



Judicial Activism and Judicial Restraint in a Democratic Legal System

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Abstract

Judicial activism and judicial restraint represent two influential approaches that shape the role of courts within a democratic legal system. This paper examines the conceptual foundations, democratic implications, and institutional limits of both approaches, emphasizing their impact on constitutional governance. Judicial activism is understood as a proactive judicial role in reviewing legislation and executive action to protect constitutional values, fundamental rights, and democratic principles, particularly in situations where political institutions fail to act. In contrast, judicial restraint highlights self-limitation by courts, deference to elected branches, and respect for democratic decision-making processes. The study argues that neither approach is inherently democratic or anti-democratic; rather, their legitimacy depends on context, constitutional design, and the quality of democratic institutions. Through a comparative and theoretical analysis, the paper explores how excessive activism may undermine democratic accountability, while excessive restraint can permit rights violations and unchecked political power. It further highlights the importance of judicial independence, separation of powers, and public legitimacy in balancing these approaches. The paper concludes that a nuanced and context-sensitive balance between activism and restraint is essential for maintaining constitutional supremacy, protecting rights, and reinforcing democratic governance in modern legal systems.

Keywords: Judicial Activism; Judicial Restraint; Democracy; Constitutional Review; Separation of Powers; Judicial Independence; Democratic Governance

1. Introduction

Contemporary constitutional democracy requires citizens to exercise choice in the governance of their polity. The judiciaries of democracies potentially intervene in exercising freedom of choice between, say, determining the policy regarding same-sex marriage, health care, or other aspects of public policy either through direct and intervening actions or indirectly by declaring unconstitutional legislation. Such modes of activism are not without substantial costs. Judicial action lacks the accountability characteristics of other public authorities of government and exempt from the discipline of regular elections, mediation of representative bodies, or negotiation and/or deliberation that constrain legislative and executive public officials, such being within the purview of Congress or other concerns such as transparency or public spokesperson. Judicial action does not request individuals to choose freely under circumstances concerning matters of public policy. Judicial settlements tend favor certain groups against other groups, and thus enable the public officials to escape the choice as to whom should win the political contest. Say, letting various public officials avoid transparent to the public practices thereby risk battles avoidance policy choices. Individuals participating in challenging the status quo reflect back onto what policies are adequate considering democratic principles, and public agenda awaiting to participate chooses to evaluate governmental activities reflect back towards public official. Collectively, a broad array of policies approach find individuals viewing consider under

the presidency of narrow public policies yet does not imply neglect of fostering fuller citizenry engagement, challenges can remain open under generous liberal way affecting the public policy thereby render court to place limits on public policy choices underfullness apropiate towards the democratic life. (H. Simon, 2016)

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2. Foundations of Judicial Roles in Democracy

The foundations of judicial roles in democracies can be traced to their constitutional mandates and the principles of judicial independence. These are typically enshrined in the constitution, which plays a directing role in the allocation of the judiciary's activities and functions. Since the primary rationale for embedding the judiciary in the constitution is to safeguard the rule of law, one would expect political constraints governing judicial functioning to be enshrined at this level as well. Moreover, courts do not operate in *vacuo*; they are simply one institution within the system of checks and balances that is part of the constitutional structure of a democratic state. Hence, they will undoubtedly be influenced by the principal actors and institutions of the polity. Consequently, the separation of powers and checks on political power provide an additional fundamental basis for theorising about judicial roles in democracies (Landau, 2014).

In all systems with a written constitution, irrespective of whether the document is superior or inferior to ordinary law, both the political and the legal dimensions of the issue concerning the definition of the judicial realm are relevant for an understanding of the judicial role. The definition of the political sphere has implications for the legitimate scope of legislative and governmental action, which in turn has a direct bearing on the scope of judicial review and the corresponding institutional role of the courts themselves. Judicial independence involves (a) independence along with impartiality regarding the parties in the legal dispute and (b) independence and impartiality with respect to political actors and decisions that have an impact on these disputes.

2.1. Constitutional Mandates and Judicial Independence

The judicial branch has become closely linked with upholding democratic values due to many constitutional mandates. Elections ensure that the legislative branch is accountable to the citizens. Legislative action in turn is necessary to protect democracy because the spirit of the law changes through time; judicial activism can be beneficial to democracy when it creates new paths for freedom and equality. Mandates range from constitutions that confer popular sovereignty to those that affirm planning freedom and instruct courts to protect against technocracy (Landau, 2014). Adding to these constitutional directives, electoral politics has created expectations about when and how courts

intervene. In interim periods when regimes change but assemblies remain unaltered, courts can do much to protect democracy where it is threatened by partisan capture.

2.2. Separation of Powers and Checks and Balances

The principle of separation of powers is an essential pillar of both liberal democracy and the rule of law (H. Simon, 2016). Courts exercise various powers and functions and are critical components of legislative, executive, and quasi-legislative authorities in both democratic and non-democratic societies. Such functions are often bounded by adjudicative or quasi-judicial powers that constrain discretionary, free-wheeling policy choices. The political salience of issues, the resulting uncertainty about whether policy responses required would violate constitutional restraints, and the inability of government defendants to bind future governmental actions on subsequent, similar cases enhance the likelihood of active judicial behavior.

3. Conceptual Framework of Judicial Activism

Judicial activism is defined as the willingness of courts to intervene in public policy, rendering decisions on the constitutionality of legislation and executive action. The notion has evolved considerably, from an early focus on judicial intervention as a necessary counterbalance to unjust legislation to a broader conception of judicial law making. This progression enables judicial activism to encompass new forms of state activity and alternative means of constraining the state, such as international treaties (H. Simon, 2016). The judicial establishment, a component of the state with the power to strike down statutory and executive acts, has been the traditional focus of judicial activism. Court-ordered solutions to social issues, however, often operate outside the law and transcend ordinary judicial review, thus forming a distinct category. The two conceptions of judicial activism pursued in successive parts permit consideration of how judicial roles can promote democracy, whether by applying externally imposed rules or elaborating internal democratic principles.

The latter approach has been increasingly influential within democratic theory and practices, yet judicial action still raises democratic concerns. These are especially pronounced under political regimes neither entirely democratic nor fully undemocratic. Courts wield considerable power even at settled constitutional stages when the regime itself remains subject to change. Public law making remains a central vehicle for augmenting democracy, and judicial activism can facilitate or obstruct these steps: expanding citizen engagement through policy frameworks and imparting a democratic character to antecedently accepted rules (Singh, 2017). Political authority thus traverses various sites, some of which can be responsible for constraining political power.

3.1. Definitions and Historical Evolution

Judicial activism pertains to the exercise of interpretive discretion in adjudication, resulting in decisions that have significant policy influence, especially in the spheres of fundamental rights, public interest and economic regulation, among others (Singh, 2017). It has been described as the readiness to override (or disregard) a democratically enacted law on the stated ground that it violates a constitutional provision, even on a constitutionally provided framework for self-correction by the legislature (H. Simon, 2016). The concept of 'judicial activism' properly refers to the extraordinary use of the power of judicial review or very bold decision-making in constitutional matters. A precise characterization reveals the factors involved in judicial activism: a statistically significant overall increase in the breadth, depth and frequency of such judicial decisions at the Supreme Court level ; and the chronic tendency of some high and intermediate courts and judges to engage in prominent constitutional activism after statutory legislation at the lower court or tribunal stage, as well as a commitment to go beyond restrictions upon legislative subject-matter jurisdiction over economic and social rights.

3.2. Instrumental Rationales and Policy Implications

Courts display an activist approach when they unambiguously impose their views on political and societal questions that go beyond a reasonable interpretation of the law and judicial precedent.

Thus courts determinedly circumscribe the powers of particular branches of government, or levels in multi-tier systems, in respect of decisions of general normative, institutional or jurisdictional import. Pre-emptive decisions are often categorically resolute: for example, pronouncing specific policy proposals invalid, striking down legislative enactments, or declaring emergency powers infrangible under any circumstances. Such judicial interventions must, by necessity, entail a prescription of appropriate institutional or policy alternatives. By contrast, a more restrained conception allows legislative and executive choices a wider area of operational latitude. In specific instances, the frameworks for settling fundamental decisions in normative self-determination—and thus the precise contents of democratic deliberation—remain indeterminate, or the conditional limits imposed on the democratic procedural sphere allow for a substantial variety of conceptually and constitutionally permissible political distributions of authority.

3.3. Critiques and Defenses of Activist Jurisprudence

Jurisprudential critiques and defenses of activist decision-making increasingly converge around the broader premises of democratic constitutionalism and democratic experimentalism. The former involves the notion that contemporary judicial decision-making might be viewed as accountability politics properly conceived within a framework of popular sovereignty associated with the social contract tradition. This decidedly political understanding of the judicial role departs from familiar liberal conceptions of democracy that imagine a democracy of reasons in which the legitimacy of governmental action hinges on the specification of pre-legal and presumably universal moral principles by reason. The charged concept of democracy favors judicial conduct that is broadly attuned to ongoing societal experimentation and far less concerned with aligning government with prior counter-legal ideals (H. Simon, 2016). Activism—on any measure of its intensity—appears scarcely compatible with the substantive restrictions impulse that concentrates on the separation of powers and interprets judicial intervention strictly as a remedy for gross dysfunction (J. Segall, 2009).

4. Conceptual Framework of Judicial Restraint

Judicial restraint is a philosophy and role conception developed to delineate appropriate conduct in a democracy by judges situated within an independent judiciary tasked with resolving differing legal views among the coordinate branches of government. While judges mounting a restrained approach have constituted a central figure in its development, the tradition is not synonymous with narrow conception and limited activity. Judicial restraint is hence viewed as a policy of self-imposed limitation (M. Lamb, 1982).

Restraint takes a variety of forms depending on context, scope, and focus. The commitment is for courts in tangible matters of law to defer to the pragmatic capabilities of coordinate branches. When the activities of other governmental actors are nevertheless open to legal contestation, judges are urged to impose checks minimally disruptive of their operations and with a show of regard for the intent of legal provisions or prior precedents. Restraint is applied to legislation and statutes that remain beyond the constitution or equivalent legal provision. When the constitution offers no express guidance, a commitment to restraint further suggests a legitimate role for the legislature in interpreting it; while co-ordinate branch interpretations remain open to review, the judiciary ought not to usurp it as a primary expositor ((Wicaksana) Dramanda, 2014).

4.1. Principles and Historical Development

As the boundaries of the constitutional state expand, the criterion of redundancy emerges in evaluating broad legislation, and such scrutiny offers a distinctive interdependence between political theory and constitutional law. The rise of “transitional” or “post-colonial” democracies has introduced an additional, rarely considered criterion—namely, that judicial review should not undermine the pursuit of democracy, something inherently problematic when much of the legislation is directed toward establishing a constitutional state in the first place. The abstraction of democracy that political theory frequently endorses, embracing core procedural features while exercising discretion over substantive values, becomes viewed as unbalanced in contexts that feature fundamental issues. This concern recurs with respect to social or economic rights in neo-liberal environments because systems

with little access to the basic requirements for exercising rights often encourage political instability and judicial activism (H. Simon, 2016).

4.2. Constraints, Legitimacy, and Democratic Feedback

Identifying and applying constraints that enhance judicial decisions' legitimacy forms an important component of the theory of judicial restraint. The separation of powers situated within a democracy generates a division of responsibilities and functions. In situations of judicial review, where statutes or actions adopted by the legislature or executive branch are adjudicated for constitutionality, the question arises whether judges can depend exclusively upon the separation-of-powers principle in cases involving either statute or constitutional scrutiny. Even when judicial independence is present, executive or legislative actors might maintain that courts overstep their function, particularly vis-à-vis the promulgation of a statute that is deemed self-evident or a constitutional requirement considered noncontroversial. The principle of democracy thus appears in a distinctive manner. Prudent positions posit yet another obstacle, deeming it appropriate for judges in review of statutes or examination of explicit, popularly adopted constitutional provisions to seek the will of the democratic majority as a constraint-by-the-people (Landau, 2014).

The theory of judicial restraint accords decision-makers the challenging task of constructing policy. On the continuum of static democracy, courts attempt to identify "legitimate" measures regarding matters like environmental preservation or health insurance. Courts ascertain what is proper and thus demand that a definable majority intervene to introduce or alter regulation. Over time, this conception evolved into an entirely different question. Establishing formalism and analytical rigour of the reviewers' challenge becomes decisive. Judicial activity alters the question constitutionally reinforced, framing judicial decisions under statute and additional contextual indicators—substance, process, issue, and firm legal setting—as a response to further-reach-central matters that nevertheless exhibit relevance to general principles like democracy (H. Simon, 2016).

4.3. Evaluating Restraint in Statutory and Constitutional Review

In a democratic legal system, the societal consequences of restraint in judicial review depend on whether legislative enactments fall within ordinary statutes or are enshrined in the constitution. Although statutory and constitutional review may employ the same reasoning and engage parallel interpretive questions, the decision-making choices after activist or restrained adjudication often differ. The Supreme Court of Canada has adopted a developmental approach to statutory and constitutional interpretation that facilitates a variant of this doctrinal separation. By clarifying the implications of judicial-restraint theories for statutory review, the Canadian experience illustrates that both electoral responsiveness and policy stability remain relevant even when statutory review is economically downstream from constitutional review. The dangers of excessive parliamentary deference may likewise arise outside the context of a single, foundational constitution. The original Canadian Constitution Act contains no express grounds for abrogating democratic principles, yet the vitality of the democratic-equilibrium principle depends critically on the specific governance form that a country adopts, such as royal-executive, parliamentary, or direct-democracy. Interim arrangements between decolonization and full independence, or between independence and a new federal constitution, may activate similar concerns about overly cautious and therefore path-dependent perspectives (Landau, 2014) ; (H. Simon, 2016).

5. Comparative Perspectives

The 2005 constitutional reform in Turkey prompted contentious debates about the role of the judiciary in the democratic society, in particular whether courts should prefer an activist stance or a more restrained approach. Jurisprudence in many democracies, including Turkey, has made reference to the concept of judicial activism, which is defined in various ways and, consequently, encompasses different practices and values. Activism is often juxtaposed with restraint. The issue of judicial roles arises at two general levels: in relation to the roles that civil society, political and bureaucratic authorities, technocrats and the intending public play in establishing constitutional oversight and prerequisite conditions for democracy, and in relation to Utopia and the extent of the gap that may

exist between democratic ideal and democratic reality. Courts play an important role in the society but in some cases they become an obstacle to democracy. When courts display a constructive or proactive role, this should be seen as being activist. Constructive or proactive judicial role may occur in an apparent environment of institutional capacity and political commitment towards democracy, however, it might also occur in an environment characterised by prevalent pathetic democracy. The Prime Minister of Turkey in 2001 stated that 'an ultra modern and advanced parliament on par with those of developed nations does not reach the level of a genuine representative democracy' (Landau, 2014). Activism is still exhibited in those cases where there is no long-lasting commitment to improve the quality of democracy. A political system exhibiting a set of social problems with limitations on participatory and hyper representative democracy, but at the same time permitting the formal representative-democratic procedures of election, a modern Parliament and a constitution might be adversely affected by proactiveness. Adverse conditioning may arise in any situation where the condition of formal democracy is compromised by the nature of social realities. In some cases where the formal representation of democracy lingers, activism may be promoted in order to bridge the gap between formal democracy and societal (real) democracy. Improper demand of activism of this sort is, thus, encountered.

5.1. The Supreme Court of the United States

Judicial behaviour in the federal system of the United States is uniquely defined by the practice and tradition of the Supreme Court of the United States. The unambiguous language of the founding document neither includes mandatory nor discretionary, but rather does prescribe the two principal judicial operations of statutory and constitutional review. The former — the authority of the whole legislative act as well as of individual clause to be reviewed for possible repugnance to the national constitution — remains a constitutional obligation. Judicial review in the latter form whereby a law deemed unconstitutional could be set aside was decisively endorsed by *Marbury v. Madison* (1803) and remains a free discretionary operation that can, in principle, be omitted altogether. However, principles of judicial restraint and activism remain powerfully imprinted in the exercise of both the mandatory and discretionary review processes.

The increasingly widespread perception that the Court, for an increasing number of decades, has actively engaged in the process of governance from an essentially political foundation at odds with constitutional convention frequently is termed judicial activism. The popular notion that the activist tendency has become hegemonic over the past three decades and continues to consolidate in the current time period is equally pervasive. Nevertheless, the circumstances characterising this activism trend are sufficiently dissimilar to give rise to the qualification of a different historical and analytical phase of judicial activism from those previously outlined in American Democracy and the Rule of Law (J. Segall, 2009).

5.2. The Constitutional Courts of Europe

European constitutional courts offer a diverse perspective on the contest between judicial activism and restraint. Jurist Maria K. Krajewska categorizes these courts into three groups based on how they mediate these extremes. First is the "proponent model", which encompasses the Polish Constitutional Tribunal, the Czech Constitutional Court, and the German Federal Constitutional Court. These courts favor judicial activism to guarantee democracy and fundamental rights and allow concrete review of statutes. The second category, termed the "guardianship model", includes the Hungarian Constitutional Court and the Slovak Constitutional Court, which exercise moderate competence review to maintain institutional balance without substantial legal or political encroachment. The third is the "restraint model", represented by the Estonian Supreme Court and the Austrian Constitutional Court, opposing activism as a threat to democracy and restricting review of compliance with generally recognized norms to purely and ethically unjust legislation.

The European Court of Justice (ECJ) prioritizes the uniformity of European law and facilitates legal recourse to European institutions as essential for constitutive procedures. National courts thus maintain a passive role and abstract review is reserved for compliance with material conditions. The European Court of Human Rights (ECHR) applies the margin of appreciation doctrine to national

legislation, resembling restraint. Majorities on these courts favor further-reaching enactments, though the same chambers have blocked national ratification of treaties to guarantee national compliance with European provisions. The ECJ, initially focused solely on common market provisions guaranteeing free movement of goods and services, now intervenes in intimate aspects of Member States' life. Counter-intuitively, the supremacy and direct effect of Community law led to fewer opportunities for judicial remedy at the national level. Substantial or legality review of pre-empted provisions enabling judicial access remains extensive, and abstention is more pronounced in areas of less strategic national importance. Extensive enforcement of national treatments for cross-border storage activities undesirable on national grounds is observe in Poland (Kühn, 2007).

5.3. Other Democratic Traditions

Besides the US Supreme Court and the European constitutional courts, many democracies protect fundamental rights through judicial review. Yet a plethora of apparently self-contradictory theories seek to explain why, even in a democracy, courts intervene outside the political process or counter the preferences of most citizens. Some of these traditions have roots practically as deep as those of modern constitutionalism, but much contemporary theoretical effort seeks both to provide arguments for the judicial review afforded by particular democratic traditions and to justify a form of judicial behaviour that remains recognizably restrained yet responds intelligently to the dilemmas of contingent democracy.

Normative accounts of democratic government thus routinely grapple with the question of judicial role, and the establishment of a formalised constitution that unambiguously defines courts' roles in the democratic architecture of society does not make the matter easier. What courts may do whose role under a contingent or defined democracy remains hotly debated. The pertinent elements of the theoretical literature that arises from these traditions engage comparably with the respective literatures developed concerning the US Supreme Court and the European courts. The progressive-democratic tradition elaborates the role of courts under democracy without distorting it into the "more active than mere referee" character frequently ascribed to activist judges by contemporary scholarship (H. Simon, 2016).

6. Institutional Design and Contextual Factors

Judicial rulings are shaped by institutional context, including court structure, appointment processes, decision-making rules, duration of tenure, political salience, and the balance of powers (Landau, 2014). Differences between activism and restraint tendencies are correlated with characteristics of the judicial system and with the political disposition of the executive and legislative branches (H. Simon, 2016). Political context also shapes deliberation and decision-making, as preferences and norms of legitimacy evolve in line with the balance of power and with democratic support for appropriateness and scope of judicial review. Pressures from public opinion, media discourse, organized interest groups, and civil society affect both the policy content of decisions and the perceived legitimacy of courts and decisions. Finally, the impact of judicial action on the democratic regime, on political representation, and on judicial independence varies with systemic characteristics and with democracy.

6.1. Court Structure, Appointment Processes, and Political Salience

Certain countries exhibit a heightened degree of political awareness in the constitutional discourse than others—the political salience of constitutional discourse, and by extention the political interest conveyed through constitutional discourse, is much higher within certain nations than others. Countries in which constitutionalism and constitutional discourse have previously been embedded in political and social fabrics tend to develop judicial practices that distance the courts from the political realm (Landau, 2014). In certain countries, the widespread recognition of the pivotal role of political support in maintaining the legitimacy of non-majoritarian and constraining institutions leads non-majoritarian and exceptional institutions to confine political support-seeking behaviour to a minimum. Courts thus constrain themselves from operating in the realm of political salience, and therefore operate within technical discourses distinct from political and ideological discourse that permits them

to retain against political salience. In these systems, courts may seek broad consensus for their decisions. Courts in Stalemate Regimes, by contrast, continue to search for coercive legitimacy to a much wider extent, operating in highly visible and politically sensitive areas.

6.2. Public Opinion, Media, and Legitimacy

Debate continues on the legitimacy of judicial activism. While judges often claim their decisions rest on legal authority, the contents of those decisions speak volumes about whether the intent was merely to apply the law. Laws are seldom clear on their face; this specificity is universally recognized and recognized, for example, in administrative law. In the absence of legislative precision, interpreting constitutional provisions leans toward judicial philosophy. Judicial interpretations thus engage with first principles on questions of authentic democracy, core liberties, and the Constitution itself—can the judiciary transcend governmental hierarchy (J. White, 2009)? Courts possess a unique ability to protect the public from abuses of power, yet their authority remains precarious; temporary restraints, such as trials or courts constructively serve to preserve civil governance and political legitimacy (G. Wilson, 1993).

6.3. Civil Society and Judicial Accountability

Judicial decisions often depend on public perceptions of the judiciary's authority and declining trust can diminish the effectiveness of judicial review. Like the policing of the British Columbia Supreme Court's ruling on the 2012 Vancouver municipal election, media accounts illustrate the public and political character of judicial legitimacy. Political and regulatory are crucial for judicial enforcement of public-interest and policy-minded rights claims that legitimacy depends on civil society engagement with public issues through constitutional or statutory instruments. Some jurisdictions—encompassing the provincial or civil law world, member states of the European Union, or political regime—many rely on oversight agencies or authorities explicit or transparent technology to assure political accountability. In contrast, the characteristics take on heightened significance where explicitly or civil society and a regard to deliver fundamental public policy. Colombia offers an instrumentally well-specified illustration of such engagements that features the deliberate embellishment of elected-agent accountability renders useful clarifications of the services and yet clients.

7. Balancing Act: Toward a Pluralistic Theory of Judicial Role

The distinction between judicial activism and restraint appears increasingly outdated (M. Lamb, 1982). In the United States, theoretical and attitudinal studies indicate that viewing most decisions simply through an activist-restraint lens obscures the principal ideological factors shaping decisions (E. Nelson, 2014). In practice, judges also consider more than the broad activist-restraint dichotomy. Actual judicial behavior can be characterized through the lens of pluralism (J. Segall, 2009). Members of the judiciary draw on diverse schemas in analyzing an array of problems confronting courts, dynamically adjusting their frameworks to accommodate circumstances. Nevertheless, the focus remains on activism and restraint due to the salience of both doctrines. Each exerts a considerable influence on decision-making in virtually all democracies. Both terms serve as short-hand for complex philosophies that express fundamental commitments of respective core cases and facilitate broad yet meaningful analysis.

7.1. Conditions for Constructive Activism

A pluralistic theory of judicial role that identifies conditions for activist courts to engage in constructive, democratic social policy has considerable theoretical appeal and practical relevance. Democracies do not regard judges as mere tools of social movements and recognize that courts with ample discretion can behave in undemocratic fashion. At the same time, even democratic courts sometimes must act against the preferences of public actors. The jury is still out on whether the conditions for constructive activism hold in Southern Africa or anywhere else and, if they do, whether the net benefits of activist intervention outweigh the risks.

Courts can help define the boundaries of democratic contestation when political actors abuse, reorganize, or interfere with popular mandates. Democratic deliberation proceeds in a context shaped by government priorities, partisan majorities, and the prevailing political and legal culture. Judgments led by either a strong or weak judiciary illustrate broad political environments. Constructive interventions focus on institutions, processes, or sectors of law where suffrage, deliberation, pluralism, or accountability remain limited and where activism would not substantially elevate judicial supremacy or detract from pro-democratic policies. (H. Simon, 2016)

7.2. Safeguards and Limits on Judicial Power

Judges exercise power, yet their responsibilities and the methods for exerting their authority vary. Certain modes of exercising power risk receiving little oversight if they occur within circumstances that provide judges with appropriate legitimacy and if decision processes are transparent, publicly justified, and made amenable to evaluation and control. A chief obstacle to maintaining accountability is that in many democratic systems, judges possess the authority to make decisions declaring, altering, or even invalidating legislative or executorial policies that are the operative outcome of consensus among elected representatives. The core of participating in democracy from these common standpoints is the capacity for individuals and groups to define and pursue a common course of action and the power lying behind enforcing that course of action when it is mutually agreed. Because courts can—and quite frequently do—declare, change, or veto such policies, they cannot easily escape control through channels other than binding legal texts, philosophical doctrines, or comprehensive analytical arguments addressed to the public good.

The authority to peremptorily cancel, preclude, inhibit, alter, or drain survival from any course of action commonly pursued and authorized by political representatives actively engaged in that enterprise entails a substantive and important form of power. A democratic approach can construe the relevant form of authority in regard to its operative effect on law and policy broadly, either as an explicit declaration of the illegitimacy or invalidity of the law or a more covert action of directly promoting the underlying aim through the legal environment. Judges in successive systems refrain from exercising that authority according to a fairly common understanding of their role in a political democracy. They also eschew any judicial review founded solely on philosophical or principled elaborations disconnected from detailed legal provisions or precepts that have received prior commitment from the polity and that are generally recognized as binding (H. Simon, 2016).

Judicial power holds (often implicitly) the status of a second-order form of authority across democracy. When courts stepping outside affirmative legal constraints on a broad scale apply philosophical, teleological, or ideological reasoning (excepting at most legal interpretations related to purely rhetorical legal texts) to impact further policy arrangements usually viewed as lying outside their proper domain, they increasingly do so at the partial expense of their democratic function. High sensitivity to such forms of influence pervades large segments of the general public. These considerations help determine how courts interact with constituencies with access to powerful mechanisms for influencing public opinion (P. Sathe, 2001).

8. Conclusion

Judges today operate under the spectre of two contradictory mandates. On the one hand, their duty to apply the rule of law forbids them from acting arbitrarily or pursuing their own policy preferences. On the other hand, as custodians of constitutional rights, they are granted the power to act in opposition to the will of the majority. Democratic governments are expected to refrain from infringing the rights of individuals and minorities. The degree to which judges are permitted to fulfil this function is hotly disputed. For some, the preservation of democracy depends on restraint; for others, activism is essential to uphold the democratic character of the constitution itself. The democratically elected branches of government are controlled by opposing political parties, which curtail the imposition of one party's policy preferences onto society by requiring a political consensus. Judiciaries are structured differently; judges are appointed rather than elected and are granted a fixed and lengthy, if not life, tenure. Judicial appointments occur relatively rarely and after a time lag, and judges typically follow broader, longer-term societal movements rather than day-to-day fluctuations in

public opinion, a pattern which lends greater legitimacy to fully informed constitutional reviews than to policy evaluations. Because the population is polled regularly regarding the actions of public officials, their legitimacy can be described in terms of democratic accountability. It has been widely argued that unelected officials whose powers are not sufficiently checked resort to outright dictatorship at each opportunity. Democratic constitutionalism would therefore seem to forbid any action contrary to the majority view in the absence of some powerful corrections upon public officials and popular will, although post-elected despotism may occur.

Judicial power may instead legitimately counteract policy inertia through judgements that rectify existing laws or practices or through policies that reduce the disparities with the expected minimum eligibility or entitlements of equal basic rights. Constraints on judicial power may still be necessary to prevent severely anti-majoritarian decisions from usurping the authority of the citizenry, political parties, and elected officials that are supposed to run the government.

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