

A Theory of Judicial Constitutional Design

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ABSTRACT

The purpose of this paper is to describe how judges engage in constitutional design, irrespective of legal tradition. I examine in great detail the role of the judge: as a conflict solver, as a member of an institution, as part of the political system and as a human being, for those are factors that intervene in the activities he makes. I later analyze the dynamics that a Constitution can have: the change in their structure conceptualized as interpretation, mutation and resistance and their relation. Interpretation is the determination of the scope of a norm, mutation is the change of meaning without amendment and resistance is a concept that bridges the first two, which is the capacity of the constitutional rule to adapt to the political game and to assume mutations. Finally, these concepts are intertwined in order to show how judges by means of their function, (re)design the Constitution by means of adjudication and policymaking (rule issuance by the stating of precedent).

1 Introduction

The purpose of this paper is to describe how judges engage in constitutional design, irrespective of legal tradition; to accomplish this, I make use of legal doctrine of both the United States and of Latin America and Europe, for they grasp different aspects of constitutional review and judicial policymaking.

I start with the idea that judges have a political role and can use their function to change the Constitution they interpret to fill its gaps or to serve other purposes; that is, judges do not merely apply the Constitution to a concrete case by means of a deductive or inductive process, they also engage in constitution making.

To understand the nuances of this idea, I examine in great detail the role of the judge: as a conflict solver, as a member of an institution, as part of the political system and as a human being, for those are factors that intervene in the activities he makes. This is what constitutes the core of the first segment of this article. The second part of this study pertains the way in which Constitutions change in their structure, which are conceptualized as interpretation, mutation and resistance and their relation. Interpretation is the determination of the scope of a norm, mutation is the change of meaning without amendment and resistance is a concept that bridges the first

two, which is the capacity of the constitutional rule to adapt to the political game and to assume mutations.

Finally, these concepts are intertwined in order to show how judges by means of their function, (re)design the Constitution by means of adjudication and policymaking (rule issuance by the stating of precedent).

2 The reality of adjudication

2.1 *The judge and his role*

Through history, judges have acted as problem solvers in societies, helping them maintain cohesion by the performance of this role. The concept underlying this endeavor is that of the triad, which is defined by Shapiro as a situation that arises whenever conflict exists in a dyad, that is, a relationship between two persons, and the intervention of a third to resolve it. This is a very universal social pattern that has emerged in almost every place and age.¹

Alec Stone Sweet advances a theory on how they create governance and adapt it to changes in society; it has three core elements: the dyad, the triad and the normative structure. He describes the dyad as any ““pattern of [direct] exchange” between two individuals or groups”,² defining a wide range of human behavior, being the foundation of Society. This relationship has as a normative basis the principle of reciprocity, which links the parties to a “common fate”.³



Figure 1.

Because the dyad is an unstable structure and when there is conflict it transforms into a triad incurring into what is called Triadic Dispute Resolution, which is also a primary form of social organization that acts as a guarantor of reciprocity and thus perpetuates the dyad, it is an agent of social change. This can be visualized in the classical triangle posited once by Carnelutti:

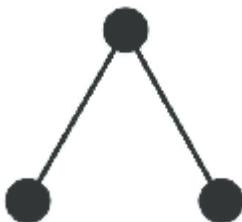


Figure 2.

The main problem of the triad is that when the dispute resolver gives a holding to the parties, those affected by the decision might perceive it as unjust. Shapiro addresses this issue: “At the moment the two disputants find their third, the social logic of the court device is preeminent... when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. To the loser there ... only the brute fact of being outnumbered...”⁴⁵ This is visualized as follows:



Figure 3.

To combat the perception of unfairness, Carter and Burke say, judges need to justify their approach in their decision, for this might stem from the notion that there is no “right answer”, so legal reasoning is a justificatory endeavor.⁶

Now, to perceive judges solely as conflict solvers is to incur in a misunderstanding of their function. It is true, that judges take part on “triadic dispute solving” when they act as a third party to solve a conflict, but when their holdings become prescriptions for solving future conflicts, the nature of their activities changes. The judges as agents of social order are also law makers, and through this function, they create policy. And because they do so, they cannot be isolated from politics and ideology.

2.2 Judges as policymakers

Judges act as agents of the State when there is conflict, and by creating rules on how to solve future conflicts, they act as policy makers. But, the fact that they do so means that they are not as constrained as it may be thought, that is, that they do not always “find” what the law says, but instead, they make it. Shapiro states that whenever the decisions of a judicial system have precedential weight judges policymaking functions, therefore a tension exists between it and the rule of law, that is, the notion that they apply pre-existing law (which has been proven false). So judges deny their policymaking role, and thus, they lie.⁷

Rubin and Feeley, citing Dworkin describe policymaking as “the process by which officials exercise power on the basis of their judgment that their actions will produce socially desirable results”.⁸ These authors also seek to stress a difference between policymaking and interpretation, stating that for policymaking, the legal text is a source of jurisdiction, whereas for the latter it serves as the justification of a decision.⁹ That is, for policymaking, the legal text is the floor, while for interpretation is the ceiling.

The third element in Stone Sweet's theory of governance is the normative structure, which he describes as "...the system of rules—or socially constituted constraints on behavior—in place in any community...What I call normative structure is equivalent to what North (1990) calls "institutions," variously: "the rules of the game," "customs and traditions," "conventions, codes of conduct, norms of behavior, statute law, common law, and contracts"...".¹⁰

The dyad functions in base of a coordination of the self-interest of the parties by means of reciprocity and a shared view of the future, it is further cohesioned by the normative structure that can help prevent disputes, help the dyad solve them using reciprocity or by helping to constitute the triad. When this is the case, as it was mentioned before, has to face the perception of unfairness of the affected party by the justification of the decision made, which is product of legal reasoning. In the case of adjudication, the triadic dispute resolution is a rule generating activity which is abstract, general, and prospective in nature.¹¹

Whenever the judge creates rules in an abstract way he makes policy. These rules feedback into the existing normative system and in this way, there is an adaptation of the existing body of rules to the changes of society. Stone Sweet summaries the interaction of the elements of this theory with the following illustration:¹²

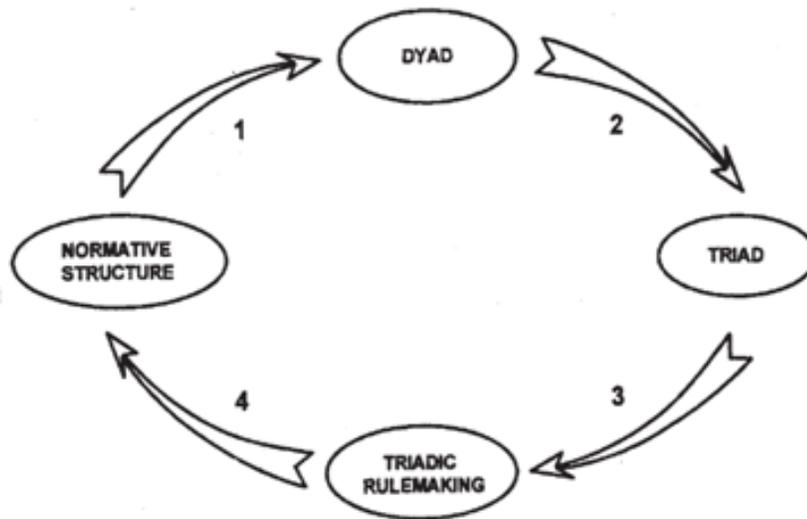


Figure 4.

2.3 The policymaking process

Having clarified that judicial policymaking and doctrine (abstract rulemaking) are synonyms; it is useful to see the process that judges go through in making doctrine. The first two steps involve the existing legal doctrine and the attitudes of the judge and how they interact. Whenever a judge's attitudes clash directly with legal doctrine, these scenarios can happen:¹³

- a) The judge ignores his attitudes and acts within his understanding of doctrine.
- b) The judge ignores legal doctrine and sentences with his attitudes in mind.
- c) The judges *integrates* both his attitudes and existing legal doctrine.

The third element in the judicial policymaking process is called integration, in it, the judges will not try to assure themselves that they are invoking generalized beliefs, but they will be acting more instinctively as part of their ordinary decision-making process. The final step in the judicial policymaking process is coordination, which involves the propagation of the idea that comes from the integration of attitude and doctrine that takes place in a judge's mind. This propagation can be horizontal or vertical, the first one happens when an idea is communicated among peers, and the second when the idea is transmitted from a superior to inferiors within a hierarchical structure.¹⁴

These topics will be revisited in later parts of this study, when aspects of constitutional design are touched; however, it is important to lay out the role of policymaking of the judges as prolegomena to this discussion.

2.4 Judges as members of an organization

In this section, it will be studied how judges act in an institutional context, and how their behavior is shaped by being part of a larger organization of individuals with a set of goals. North defines institutions as "...the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction".¹⁵ Because they seek to influence human behavior, these structures provide incentives of varying nature, institutions also shape societies, reduce uncertainty by providing a structure.¹⁶

North defines organizations as a "group of individuals bound by some common purpose to achieve objectives..."¹⁷, they can be of political, economic and social nature, among others and in seeking to accomplish their objectives can trigger institutional change.¹⁸

The Judiciary is both an organization and an institution. It is an institution when one sees the constitutive rules of the organization and those norms that regulate its functions and their scope; it is an organization when one sees the group of men invested to perform adjudicatory functions in the name of the State. The way judges are incorporated into an organization can vary from one legal system to the other, and it depends upon factors like legal culture, size of population, history, budget, and many others.

For example, in France there is a historical distrust of judges, for in the times of the monarchy, they were instruments of repression and of securement of the privileges of the elite. As a consequence, there is no mention of judicial branch but a "judicial authority"¹⁹ and there are three systems of courts: one that has jurisdiction over private law whose main court is the Court of Cassation, one that has jurisdiction over administrative law which is the Council of State and the Constitutional Council, which handles exclusively questions of constitutionality.

In civil law tradition, it is common for the judiciary branch to have a career in which aspirants go through a hierarchical process of training that will certify their capability of imparting justice as judges or magistrates.

In the American judiciary, the institutional structure is very different: in many states, judges are elected, on the federal level, judges are selected in a political process from a pool of professionals that include public servants, litigators and there rarely is an opportunity of ascending to a higher post. But even with this loose structure, there is an organizational frame of mind within judges, because they carry out the same functions and feel integrated into the same

structure, also, due to the publication of opinions and the several opportunities of feedback in which they can coordinate their ideas and positions.²⁰

2.5 Judges as part of the political system

Once that the role of judges has mostly been defined, it is useful to see how judges carry out their function in the midst of the political game, that is, within the constant struggle for the allocation of power and the implementation of policy. Karl Loewenstein defines power as the function of making and deciding policy, and creates a distinction between those that exercise power (“power holders”) and those that are the recipients of such activities (“power addressees”).²¹

Because it has been said that the judges is a policymaker, it can be understood that he is a power holder, and the dyad over which he presides are the power addressees, and therefore he is a participant (be it as an individual power holder, or as member of an organization) in the political system. Within the political struggle, it can be understood that law is the product of an ideological clash, for the legislative process brings about debate and negotiation regarding the content of a norm. Because a law is not self applicable, it has to be interpreted by the organs charged with its execution, which are usually the executive and its agencies and the judiciary.

Kennedy defines ideology as “universalization project of an ideological intelligentsia that sees itself as acting “for” a group with interests in conflict with those of other groups...”²² The members of the intelligentsia can argue the ideology before legislatures, administrative agencies and judges when the ideological issues are legal.²³

To him, the intelligentsia is formed by the “people who operate the ideology, who develop it, apply it, and change it sometimes radically, over time...”,²⁴ because of this mutability ideology can be different from the interests that fuel it, but not completely autonomous. Ideology is defined by the tensions that exists between those groups that form the intelligentsia, which ends up permeating the legal materials.²⁵

These concepts reinforce the idea that to determine the content of the rule of law- be it by enacting norms or by interpreting them- there is an ideological struggle, that is, different interest groups support the projects that “universalize” through their values and principles and materials, their interests and their implementation.

A legal question can be structured in two ways: either it is a deductive or a policy argument. On the first case, the meaning of a norm is ascertained by a logical, analytical or semantic process, which excludes ideology. On the other hand, policy arguments presupposes that deduction is not entirely applicable, that is, policy is applied under the notion that the rule in which it is contained is desirable under a set of social or institutional values.²⁶

Finally, Kennedy states that the basis for policy argument is on a “force field” decision process, which has the following components:²⁷

- a) More than one policy is likely to apply to a question of law, and the policies are perennially (though not necessarily) in conflict.
- b) Rules (subrules) represent compromises of conflicting policies, “drawing the lines” that “gives” more or less to each affected interest, right or principle.

- c) For any given policy question, there will be an indefinitely large number of possible rules, each differing from the others in how much it responds to each policy.
- d) In selecting among the possible rules that would settle the question of law, the judge has to “balance” the conflicting policies.

In deciding a case, the judge will decide the applicability of these arguments by weighing the facts of the case and circumstances that constrain argumentation to of one or the other. However, the difference between deduction and policy will not always be clear and the judge can be susceptible to their misapplication.

It is important not to lose from sight the fact that policy aspects in law and its application give way to ideology, that is, a judge, in choosing the policy argument to solve the conflict submitted to his jurisdiction, will do in a way that is akin to his ideology (whether he is conscious of it or not). In the words of the author, policy is a “Trojan horse” for ideology.

2.6 Judges as human beings

Having analyzed the role of judges as third party conflict solver, policy maker, member of an institution and partaker in the political system, it is necessary to consider in them an aspect that seldom is recognized in scholarship. *Judges are human beings.*

That is, as every other human being they have been shaped by their circumstances and experience and they have a system of values that help them understand the environment in which they live. They have a perception of things varies from that of other fellow humans, even when they have the same role.

Judge Posner coincides with these notions when he talks about the role that preconceptions have on rational thought, for even if they sometimes are inaccurate, they are information and it varies from person to person. He explains them thoroughly.²⁸

...these attributes might converge to form a general cast of mind that would in turn generate specific preconceptions that a judge brings to the case. Our perceptions are produced by the interactions between sensory impressions-the impact of the external world on the organs of sense- and a classificatory apparatus in the brain... In other words, people see (literally and figuratively) things differently, and the way in which they see things changes in response to changes in the environment. That is true of judges. As Cardozo said, “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”

What Posner says holds true: human beings have different perception of things one from the other, and so do judges. Also, there are varying degrees in intelligence, skills and many other attributes among people; this is also applicable to the judiciary. Not all adjudicators are created equal.

The legal training that is required of judges and the institutional requirements of selection can be means to attempt to overcome these differences and offer certain standard of quality to those that

seek an adjudicative remedy. Also, the degree of institutionalism assures that there will be some consensus among its elements.

Because human being is relative in its nature, it can be said in agreement with Carter, that there is no “right answer” to a difficult legal problem; however, a judge within his capacity can justify the path taken in making a decision, and after he has done so, his ideas can be held by others of the same hierarchy and by his inferiors and polished beyond the intended scope. That is, there can be a consensus. Also, it is important to note that the decisions made by judges will also reflect the moral of the time.

Finally, the risks that the dehumanization that the legal process can lead into are also worth of note. Judge Noonan talks of masks as a metaphor of said dehumanization: “By mask I mean a legal construct suppressing the humanity of a participant in the process. Mask is the metaphor I have chosen for such constructs, because the human face is where emotion and affection are visible if not deliberately concealed”.²⁹

Judges, he acknowledges, in doing their role can be masked for “It may be that the role becomes a mask whenever the purpose of serving others is forgotten; the judge who has forgotten the purpose of justice is almost surely masked”.³⁰

The masks that judges employ are a consequence of the wear that the legal process can cause in them and the efforts to relieve themselves from it to accomplish their function.³¹

The users of any system-scientific, theological, legal-encounter points where their premises and their practices are inconsistent. These gaps in the system must be bridged or the system changed. To bridge the gaps, those who accept the system employ fictions... fictions are a necessity of law...Masks are a variety of fiction. At the points of a legal system where it is too much to recognize that a human being exists, a mask is employed. The intolerable strain is relieved. It may be supposed that as fictions in general are a necessity, so the subspecies of fictions, masks, are inevitable.

All these factors are important to understand the dynamics of both the interpretation of the Constitution and the policymaking process that judges can undertake.

2.7 Judges from outer space: A reprisal.

For the better development of some of the topics developed in past paragraphs, it is quite useful to draw reference from literature, not on grounds of what the great writers have stated about judges, but what have they said about human nature. A most illustrative book in this aspect is *The Little Prince*, written by Antoine de Saint Exupery.³²

Though it may seem as a simple children’s book, it is an introductory guide on human behavior by means of simple examples (perhaps too simple for the taste of grownups) like the relationship between the Little Prince and his rose, or the Little Prince and the fox, which explore love and friendship.

When the Little Prince ventures out of his planet by taking advantage of a migration of wild birds- leaving his two volcanoes and his rose behind- he explores a series of asteroids before arriving on Earth: 325, 326, 327, 328, 329, and 330.

These asteroids were inhabited by a king, a conceited man, an alcoholic (or a tippler in the book), a businessman, a lamplighter and a geographer, and by conversating with them, he gains insight on the activities and motivations of grown ups. It would be interesting to imagine if he had stumbled with the seldom visited asteroid 331 before arriving to Earth, and that this celestial body would be inhabited by a judge:

The seventh planet was inhabited by a judge, who was clad in a black robe and dusted wig, he was seating behind a desk which was at the same time both simple and imposing.

"Please approach, so that I may hear your cause" said the judge as he saw the little prince.

"Who are you?" asked the little prince.

"I am a judge" said the judge with an air of authority "now, what business brings you before this court?"

"Business?" inquired the little prince.

"Yes" said the judge somewhat impatiently "do you have a conflict for me to solve?"

Unbeknownst to the little prince, was the fact that to judges, all men argue a cause before them.

"Well" said the little prince humbly, "I left my rose at my planet and I miss her".

"Internal conflict is outside my jurisdiction. Do you have an external conflict? That is, one between you and somebody else" said the judge in a terminant tone.

"No, why should I?" answered the little prince puzzled by the question.

"Sometimes, men have conflicts with one another. I solve them as an impartial third party" informed the judge.

"What is "impartial"?" asked the little prince.

"Treating all rivals or disputants equally; fair and just" responded the judge, browsing a thick book as a sign of impatience to the questions of the little prince.

"How can you do that?" asked the little prince.

"I look at the applicable law and adapted to the facts presented before me to issue my sentence." Said the judge as technical as ever.

“But if you rule one disputant over the other, don’t they feel that you are against them?” asked the little prince.

- “As I said, retorted the judge angrily, I am impartial, I just find what the law says on particular issues.”

“And how do your sentences solve the problems?” inquired the little prince.

“These holdings help to avoid social conflict as they set a path for similar future controversies to be decided in the same manner by my fellows at the bar”, said the judge in a very formal and scholarly tone.

-“But then you are making laws”, said the little prince.

-“I do not legislate, said the judge offended by the words of the little prince, I just solve conflicts.”

- “But sir, said the little prince tactfully to appease the judge, if you say one thing, but do another differently, aren’t you lying?³³

The judge threw a plaque from his desk to the little prince, which missed narrowly, and then turned his seat 180 degrees. The little prince looked at the former projectile; it read “Hon. Hercule Main”.³⁴

"The grown-ups are very strange," the little prince said to himself, as he continued on his journey.

Indeed young sir, they are.

3 Constitutional dynamics

3.1 *Constitutional interpretation*

Brest defines constitutional interpretation in the following manner: ““Constitutional interpretation” comprehends the methods or strategies available to people attempting to resolve disputes about the meaning or application of the Constitution.”³⁵ Who can interpret the Constitution? Walter Murphy responds by saying: ““Just about everybody” is a roughly accurate response to the question who interprets. Judges are highly visible interpreters; but every public official sometimes, explicitly or implicitly, interprets the constitution”.³⁶

If it can be interpreted by anyone, then whose interpretation is definitive? An almost mechanical answer would be that the judges by virtue of judicial review can interpret the Constitution due to the fact that they have taken an oath to uphold the Constitution,³⁷ however, this affirmation, included in Article VI of the Constitution³⁸ is general. If the judiciary, according *Marbury v Madison*³⁹ can declare laws unconstitutional because it has sworn to uphold the Constitution, what happens to the other branches of the government? They also have a duty to uphold the Constitution, and they must do so, within the scope of their own nature.

When they do, it can be said that they are applying the Constitution and because no law can be applied by itself, then they are making a valid interpretation of the Constitution. Regarding the private citizen, whenever they are contesting the constitutionality of a law or act of government because they consider it in violation to their rights, the interpretation they submit to the judges is one that will carry force if it's taken into consideration. This structure of joint interpretation converges in what Louis Fisher calls the doctrine of "coordinate construction". He says:⁴⁰

Under the doctrine of "coordinate construction," the President and members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide but afterwards as well. All three branches perform a valuable, broad, and ongoing function in helping shape the meaning of the Constitution.

Allan Brewer Carias defines the principle of constitutional supremacy as a manifestation of the popular will, and manifests itself as a constitutional right to have to said supremacy;⁴¹ the preamble of the US Constitution gives continuation to the idea.⁴² Interpreted harmoniously with the Constitutional preamble, the idea of constitutional supremacy advanced by Brewer gives people the right of applying the Constitution, that is, to see that it is upheld, and with it the possibility of interpreting the Constitution, for no law is self-enforcing. With this said, it can be concluded that whoever seeks to apply the Constitution has a valid constitutional interpretation.

There is no infallible way for understanding and interpreting the Constitution, no right answer. Whoever seeks to apply the Constitution may have a valid interpretation of it; however, judges, by their exercise of judicial review, are interpreters of the Supreme Norm and can employ any method of ascertaining the meaning of the Constitution to justify their reasoning in the performance of their functions.

Judges have a system of values (that include morals) and experiences that allows them to understand and interact with their environment, they also have a level of training and institutional thought that assures certain frame of mind and a standard of legal knowledge. Product of their legal training is the knowledge of a specific language, which according to Bourdieu, "combines elements taken directly from the common language and elements foreign to its system. But it bears all the marks of rhetoric of impersonality and neutrality".⁴³ The use of this language in the Constitution allows it to incorporate many conflicting elements of social life, product of ideological clashes; into a language that a judge can use in interpretation to give them some amount of coherence.

Carter and Burke describe the elements of judicial reasoning, that is, those things that the judge must harmonize in order to convince of the quality of his reasoning:⁴⁴

- The case facts established in the trial and preserved in the record of the evidence produced at the trial.
- The facts, events and other conditions that we observe in the world, quite apart from the case at hand, which we call social background facts.
- What the rules of law, that is, the official legal texts created by the state, say about cases like this
- Widely shared moral values and principles.

When submitted with a conflict that requires the interpretation of the Constitution, because the case facts and the facts are directed towards this situation, a judge will choose among the legal materials that he has available, that is, the rules of law that includes the Supreme Norm itself, and the interpretation that the parties and the several *amici curiae* provide and using as a base the different values (moral, ideological and others), experiences, legal knowledge, he will use interpretative methods to justify the conclusions he reaches in his proposed solution to the legal problem submitted to his jurisdiction. The use of these methods will vary according to a complex series of factors, among which we can find the case facts, the formation of the judge, the facts, legal culture, and popular perception.

The purpose of constitutional interpretation is to fill a deficiency in the law by means of extending the signification of the legal text. When a gap in the law is to be filled, but there is not a norm to interpret, then the activity to be made is that of gap-filling, known to civil law scholarship as “integration”. This limitation is best expressed by Sagues⁴⁵: “The integration of the constitutional norm is a legal creative process, destined to cover the “gaps” in the Constitution. It is a mechanism distinct from that of interpretation, because here, there is no norm to interpret” (author’s translation).

3.2 Constitutional gap-filling

Sagues, in his study of judicial constitutional interpretation approaches constitutional gap-filling and gives a concept on what is a constitutional gap: “...they are only those normative gaps the import “institutional failures, lack of fundamental institutions that impede the functioning of the constitutional order”. Constitutional gap is one that puts the legal-political order of the State “in great commotion””.⁴⁶

This author divides constitutional gap in two types: historical gaps,⁴⁷ which are those in which the Supreme Norm does not regulate matters regarding the structure and operation of the State due to circumstances not envisioned by the Framers, and the axiological gaps⁴⁸ are those in which there is an existing constitutional norm, but this goes against legal and political values.

In the same fashion as in constitutional interpretation, it is necessary to ask: Who can integrate the Constitution? Is it only a task befitting the amendment procedure? Sagues gives a pragmatic answer: “It is not sensitively possible that the judge stops sentencing or the executive to administrate in the presence of a constitutional gap... it would mean the paralysis of public services or the administration of justice when not the legislative process, until the constituent power is summoned and he decides what were necessary”.⁴⁹

To complement this answer is necessary to remember the constitutional oath contained in Article VI of the Constitution, if it bestows upon all of the organs of government the duty to uphold the Constitution and there is a gap that impedes them to act within the scope of their faculties, then they are capable of filling the gap presented in the Constitution.

Professor Sagues also makes a classification of the sources of constitutional gapfilling and divides them in two: Self-integration,⁵⁰ which consists of filling the gap by means of analogy with the Constitution and its principles, and heterointegration, which is the use of “legal principles, starting with those of constitutional law⁵¹ that are above the Constitution, as well as natural law and exemplary foreign law”.⁵²

3.3 Constitutional mutation

Constitutional mutation has been a recurrent topic of study in European constitutional theory since the end 19th century. Jellinek defines constitutional mutation as: “that modification of the Constitution that leaves its text unchanged, without formal amendment that is produced by facts that do not have to be followed by the intention or conscience of such mutation” (author’s translation).⁵³ While Dau-Lin as “the incongruence that exists between constitutional norms on one hand and the constitutional reality on the other” (author’s translation).⁵⁴

Early positivists like Laband and Jellinek defined the mutation of the Constitution as a problem that arose in the political practice of the Constitution of 1871. In his view, Dau-Lin also perceived it as a problem, but he also helped to define its nature.⁵⁵ To me, mutation is a feature of rigidity in constitutions, but it is not necessarily a problem. Only when the mutation is in contradiction of the Constitution, it can be considered as pathology or a problematic.

When trying to explain the endurance of Constitutions, Elkins, Ginsburg and Melton develop a theory of constitutional bargain and renegotiation. They have three facts that help a constitution endure the enforcing and renegotiation processes: inclusion, specificity and flexibility.⁵⁶ Their idea of flexibility is similar to mutation, but they are not the same, for the former not only comprises the idea of mutation, but also of resistance, which will be explored later.

When there is a tension between the Supreme Norm and the reality, the mutation arises as a form of liberating such pressures, changing the sense of the Constitution, but rendering it still applicable, otherwise there would be a rupture in the constitutional order and the Supreme Law would not endure, for the continuous unresolved stress would result in a breakdown of its established order.

Mutation must be understood then as a coping mechanism for Constitutions so they can endure stress brought by time, internal and external changes and interactions between the subjects of the Constitution. And so Elkins et al understand it, when they justify the need for flexibility: “Given the existence of exogenous shocks that change the costs and benefits to the parties to a constitutional bargain, constitutions require mechanisms for adjustment over time”.⁵⁷

Regarding the limits of mutation, Da Silva says that the conflict between reality and norm can be resolved: “a) by constitutional amendment, b) by the prevalence of the norm over the fact by a firm judicial decision”.⁵⁸ Pedro de Vega takes these notions further:

... Meanwhile the always latent tension between the fact and the norm, it is not presented in terms of a conflict and manifest incompatibility, the constitutional mutations can coexist with the principle of constitutional supremacy, without the latter suffering a significant detriment. The problem of the limits of mutation starts when the tension between the facts and the normativity turns socially, politically and legally into a conflict that endangers the notion of supremacy itself. It is then when it appears as the only possible alternative to, either convert the constitutional practice (mutation) in a norm through amendment, or deny the legal value of the mutation, in the name of existing legality...⁵⁹

3.4 Constitutional gapfilling as mutation

Mutation does not consist of ascertaining the meaning of a Constitution; ideally, it looks to change it to relieve the pressure of an exogenous stress, although there are mutations that can cancel the content of the Supreme Law. Gap-filling implies change in the sense of the Constitution without amending the text, but this does not mean that it is synonym with mutation. The latter is every change (beneficial or detrimental) to the Constitution without amendment, gapfilling looks to adapt the Constitution to external stimuli, so it can be said that mutation is the genre and gap-filling the species.

Gap-filling comes from a stress caused by exogenous conditions, which include the passage of time. This pressure impedes the correct function of the Constitution, and to prevent the collapse of the constitutional order, its meaning is changed (although not its text) to allow it to overcome the obstacle referred before. Both mutation and gap-filling can be done by any organ of government (no matter which branch it belongs to) through norms (statutes or regulations), custom, political convention and constitutional precedent. Gap-filling as a sector of constitutional mutation can be made by using the Constitution or by using external sources to fill the gap, but always done under the frames of legal reasoning.

An equivalent in American constitutional doctrine to constitutional gap-filling as mutation is constitutional construction,⁶⁰ already analyzed in the study of the limits of constitutional interpretation. Regarding the need for constitutional construction, Balkin states the following:⁶¹

We need construction in two situations. The first is when the terms of the Constitution are vague or silent on a question and to apply them we must develop doctrines or pass laws to make its words concrete or fill in gaps. The second is when we need to create laws or build institutions to fulfill constitutional purposes. Both of these practices are the work of living constitutionalism.

It then becomes clear that constitutional construction comprises the concept of gapfilling by means of judicial and legislative action, as shown in the constitutional mutation typology.

3.5 Constitutional resistance

The notion of constitutional resistance can be extracted from the teachings of Spanish professor Francisco Tomas y Valiente: a) The resistance of the Constitution can be understood as the adaptability to the political dynamic; b) it is also its capacity of being interpreted in a flexible manner and to change in function of new problems and sensibilities; c) it is also a resistance to amendment, making it unnecessary; d) constitutional resistance must be elastic, it consists of assimilating, without leaving out, the different political expectatives not opposed frontally to its text; e) a Constitution has resistance if its capable of coupling the norms with the political reality, that is, its capacity to assume mutations.⁶²

Resistance, like mutation, is a feature of rigid constitutions and is the capacity a Constitution possesses to adapt to change. It finds itself working as a bridge between constitutional interpretation and mutation, for it can be conceived as an interpretation that expands its content, or the assimilation of gap-filling that changes its meaning altogether. In short, like mutation, resistance is part of a Constitution's capacity to respond to external pressures.

3.6 Relationship between constitutional interpretation, resistance and mutation.

Constitutional interpretation and resistance are similar in substance, because they are forms of a Constitution for coping with the different circumstances that influence in its duration, however they differ in the fact that interpretation can expand the meaning of the Constitution as long as the norm permits it, but the nature of resistance is adaptability to change and though it overlaps in some terrains with interpretation, it can prescind of it and border with gap-filling.

As was said before, resistance is a feature of the rigidity of a Constitution, but interpretation is not, for a flexible Constitution, as any law, can be interpreted.

Regarding the interception of interpretation and resistance, it is worthy to mention a constitutional interpretation Sagues calls mutative interpretation, which is an interpretative process that admits the existence of a mutation.⁶³ He divides this interpretation in two types: interpretation promotive of the mutation⁶⁴ which is one that gives origin to the mutation and interpretation recognizant of the mutation,⁶⁵ which consists of the verification and reception of a mutation made in custom and admits it as a turn from the text of the Constitution.

These concepts are not as much as the realm of interpretation, as they are not looking to determine the meaning of the Constitution, but to give way to gap-filling, however, they are not constitutional mutations, but these acts are within the scope of constitutional resistance. , which is an intermediate concept, that fills the gap between interpretation and integration (mutation).

In U.S. case law, an example of mutative interpretation can be found in *Cooper v. Aaron*, written in 1958 by Chief Justice Black on the eve of *Brown v Board of Education*. In explaining the reach of the equal protection clause of the Fourteenth Amendment, the Court makes an interpretation of the Supremacy Clause, and of *Marbury v Madison*.⁶⁶

Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.’ In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as ‘the fundamental and paramount law of the nation,’ declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, that ‘It is emphatically the province and duty of the judicial department to say what the law is.’ ***This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution,*** and that principle has ever since been Se9c174c29c1b1 respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. ***It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land,*** and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (***emphasis added***)

By stating that the constitutional interpretations carried out by them are part of the supreme law of the land, the Supreme Court justifies their potential for mutating the Constitution. This case fits perfectly into the idea of mutative interpretation carried out by Sagues, for this interpretation gives support to the interpretation of the Fourteenth Amendment made in *Brown*, but recognizes the idea of extending the scope of the Constitution even beyond its original meaning.

Mutation (gap-filling) and resistance both originate from a rigid Constitution, that is, one that makes difficult the amendment process or impedes it. They both react before the problem of a gap that endangers the Constitutional order, however, resistance is also akin to interpretation and the ascertaining and expansion of a Constitution's meaning without presenting a complete change in it. If it weren't like this, resistance would not be distinguishable from mutation, as is the case with constitutional gap-filling.

The concepts of interpretation, resistance and mutation (constitutional gap-filling) are related with the capacity of a Constitution to endure and be applied, although they differ regarding the method they use to do so, for an interpretation expands a meaning, mutation changes it and resistance dwells within both having a nature of its own.

The idea of the flexibility of a Constitution advanced by Elkins, Ginsburg and Melton comprises the concepts of interpretation, resistance and mutation. Flexibility is the capacity of the text of a Constitution to adapt and incorporate external stimuli into its structure, this ranges from expanding its meaning or changing it altogether. Interpretation, resistance and mutation are variations of a Constitution's meaning when responding to external stimulus, be it political, economic, legal, the passage of time, among others imaginable. That is, they are degrees of constitutional flexibility.

4 Judicial constitutional design

4.1 Relationship between adjudication and constitutional dynamics

Having stated the different sides of the judicial function and how the Constitution transforms its contents according to the circumstances and the passage of time, it is now necessary to relate them both, as a prelude of the topics of the unwritten constitution and judicial policymaking as constitutional mutation.

When a judge, acting as a Triadic Dispute Resolutor, applies the Constitution (normative structure) by means of his function he is either interpreting or mutating it (rulemaking), and he does it with all the factors of judicial behavior intervening in this process, as it was shown with the depiction of the interpretative process carried out by the adjudicator.

This means that he possesses a set of values defined by his interaction with society, experiences, training and institutional thought, which will be used to justify the determination of the content of the interpretation of the Constitution or the changes that will be made as mutation by means of judicial policymaking, when the judge integrates his attitudes with legal doctrine.

A prime example of interpretation can be found in *Gibbons v Ogden*, in which Marshall C.J. interpreted the scope of the word commerce in the U.S. Constitution.⁶⁷ A curious mutation can be seen in the "separate but equal" doctrine stated in *Plessey v Ferguson*⁶⁸ - later overturned by *Brown v Board of Education* among other precedents-, in which the Equal Protection Clause was applied by the Supreme Court to uphold a Louisiana segregation law that mandated separate railroad cars for blacks and whites, stating that equal protection is circumscribed in civil rights, but not social conventions.

This changed the meaning of this clause for the time it was effective. The policymaking process carried out by this decision was consequence of the conflict of the judge's attitudes and the law, in which the ensuing integration resulted in the idea that separation could foster equality.

Finally, an instance of interpretative mutation can be found in the prison reform cases that took place between 1965 and 1986, in which many state prison systems-starting with Arkansas- were declared unconstitutional on grounds of the Eight Amendment.⁶⁹

This interpretation served as a grant of jurisdiction to courts that allow them to create and implement policy, through the attitudes-doctrine-integration-coordination process stated in previous paragraphs. By providing a justification for policymaking and mutation, this interpretation can be considered mutative.

4.2 Judicial policymaking and judicial doctrine

A small reprisal of judicial policymaking is useful for the development of this topic:⁷⁰

Policymaking – says Howard E. Dean-is deciding what is to be done by choosing among possible actions, methods or principles for determining and guiding present and future actions or decisions. Courts, especially high appellate courts such as the Supreme Court often make such choices, establishing new rules and principles, and thus are properly called policymakers.

Judicial doctrine can be defined as:⁷¹ “bodies of rules or principles either authoritatively declared or systematically advocated”. Another definition is provided by McNollgast: “We interpret doctrine as being the set of rules and methods to be used to decide a particular class of cases”.⁷² The scope of doctrine is also defined:⁷³

...The Court has the discretion to make the range of variability in acceptable outcomes narrow or broad. At one extreme, it can tolerate chaos by refusing to hear all appeals on a given issue, thereby implicitly establishing a “doctrine” that any feasible outcome is acceptable. At the other extreme, the Court can specify completely the outcome that ought to emanate from a given category of cases, and tolerate no deviation.

If one makes a contrast between judicial doctrine and policymaking, it is easy to realize that they are synonyms: both involve decision making of present and future cases through methods, principles or general rules.

Another concept of importance is that of stare decisis, which is the “principle that precedents are to be followed in the adjudication of cases”.⁷⁴ This principle helps to determine the range of judicial policymaking, for lower courts are bound to follow the principles set by the Court in its case law. However, the Supreme Court is not bound to its own precedent, and can act upon its policy preferences. Shapiro has a useful view of stare decisis, which is described by Kritzer:⁷⁵

Incrementalism, Shapiro observes, is “a method of decision-making that proceeds by a series of incremental judgements as opposed to a single judgement made on the basis of rational manipulation of all the ideally relevant

considerations”...Shapiro argues that incrementalism is a much better description of the process of judicial policy-making that is stare decisis, in no small part because of the fundamental flaws of the classical view of stare decisis... The core of Shapiro’s analysis is that precedent is best conceived not as an immutable line of binding principles but as reflecting a particular style of incrementalism... Shapiro’s concern here is not so much with who wins and who loses in specific cases but rather with the evolution of legal doctrine that guides the actions of potential future litigants...

This means that policymaking is a dynamic and evolving process, for new circumstances not contemplated by the initial rule or principle can emerge as additions or exceptions to it, or the Supreme Court can elaborate a principle that is fine-tuned by the appellate courts as future cases get to be decided.

4.3 Judicial policymaking as constitutional mutation

Courts are policymakers: They engage in such activity by means of declaration of rules, principles or methods in the cases that they get to decide, they get to direct the outcome of future cases- by means of integration of attitudes and legal doctrine- ever changing and evolving when circumstances comprised by future cases make it necessary.

Judicial policymaking was distinguished from interpretation by Rubin and Feeley by saying that for the former the text is a source jurisdiction, while for the latter it is a justification of a decision. In constitutional matters, policymaking comprises the areas of constitutional mutation and resistance, that is, policymaking can be made either by a constitutional interpretation that supports it or fosters it (mutative interpretation) or by a change in the constitutional text without amendment (constitutional gapfilling as a type of mutation). Policymaking can ensue by means of an omission, that is, when a norm is effectively not applied, as is the case of the XIII Amendment, which states:⁷⁶

Neither slavery nor involuntary servitude, ***except as a punishment for crime whereof the party shall have been duly convicted***, shall exist within the United States, or any place subject to their jurisdiction. ***(emphasis added)***.

In this case, the text of the Constitution abolishes slavery in general, except for the case of imprisonment; however, this part of the Constitution has seldom- if ever- been applied. In this case, policy was made by mutating the Constitution through omission in its use. Stressing on this, Grey commented that the nature of the role of the Court as constitutional mutator is not entirely jurisdictional; therefore it is outside the realm of the justification of a sentence (constitutional interpretation):⁷⁷

Second, one can ask the jurisprudential question whether as a general matter the defining and enforcing of basic rights without external textual guidance is essentially a judicial task... A rigorously positivist jurisprudence would hold that judicial decision not directed by the articulate command of a determinate external sovereign is not truly adjudication. Rather it is a species of legislation. But this sort of positivist also views the entirely traditional judicial task of common law development through case-by-case decision as a form of legislation. If common

law development is an appropriate judicial function, falling within the traditionally accepted judicial role, is not the functionally similar case-by-case development of constitutional norms appropriate as well? Granted that the supremacy of constitutional law over legislation, when contrasted with the formally inferior status of common law, makes a great difference. But the difference is in the hierarchical status of the judicial decision--which turns on a question of *authority*--and not in the intrinsic nature of the task.

The constitutional mutation is brought upon general by means of principles that are systematically declared in a series of cases, that is, one precedent can establish a rule, which is defined in subsequent cases as the passage of time, the political dynamics and other factors put stress upon the constitutional order.

In these cases, when the stress is unavoidable and the interpretation of the Constitution impossible, the Supreme Court, as guardian of the constitutional order, must change it to prevent its systematical failure and keep it functioning. That is, the Court is used as an escape valve of the pressure that accumulates upon the Higher Norm.

Finally, the role of the Supreme Court in determining the constitutional content by means of policymaking can be summarized by Dean:⁷⁸

Clearly the Supreme Court is more than just a legal body: the Justices are also “rulers” sharing in the quintessentially political function of authoritatively allocating values for the American polity. Representing a coordinate branch of the national government, they address their mandates variously to lawyers, litigants, federal and state legislative, executive and judicial officials, and to broader concerned “publics.” ... They do not expound a prolix or rigid legal code, but rather a living Constitution “intended to be adapted to the various crises of human affairs,” as Chief Justice Marshall said in the *McCulloch* case. And the Justices employ essentially common law judicial techniques: they are inheritors indeed, but developers too- “weavers of the fabric of constitutional law”- as Chief Justice Hughes observed. The nature of the judicial process and the growth of the law are intertwined...

5 Conclusion

1. Judges not only interpret the law, but they create it through doctrine and by doing so, they make policy choices, they decide between competing ideologies contained in legal materials and are participants of the political system by being power holders within the scope of their assigned competence.
2. However, judges are also human beings, and can succumb to the pressures of the endeavor they are to carry out by creating masks, that is, legal constructs by which they hide their humanity whenever making a decision.
3. A Constitution, like any law, is subject of application and as such it has flexibility, that is the capacity to adapt to the everchanging circumstances of human social interaction. This capacity is comprised in the following factors: interpretation, mutation and resistance.
4. When the subject matter is the Constitution, the judges- as the other members of the branches can- interpret and mutate it within the scope of their activities, which means that

they are constitutional (re)designers. Their interaction helps build the constitutional order of the polity.

5. It was shown that precedents can have varying nature regarding their relation with the Constitution, and that policy implementation through doctrine established in a series of precedents can imply a change in the meaning of the Constitution without an amendment process.
6. The judges design Constitution using their moral values, legal training and policy preferences as a starting point, and then they conciliate these positions with the legal materials available, which can be divergent or convergent with their ideologies and preferences.
7. Whenever the Supreme Norm is interpreted (be it a simple or a mutative one) or mutated, this expansion is incorporated and ends up creating a system, which is the constitutional order. This is consequence of the nature of the Constitution, which must adapt to a series of varying circumstances, this means constant interpretation and when there is a strong stress on this system a mutation ensues.

Notes

¹MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS*, 1, (The University of Chicago Press, 1981).

² Alec Stone Sweet, *Judicialization and Construction of Governance* http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=alec_stone_sweet, 148,149

³ *Id.*

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⁵ Martin Shapiro, *supra* note 1, at 2.

⁶ LEIF H. CARTER & THOMAS F. BURKE, *REASON IN LAW*, 10, (8th ed., Longman, 2010).

⁷ Martin Shapiro, *Judges As Liars*, 17 Harv. J.L. & Pub. Pol'y 155 (1994)

⁸ MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICYMAKING AND THE MODERN STATE*, 5, (Cambridge University Press, 2000)

⁹ *Id.*

¹⁰ Stone Sweet, *supra* note 2, at 150.

¹¹ *Id.* at 156.

¹² *Id.* at 152.

¹³ Feeley & Rubin, *supra* note 7 at 223.

¹⁴ *Id.* at 219, 226, 229.

¹⁵ DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE*, 3, (28th printing, Cambridge University Press, 2009).

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4, 5.

¹⁹ Constitution de la Republique Française, <http://www.assemblee-nationale.fr/english/8ab.asp#IX>

²⁰ Feeley & Rubin, *supra* note 7 at 226, 227.

²¹ KARL LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS*, 6, (2nd ed., University of Chicago Press, 1965).

²² DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)*, 39, (Harvard University Press, 1997).

²³ *Id.*

²⁴ *Id.* at 41.

²⁵ *Id.* at 41.

²⁶ *Id.* at 99.

²⁷ *Id.* at 99, 100.

²⁸ RICHARD POSNER, *HOW JUDGES THINK*, 67 and 68, (1st ed., Harvard University Press, 2010).

²⁹ JOHN T. NOONAN JR., *PERSONS AND MASKS OF THE LAW*, 20, (University of California Press, 2002)

³⁰ *Id.* at 21

³¹ *Id.* at 25, 26.

³² ANTOINE DE SAINT EXUPERY, *THE LITTLE PRINCE*, (Harcourt Inc., 2000).

³³ It appears that Prof. Martin Shapiro was inspired by this obscure passage of the Little Prince. See Martin Shapiro, *Judges As Liars*, 17 Harv. J.L. & Pub. Pol'y 155 (1994).

³⁴ Or Hercules Hand in English. This character was construed by taking the name of Dworkin's Judge Hercules, a pinch of Judge Hand's infamous temper and the image of the typical XVIII century judge.

³⁵ Paul Brest, *Constitutional Interpretation*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, 464, (Levy, Karst and Mahoney eds., Macmillan Publishing Company, 1986).

³⁶ WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY*, 463, (John Hopkins University Press, 2007).

³⁷ The legal foundation of this institution within the United States is *Marbury v Madison* and its most know justification can be found in the 78th number of the *Federalist*.

³⁸ U.S. CONST. art. VI, § 1, cl. 3.

³⁹ 5 U.S. (1 Cranch) 137 (1803)

⁴⁰ LOUIS FISHER, CONSTITUTIONAL DIALOGUES, 231,232, (Princeton University Press, 1988)

⁴¹ Allan Brewer Carías, *Nuevas reflexiones sobre el papel de los tribunales constitucionales en la consolidación del Estado democrático de derecho: defensa de la Constitución, control del poder y protección de los derechos humanos* [New reflections on the role of the constitutional tribunals in the consolidation of the democratic rule of law: defense of the Constitution, control of power and the protection of human rights], Anuario Latinoamericano de Derecho Constitucional (2007, tome I). <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20071/pr/pr5.pdf>

⁴² U.S. CONST. pmbl.

⁴³ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 805, 820,(1986-1987).

⁴⁴ Carter & Burke, *supra* note 5 at 10.

⁴⁵ NESTOR PEDRO SAGÜES, LA INTERPRETACIÓN JUDICIAL DE LA CONSTITUCIÓN [Judicial Interpretation of the Constitution],119, (2nd ed., Lexis Nexis, Buenos Aires, 2006).

⁴⁶ Sagües, *supra* note 44, at 119.

⁴⁷ *Id.* at 121.

⁴⁸ *Id.* at 121.

⁴⁹ *Id.* at 126.

⁵⁰ *Id.* at 127.

⁵¹ Constitutional case law could be taken as a reference for finding these principles.

⁵² Sagües, *supra* note 44, at 128

⁵³ HSU DAU-LIN, MUTACIÓN DE LA CONSTITUCIÓN [Constitutional Mutation], 29, (trans. Pablo Lucas Verdu and Cristian Forster, Instituto Vasco de la Administración Pública, Onati, 1998).

⁵⁴ *Id.* at 31.

⁵⁵ Dau-Lin, *supra* note 76 at 31.

⁵⁶ ZACHARY ELKINS, TOM GINSBURG AND JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS, 65, 78, (Cambridge University Press, New York, 2009)

⁵⁷ *Id.* at 81.

⁵⁸ Jose Alfonso Da Silva, *Mutaciones Constitucionales* [Constitutional Mutations], CUESTIONES CONSTITUCIONALES (Number 1, July-December 1999), <http://www.juridicas.unam.mx/publica/rev/cconst/cont/1/tes/tes1.htm#N31>

⁵⁹ PEDRO DE VEGA, LA REFORMA CONSTITUCIONAL Y LA PROBLEMÁTICA DEL PODER CONSTITUYENTE, [Constitutional Amendment and the problem of the Constituent], 215, (6th prtg., Technos, Madrid, 2007).

⁶⁰ Not to be confused by the notion advanced by Keith Whittington, who states that construction is the interpretation made by the executive and legislative. See KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, (Harvard University Press, 2001)

⁶¹ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549, 559-60 (2009).

⁶² Francisco Tomás y Valiente, *La Resistencia constitucional y los valores* [Constitutional resistance and the values],

http://www.cervantesvirtual.com/servlet/SirveObras/public/01361620824573839199024/cuaderno15/volI1/doxa15_08.pdf?portal=4

⁶³ Sagües, *supra* note 44, at 44.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Cooper v. Aaron*, 358 U.S. 1, 4-26, 78 S. Ct. 1401, 1402-14, 3 L. Ed. 2d 5 (1958)

⁶⁷ *Gibbons v. Ogden*, 22 U.S. 1, 213, 6 L. Ed. 23 (1824)

⁶⁸ *Plessy v. Ferguson*, 163 U.S., 16 S. Ct. 1138, 1138, 41 L. Ed. 256 (1896)

⁶⁹ Feeley & Rubin, *supra* note 7 at 39

⁷⁰ Howard E. Dean, *Judicial Policymaking in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, 1043, (Levy, Karst and Mahoney eds., Macmillan Publishing Company, 1986).

⁷¹ Kenneth L. Karst, *Doctrine in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, 573, (Levy, Karst and Mahoney eds., Macmillan Publishing Company, 1986).

⁷² McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1639 (1995)

⁷³ *Id.* at 1631, 1641.

⁷⁴ Dennis J. Mahoney, *Stare decisis in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, 1725, (Levy, Karst and Mahoney eds., Macmillan Publishing Company, 1986).

⁷⁵ Herbert M. Krtizer, *Martin Shapiro: Anticipating the New Institutionalism in* PIONEERS OF JUDICIAL BEHAVIOR, 401, 402 (Nancy Maveety ed., University of Michigan Press, 2006).

⁷⁶ U.S. CONST. amend. XIII, §1

⁷⁷ Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 714-15 (1975).

⁷⁸ Howard E. Dean, *supra* note 70, at 1046.