitutional Republic*, Urbana/Chicago: University of Illinois Press, 1994.
22. Cf. A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers*, ed. C. Rossiter, New York: New American Library, 1961, p. 384.
23. Cf. S. Snowiss, *Judicial Review and the Law of the Constitution*, New Haven (CT)/London: Yale University Press, 1990, chaps. II and III.
24. T. Bonazzi, "Il Demos Basileus e la nascita degli Stati Uniti", *Filosofia politica*, 5 (1991), p. 102.
25. Appleby writes: "Despite the celebration of popular sovereignty in America, the sovereign people were restrained once the constitution was ratified"; cf. J. Appleby, *Liberalism and Republicanism in the Historical Imagination*, p. 219.
26. The historical context in which the Marshall judgment is situated, or rather the background constituted by the battle between Federalists and Republicans over the Constitution, is seldom remembered. For an in-depth analysis, see P. Kahn, *The Reign of Law. Marbury v. Madison and the Construction of America*, New Haven (CT)/London: Yale University Press, 1997.
27. T. Jefferson, *Public and Private Papers*, introduction by T. Wicker, New York: Vintage Books, The Library of America, 1990, pp. 168–9. For the significance of Jefferson's inaugural speech and the challenge which this presented for the Federalist interpretation of the Revolution, see also P. Kahn, *The Reign of Law*, passim.
28. *Appendix: William Marbury v. James Madison, Secretary of State of the United States*, in P. Kahn, *The Reign of Law*, pp. 254–6.
29. S. Snowiss, *Judicial Review and the Law of the Constitution*, p. 119.
30. S.C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall*, Princeton (NJ): Princeton University Press, 1990, p. 144.
31. On this thesis there is agreement in the works of Stimson (*The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall*) and Stoner (*Common Law and Liberal Theory*). On the same topic, see also C.L. Tomlins, *Law, Labor and Ideology in the Early American Republic*, Cambridge (MA): Cambridge University Press, 1993, in particular pp. 93–4, 104–5.
32. The Fifth Amendment establishes, among the various guarantees for the protection of the freedom and security of the individual, that no person may be "deprived of life, liberty, or property, without due process of law".
33. Cf. J. Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy*, Chicago: The University of Chicago Press, 1985, p. 225; R.M. Smith, *Liberalism and American Constitutional Law*, Cambridge (MA): Harvard University Press, 1985, p. 73.
34. Cf. L. Tribe, *American Constitutional Law*, Mineola (NY): The Foundation Press, 1978.
35. The Federal structure has acted as a powerful restraint on the protection of fundamental rights, and in part it continues to do so, given the competitive and not cooperative character of US Federalism. Being in direct rivalry among themselves in

questions of investment and production, within a system which permits special interests to negotiate in order to obtain from state legislative and judicial organs the most favourable conditions for them, it is difficult for the states to manage to maintain high standards of regulation of working conditions; cf. H.N. Screiber, "Constitutional Structure and the Protection of Rights", in A.E. Dick Howard (ed.), *The United States Constitution. Roots, Rights and Responsibilities*, Washington, DC/London: Smithsonian Institution Press, 1992, p. 195. On the same topic, see also H.A. Linde, *Citizenship and State Constitutions*, pp. 381–96.

36. In sect. I, the Fourteenth Amendment affirms: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
37. Cf. M.J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, Oxford: Oxford University Press, 1992, pp. 10–11.
38. For the opposition of the Court to the regulation of child labour, cf. S.M. Griffin, *American Constitutionalism*, Princeton (NJ): Princeton University Press, 1996, pp. 88–9. The sentences of the Court during the "Progressive Era" against the legislation on child labour are often taken as an example of the ability of the Supreme Court to block for decades reforms which were widely supported by public opinion, see J. Agresto, *The Supreme Court and Constitutional Democracy*, Ithaca (NY): Cornell University Press, 1984, pp. 28–9.
39. With this ruling, the Court declared unconstitutional the legislation introduced by the State of New York for the regulation of the working hours in bakeries. The sentence is considered emblematic of the conservative role played by the Court at the beginning of the twentieth century (the "*Lochner* Era", from the name of that sentence), blocking the introduction of legislation more favourable to the working class; cf. S.M. Griffin, *American Constitutionalism*, pp. 100–1.
40. Cf. M.J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, passim.
41. Cf. M. Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture*, New York: Alfred A. Knopf, 1986.
42. I refer here to the analysis by L. Tribe, *American Constitutional Law*; see, in particular chaps. 11 and 16.
43. On the movement of the C.L.S., see A. Carrino, *Ideologia e coscienza. Critical Legal Studies*, Naples: ESI, 1992.
44. R.M. Unger, "The Critical Legal Studies Movement", *Harvard Law Review*, 3 (1983), p. 563.
45. Ibid.
46. For this reading of US constitutionalism, cf. R.S. Kay, "American Constitutionalism", in L. Alexander (ed.), *Constitutionalism. Philosophical Foundations*, pp. 16–63.
47. Cf. A. Scalia, "The Rule of Law as a Law of Rules. Oliver Wendell Holmes Bicentennial Lecture", *Harvard Law School*, 56 (1989), 4, pp. 1175–88.
48. What counts in the originalists' interpretation is history. For the originalists, then, as John Arthur explains, "the question to be asked in interpreting vague constitutional language is how those who originally wrote the words understood them";

J. Arthur, *Words that Bind: Judicial Review and the Grounds of Modern Constitutional Theory*, Boulder (CO): Westview Press, 1995, p. 23. On the originalist perspective, see R. Bork, *The Tempting of America. The Political Seduction of the Law*, New York: The Free Press, 1990; R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Indianapolis (IN): Liberty Fund, 1997.

49. A. Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws", in A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, ed. by A. Gutmann, with comments by G. Wood, L.H. Tribe, M.A. Glendon, and R. Dworkin, Princeton (NJ): Princeton University Press, 1997, p. 21.
50. Ibid., p. 38.
51. Ibid., p. 40.
52. Ibid., pp. 3–9.
53. Ibid., p. 47.
54. Ibid., pp. 46–7.
55. M.A. Glendon, "Comment", in A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, pp. 95–114.
56. An attempt to reformulate textualist originalism, attentive to the distinction between the interpretive question and the normative question, or rather to the problem of the directive which must be drawn from the constitutional text with relation to the specific case, is found in M. Perry, *The Constitution in the Courts. Law or Politics?* Oxford: Oxford University Press, 1994.
57. Cf. C.R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court*, Cambridge (MA): Harvard University Press, 1999, pp. 237–41.
58. On this point, cf. G. Palombella, *Costituzione e sovranità. Il senso della democrazia costituzionale*, Bari: Dedalo, 1997, pp. 25–9.
59. The idea of the Constitution as a "rock-solid, unchanging constitution" is formulated by Scalia; cf. A. Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws", p. 47. For the non-adherence of Dworkin to the idea of a "living constitution" cf. R. Dworkin, "Comment", in A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, pp. 122–3.
60. Cf. D. Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge (MA): Harvard University Press, 1998; see, in general, pp. 119–30.
61. R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution*, Cambridge (MA): The Belknap Press of Harvard University Press, 1996, pp. 19–20.
62. R. Dworkin, *Law's Empire*, Cambridge (MA): The Belknap Press of Harvard University Press, 1986, p. 199.
63. Cf. R. Dworkin, "On Interpretation and Objectivity", in R. Dworkin, *A Matter of Principle*, Cambridge (MA): Harvard University Press, 1985, chap. 7.
64. R. Dworkin, *Freedom's Law*, p. 10.
65. Cf. G. Palombella, "Giudici, diritti e democrazia", *Democrazia e diritto*, 1 (1997), p. 248.
66. Cf. J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a. M.: Suhrkamp Verlag, 1992, Eng. tr. *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, Cambridge (MA): The MIT Press, 1996, p. 222.
67. Ibid., pp. 222–3.
68. Ibid.

69. A. Gutmann and D. Thompson, *Democracy and Disagreement*, Cambridge (MA): The Belknap Press of Harvard University Press, 1996, p. 45.
70. Ibid., pp. 45–6.
71. F.I. Michelman, "Constitutional Authorship", in L. Alexander (ed.), *Constitutionalism. Philosophical Foundations*, p. 77.
72. B. Ackerman, *We The People. Foundations*, Cambridge (MA): The Belknap Press of Harvard University Press, 1991; B. Ackerman, *We The People. Transformations*, Cambridge (MA): The Belknap Press of Harvard University Press, 1998.
73. Cf. A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis: Bobbs-Merrill, 1962.
74. J. Ely, *Democracy and Distrust*.
75. The First Amendment, as is well known, confirms the respect of freedom of religion as well as freedom of expression.
76. B. Ackerman, *We The People. Foundations*, p. 15.
77. Ibid., p. 13.
78. Ackerman offers a detailed analysis of the period of Reconstruction and of the New Deal; see B. Ackerman, *We The People. Transformations*, passim.
79. J. Waldron, "Review of B. Ackerman, *We The People: Volume I, Foundations*", *Journal of Philosophy*, 90 (1993), 2, p. 153.
80. Cf. D.F. Epstein, *The Political Theory of the Federalist*, chap. III.
81. C.R. Sunstein, "Interest Groups in American Public Law", *Stanford Law Review*, 38 (1985), p. 42.
82. Cf. C.R. Sunstein, *The Partial Constitution*, Cambridge (MA): Harvard University Press, 1993, p. 21.
83. Ibid.
84. Ibid., p. 24.
85. Ibid., pp. 143–4. Here Sunstein reconsiders and re-elaborates the theory of Ely, tying it to a different conception of democracy (no longer the model of pluralist democracy but instead that of deliberative democracy).
86. S. Holmes, "Precommitments and the Paradox of Democracy", in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, Cambridge (MA): Cambridge University Press, 1997, pp. 195–240.
87. Cf. C.R. Sunstein, "Constitutions and Democracies", in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, p. 340.
88. Ibid.
89. C.R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford: Oxford University Press, 1996, p. 7.
90. Cf., for example, C.R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court*, p. 114.
91. For a highlighting (in tune with the positions of Sunstein) of the limits of the liberal conception of constitutionalism as an outline of the rights that act as a power in opposition to, and in permanent conflict with, the democratic idea, see G. Palombella, "Giudici, diritti, democrazia", passim.
92. For a similar interpretation of constitutionalism, see R. Bellamy, "The Political Form of the Constitution: Separation of Powers, Rights and Representative Democracy", *Political Studies*, 44 (1996), pp. 436–56.
93. On the effect of radicalization of the conflict produced by the constitutionalization of the right to abortion, cf. P. Raynaud, "Tyrannie de la majorité, tyrannie des

minorités", *Le débats*, 69 (1992), p. 56. The article also takes into consideration the contradictory effects of the judicial policy of affirmative action.

94. Cf. G.A. Spann, *Race Against the Court. The Supreme Court and Minorities in Contemporary America*, New York: New York University Press, 1993.
95. Cf. C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, Norman (OK)/London: University of Oklahoma Press, 1993, in particular chap. VI, which pays considerable attention not only to the distorting effects of judicial action on political discourse, but also to the difficulties of the judiciary in controlling the systemic effects of its own decisions.