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Making Sense of Judicial Lawmaking: a Theory of
Theories of Adjudication

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Abstract

Engaging with the literature on courts and judicial politics, this article argues that one should distinguish between three theoretical approaches to adjudication and, correspondingly, three families of theories of judging: socio-political, legal-positivist, and normative-prescriptive. Socio-political theories are concerned with the causes of judicial behaviour, whereas legal-positivist theories focus on the relations between the decisions of the courts and the other rules of the legal system. Normative-prescriptive theories of adjudication, on the other hand, are concerned with the moral evaluation of judicial behaviour and judicial institutions. Although interrelated in various ways, the three approaches should nonetheless be viewed as complementary rather than competing approaches to adjudication. Thus expounding what amounts to a meta-theory of adjudication, the article offers a general theoretical framework aimed at facilitating dialogue and cross-fertilisation among the disciplines that study courts and judges: political science, sociology, law, and political philosophy.

Keywords

Judicial Politics, Adjudication, Judicial Lawmaking, Theories of Law, Judges, Legal Positivism, New Institutionalism

Making Sense of Judicial Lawmaking: a Theory of Theories of Adjudication

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Judicial power seems to have expanded considerably in the second and, especially, the last quarter of the twentieth century (Tate and Vallinder 1995). Democracies, in Asia (India, Israel), North America (Canada, United States), Africa (South Africa), and Western (France, Germany, Italy, Spain) as well as Eastern Europe (Poland, Hungary), have faced growing judicialisation (see Hirschl 2004; Ginsburg 2003; Alec Stone Sweet 1992, 2000, 2004; Volcansek 2001; Vanberg 2005; Sadurski 2005, 2006: 13-8). Though it may since have receded or stabilised in some places, the influence of judges and courts on policies and practices in every facet of public and private life has increased significantly over the past three decades. Party funding and abortion, for example, have been high-profile areas of judicial interventionism in many countries. Moreover, where constitution-makers have provided for judicial review of legislative acts, constitutional courts and supreme courts have been at the forefront of this evolution. Many of these courts have come to assume a central role in their political and legal system. Statistics on constitutional litigations and the development of new judicial practices reveal a new judicial assertiveness and the willingness of constitutional judges to confront other branches of government. Statutes are struck down on constitutional grounds with increasing frequency. But this is only one – admittedly very conspicuous – manifestation of the judges’ newly acquired power. Though less spectacular, the extensive use and the diffusion across legal systems of the technique of binding statutory interpretation – what German and French constitutional scholars respectively call “*verfassungskonforme Auslegung*” and “*réserve d’interprétation*” – has far-reaching implications for legislatures, administrations, and lower courts. The technique allows constitutional judges to instruct

administrative bodies and lower tribunals on how to construe certain statutory provisions to ensure they are applied in conformity with *their* interpretation of the constitutional text.¹ In some countries, the increasing influence of constitutional courts over policymaking is also reflected in the practice of admonitory decisions – “*Appellentscheidungen*” in German legal parlance. Blurring, almost to the point of completely obliterating, the traditional dichotomy between “legislating” and “judging”, the practice enables constitutional judges to dictate the content of prospective legislation to the legislators. Parliamentary majorities are required to enact or to revise substantial pieces of legislation within a limited period of time, with the deadline set by the judges themselves (Berhendt 2006). What is more, these manifestations of judicial power seem to go beyond what the relevant constitutional provisions require. Doctrines (such as proportionality and similar least-restrictive-means tests) as well as rights (like “privacy” in the American Supreme Court’s jurisprudence) that have become central elements of judicial argumentation and are routinely invoked in judicial opinions seem to have no basis in the constitution. In other words, it seems impossible to reconcile them with a plausible interpretation of the constitutional text.

Predictably, not everyone is happy with this evolution. And judicial interventionism, especially at the constitutional level, has met with intensifying criticism. Legislative majorities and elected office-holders in general, as well as ordinary and lower courts (whose rulings are regularly overturned by the supreme or constitutional tribunal) have accused constitutional judges of “judicial activism”, or of usurping power to establish a “*gouvernement des juges*”, a “*Richterstaat*” or a “*Jurisdiktionsstaat*”. Some of these expressions – used by journalists and politicians alike – have become ordinary, every-day (American) English, French, if not German, expressions. Their widespread use might be viewed as a further sign of the rise of judicial power; the sign that political, judicial, and social actors are increasingly aware of the role played by judges in shaping public policies and private practices.

Now, if the rise of judicial power is indeed real, we have good reasons to be interested in understanding how courts function; to be interested in assessing the impact of their decisions; and in evaluating judicial processes and outcomes. On closer analysis, it appears that a proper understanding of how democracies, and notably constitutional democracies, operate and evolve over time necessarily presupposes some account of the role played by judges and courts in policy-making. An account of judicial lawmaking may even be required to ascertain whether a given regime is really democratic or to determine whether the way in which legal rules are applied in a given legal system genuinely reflects the ideal of the rule of law and not just the rule of judges.

To be sure, there are plenty of monographs, commentaries, and articles on courts and people in robes. Whether in German, French, Italian, Spanish or English, the literature on the subject is immense and impossible to survey comprehensively. At a methodological level, there is a raging debate, with different emphases from country to country, about the appropriate methods and approaches to the study of courts and judges (see Shapiro and Stone Sweet 1994; Spaeth and Segal 2001; Troper, Champeil-Desplats and Gregorzyck 2006; von Beyme 2001; Mueller 1997; Larenz 1983, 1991; Jestaedt 2006). The methodological debate, however, is unsatisfactory. And, as a result, lacking

¹ For statistics concerning the use of this technique by the German Constitutional Court see Donald P. Kommers (1997: 53); for the French Constitutional Council and the Italian Constitutional Court see di Manno (1997) and Viola (2001). See also Stone Sweet (2000: 71-2).

theoretical guidance, what the academic literature has to say on existing courts and tribunals often obscures more than it illuminates the operations of these institutions. In Europe the academic discourse has long associated itself with a deceptive picture of judicial decision-making, depicting judges as both neutral and benevolent actors, thus largely downplaying the importance of courts as policymakers. That feature of European legal scholarship largely owed to the fact that European lawyers and legal scholars enjoyed, until recently, a nearly absolute monopoly on what was said and written about their courts in academia. Over the past decade, however, the scholarship on European courts has undergone a profound renewal and this is no longer so. There is now a substantial literature – the work of American political scientists for the most part – on the politics and strategies of European courts. No longer are judicial rulings and opinions the obscure – Byzantine – stuff of lawyers. Yet, while this is undoubtedly a cause for celebration, and notwithstanding the great merits of the recent political science literature on judicial politics, the academic debate on courts and judicial review is still characterised, on both sides of the Atlantic, by a mixture of confusion and misunderstanding. Criticising the works and approaches of the other discipline, political scientists and lawyers often end up talking past each other. And it is not always clear what a given theoretical approach purports to tell us about the activity of courts and judges; just as it is not always clear what a given approach does not tell us – what it does not purport to tell us – about adjudication. What is more, despite recurrent calls for more interdisciplinary research and dialogue, there is still no clear understanding of the basis on which interdisciplinary dialogue and research should proceed. Instead of generating interdisciplinary cross-fertilisation, it has only produced interdisciplinary syncretism and interdisciplinary confusion.

This is precisely the methodological issue I want to address in the present paper. In my view, the confusion characterising the methodological discussion is primarily due to a lack of understanding of the distinct theoretical perspectives from which the rule-making activity of courts may be explained and to a poor grasp of the manner in which these approaches relate to each other. To provide this understanding we need a meta-theory of adjudication – that is, a theory of theories of judicial lawmaking. Such a meta-theory must be more than just a typology of existing theories of adjudication. In short, starting from some basic ontological and epistemic assumptions about legal rules and social behaviour, the task of a meta-theory of adjudication is to determine the kind of claim that may be made from a given theoretical perspective about a particular judicial ruling or a particular set of judicial rulings. In other words, the aim of such a theory is to identify the sort of claims about the courts and their pronouncements that may intelligibly be framed from a given theoretical vantage-point in way that is consistent with these basic assumptions.² By mapping the relations between what it identifies as

² Here I must be clear about what my meta-theory purports to say and what it does not purport to say. The object of a meta-theory of adjudication is not adjudication itself but the *theories studying adjudication*. A meta-theory is by definition a second order theory, which takes first order theories of adjudication at its object of inquiry. Such a theory does not itself make any empirical claim; it does not make any specific claim about the operations of specific courts and judges. Thus it will not provide any answer to the question as to whether, for example, the rulings of the European Court of Justice on non-tariff barriers can be explained by the values and preferences of the judges sitting on the Luxemburger court, or whether *Roe v. Wade* rests on a correct interpretation of the Fourteenth Amendment. Answering such questions is precisely the task of first order theories of adjudication. It is not the task of a meta-theory of adjudication. Note, incidentally, that my occasional remarks on the plausibility of the first order theories discussed in the present paper are not part of my meta-theory. These remarks (informed, of course, by own view of

complementary, rather than opposed or competing, approaches to adjudication, such a meta-theory should provide those with an interest in the study of courts with a general theoretical framework, enabling them to pursue interdisciplinary research without mixing up the findings of related but nonetheless distinct approaches.

My central claim here is that we should distinguish between three approaches to adjudication, three ways of looking at adjudication which correspond to three families of theories of adjudication: (1) the normative-prescriptive approach, (2) the “socio-political” or “sociological” approach, and (3) the “legal-positivist” approach. These three approaches, I contend, are interrelated in some important respects. A “socio-political” theory, for example, necessarily rests on some assumptions about the nature of legal norms and the ways legal systems function – questions that are precisely the focus of “legal-positivist” theories. In other words, a socio-political theory presupposes a legal positivist theory of judicial law-making. Similarly, I argue that normative-prescriptive theories of adjudication cannot do without an account of how judges decide cases or may potentially decide cases given the legal and political systems in which they operate – an account that only legal-positivist and socio-political theories can provide. Yet, despite their shared assumptions, these three approaches should nonetheless be viewed as distinct. We should understand each approach as being concerned with a discrete feature of judicial lawmaking. To put it in a nutshell, the normative activity of courts raises different questions and each approach should be understood as addressing a separate one.

The paper is organised as follows. I begin with a brief outline of the three approaches. Characterising them as three distinct ways of looking at adjudication, I also try to lay bare their basic epistemic and ontological assumptions. The following section examines the socio-political approach in a more thorough fashion and discusses the various socio-political theories developed by political scientists. Section three focuses on the legal-positivist approach. In this section, I try to do three things. First, I attempt to contrast the legal-positivist with the socio-political approach. Second, I try to dispel the confusion that has led many commentators to mischaracterise this approach either as a (bad) causal or as a normative-prescriptive approach to adjudication. Third, I try to refute some of the most common objections and criticisms levelled at the legal-positivist theories developed by Hart (1961), Merkel (1993), Kelsen (1992) and their followers (Walter 1974; Thaler 1982; Pfersmann 2005a, 2005b, 2001). I attempt to demonstrate that some of these objections stem from a misinterpretation of these theories’ object of study, while others derive from unwarranted philosophical assumptions. Next, section four turns to the normative-prescriptive approach. Here I attempt to resituate the normative issues raised by judicial lawmaking and, in particular, by judicial review in the broader politico-philosophical debate on the legitimacy of political institutions and political decision-making. Finally, I conclude with a critical assessment of the extant research on adjudication and some suggestions for a more theory-conscious debate on adjudication. The objective is both to facilitate the cross-fertilisation of the different disciplines taking adjudication as their object of study and to avoid the pitfalls of methodological syncretism as well as the resulting interdisciplinary confusion.

what is a plausible first order theory of adjudication) are primarily a way of making sense of the various first order theories and of the methodological debate at the first order level.

I. Three Ways of Looking at Judicial Lawmaking: the Political Philosopher, the Social Scientist, and the Law Professor's Point of View

The three approaches might be summarized as follows:

(1) The first approach looks at judicial decision-making from the vantage-point of political theory – that is, political philosophy. We may call it the “normative”, the “evaluative” or the “prescriptive” approach (hereafter I will use the label “normative-prescriptive approach”). Roughly, this approach purports to determine what and how courts ought to decide. Theories adopting this approach aim at providing moral standards for the assessment and evaluation of the fairness or efficiency of judicial decisions. Should courts refrain from intervening in, say, foreign policy, abortion, or elections? Should constitutional courts defer to the judgement of legislatures on economic issues? To what extent can judicial law-making be reconciled with majoritarian democracy? These are the kind of questions we want to answer when we look at judicial behaviour from this point of view.

(2) The second approach is what might be called the “socio-political” or the “sociological” approach. A theory analysing judicial law-making along these lines takes the content of judicial decisions as its dependent variable and goes on to identify some independent variable(s) likely to affect it. Theories falling into this category thus seek to explain adjudication in a causal fashion. As we shall see, all sorts of independent variables can be taken as point of departure to test hypotheses about judicial behaviour: the judge's attitudes (her brute preferences); the external institutional setting (the rigidity of the constitution-amending or legislative process for instance); the internal institutional setting (the collegial structure of judicial bodies); precedents (that is prior judicial decisions); what the judge had for breakfast, etc... Political scientists have developed various models, using one or more of these variables to study the behaviour of courts and justices in the US and, more recently, in Europe.

(3) Finally, the socio-political and the prescriptive approach should be distinguished from yet another approach. For want of a better label, we may call it the “legal-positivist” or the “normativist”³ approach (hereafter I will stick to “legal positivism”). Like the socio-political approach, but unlike the prescriptive approach, this approach is about describing what judges do, not what they ought to do. Yet, whereas the second approach seeks to establish causal relations between decisions and some independent variables, legal positivism focuses on norms and, more precisely, on relations among legal norms: the relations between the legal general (that is, the statutory or constitutional) norms that courts are supposed to apply and concretise, on the one hand, and the judicial norms that judges have enacted or may enact, on the other. Since relations

³ I self-consciously employ the term “normativist” to draw on Hans Kelsen's conception of legal science as a discipline conceiving of its subject-matter, law (that is to say legal systems), as a purely normative phenomenon without being itself normative. Echoing this conception, H.L.A. Hart characterized his own enterprise, in his major work (Hart 1961: v), as “an exercise in descriptive sociology” conceptualizing “law” as a normative phenomenon.

among norms are not causal relations, the basic unit of explanation here is not causality. Instead, what theories adopting this approach attempt to shed light on is best described, as I will try to demonstrate, in terms of “imputation”. We may also characterise the legal-positivist approach as focussing on justification and, more precisely, on a certain class of justifications for action – legal-positive justifications for action. Legal-positivist theories of adjudication aim at determining whether the rules of the legal system provide justification for the decisions of the courts. They also attempt to explain how legal rules constitute courts and enable us to identify their rulings. From a legal-positivist perspective, as we shall see, the study of judicial law-making largely becomes applied linguistics and applied logic. In order to establish, with the highest degree of precision, the relations between the judges’ decisions and the norms they are meant to concretise – to apply to concrete cases –, we need the tools of semantics and formal logic. I am tempted to say at this point that this is the way a law professor would, and should, look at adjudication. And for that reason I think this approach deserves the label “legal”. Yet I am aware that there are many conflicting conceptions of “law” and, consequently, of the job of law professor currently represented in legal academia. There is, as we shall see, strong resistance in legal academia to this way of approaching adjudication. So, to avoid unnecessary polemics, I will not insist here on using that label to refer to this approach.

At this juncture, my trichotomy may still look somewhat obscure. The scope of the third approach in particular may not seem very clear. More importantly, the claim that these three approaches are distinct, despite the fact that they are equally concerned with adjudication, is likely to appear controversial considering that most lawyers and political scientists apparently assume that there are only two distinct approaches to adjudication. Usually, specialists of courts and judicial behaviour in political science merely distinguish between normative-prescriptive and causal-descriptive models of judicial decision-making. The methodological debate in the judicial politics literature almost never considers the possibility of a third way – a third positive, yet non-causal, approach to adjudication (see e.g. Ruger, Kim, Martin and Quinn 2002: 1155-1160). What is presented as the “legal model” of adjudication is frequently understood as a (bad) causal theory of judicial decision-making (see Spaeth and Segal 1993: 62-4). The same tendency to reduce the number of approaches to adjudication to two is also common in legal scholarship. Legal scholars belonging to the Critical Legal Studies (CLS) movement in the U.S., French “neo-realists” and other rule-sceptics in Europe, as well as proponents of natural law theories of adjudication, explicitly or implicitly reject the possibility of a third approach to adjudication beside the causal-descriptive and the normative-prescriptive approaches (see Kennedy 1997). CLS scholars (Tushnet 1983; Singer 1984; Kennedy 1997), and French neo-realists (Troper 2000; Champeil-Desplats 2001), as many European legal theorists (see e.g. Guastini 1993) regard meaning and interpretation as purely subjective. In their view, there is no place for theories purporting to offer an objective description of the norms courts and judges are supposed to apply. Scholars of this persuasion construe these theories as prescriptive theories of judging. So, at best, they regard them as “good” (that is “progressive”) prescriptive theories. At worst, they dismiss and denounce them as “bad” (“conservative”) ideologies – covers for the real motives behind the courts’ policies and the political

agenda of the sitting judges. For very different reasons, the lawyers and legal philosophers who have tried to revive the idea of natural law (Dworkin 1977, 1985, 2004; Alexy 1992; Finnis 1980) also reject the notion that a theory can properly describe the relations between the rulings of a court and the constitutional and statutory norms it is in charge of applying to concrete disputes without simultaneously asserting what these general norms ought to be. Unlike CLS scholars and French neo-realists, they do not do so because they subscribe to a form of rule-scepticism denying the possibility of objective meaning. Indeed, they do admit that legal norms (be they judicial, constitutional, or statutory) objectively exist (ontological objectivity) and that it is possible to arrive at reliable representations of these norms through appropriate methods (epistemic objectivity). But they claim that it is nonetheless impossible to say what the law is without saying what the law ought to be. In other words, they reject the idea of the autonomy of law – the thesis that legal systems are independent of other normative systems, such as morality, etiquette etc...

I shall later try to argue that political scientists are wrong to construe what I call the “normativist” (or, alternatively, the “legal”) approach as a causal-descriptive approach. I will also try to demonstrate why the rule- and meaning-scepticism of CLS scholars and neo-realists is self-defeating. Likewise, I will try to refute the “Inseparability Thesis” endorsed by natural law theorists as resting on variants of conceptual and moral realism that turn out to be both implausible in theory and epistemologically unworkable in practice. But that will have to wait until the third section. For the time being, two points I think are worth stressing. First, it is crucial to bear in mind that these three approaches are not and should not be regarded as opposed or incompatible. Rather, each approach, and its corresponding family of theories of adjudication, should be understood as focusing on a distinct feature of adjudication. Even if they have an important concern in common – all three want to say something about adjudication –, these three approaches, and the three families of theories of adjudication they define, should be neatly and carefully distinguished from each other. It means that a socio-political theory of adjudication engages in a different enterprise than a legal-positivist theory of adjudication. Thus the claims of a socio-political theory cannot falsify the claims of a legal-positivist theory, and vice-versa. Second, the trichotomy rests on a set of basic epistemic and ontological assumptions. At the ontological level, I assume that normative-prescriptive theories are not truth-functional. The propositions of a prescriptive theory of adjudication are not in the business of being true or false. This position is known as moral anti-realism: there is no such thing as moral reality or moral facts.⁴ Socio-political and legal-positivist theories, by contrast, are assumed to be truth-functional – they are assumed to be in the business of being true or false. Here I posit that legal norms exist objectively and that propositions describing these norms are either true or false. Similarly, I assume that judicial decisions are determined by factors which can be interpreted as causes⁵; just as I assume that socio-political theories of adjudication describing the causes behind these decisions do so either accurately or inaccurately. From an epistemological point of view, both socio-political and legal-positivist theories of adjudication are assumed to be empirically falsifiable, whereas prescriptive theories of adjudication are assumed to be incompatible with an empiricist epistemology. In no way should this position be viewed as a negative

⁴ On moral anti-realism see Joyce (2005), Sayre-McCord (2005), and Blackburn (1994).

⁵ Inasmuch as the notion of causality may be used to describe human action and social interactions. On this see Davidson (1963).

appreciation of the prescriptive approach and of prescriptive theories of adjudication. It simply follows from our moral antirealism: assuming there is no objective moral reality, moral claims are not amenable to empirical verification. The implication is that theories belonging to that family are not empirically falsifiable and, therefore, that it will not be possible to arbitrate between competing prescriptive theories of adjudication on the basis of empirical observation.

II. The Socio-Political Approach to Judicial Lawmaking

This section considers the socio-political approach and the literature on judicial politics. My objective here is not to offer a comprehensive review of the existing scholarship on the subject. Instead, I want to paint a broad picture of the family of theories adopting the socio-political approach that both shows the main questions with which these theories must grapple and is sufficiently detailed to prepare the ground for the discussion of the other two families of theories.

Studies embracing that approach initially emerged in the United States, but have begun to spread in Europe, as political scientists have come to realise that courts and judges play an important – and at times crucial – role in making and shaping public policies and political processes. The scholars adopting that approach have developed and refined models of judicial decision-making drawing on the insights and theoretical assumptions of what was, in the discipline of political science, the dominant intellectual paradigm of the time. While early studies were for the most part grounded in behaviouralist accounts of individual behaviour and focused on socio-psychological variables, more recent ones are grounded in rational choice thinking, new institutionalism, and game theory – the dominant theoretical paradigms in contemporary political science.

A. The Socio-Political Approach in Europe and America

Initially, the development of theories attempting to explain judicial behaviour in causal terms was an all-American enterprise. The approach was first given distinct contours by the American legal realist movement. Jerome Frank, Karl Llewellyn, Leon Green, Max Radin, Felix S. Cohen, and their like-minded fellows in American law schools argued, against the orthodoxy of the day, that lawmaking inhered in judging and called for an empirical study of adjudication looking beyond the justifications judges adduce for their decisions.⁶ Explicitly aiming at building theories that would enable predictions about the

⁶ On the American legal realist movement see Brian Leiter (1997). Emerging in the same period, the “Free Law Movement” (*Freirechtsbewegung*) was the German counterpart of American legal realism. Pointing out the indeterminacy of statutory norms, the leaders of the movement held, quite like their fellow American legal realists, that lawmaking was inherently part of judging (see Larenz 1983: 59-62). Unlike American legal realists, however, the German movement and its authors did not find any echo in the German political science community. A third school of thought, known as “Scandinavian Legal Realism”, which prospered in the decade 1940-1950, also emphasized the political nature of judging and embraced the research agenda of the two other schools. As the German *Freirechtslehre*, it has not left any distinct intellectual heirs, although French and Italian neo-realists (Troper 2000; Guastini 1993) advocate a similar conception of judging.

Note that, here, the adjective “realist” (and, correspondingly, the noun “realism”) is not used to denote an ontological position, but to stress the fact that the goal of the observer is to describe judicial behaviour lucidly, in a non-ideological manner. Paradoxically, from an ontological point of view, many

content of future rulings, they argued that lawyers should look behind the language of judicial opinions and the “paper rules” of the statute book invoked by these opinions in order to uncover the judges’ “real” motives. The first systematic, empirical researches, however, were the work of academics affiliated to political science departments not to law schools. The pioneers of the field were Herman Pritchett (1948), Robert Dahl (1957), Walter Murphy (1964), Sydney Ulmer (1965), Glendon Schubert (1958, 1965), and Martin Shapiro (1964). In American academia, judicial politics has, since then, established itself as a distinct sub-discipline of political science.

As I said above, this approach to adjudication has long remained unknown of in Europe. European political scientists did study and compare legislative and executive bodies, but ignored the courts. The common perception was that courts and judges were outside politics (see von Beyme 2001; Rehder 2007). The judiciary was the province of lawyers. And judges, it was thought, were not lawmakers: their job was to apply the law, not to make it. For reasons I will later try to unravel, legal scholars, far from questioning this assumption, largely contributed to the perpetuation of this “mythology of judging”. In fact, law professors often entered the public forum to defend ‘their’ courts against politicians and legislators who, unhappy to see their reforms quashed by judicial fiat, accused the men and women in robes of being ideologically biased against the policies of the elected legislative majority. Responding to politicians who accused the Constitutional Council of behaving like a “*gouvernement des judges*”, French constitutional law specialists thus insisted that the Council was outside politics and that all it was doing was to “apply the constitution, all the constitution, and only the constitution” (see, e.g., Favoreu and Philip 2005: 310-1 and 468-70). Law professors in other countries, like Germany, Spain, or Italy (see Stone Sweet 2000; Schlink 1989, 1992), also behaved like loyal supporters rather than neutral observers of their constitutional tribunal. The law literature on the ECJ does not stand out for its critical tone either. It often praises the Court for doing the “right thing”, while less favourable views of its jurisprudence are quickly dismissed as unsupported or erroneous (see Rasmussen 1986: 147-54; Schepel and Wesseling 1997: 178-9). In such context, any attempt to explain the judges’ decisions in terms of strategic decision-making and preference maximisation sounds subversive and is likely to be discarded as an attempt to undermine the institution of judicial review.⁷

Hence it should come as no surprise that the first academics to study European courts from a socio-political point of view were American political scientists. *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* by Donald Kommers (1976) was the first account of the jurisprudence of the German Federal Constitutional Court (GFCC) by a non-lawyer. The book also provided the first systematic analysis of the socio-economic background of the judges who were at the time serving or had served on the German tribunal. Likewise, Alec Stone Sweet’s doctoral dissertation *The Birth of Judicial Politics in France*, published in 1992, was the first attempt to apply the methods of political science to study the behaviour of French

of these “realists” are anti-realist with respect to legal rules: their theory of judging is based on the premise that legal rules do not exist objectively.

⁷ The position of Louis Favoreu, one of France’s most eminent constitutional scholars until his death in 2005, is illustrative. Strongly resisting the idea that the decisions of the Constitutional Council had anything to do with politics, he has repeatedly and explicitly denied that the Council is a policymaker or even a lawmaker (see e.g. Favoreu and Philip 2005; see, on French constitutional scholarship in general, Stone Sweet 1992: 93-116).

judges. Conceptualising the Council as a third chamber, Stone Sweet's seminal work had little in common with the existing French literature on the institution. The same was true of Mary L. Volcansek's book (Volcansek 2000) on the Italian Constitutional Court (ICC). In a similar vein, in the 1990s, when political science "discovered" the ECJ (Mattli and Slaughter 1998: 177), this was largely the result of efforts by scholars hailing from American universities. Many of the most prominent names in the political science literature on the ECJ are American academics (Mattli and Slaughter 1998; Mattli and Burley 1993; Alter 1998, 2001; Stone Sweet 2004; Conant 2002; Cichowski 2007). Yet, in the meantime, inspired by their American colleagues, some European political scientists have become interested in courts and judicial politics (see Landfried 1984, 1988, 1994; Stüwe 1997, 2001; von Beyme 2001, 1997: ch. 17; Hönnige 2007). A handful of lawyers, weary of the mythology of judging, have also embraced this approach as a way of demonstrating that courts are not merely, as Montesquieu had it, "the mouth that pronounces the words of the law" (see Meunier 1994; Troper and Champeil-Desplats 2005). Moreover, special issues of major political science journals, such as *West European Politics* (1992) or *Comparative Political Studies* (1992), have been devoted to judicial politics in Europe. As a result, many more people now acknowledge the political dimension of judicial lawmaking. In sum, the socio-political approach is becoming a mainstream research field in Europe too.

B. The Models Developed and Used by Political Scientists

The literature on judicial politics makes use of various, competing models of judicial decision-making. Some emphasise the values and ideological preferences of judges, while others stress the role of institutional contexts as the main factor in judicial decision making. As said, recent studies – reflecting the influence of economic thinking on political science in general – draw on the insights of rational choice theory⁸, new institutionalism⁹, delegation theory, game theory, and strategic accounts of decision making in general (see Epstein and Knight 2000).

The Attitudinal Model

The central proposition of the attitudinal model is that judges decide cases in light of their brute policy preferences – their attitudes. To oversimplify, a conservative judge will vote for conservative decisions, whereas a liberal judge will vote for liberal ones. An important implication of the attitudinal model is that a change in judicial personnel is likely to bring about a change in judicial policies. This was the assumption behind

⁸ On the use of rational choice in political science see Riker (1991), and (more critical) Parsons (2005).

⁹ The term "New Institutionalism" has been used to denote different schools of thought that emphasise the role of institutions in shaping behaviour and in determining social and political outcomes. Hall and Taylor (1996) identify and contrast three variants of the neo-institutionalist paradigm: historical institutionalism, rational choice institutionalism, and sociological institutionalism. According to this typology, it would seem that specialists of judicial politics have drawn heavily on the insights of rational choice institutionalism, while almost completely ignoring the precepts of sociological and historical institutionalisms. Institutions have thus been taken into account as constraints on the rational decision calculus of rational judges, but the idea that institutions also influence preference formation and that judges, like all individuals, find themselves embedded in cognitive and organizational fields which determine their concept of self-interest and utility has hardly played any role in explaining judicial behaviour (see Gillman and Clayton, 1999: 5-7).

President F.D. Roosevelt's "court packing plan" when, after securing re-election in 1936, he tried to end the Supreme Court's opposition to his New Deal reforms by enlarging the Court so as to get a majority of judges sympathetic to his policies. His move eventually backfired. And, facing a popular backlash, Roosevelt had to drop his judicial plans. Although, as history has it, the Supreme Court soon adopted a less confrontational stance vis-à-vis the President and his New Deal programme (the "switch in time that saved nine"), this famous episode nonetheless shows that Roosevelt was deeply convinced that the decisions of the Supreme Court had more to do with the values and preferences of the sitting Justices than with the precise wording of the constitutional provisions. More generally, it seems that every authority yielding the power to appoint judges shares the same conviction. As difficult as the exercise might be, these authorities habitually seek to appoint judges sympathetic to their own political agenda. When they had to fill a vacancy on the Supreme Court, American Presidents – and not just Roosevelt – have tried to appoint judges who, they believed, shared their political, economic, and moral views. French Presidents usually appoint their personal advisers or their closest political friends to the Constitutional Council – presumably in the hope that it will influence the court's jurisprudence. Similarly, in Germany, candidates to the office of constitutional judge are normally identified by party affiliation and are carefully chosen by the *Bundestag* and the *Bundesrat* so that the composition of the constitutional court reflects the weight of each party in German politics. In other words, these authorities appear to subscribe to the central tenet of the attitudinal model: the judges' personalities and preferences matter, because they (at least, partly) determine the content of their rulings. The attitudinal model, however, does not necessarily assume a coincidence between a judge's attitudes and the policy preferences of the judge-recruiting authority. Surely, some variants of the model do assume that the policy preferences of the appointing authority are a good indicator of the policy preferences of its appointees. Yet most variants of the attitudinal model do not take the preferences of the appointing authority as a proxy for measuring the attitudes of judicial appointees. Early works on judicial politics used the social backgrounds or personal attributes of judges as a proxy variable for their attitudes (e.g. Ulmer 1970). More recent ones have looked at past voting records, thus explaining later votes by reference to the attitudes assumed to be revealed in previous ones.¹⁰ Scholars have also used newspaper editorials and pre-nomination speeches to locate judges on some ideological space (typically left/right or, in the United States, liberal/conservative).¹¹

¹⁰ See Segal and Cover (1989); Danelski (1966). This allows for the possibility that an appointee may reveal his sincere preferences only once in office, thus failing the expectations of the appointing authority. This is not uncommon. David Souter, appointed by George Bush Sr. and, therefore, supposedly conservative, now passes for one of the most liberal Justices on the American Supreme Court – thus outraging Republicans and social conservatives.

¹¹ This raises the more general problem of measuring preferences. Preferences are psychological phenomena, and, as such, are not directly accessible. To be sure, individuals often express preferences publicly. There are, however, good reasons to believe that public expressions of preferences are not always sincere. When, for example, individuals seek prestigious jobs and political offices, the desire to please the authorities or constituencies in charge of filling these positions may lead them to hide their sincere preferences. So the question is: what is a reliable proxy for sincere preferences? The problem is, of course, not specific to the study of judicial behaviour. Political scientists face the same difficulty when they study the behaviour of elected officials, or try to explain the choices voters make. More generally, all social scientists committed to methodological individualism, economists as much as sociologists, need to

With Harold Spaeth and Geoffrey Segal (Spaeth and Segal 1993, 2001) currently its leading advocates, the attitudinal model has dominated the judicial politics literature on the Supreme Court ever since the 1960s (Epstein and Knight 2000). Yet it has been largely absent in researches on European and, generally speaking, courts outside the U.S.. Though some critics of the GFCC have suggested that in recent, highly controversial, cases the votes of the Karlsruhe judges had fallen along party lines (Würtenberger 1997: 65-66), few analysts have systematically investigated the preferences of European judges. One notable (and recent) exception is Eric Voeten's study of voting patterns on the ECHR (Voeten 2007). Analysing the votes of ninety-seven judges on 709 issues between 1960 and 2006, Voeten argues that judges appointed by aspiring EU members and governments favourably disposed toward European integration tend to be more activist (more likely to rule in favour of the applicant than in favour of the State). Making convincing use of quantitative methods, his study may well prove, in the near future, to have paved the way for a whole new scholarship on the ECHR. So far, however, it is – to my knowledge – the sole systematic research of this kind on a European judicial body. Many explanations may be advanced for the limited influence of the attitudinal model on the political science literature on European courts. The main reason has probably something to do with the secrecy surrounding judicial deliberations and the prohibition (with the exception of Germany, Spain, Portugal, and the ECHR)¹² of separate and dissenting opinions (Rehder 2007: 17). Not only do these two features of the judicial process in Europe make it very difficult, if not impossible, to test the predictions of any variant of the attitudinal model (Volcansek 2000: 7). Some theorists (Ferejohn and Pasquino 2002: 20-22) also suggest that the fact that public dissent is not an option tends to reinforce the collegial dimension of judicial decision-making. This in turn makes the judges' brute preferences less relevant to explain their choices. Indeed, it is suggested that, in such context, judges have an incentive to negotiate their vote and to go for their second or third best choice, instead of sticking to their first, so as to weigh effectively on the final decision of the court. Assuming that every judge wants to maximise her influence on the court's policies, it seems less rational for her to be a lone dissenter if she is not allowed to vent her dissent in public than in the situation where she is allowed to do so. Published, a dissenting opinion may well undermine the court's authority and subsequently prompt a reorientation in its jurisprudence. If, instead, it is only expressed in the privacy of the court's chamber, it is unlikely to have any significant impact on the legitimacy of the court and, therefore, on its policies. This, added to the difficulties involved in collecting data about the values and preferences of European judges, may explain why researches on European courts have neglected the attitudinal model, preferring some variant of the institutional model.¹³

measure preferences whenever they take the individual as their basic unit of explanation. (See Epstein and Mershon, 1996.)

¹² However, in these two countries legal and informal norms discourage the publication of dissenting opinions. They turn out to be quite rare in practice (for Germany see Kommers 1997: 26; for detailed statistics see *Jahresstatistik* 2004: <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?aufgaben>).

¹³ Advocates of the attitudinal model point to the fact that members of the American Supreme Court are appointed for life as support for the use of their model in the American context (Spaeth and Segal 1993: 69; Segal 1999: 238). In short, because the justices are not accountable to any other branch and – given the prestige, power, and security associated with the position of Supreme Court justice – are extremely unlikely to seek higher offices, they are more likely to give freewheel to their brute policy preferences. Since this institutional feature is absent in other countries, where constitutional judges are appointed for a

The Institutional Model

Proponents of institutional theories concede that the preferences and values of the judges play a role in judicial decision-making. But they argue that this role is severely constrained by the institutional setting in which judges operate (Gillman and Clayton, 1999). The institutionalist model comes in two main variants: the institutionalist internalist, and the institutionalist externalist model.

The Institutional Internalist Model: judicial decision making as a collegial game

The institutionalist internalist model emphasises the collegial structure of judicial bodies and the dynamic of the judicial deliberative process. The model's central claim is that judges readily move away from their ideological ideal point so as to effectively weigh on the court's final decision, or, at least, its long term policies. Suppose, for instance, that judge X is hostile to the nationalisation policy of a leftwing parliamentary majority and that there is no other judge on the court sharing this brute preference or, at least, that there are not enough judges sharing this brute preference to form a voting majority. Even though X would have preferred a ruling declaring nationalisations unconstitutional altogether, she might nonetheless be willing to join a coalition of judges that will issue a decision stipulating that a nationalisation bill will be declared constitutional if it provides for generous compensation of the dispossessed shareholders. If the alternative to joining the coalition is leaving another group of judges to get away with a ruling more favourable to the parliamentary majority – giving carte blanche to parliament to go ahead with the nationalisation of private companies –, one would expect her to have a strong incentive to join the coalition. “If you can't beat them, join them”: by moving away from her ideological ideal point to join the coalition, X would secure a higher pay-off. To be sure, one should expect the collegial dynamic to be a lot more complex in many cases. To secure a voting majority, the coalition may also need the vote of judge Y. Y being willing to join the coalition but only on the condition that, for example, the final opinion of the court carves out an exception to the compensation scheme for companies detaining monopolies. Further institutional elements may operate as constraints on the collegial game, such as the rules concerning quorum for decisions, the majority required to strike down laws, the size of the court, or the powers of the chief justice to assign opinions to particular justices (see Maltzman, Spriggs and Wahlbeck 1999: 46-47). Regardless of their level of sophistication, the theories based on that model all predict that, within this institutional framework, judges will vote on the basis of what they expect their colleagues will do. In some cases, it may lead them to negotiate their votes. Thus an exchange of concessions and advantages (in short: horse-trading and back-scratching) will take place during the deliberation leading to the court's final decision.

Developed in the American context (Murphy 1964; Maltzman, Spriggs and Wahlbeck 1999, 2000; Epstein and Knight 1998), the institutionalist internalist model

limited period of time (typically 8, 9, or 12 years), this would seem to be another argument against relying on the attitudinal model to study the operations of constitutional courts in these countries. This argument, however, appears largely irrelevant. For, although they do not enjoy lifetime tenure, most appointees in Europe are generally law professors, ordinary court judges, or politicians in the twilight of their career, unlikely to seek promotions and higher offices the day they leave the constitutional court.

has been mainly applied to the U.S. Supreme Court. But it has also been invoked to explain decision-making on the French Constitutional Council (Meunier 1994: part 1). Moreover, Ferejohn and Pasquino (2004, 2002) have argued that the importance of internal deliberation is a salient feature of the European (Kelsenian) model of constitutional adjudication, setting it apart from the American model of judicial review. Yet, as for the attitudinal model, there are practical obstacles to the spread of internalist theories of adjudication in Europe. Although there are good (institutional) reasons to believe that collegial deliberation plays a bigger role in European judicial politics, such theories are not amenable to empirical falsification. In the United States, researchers have open access to data on opinion assignment and the Supreme Court's conference meetings (where, after hearing the oral argument, the court discusses the case and the Justices take a preliminary vote). American scholars have compiled databases on these as well as other aspects of the Supreme Court's operations (see Spaeth 2001a, 2001b).¹⁴ With a "strategic turn" reshaping the field of judicial politics (Epstein and Knight 2000), there has been a recent flurry of internalist accounts of the Supreme Court decision-making process relying on these data (see for example Johnson, Spriggs and Wahlbeck 2005). In Europe, by contrast, such data are not available. As said, European courts meet in closed sessions and no record of the deliberations is made public. Even in countries (like Spain and Germany) where dissenting opinions are permitted, the deliberative moment is an essentially secret affair. To the observer, European courts are black boxes (Stone Sweet 1992: 116). As a result, any account of judicial decision making in terms of collegial interactions and internal strategies is bound to remain speculative. This helps explain why those who have conducted researches on European courts have neglected the internal dimension of judicial decision making. As Britta Rehder points out (Rehder 2007: 17-18), a distinct feature of the literature on European judicial politics is that it largely ignores the individual judge as unit of analysis. It treats the courts as unitary actors rather than as loose conglomerates of preference-maximising individuals. Privileging the institutionalist externalist model, studies on European courts have focused on the interactions between the courts and actors outside the courts rather than on the internal decision-making process.

The Institutional Externalist Model

As its name suggests, the institutionalist externalist model emphasises the broader institutional context in which courts and judges operate. It acknowledges that judicial bodies do not operate in a vacuum. Judges anticipate the reactions of other actors to their decisions; just as other actors may anticipate judicial rulings. The product of the judicial decision-making process is a function of the interactions between the court and its political and institutional environment. That does not mean that judges do not seek to further their policy goals. But it implies that, in seeking to maximise their preferences, judges are, to a large extent, constrained by their political and institutional environment.

Scholars have focused on various institutional variables to explain variations in judicial policy-making over time and among countries: constitutional rigidity (Lijphart 1999; Stone Sweet 2004: 25-6; Alter 1998: 135-42, 2001: 195-8); the distance between the policy preferences of the disputants or between that of the legislative majority and the opposition (Stone Sweet 1992, 1997); the policy preferences of the legislature and

¹⁴ The website of the University of Kentucky's department of political science provides links to the main datasets: <http://www.as.uky.edu/polisci/ulmerproject/databases.htm>.

the executive (Eskridge 1991a, 1991b; Volcansek 2001); public opinion and public support for the court (Lijphart 1999: 216-231); Vanberg 2001, 2005; Volcansek 2000: 11); and precedents (see Spaeth and Segal 1999; Shapiro and Stone Sweet 2002: ch. 2).

The suggestion that constitutional rigidity might be a factor in judicial lawmaking rests on a very simple intuition. If the legislature can easily reverse the rulings of the supreme or constitutional court by changing the law or by amending the constitution, one should expect the court to defer to the policy preferences of the legislature. For, were it to veto a bill on which the legislature places substantial importance, the court would be almost certain to be overturned – an outcome that might damage the court’s institutional standing. Alternatively, if the legislative or constitution amending process is long and costly (high level of legislative or constitutional rigidity), the court will be less anxious to confront the legislature and to veto its bills, since it is less likely to be overturned. Consequently, so goes the argument, courts and judges are more likely to be assertive at the constitutional than at the statutory level where overriding the decisions of the courts only requires a simple majority. At the level of constitutional adjudication, judicial activism (as measured by the number of statutes declared unconstitutional) is likely to be highest in countries with very rigid constitutions. Some comparative studies seem to support this proposition (see e.g. Lijphart 1999: 228-230¹⁵). And it has been argued that one of the reasons why the ECJ has been able to play such a decisive and prominent role in European integration – the ECJ is justifiably viewed as a very “activist” court – is that overturning its decisions on treaty interpretation requires a unanimous agreement of the Member States and a long, both cumbersome and uncertain (remember the failure of the Constitutional Treaty) ratification process (see Alter 1998: 135-42; Stone Sweet 2004: 25-6). Given the rigidity of the EU and EC Treaties, the Luxemburg court need not fear any reaction from Member State governments or legislatures.¹⁶

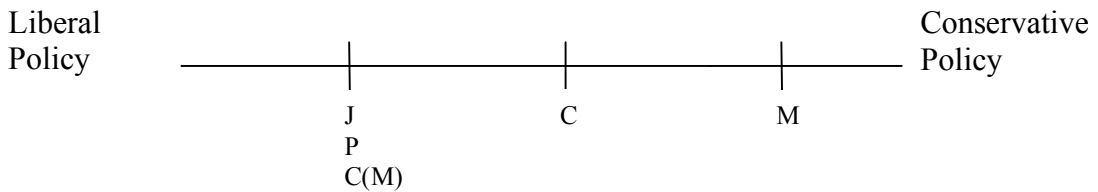
However, constitutional rigidity, alone, can only account for variations between countries with different constitutional settings. It cannot explain variations between countries whose constitutions are equally rigid. Nor can it explain variations in judicial activism over time within the same constitutional arrangement. So, instead of looking solely at the relative rigidity of the rules governing the adoption of laws or constitutional amendments, scholars have investigated and theorised the impact of other relevant actors involved in the constitution-amending (or legislative) process – parliamentary majority, opposition, the cabinet, public opinion etc... – on judicial lawmaking. Amending a constitution commonly requires an agreement between the parties composing the legislative majority and the opposition (super-majority requirement). And, in effect, the same goes for the passage, modification, or abrogation of ordinary laws in two chamber legislatures. Indeed, in situations where each chamber is dominated by a different coalition, the successful adoption of any bill will *de facto* presuppose an agreement between the two coalitions. Accordingly, the level of convergence between majority and opposition, as anticipated by the court, rather than

¹⁵ Lijphart, however, does not state precisely what he means by “judicial activism” or “strong judicial review”. Though his findings seem quite plausible, his study is, in fact, not replicable, for that precise reason.

¹⁶ The same might be true concerning the interpretation of secondary EC legislation. While no ratification process is required for the adoption of directives and regulations, the EU’s two main legislative instruments, the Treaty still conditions the validity of these acts upon qualified majority, and sometimes unanimity, voting in the Council of ministers, in addition (in the co-decision procedure) to the agreement of the European Parliament.

the degree of constitutional or legislative rigidity, may turn out to be the main determinant of judicial behaviour. If the level of convergence is high (that is: if majority and opposition share the same policy preferences), one should expect the court to be deferential and to refrain from issuing rulings likely to trigger a political backlash. Indeed, whenever both the majority and the opposition dislike a ruling, the likelihood that they will take action to overturn it will be high. Conversely, if the level of convergence is low – because majority and opposition have antagonistic policy preferences –, one should expect the court to behave in a less deferential and more activist way. As the risk of being overturned seems more remote, the judges will feel freer to write their brute policy preferences into their decisions and, consequently, controversial rulings will be more likely. Of course, one may argue that these are not the only institutional constraints entering in the court’s decision-making calculus. In the United States, e.g., the President is vested with a veto power. The constitution allows him to veto any bill voted by the Senate and the House. So, given that the constitution requires a two-third majority in both houses to override the presidential veto, one could reasonably expect the anticipated position of the President on a particular bill to be part of the Supreme Court’s decision making strategy, at least at the level of statutory interpretation. Whether this kind of explanation is empirically valid and, if at all, whether it explains a significant number of observed variations in judicial behaviour remains to be seen. Nonetheless, this gives us a glimpse of the sort of thinking one finds in much of the recent political science scholarship on the American Supreme Court (see Eskridge 1991a; Ferejohn and Weingast 1992; Marks 1989). In two seminal articles, William Eskridge (1991a, 1991b) – largely drawing on Brian Marks’s dissertation (Marks 1989) – depicted the Supreme Court as a strategic decision-maker whose choices, at the level of statutory interpretation, are a function of the sitting justices’ brute preferences but also depend on the preferences of Congress, congressional committees, and the President. His model predicted that the Supreme Court would behave differently depending on the distribution and convergence of the policy preferences of these organs. Figure 1 represents an equilibrium in which the distribution of preferences favours the Court.

Figure 1 : Unconstrained Court



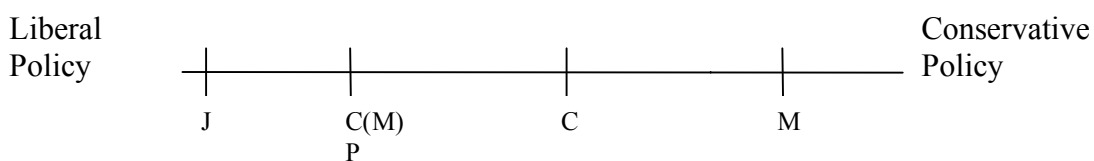
Equilibrium Result, $x \equiv J$

Adapted from: Eskridge 1991b

The letters stand for the ideal points of the different actors on a one-dimensional policy space (liberal/conservative – it could as well be left/right). J denotes the preferred position of the court, based on the attitudes of the median – or pivot – member of the Court¹⁷; M is the preferred position of the median member of Congress; P is the ideal point of the President; and C represents the most preferred position of the key committees in Congress that decide whether to propose a bill to their respective houses, while C(M) denotes the committees' indifference point in relation with M (they have no preference for a policy at M over a policy at C(M) and vice-versa). In such circumstances, the model predicts the Supreme Court will be able to vote its preferred position into its decisions. Its liberal policies will prevail over the more conservative positions of Congress and the congressional committees. The reason is that the committees will have no incentive to set the legislative process into motion by referring an override bill to Congress. Though they would obviously prefer an outcome closer to their ideal point, the committees are unlikely to get one by proposing an override bill to Congress, since the ideal point of Congress (M) is not closer to their ideal point (C) than the Court's decision (J). In the American context, congressional committees yield considerable power over the legislative process because they assume the role of agenda-setter (Eskridge 1991b: 367-374). Yet they lose control of their bills as soon as they refer them to Congress, as members of Congress will normally amend and rewrite them in accordance with their own policy preferences (or, more precisely: in accordance with the policy preferences of the median member of Congress). So, going back to the distribution of preferences depicted in Figure 1, if the committees were to refer a bill overriding the decision of the Court to Congress, the most likely outcome would be the enactment of a statute reflecting the policy preferences of the median member of Congress (M). From the committees' perspective, this outcome would not be better than the Court's ruling. Other things being equal, this equilibrium holds as long as the Supreme Court makes a decision at or to the right of C(M). On the other hand, if the decision of the Court were to fall left of C(M), the committees would have an incentive to set the legislative process into motion, as the enactment of a statute overriding the Court would make them better off. It might be in the Supreme Court's interest, however, to vote in a sophisticated fashion so as to avoid a congressional override, even when the court's ideal point is to the left of C(M). Figure 2 depicts an equilibrium in which the distribution of preferences will usually force the Court to move away from its ideal position.

¹⁷ This characterization of the Court's position in Eskridge's model reflects the institutionalist (internalist) assumption that what counts, in an institution where decisions are taken by majority vote, is the position of the median voter – not the precise position of every voter.

Figure 2 : Constrained Court

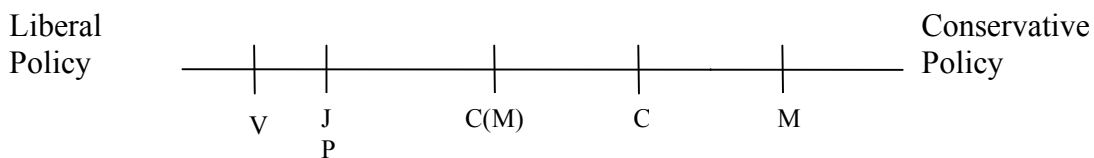


Equilibrium Result, $x \equiv C(M)$

Adapted from: Eskridge 1991b

If the Justices were to issue a ruling at J, both Congress and the congressional committees would probably take steps to override the Supreme Court, because they both prefer an outcome right to J. Provided that Congress successfully overrides the Court, the resulting legislation would reflect the ideal point of Congress (M). M being closer to C than J ($M > C$), the committees would be willing to set the legislative process into motion by referring an override bill to Congress. Yet, making a ruling at J is not the Court's best strategy in this situation. The Court would be better off issuing a ruling at C(M) instead of J, because then committee members would have no incentive to refer an override bill to Congress. From the Court's point of view, though C(M) is inferior to J ($C(M) < J$), C(M) is nonetheless superior to M ($C(M) > M$). Hence, assuming that the Court will always prefer an outcome closer to its preferred position, Eskridge's model predicts that the Court will sometimes refrain from writing its brute preferences into its decisions. Note that while Eskridge suggests that the President is not an important player under the conditions represented in Figures 1 and 2, he also argues that the President may help the Court prevail over Congress and congressional committees when it is aligned with the Court and there is no two-thirds majority in the legislature to override the President's veto. Figure 3 describes such a situation.

Figure 3: Unconstrained Court and Presidential Veto



Equilibrium Result, $x \equiv P \equiv J$

Adapted from: Eskridge 1991b

Here V denotes the “veto median”, the point at which one third of the legislators are on one side of the policy outcome, and two-thirds on the other. The figure shows that the Court need not fear an override statute even if it issues a ruling at J – outside the zone comprised between $C(M)$ and (M) where congressional committees might not be willing to cooperate with Congress to overturn the Court. Indeed, even if the committees refer a bill to Congress and Congress votes it, the President will veto the bill because his preferred position coincides with the Court’s ideal point. In such a situation, knowing that congressmen will unite to form a two-third majority against an outcome only if that outcome is at or to the left of V , one should expect the committees and Congress to renounce overriding the presidential veto, because V is worse than J ($V < J$) from their point of view.

Using the insights of game theory, Eskridge thus modelled the interactions between the Supreme Court, Congress, and the President as a separation of powers game in which each player behaves strategically on the basis of his preferences and of his perception and anticipation of the other players’ preferences and strategies. Since the publication of Eskridge’s seminal articles in the early nineties, scholars have used similar models to explain interactions between legislatures and courts not just in the United States but also in Europe (see Stone Sweet 1999; Volcansek 2001; Vanberg 2005; Hönnige 2007). In Alec Stone Sweet’s theory of Triadic Dispute Resolution (TDR), the dispute resolver’s calculus is informed by the respective positions of the parties to the dispute, as depicted in Figure 4.



Figure 4: The Dispute Resolver’s Calculus in Triadic Dispute Resolution

Adapted from: Stone Sweet 1999

Position A.1 is the most preferred outcome of disputant A, while B.1 represents the outcome desired by disputant B. The space between A.1 and A.2 represents the range of outcomes that the dispute resolver believes will be accepted by A (substitute the space between B.1 and B.2 for B). The space between B.2 and A.2 represents the dispute resolver’s assessment of the set of outcomes that will lead to compliance while preserving her legitimacy and authority. Now, assuming that the dispute resolver cares for her authority and legitimacy – which suppose that she is regarded as impartial and that addressees comply with her decisions –, one should expect her to choose an outcome from that set. Alec Stone Sweet also notes that in “hard” cases there might be no B.2-A.2 space. In such circumstances, he argues, the dispute resolver’s legitimacy will rest primarily “on the persuasiveness of its normative justifications” (Stone Sweet 1999: 156). Stone Sweet finds support for his model in the judicialisation of the French Fifth Republic and the rise of the Constitutional Council (Stone Sweet 1999: 172-8) as

well as in that of the international trade regime (Stone Sweet 1999: 164-72) and several other European political systems (see Stone Sweet 2000). In discussing the judicialisation of French politics, he suggests that the Constitutional Council has responded to the opposition's increasing reliance on constitutional referrals as a weapon against the executive and its parliamentary majority by developing new judicial techniques and by justifying its rulings more carefully.¹⁸

Mary Volcansek (Volcansek 2001) also conceptualises judicial decision-making as a three-player game. Very much like Eskridge, she sees the policy-making process as a game among the constitutional court, the legislature, and the executive. Like Eskridge too, but unlike Stone Sweet, she models the court's ideological position and strategies as endogenous – not exogenous – to the positions and strategies of the other two players. The executive and legislative branches act on the basis of what they perceive to be the court's strategy; and, in turn, the court behaves on the basis of what it perceives to be their strategy. Volcansek finds supports for her analysis in the Italian Constitutional Court's jurisprudence on the legalisation of divorce and executive decree laws (Volcansek 2001: 354-66). In his work on the GFCC, Georg Vanberg (Vanberg 2005, 2001) focuses on the relations between the Court and the legislature, describing their interactions as a two-player game. Formalised mathematically, his model is more sophisticated than those of Stone Sweet and Volcansek. What is more, it incorporates public support for the Court and public transparency (whether or not the public is aware of the issue dealt with by the Court and the legislature) as exogenous variables. Vanberg contends, among other things, that the influence of courts in general (not just the GFCC) on policy-making is strongest when they enjoy high public support and the legislative process is transparent (Vanberg 2005: 28-38). In such a context, the impact of the courts on policy-making may be direct, translating in the judicial invalidation of legislative bills. But it may be indirect too, resulting in legislative self-censorship rather than direct judicial annulments.

Note that neither Vanberg, nor Volcansek, nor Stone Sweet attribute purely self-interested goals to the courts. Vanberg and Volcansek explicitly accept that doctrinal consistency or the guaranty of principles enshrined in the constitutional texts might (at least sometimes) be the primary interests pursued by the courts (see Volcansek 2001: 352-353; Vanberg 2005: 26). Put differently, their models do not rule out the possibility that legal norms – constitutional or statutory provisions, or precedents – may, via the judges' preferences, play a role in judicial decision-making.

Some recent studies (Spaeth and Segal 1999; Shapiro and Stone Sweet 2002: ch. 2; Stone Sweet 2004: 30-41) have specifically attempted to theorise and to provide an empirical picture of the role of precedents in judicial decision-making. Stone Sweet argues that judge-made law develops in a path-dependent manner, as a self-reinforcing dynamic:

Given certain conditions, legal institutions will evolve in path dependent ways: that is, the social processes that link litigation and judicial law-making will exhibit increasing returns. Once under way, these processes will build the discursive techniques and modes of decision-making specific to the exercise of judicial power; they will enhance the centrality of judicial rule-making vis-à-vis

¹⁸ Statistics reveal that the average number of paragraphs (“*considérants*”) in Council's opinions has increased considerably since 1974. Sharp increases coincide with the accession to power of a new parliamentary majority (1981-2, 1986-7, 1993, 1997). (For detailed statistics see Dyevre 2006.)

other processes; and they will, periodically but routinely, reconfigure those sites of governance constituted by rules subject to intensive litigation. (Shapiro and Stone Sweet 2002: 111.)

The judicialisation of parliamentary politics (the use of judicial arguments and threat of referrals to the court as bargaining weapons within legislative assemblies) and the phenomenon of legislative self-censorship – extensively documented by Landfried’s investigation of the German legislative process (Landfried 1984), and Stone Sweet’s dissertation on French judicial politics (Stone 1992) – seem to give some empirical credence to that thesis. From a rational choice perspective, the path-dependence argument makes sense if we assume that judges want to maximise their influence on policy-making. Indeed, if potential litigants believe that the judges will always adjudicate like cases alike, they will anticipate the judges’ future decisions on the basis of their past decisions. The impact of a particular ruling will go beyond the case and the parties directly involved, as other actors will interpret the ruling as a signal that all similar cases will henceforth be given the same solution. Now, from the judge’s point of view, this belief is in fact a condition of her power. For, were it to disappear, her influence would not extend beyond the cases she effectively decides and the parties involved. But, at the same time, this assumption works as a constraint on her and her court because, as soon as they have set a precedent on a particular issue, the precedent makes it costlier for them to decide a new case according to their preferences. This does not mean that the desire to preserve the influence of the court will always trump other concerns. Judges will face a trade-off between abiding by the precedent at the expense of satisfying their brute preferences so as to preserve the court’s authority, and satisfying their immediate preferences at the risk of undermining the court’s mid- or long-term influence. Nevertheless, it strongly suggests that judges cannot afford to completely ignore their own precedents. Whether and to what extent this is an accurate description of reality remains to be demonstrated empirically, however. On closer analysis, even the well documented phenomenon of legislative auto-limitation merely provides empirical support for one implication of the path-dependence argument. It shows that potential litigants really anticipate future judicial decisions on the basis of past rulings. But it does not prove that the judges would have decided otherwise, had the precedents not been there. At least with respect to the U.S. Supreme Court, Spaeth and Segal’s systematic study of conference meetings and individual voting behaviour suggests that precedents have only a modest impact on the choices judges make (Spaeth and Segal 1999). What is more, the very concept of precedent and judicial reasoning based on precedents are apparently far from being universal features of all legal and judicial cultures. South American lawyers and judges, for example, do not seem to attach any authority to judicial pronouncements beyond the parties formally and directly involved, as the absence of arguments founded on past rulings in forensic argumentation and judicial opinions shows.¹⁹

It seems reasonable to predict that socio-political models of judicial decision-making will evolve toward a higher degree of complexity and mathematical formalisation to make sense of the view that “judges’ actions are a function of what they prefer to do, tempered by what they think they ought to do, constrained by what they perceive as feasible to do” (Gibson 1983: 9). Using sophisticated statistical tools and multivariate models, the works of Vanberg (2005) and Voeten (2007), as well as the

¹⁹ On Brazil see Moraes (2005: 510-6).

“Supreme Court Forecasting Project” (Ruger, Kim, Martin and Quinn 2004, 2002) give a flavour of where the research is heading.

Having examined the socio-political approach and offered a broad (though almost certainly incomplete) picture of the family of theories using that approach, I now turn to the normativist approach.

III. The Legal-Positivist Approach to Judicial Lawmaking: the Role of the Judge in the Structure and Functioning of the Legal System

What is the legal positivism all about? I must confess that I am often at pains to explain the value of this approach to lawyers and law students. Lawyers do not question so much the logical consistency or the empirical validity of the theories which adopt this approach. Rather, as practical people, what they question is their *use*. What is it for? Who is that going to help? Since I have said that the legal-positivist approach might be characterised as the law professor’s perspective on adjudication, this may seem quite bizarre. Even more paradoxical, at first glance, is the fact that lawyers grasp the value of the socio-political approach to adjudication more easily. Of course, some criticize the models designed by political scientists or dispute the actual significance of the variables they emphasise in judicial decision-making. Nonetheless, lawyers, in general, easily see the point and the potential use of socio-political theories of adjudication. The fact that most lawyers are practitioners rather than academics is indubitably part of the explanation. Indeed, for most people, the “canonical” lawyer, as it were, is either (a) the judge (preferably holding her gavel), or (b) the trial-lawyer (“barrister” in the U.K., preferably arguing a desperate case), or (c) the legal adviser (“solicitor” in the U.K., archetypically drafting contracts or advising top business executives). The image of the law professor toiling laboriously on the exegesis of complicated legal texts in the corner of a dusty library, by contrast, does not instantly spring to the mind as a representation of the archetypal lawyer. In fact, it may well turn out that if we asked people to describe a typical law professor, most would portray him as a practitioner part-time lecturer rather than as a full-time academic. Surely, this picture is largely the product of television and the mass-media. However, it rightly exposes the importance of practitioners and of the practitioner’s point of view in the legal profession’s self-understanding as well as in “legal” thinking. I see the centrality of the practitioner’s figure as important because I think it determines what is perceived as “useful” scholarship. Suppose you are a legal adviser. Your job is to provide your client with an expert assessment of her legal situation. Telling her what, given the circumstances, would be the probable outcome of filing, or not filing, a lawsuit is an inherent part of your job. Now, what sort of knowledge do you need to provide your client with the best advice? Obviously, what you want to know is not what the courts ought to decide, but what the courts will decide in fact. In other words, you are interested in knowing how the courts will react to the behaviour and actions of your client. Paraphrasing Oliver Wendell Holmes, one might say that, as a legal adviser, you will look at adjudication from the point of view of the bad guy: the individual who wants to know what he is free to do without risking judicial punishment. Hence the evident use of socio-political theories of adjudication. Socio-political theories of adjudication explicitly aim at providing predictions of what the courts will do. So, if your job consists precisely in offering reliable forecasts of the courts’ rulings, one should naturally expect you to be

interested in what these theories say about judicial behaviour (Ruger, Kim, Martin and Quinn 2004: 761).

In a manner that seems to reflect a markedly American concern for practicality as well as the influence of the philosophical tradition (“pragmatism”) that produced William James and John Dewey, Oliver Wendell Holmes was the first to call for a “legal” science that would aim at predicting judicial rulings. Regarded both as one of the most illustrious Justices in the American Supreme Court’s history and as the inspirator of the American legal realist movement, Holmes famously proposed:

“The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law.” (Holmes 1897: 461.)

As some political scientists have noticed (Spaeth and Segal 1993: 66), Holmes thus defined the task of the socio-political approach to adjudication and paved the way for modern-day scholarship on judicial politics.

Lawyers know, however, that predicting judicial behaviour is not the whole story. Predictions about judicial behaviour are of little avail to judges – except perhaps to judges in lower courts (to anticipate the decisions of higher courts). Moreover, the job of a trial-lawyer often lies precisely in trying to defeat these predictions. For these practitioners and for many other people, “law” is not only, if at all, about forecasting tomorrow’s decisions; it is about argumentation and, ultimately, persuasion.

My objective in this section is not to offer a thorough sociological analysis of the perception lawyers have of their own trade. But I think that the way lawyers and legal scholars understand their “business” does not only explain why they instantly see the value and use of the socio-political approach. A grasp of the peculiar manner in which legal academia relates to legal practice and “legal” scholarship to its object of study, helps to put the methodological debate into perspective and to comprehend the misunderstandings as well as the criticism to which legal-positivist theories of adjudication have been subject. Thus, before turning to the common misunderstandings and objections raised against the legal-positivist approach, I will first attempt to elaborate on this description of legal academia and legal scholarship. The realisation that much of what presents itself as “legal science” can be understood as a discourse whose aim is either to persuade the courts to adopt certain policies or to persuade the public to accept the courts’ policies will then help us to explain why lawyers so often misinterpret the legal positivist approach and why they are so receptive to the criticisms leveled – especially by natural law theorists – at legal-positivist theories of adjudication. Having clarified these points and cleaned the terrain, I shall then move on with more surefootedness to a discussion of what extant legal-positivist theories – in particular those of Kelsen, Hart, and their followers – have to say about adjudication. Finally, I will conclude this section with an examination of the relationship between socio-political and legal-positivist theories, whereby I will argue that socio-political theories necessarily presuppose some legal-positivist account of the criteria by which law (= the system of legal norms) is distinguished from non-law.

A. Background of the Controversy About the Aim and Nature of Legal Science: “Legal” Science as Courtroom Rhetoric

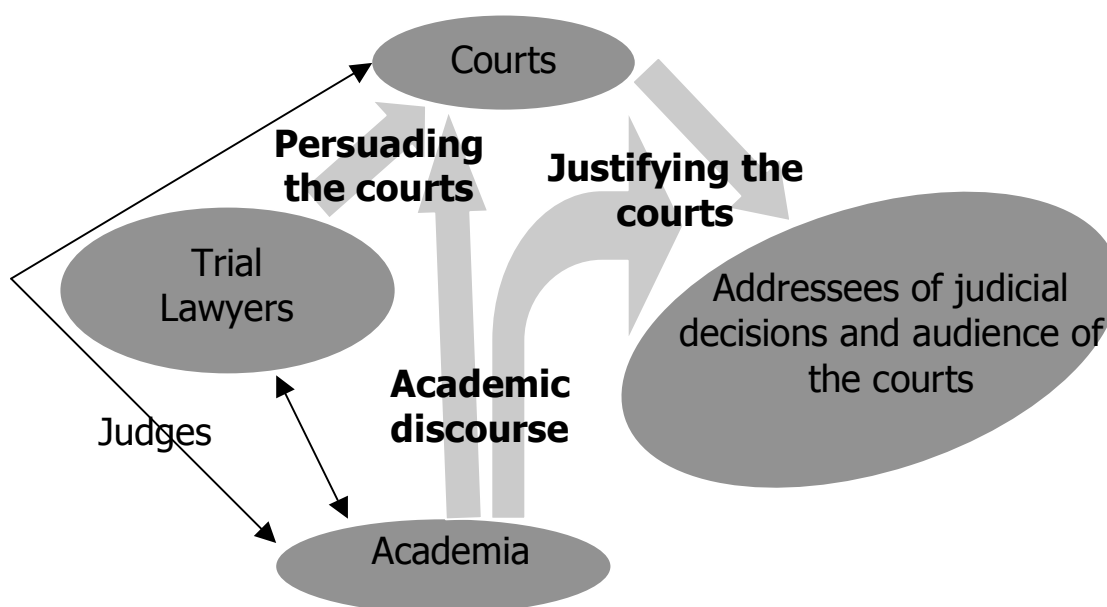
The word “law” is notoriously ambiguous. “Biology” clearly refers to, and only to, the discipline that studies living organisms – i.e., the scientific discourse on living organisms. The discipline here is clearly distinguished from its object of study. We do not ordinarily refer to a fish as a “piece of biology”. By contrast, “law”, in everyday English²⁰, does not only denote the academic discipline studying a certain subject-matter. It also denotes the subject-matter of the discipline. The sentence “this is law” may equally refer to a piece of legislation or to the academic discourse on that piece of legislation. This semantic feature of the word “law”, however, would hardly be remarkable if legal scholars and lawyers systematically specified when they mean the one and not the other. Yet this is not common practice in most of the “legal” literature (see Jestaedt 2006: 32). Textbooks and law review articles seem to treat judicial opinions and official texts as though they belonged to the very same level of language – as though they participated in the same enterprise. In France and Germany, constitutional law scholars even appear to reconsider their interpretation of the constitutional text in light of new judicial pronouncements (see Schlink 1989; Dyevre 2006). Not only is the legal system what the judges say it is. Apparently, good legal scholarship is what the judges say it is too! As it turns out, the ambiguity of the lexeme “law” reveals something about the aim and self-understanding of legal scholarship that sets it apart from scholarship in natural sciences and other social sciences.

A tentative explanation for this fact goes back to the historical process through which “law” entered academia. As far as I know, there were no economists before the institutionalization of economics as an academic discipline. But, in England and America at least, there clearly were lawyers – judges and attorneys – well before “law” became an academic subject taught in universities alongside natural sciences and humanities. Dispensed to apprentices in the office of established practitioners rather than to students in lecture rooms, training in law, as in medicine, was practical. Those who chose this training did it with a view to embracing a career at the bar or in the judiciary. “Law” was, above all, a profession. Most universities now host law schools or law departments. And law professors claim that what they do is “legal science” (or “*science du droit*” or “*Rechtswissenschaft*”). Yet “Law” as an academic discipline is still firmly embedded in the vocational tradition. Law students are trained as future practitioners. Judges and attorneys regularly publish in law journals and are often themselves law professors. They are routinely invited to law conferences and seminars; and what they say there is deemed to be as much “legal scholarship” as the contributions of other legal academics. The result is that there is not much social distance between the actors and those who write about them in the journals.²¹ This in turn seems to account for the lack of clear theoretical demarcation between the discourse of practitioners and that of academics in academic legal writing. In short, what characterizes “legal” scholarship is its orientation towards the needs of trial lawyers and judges and the absence of systematic differentiation between legal scholarship and its object of study. Legal scholars present their own writings as politically neutral and scientifically objective. But they almost invariably look at the

²⁰ The same goes for “*droit*” in French, “*diritto*” in Italian, “*derecho*” in Spanish, and so on.

²¹ In that regard see Schepel and Wesseling 1997 (showing that the share of authors affiliated to EU institutions is disproportionately high in the legal scholarship on the ECJ).

legal game through the lens of either the judge or the trial lawyer: How can a judge justify a particular ruling to ensure its social acceptance? How should a trial lawyer frame his argumentation to persuade the court to decide in favour of her client? What determines the value and usefulness of scholarship is essentially the extent to which it helps practitioners in achieving these ends. Thus the function of legal scholarship is understood as being essentially rhetorical: it is about using linguistic symbols to induce cooperation in beings that respond to linguistic symbols (Burke 1950). In more concrete terms, the mission of legal scholarship is to supply ready-made arguments to practitioners. To judges, so they can persuade the addressees of their decisions to accept and to comply with these decisions; and to trial lawyers, so they can persuade judges to decide in favour of their clients.²² Figure 5 is a tentative representation of the market for “legal” rhetoric.



The full arrows denote the production of justificatory discourse and point to the addressees of the discourse. Legal academia thus produces rhetoric both (a) to help trial-lawyers in their effort to lobby the courts on behalf of their clients and (b) to help the courts in their effort to convince their audience and, in particular, the addressees of their rulings that those are legitimate rulings and, therefore, should be accepted. The simple arrows designate not the production of discourse but the movement of people between academia and law practice. Judges and trial-lawyers intervene in seminars and speak at law conferences; law professors are appointed to judicial positions or become consultants for law firms. Within universities, this constant movement between academia and practice is, I think, unique to law departments and law schools. Other

²² As noted by Jestaedt (2006: 18-19) with respect to German legal scholarship, lawyers tend to say that “legal praxis” is about the application of laws, yet they focus exclusively on the application of laws by judicial bodies, thus ignoring the fact that other organs – administrative agencies, legislatures, etc. – also apply legal rules. Jestaedt puts this narrow understanding of legal praxis down to the judge-centrism (“*Richterzentrierung*”) of German legal training.

departments – with the exception perhaps of business and management departments – are not so closely intertwined with the people who are supposed to be part of their own object of study. This feature of legal academia bears emphasising here because it has, I think, two important consequences for legal scholarship. First, as I have already mentioned, it reinforces the orientation of legal scholarship toward the needs of practitioners.²³ Second, and more importantly, the proximity of legal academia to legal practice has, quite paradoxically, led to the politicisation of legal scholarship and, at the same time, to the promotion of the legal scholars who had worked hardest to perpetuate the mythology of judging and the vision that judges are outside politics. I believe that legal scholarship would look differently if practitioners never wrote in law journals and never talked within university walls. As a point of comparison, imagine how political science would look like if politicians, representatives of pressure groups, and other decision-makers regularly published in the top political science periodicals and were constantly invited to workshops and symposiums at political science departments.

To be successful – social cooperation being the measure of success –, a rhetorical discourse must be tailored to its audience. The rhetorician needs to know the values and cognitive processes of her audience (Coulson and Oakley 2006). She needs to know the linguistic symbols to which her audience will respond and the mental processes by which her public will determine whether a proposed course of action is consistent with its values and preferences. Consciously or unconsciously, trial-lawyers and judges, but legal scholars too, know this. They also know that they can take advantage of the cognitive biases of their audience by using the appropriate linguistic cue. In Western democracies, people are more likely to accept a judicial ruling if (a) they believe that this ruling can be deduced from the statutory or constitutional rules that judges are in charge of applying, or (b) if they believe that this ruling is a necessary implication of a right or freedom deemed fundamental, or (c) if they believe both. The view that judicial rulings are more acceptable if they are deductible from the constitution or any other rule adopted by a non-judicial body derives from old conceptions of the separation of powers. From Montesquieu to Hamilton, to Kant and Condorcet, many famous Enlightenment thinkers and constitution-makers believed that judging both could and should only be about applied logic. In the Federalist Paper no. 78, commenting on the provisions of the new American Constitution regarding the judiciary, Alexander Hamilton stated that judges “may truly be said to have neither force nor will, but merely judgement”. This statement echoed Montesquieu’s famous characterisation of the judge “as the mouth that pronounces the words of the law”. Kant, Condorcet, and Beccaria similarly endorsed a formalist theory of adjudication (La Torre 2002: 378-9). Provided that judges are honest, competent, and desirous to faithfully

²³ In the writings of many lawyers, this orientation finds an expression in a variant of what Matthias Jestaedt calls, after Carl Schmitt, the “*antitheoretische Affekt*” (Jestaedt 2006: 3-4). Characterising themselves as practical men and women, they simply dismiss any form of methodological reflection as pointless. All legal theorists, presumably, have once faced the disarming objections of such a “pragmatic” lawyer: “You know it may work in theory, but, at the end, of the day, it’s useless”; “We want to know the law and only the law, we don’t need your theorising”; “The judge has never heard of such theories”; “The judge has said X in decision Y, so your theory is plainly false”. The view that one can describe the law without making any theoretical assumptions is, of course, mistaken. Just as nobody can jump over his own shadow, no description of the “law” can avoid making assumptions regarding the constitutive properties of the object “law” and the conditions that a statement should satisfy to be considered a reliable representation of this object. In fact, far from avoiding theoretical commitment, the self-proclaimed pragmatic merely argues that we should stick to our received methodology.

apply the law, these illustrious thinkers believed, judging could be reduced to syllogistic reasoning. The solution of a case was understood as a function of two variables: rules + facts = decision. This theory of judging had a strong appeal because it seemed to dovetail perfectly with the political principles promoted by the Enlightenment. First, it seemed to fit together perfectly with the principle of democratic decision-making. In short, if judicial decisions are no more than a deduction of the rules passed directly by the people or indirectly by their elected representatives, there is no need to provide any specific justification for the coercive power yielded by judges. Second, this theory of adjudication was apparently a necessary implication of the ideal of the rule of law. It seemed to follow from the imperative of notice and legal certainty – the requirement that people should be able to know, before entering the courtroom, the rules by virtue of which they will be judged.

Now, this theory of judging seems to have as much appeal today as it had in the eighteenth century. The principles of democracy and the rule of law resonate as powerfully, if not more powerfully, with citizens of twenty-first century Western societies as they did with their ancestors two hundred years ago. So, from the point of view of the judge, presenting her decision as the conclusion of a syllogism in which the constitution – or any rule established by the legislature – is the major premise, and the facts of the case the minor, is a good argumentative strategy. It suggests that she is outside politics; that her decisions are the embodiment of the rule of law; and that her decisions do not contradict but, on the contrary, follow from the choices made by the people and their representatives.²⁴ Discussing the legitimacy of judicial review, the American constitutional scholar Thomas Grey explained the allure of the formalist model of judicial decision-making (which he calls the “interpretive model”) in the following way (Grey 1975: 705):

Under the pure interpretive model...when a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: “We didn’t do it – you did.” The people have chosen that the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.

What is more, suggesting a clear-cut demarcation between “politics” (with all its negative connotations) and the “law” as the sphere of courts and judges, this kind of argumentation enables the judges to dismiss the view that they are policy-makers and to pass for neutral, benevolent experts. So it should come as no surprise that judges have been so keen to use the judge-as-mouth-of-the-law rhetoric. Justice Owen Roberts’ opinion in *United States v. Butler* provides a perfect illustration of this deeply ingrained judicial tendency:

The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is

²⁴ What I am saying here about formalism and its relation with the principles of democracy and the rule of law does not imply, in any case, that democracy and the rule of law are unattainable ideals. As I suggest below, these principles can be re-interpreted in the context of a theoretical approach acknowledging the under-determinacy of legal rules.

challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.²⁵

Holding unconstitutional a central piece of Roosevelt's New Deal programme, the Agricultural Adjustment Act, *United States v. Butler* was a very controversial ruling. The fact that Justice Roberts' opinion for the Court resorted to the judge-mouth-of-the-law rhetoric strongly suggests that it was what the Justices then perceived to be the most persuasive and, therefore, most effective way of ensuring that the other branches of government would accept and comply with the decision. Constitutional scholar and Reagan's (rejected) nominee to the Supreme Court, Robert Bork put it plainly: "The way an institution advertises tells you what it thinks its customers demand" (Bork 1971: 4). The dry and extremely formal style of French judicial opinions may also be seen as a discursive strategy whose aim is to persuade French litigants and politicians that judicial rulings are merely the conclusion of a syllogism (Stone 1992).

When the judge-mouth-of-the-law strategy proved insufficient to impress their audience, judges have also relied on the courts-as-guardian-of-rights-and-liberty rhetoric.

History has given considerable rhetorical power to the language of rights and liberty. Both French and American revolutionaries fought the old regime in the name of liberty and the rights of man. The atrocities of World War II prompted a moral reaction that led to the proclamation and reassertion of the universality of "human rights". As a result, the protection of "fundamental", "human", or "universal" rights and freedoms has become a ubiquitous theme in international relations, domestic politics, and civil society. This in turn explains why couching the defense of interests and policies in terms of "fundamental rights" and "freedom" has become a powerful linguistic weapon (Primus 1999). Almost every policy or social interest may be recast as a "fundamental right" or presented as a way of fostering "freedom". In many cases, this sort of stratagem suffices to project an image of intolerance and fanaticism on those who oppose the policy or have opposing interests – unless they themselves frame their preferred position in terms of rights and liberty.²⁶ Again, one should not be surprised to discover that there is a close link between the expansion of judicial authority and the pervasiveness of rights-discourse. During the "Civil Rights Movement" in the United States, the Warren and Burger Courts frequently used the rhetoric of "fundamental rights" to expand the set of interests enjoying constitutional protection. On the other side of the Atlantic, the GFCC has construed the rights provisions of the Basic Law very broadly. This has enabled the German tribunal to act, in the name of fundamental rights, as "censor of the reasonableness of all governmental action" (Currie 1989: 359).

²⁵ *United States v. Butler et al.* 297 U.S. 1, 62-3 (1936) (Roberts, J.).

²⁶ Aldous Huxley made a similar point in *Eyeless in Gaza*:

Freedom's a marvelous name. That's why you are so anxious to make use of it. You think that if you call imprisonment true freedom, people will be attracted to the prison. And the worst of it is you're quite right.

These two examples constitute just a small sample of a general phenomenon we observe in democracies all around the world.

Ensuring the acceptance of these manifestations of judicial power would certainly have been harder, had legal scholars constantly reminded the public that the law leaves ample discretion to the judges and that, for this reason, judges are policy-makers too. Yet, many legal scholars have, if anything, tried to reinforce the effect of this rhetoric by reasserting the (delusive) view that judges are outside politics and that adjudication is solely about legal reasoning. Popular both in- and outside academia, Ronald Dworkin's writings illustrate this tendency (see Dworkin 1977, 1985, 2004). To defend the authority of the courts (and especially the U.S. Supreme Court) against its detractors, Dworkin has used both the courts-as-guardian-of-rights-and-liberty ("Taking Rights Seriously") and the judge-as-mouth-of-the-law rhetoric ("Single Right Answer Thesis"). What is more, even those who have criticised specific judicial rulings or entire line of precedents have often contributed to reinforce the view that judging both *should* and *could* be value-free. They have criticised rulings for being "political" and as departure from the ideal of formalism, rather than for being bad judicial policies (see e.g. Berger 1978, and Graglia 1996). In the same fashion, U.S. politicians regularly declare that the job of the Supreme Court is "to apply the law, not to make it" – as though the judicial application of the law did not involve any value-choice. In other words, even those who want to persuade the courts to change their policies speak the language of the judges – that is, the language of formalism and rights. Given what I have said above about the structure of the demand side on the market of legal rhetoric, one should expect legal scholarship to speak this language. The fact that it indeed does is evidence not so much of the naiveté of legal scholars but of their desire to help the courts or, alternatively, those who try to lobby the courts. As Anne-Marie Burley and Walter Mattli (Burley and Mattli 1993: 44) note with respect to the ECJ and its role in European integration:

Herein...lies a paradox that sheds a different light on the supposed naiveté of legalists. At a minimum, the margin of insulation necessary to promote [European] integration requires that judges themselves appear to be practicing law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool.

The apparent adherence of much of legal scholarship to formalism and to the belief that courts are outside politics is the primary reason why political scientists see the "legal model" of judicial decision making – and hence legal scholarship – either as bad science or as ideology clothed in legalese (see e.g. Spaeth and Segal 1993: 62-4).

There are two additional consequences of the rhetorical outlook of legal scholarship to which I would like to draw attention here. The first is that legal scholarship has remained largely provincial. Because people's values and cognitive processes are context- and culture-dependent, what is rhetorically effective in one country may well not work in another. The emotional dimension of language – the capacity of natural languages to convey and elicit emotions, which enables rhetoricians to use words to induce social cooperation in their audience – is often closely connected to the historical events and stories that people have come to associate with certain lexemes in their culture. Invoking "religious freedom" might come down well with an

American audience. Defending a policy or a client by appealing to “*la liberté religieuse*”, on the other hand, is not likely to be rhetorically effective when one addresses aggressively secular, religion-wary French. Likewise, the word “*Rechtsstaat*” certainly has a resonance in the German-speaking world that its nearest equivalents in other languages (“*the rule of law*”, “*l’Etat de droit*”, etc...) do not convey in their national culture. As a result, each country has developed its own, self-centred, legal scholarship. Unlike economics, political science, or even sociology and history, law has largely failed to become an international discipline. There is no united, internationally integrated legal science.

Another, related, consequence of the perpetuation of the rhetorical tradition is that “legal research” has not generated what is normally the hallmark of a successful science: the accumulation of knowledge. Rhetorical considerations, political aims, and argumentative strategies often appear to play a bigger role in the methodological debate than concerns for logical consistency and empirical accuracy. To the extent that it borrows the theoretical language of the hard sciences, the legal literature, in many cases, seems to do so only because it is, in the national context, an effective means to impress the targeted audience. In the same spirit, those, in legal academia, who had taken their methodological inspiration from the epistemological approach of the natural sciences have been most severely attacked and criticised when their theories appeared to undermine the efficacy of juridical rhetoric and to hamper the expansion of courts’ authority. To give an illustration, H.L.A. Hart’s most famous work, *The Concept of Law* was justifiably viewed, when it was published in 1961, as an important contribution to legal science and legal knowledge. It remained the most influential book on legal theory in the English-speaking world until it came under attack from the very scholar who had replaced Hart at Oxford University’s chair of jurisprudence: Ronald Dworkin. Dworkin attacked and dismissed Hart’s legal positivism primarily, I think, because it exposed courts and judges as law- and policy-makers. In the United States at the time, conservatives, infuriated by the Court’s rulings on abortion and criminal procedure, were lambasting the Supreme Court Justices as liberal, left-leaning zealots whose decisions had no basis in the Constitution. For the Court and its liberal-minded followers, like Dworkin himself, preserving the social acceptance of its rulings depended on their ability to persuade the American public that these rulings did not reflect the Justices’ political or moral preferences but were the sole correct interpretation of the Constitution. So Dworkin’s rejection of both Hart’s “pedigree theory” of legal validity (which Dworkin replaced by his theory of “principles”, supplemented, later on, by his theory of “fit”) and Hart’s theory of judicial discretion (Dworkin argued that there is no such thing as judicial discretion because there is a single right answer to every case), arrived in time, as it were, to save the Court. Whether Dworkin really “saved” the Court is another matter, but this shows that political and rhetorical considerations often have the upper-hand in legal scholarship. Rhetoric, however, is not knowledge, let alone scientific knowledge.

B. Common Misrepresentations of Legal Positivism

What I have just said about legal scholarship and its rhetorical outlook helps dispel the misunderstandings that surround the legal-positivist approach and legal-positivist theories.

Common Misrepresentation of the Legal-Positivist Approach I: Absolutizing the Practitioner's Point of View

One of the main questions legal-positivist theories purport to answer is whether judicial rulings are consistent with the positive rules (constitutional provisions, statutes, administrative regulations, etc...) judges are in charge of applying to concrete cases. Yet some people retort that this is pointless, especially when it comes to supreme tribunals. The objection was noted by H.L.A. Hart (Hart 1961: 138):

A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequence within the system: no one's rights or duties are thereby altered. The decision may, of course, be deprived of effect by legislation, but the very fact that resort to this is necessary demonstrates the empty character, so far as the law is concerned, of the statement that the court's decision was wrong. Consideration of these facts makes it seem pedantic to distinguish, in the case of a supreme tribunal's decision between their finality and infallibility. This leads to another form of the denial that courts in deciding cases are ever bound by rules: 'The law (or the constitution) is what the courts say it is.'

This is a typical practitioner's objection. To trial-lawyers and legal advisers, knowing that the supreme tribunal has made an incorrect application of a constitutional provision is generally of no interest, in the sense that it will not help them to better advise their clients or to win the cases they are entrusted with. From the perspective of this class of practitioners such knowledge is, in that sense, useless. Their point of view, however, is the point of view of a participant in the legal game, not the point of view of an observer external to the game. Herein lies the misunderstanding: Legal positivist theories look at the legal game from an observer's point of view; they do not purport to help practitioners to win cases or to better predict the outcome of litigation. In short, they do not purport to explain how to win the legal game. Instead, their aim is to explain what constitutes the legal game in the first place and how it works. To rebut the charge that explaining this is trivial, we need only consider a couple of questions that only legal-positivist theories can answer.

First, if representative democracy presupposes that judges adjudicate cases according to the will of the legislature as it is expressed in the legislative report, then we need to know whether the decisions of the courts are consistent with the enactments of the legislature. We must establish this with exactitude if we want to determine whether a given regime is a democracy. Second, in the same fashion, if, as modern constitutionalism has it, the constitution is to be the supreme law of the land, we need to determine whether the decisions of the courts, just as all governmental acts, really reflect that supremacy. Determining whether or not a given regime is a constitutional democracy precisely requires this knowledge. Third, a legal-positivist account of adjudication is equally indispensable whenever we want to establish whether a given legal system functions in accordance with the ideal of the rule of law. Indeed, if the rule of law is not merely the rule of judges or the requirement that every governmental action is subject to judicial review, but is also understood to presuppose that every legally binding decision is consistent with the rules regulating its production within the system – regardless of whether it is the decision of a legislative, administrative, or judicial body –, then, in order to ascertain whether this is effectively the case, we will

need the analytical tools that, by definition, only a legal-positivist theory of judging can provide. In other words, we need a legal-positivist theory of adjudication to find out whether the judges really follow the rules laid down (by the constitution-makers, the law-makers, precedents, etc...) or simply make and re-make the rules as they go along.

In most Western societies – if not in most contemporary societies – all rule-makers and decision-makers claim to be committed and to behave according to these principles. And the fact that we need legal-positivist theories of adjudication in order to assess the empirical validity of these claims shows that, far from trivial, the questions addressed by legal positivism are, on the contrary, of great interest to a lot of people.

Common Misrepresentation 2: Causal Reductionism

Another cause of misunderstanding stems from the tendency to construe legal-positivist theories as causal theories of judging. In this view, these theories, like any socio-political theory of adjudication, would purport to describe the judges' decision-making calculus and to predict judicial outcomes. The only divergence between these theories and other socio-political theories of adjudication would reside in what they identify as the determinants of judicial behaviour. In short, whereas the theories developed by political scientists emphasise the role of preferences and institutional constraints, proponents of legal-positivist theories argue that legal norms are the main, if not the exclusive, determinant of judicial behaviour. Needless to say, this misconstruction of the legal-positivist approach invariably leads to its rejection. Obviously, as causal accounts of judicial lawmaking, legal-positivist theories do not fare well. The very fact that many judicial rulings are inconsistent with the constitutional or statutory norms they are supposed to apply apparently suffice to show that it is not a plausible causal account of adjudication. So, as long as that is what the "legal model" is perceived to be, political scientists are poised to discard it as just a bad socio-political theory of adjudication.

Some lawyers and much of traditional legal scholarship have certainly contributed to this sort of misrepresentation of legal positivism. In their haste to dismiss the claim that judges are policy-makers, they have often suggested that personal preferences play no part in judicial behaviour and that nothing, except legal norms and doctrines, can explain the judges' pronouncements – even from a socio-political vantage-point. That, of course, is wrong. Given that legal norms nearly always exhibit some degree of indeterminacy, the law – Dworkin's argument to the contrary notwithstanding – does not point to a single, unique solution in each and every case. Even the most scrupulous judge desirous to be faithful to the letter of the law will have to look outside the law to solve a case vis-à-vis which the law is indeterminate. A legal-positivist theory need not deny that.²⁷ The reason legal-positivist theories of adjudication are interpreted as socio-political theories of judicial decision-making has sometimes a quite different source, however. Many people tend to think that science is only about causality and prediction. In this view, the aim of a scientific theory is to identify causal relations between events or class of events and a theory that does not seek to explain

²⁷ But note, incidentally, that a legal-positivist theory would still be a legal-positivist theory if it claimed that the law is perfectly determinate and, accordingly, that there is a single right answer to every case. In other words, a formalist view of adjudication is compatible with a legal-positivist approach. But, of course, as I suggest throughout the present essay, the view that legal norms are totally determinate is not empirically plausible.

such relations is simply not a scientific theory. So, either legal-positivist theories are about causality or they are not scientific theories at all. This form of “causal reductionism” is widespread and brings us back to the remark I made at the outset about the common view that there are only *two*, not three, theoretical approaches to adjudication (for an illustration, see the methodological discussion in Ruger, Kim, Martin and Quinn 2002).

Yet it is simply not true that science is only about causality. If we assume the existence of legal norms and we want to study these norms and the relations among them, we cannot use the concept of causality to identify and explain these relations. Relations among norms are not causal relations and we cannot understand how normative systems are structured and operate using the concept of causality. The concept that best captures the relations that might exist between legal norms is not the concept of causality but the concept of “imputation”. Hans Kelsen tried to contrast these two concepts as follows:

Just as the law of nature links a certain material fact with another as effect, so the law of normativity links legal conditions with legal consequence (the consequence of the so-called unlawful act). [...] Just as an effect is traced back to its cause, so a legal effect is traced back to its legal condition. The legal consequence, however, cannot be regarded as having been caused by the legal condition. Rather, the legal consequence (the consequence of the unlawful act) is linked by imputation to the legal condition. That is what it is to punish someone “because” of a delict, or that a lien against someone’s property is executed “because” of a debt. (Kelsen 1992: 23-4.)

The Austrian legal theorist also argued that, by putting causality at the centre of scientific thinking, the rise of the natural sciences had led people to neglect the notion of imputation and its role in the analysis of normative phenomena (Kelsen 1960).

Questions of imputation and questions of causation are frequently confused when it comes to explaining human behaviour. Drawing on Jon Elster (Elster 1982), it is helpful and instructive to contrast reasons for action and justifications for action, and to characterise causal analysis as focusing on reasons for action and imputation as focusing on justifications for action. Reasons for action are the motives, desires, or preferences that lead individuals to act as they do. Justifications for action, on the other hand, are the principles, rules, or doctrines that individuals actually invoke or may invoke to justify their actions. Thus defined, justifications for action and reasons for action are independent from each other. For example, *x* may do A and say she has done A because of B. This might be the case: B might be, at the same time, *x*’s reason for action and *x*’s justification for action. But it might equally be the case that *x* did A for the non-expressed reason C. In that case, C will be *x*’s reason for action and will not coincide with her justification for action (i.e. B). That reasons for action and justifications for action are independent from each other also means that they may be analysed independently. The fact that *x* did A because of C *qua* reason for action should not preclude us from inquiring whether B was an appropriate justification for doing A. And showing that *x* did A because of C will not answer the question as to whether B is an appropriate justification for doing A.²⁸

²⁸ As suggested by Jestaedt (2006: 10), another way of differentiating these two facets of decision-making is to distinguish between “context of discovery” and “context of justification”.

People often confuse reasons for action and justifications for action with respect to judges and judicial rulings. Those, in politics or academia, who praise the courts and try to defend the judges against their detractors, seem, at times, to suggest that the doctrinal justifications the judges expound in their opinions are also the motives that actuated them – their reasons for action. On the other side of the controversy, the courts' detractors claim that these doctrinal arguments are only a mask for the judges' real, yet secret, motives. This sort of reasoning, however, obscures the difference between justifications for action and reasons for action. The fact that the judges invoked the constitution in their opinion to invalidate a statute prohibiting, say, abortion, does not necessarily prove that these were the judges' personal motives for the ruling. It might be the case that the judges decided to invalidate the statute not because they had a strong desire to defend the constitution against legislative encroachment but because they held the view that women should be free to decide for themselves whether they want to bear a child. Yet, even if we had perfect knowledge of the judges' reasons for the decision, this would not prove that the decision is inconsistent with the constitution or, conversely, that it is consistent with the constitution. What I am trying to say here is that the two questions – what were the judges' reasons for the decision and whether there is a correct constitutional justification for the decision – are distinct issues and should be treated accordingly. This distinction precisely underlies the distinction between the legal-positivist and the socio-political approach to adjudication. The former may be understood as focusing on legal rules as justifications for (judicial) action, while the latter may be viewed as focusing on the judges' reasons for action.²⁹

It is not difficult to find instances where the two approaches are confused because justifications for action are misconstrued as reasons for action and vice-versa. During the 2002 U.S. Supreme Court's term, for example, a group of scholars engaged in a friendly interdisciplinary competition to compare the ability of "legal experts" and political scientists at predicting the decisions of the Court. The "Supreme Court Forecasting Project" involved a panel of 83 "legal experts", of which 71 were law professors (see Ruger, Kim, Martin and Quinn 2004: 763). Members of the panel were asked to predict the outcome of the cases on the Court's docket for the 2002 term. Their answers were then compared with the results of a statistical model based on information about the past voting behaviour of the sitting Justices and characteristics of the pending cases (such as the court of origin of the case, the issue area of the case, or the ideological direction of the lower court ruling) (see Ruger, Kim, Martin and Quinn 2004: 762). The accuracy rate of the statistical model proved significantly higher than that of the legal expert panel. The model got 75 % of its predictions right, whereas the panel got a mere 59.1 %. These findings were hailed as both a victory of the computer over the expert and as a demonstration that political scientists – through their use of statistical models – simply do the lawyers' job better than lawyers themselves, thereby suggesting that law schools should hire political scientists instead of academics trained in law.³⁰ The enthusiasm for statistics and the application of quantitative methods to the study of judicial behaviour, however, frequently lead people to overlook the fact that statistics and predictions do not tell us anything about the judges' justifications for

²⁹ To the extent that they take into account the role of legal rules in judicial decision-making socio-political theories of adjudication will treat them as reasons for action not as justifications for action. As we have seen above, this translates in legal rules being treated either as institutional constraints or as preferences.

³⁰ See the article "How the Computer Killed the Experts" in the *Financial Times* of September 1-2, 2007.

action. Even if we could build a statistical model that would correctly predict 100 % of the decisions, that would not tell us whether one, half, all, or none of these decisions are consistent with the rules courts are supposed to apply. While socio-political theories may do a good job at providing predictions, we nonetheless need legal-positivist theories to elucidate that latter question.

Having tried to dispel what in effect are misunderstandings rather than real objections, I now move on to a refutation of the two most serious attacks mounted against legal positivism.

C. Objections to Legal Positivism

The two positions I want to address and refute here both maintain that there are not three but only two distinct families of theories of adjudication.

The Inseparability Thesis: you cannot say what legal norms are without saying what they ought to be

Old as well as modern advocates of theories of natural law argue that one cannot say what the rules of a legal system permit, prohibit, or require without also saying what these rules *ought* to permit, prohibit, or require. This “Inseparability Thesis” implies that legal and moral systems necessarily overlap partly – in the modest version of the thesis³¹ – or completely – in the strong version of the thesis.³² It also implies that legal-positivist and prescriptive theories of adjudication form in fact one and the same family of theories. Since one cannot describe the legal norms applied by the courts without prescribing what these norms should be, the prescriptive and the legal-positivist approach are simply indistinguishable: however hard we try, we just cannot make any statement describing how the law is without simultaneously making, in some way, a claim about how the law should be.

For the reasons I have discussed above, the Inseparability Thesis appears very appealing and persuasive to many both in and outside legal academia. First, because jurists and non-jurists ordinarily perceive and understand law from the practitioner’s point of view, they tend to equate judicial argumentation (what, and everything, the judges say in their opinions) with legal argumentation. Judicial opinions are often larded with arguments that do not derive, in one way or another, from the language found in the statute book or in the constitutional text. And, when they argue a case in a courtroom, trial lawyers often invoke as authoritative rules that have not been formally promulgated by state officials. Second, the notion that moral norms are necessarily part of the system of legal norms conveniently suggests that judicial rulings which, at first glance, seem to be founded on moral principles that are outside the law, are, in reality, exclusively based on the law because these moral principles are themselves part of the law. In other words, the Inseparability Thesis is another way of suggesting that judges are outside politics. Third, I also think that the words “values” and “morality” possess considerable rhetorical force. Many people like the idea that judging is specifically about “morality” and that judges and lawyers are the natural guardians of our “moral

³¹ Under the modest version, an immoral norm cannot be a legal norm, but a moral norm is not in and by itself a legal norm: morality is a necessary, but insufficient, condition of legal validity.

³² Under the strong version of the inseparability thesis, morality is a sufficient condition for legal validity: a moral norm is for that sole reason a legal norm.

values”. For these reasons, understanding “law” as a blend of rules enacted by social institutions, such as constitutional conventions, legislatures, or administrative agencies, and moral rules – that is rules not, or not yet, institutionally formalised as authoritative – appears both sensible and desirable.

Yet the allure of the Inseparability Thesis and the fact that it fits well with some common-sense perception of what the “law” is does not prove that it is correct, let alone that it is the only correct way of understanding the phenomenon “law”. For my part, though I accept that an account of “law” conceiving law as a blend of positive and non-positive moral norms would not necessarily be incoherent, I do not think that it is the only conceivable way, or the only interesting way, or even the most interesting way of understanding law. More to the point, I do not see any good reason why the legal system and the norms it comprises could not be identified and studied effectively without any moral preconception of what these norms ought to be.

My position on this issue derives from a constructivist conception of science: the definition and delimitation of the object of study of a scientific discipline is a matter of convention; it is not something that can be discovered through empirical inquiry. In this view there is no more a “true” definition of law – that is, of the object of study of legal science – than there is a “true” definition of the subject matter of physics, linguistics, economics, or biology. It follows that the value of an ontological definition, provided it is logically consistent and empirically relevant, can only be proved *a posteriori*, by demonstrating how it enables us to make sense and to enhance our knowledge of the phenomena we want to study. In short, definitions and ontological assumptions should be judged by their fruits. This is the only rational ground on which to endorse or, on the contrary, to reject ontological assumptions.

From that perspective, justifying the endorsement of the Inseparability Thesis turns out to be a tall order. Proponents of natural law theories would have to show that the position according to which law and morality can be analysed as autonomous normative spheres is logically inconsistent, empirically irrelevant, or that theories premised on that position do not and cannot make any contribution to our understanding of legal phenomena.

Advocates of the Inseparability Thesis make no such argument, however (see e.g. Dworkin 2004). Instead their position seems to rest on a variant of conceptual realism. Resuscitating Plato’s “heaven of concepts”, they apparently posit that concepts – in this case the concept of law – are truth-functional. In brief, there are competing concepts of law, but only one is true: theirs (of course); positivist concepts of law are simply deemed to be false. To some scholars and especially to lawyers, there does not seem to be anything inherently wrong about this kind of argument. Many people speak as though concepts were in the business of being true or false. Scholars working in the field of constitutional law, for example, often argue about the definition of the word “constitution” as if there was such thing as a “true” – and not just a useful, or several useful – definition(s) of that word. Yet such controversy is bound to be sterile, since there is no way to verify that one definition is true and that the other is not.

The real point of controversies about the definition of “constitution”, however, is usually not scientific. Rather it is political and, again, rhetorical. Pro-integration scholars, for instance, insisted that the EU had a constitution, in the form of the EC Treaty, because they wanted to project the positive connotation of that word on their favourite institutions. So they carefully defined or re-defined it so as to arrive at the conclusion that the EU indeed had a constitution. Conversely, their more Eurosceptic

colleagues consistently rejected any definition of the term that could support a similar conclusion. Presumably because they thought that it would put the EU into too flattering a light (on this see Dyevre 2005). In truth, in such conceptual controversies, the “EU has a constitution” comes to mean “Hurrah for the EU”, while the “EU has no constitution” implies “no more EU” or “too much EU”. Thus the real issue is not whether one definition or the other enables us to better understand and more meaningfully compare political and legal structures. The participants’ main concern in such a debate has more to do with the connotation they associate with the terms under discussion – in that case the positive connotation of the lexeme “constitution” – than with a preoccupation for the advancement of scientific knowledge. In the last analysis, the choice of one definition over another tells us more about the attitudes and preferences (pro-EU or anti-EU in my example) of the author or user of the definition than about the subject-matter of the analysis.³³

The same goes for the definition of “law” as for the definition of “constitution”. The endless academic debate on the definition of “law” is bound to be fruitless because there is no way to verify that, for instance, Hart’s concept of law is false and that Dworkin’s definition is true. The reason the quarrel goes on is because some scholars, like Ronald Dworkin, not only want to call their own favourite moral argument “law” but also reject the possibility that this argument might not be called “law” from a different theoretical perspective. Why should one want to monopolise the label “law” for his own theory? Here again, the reason has most probably something to do with politics and rhetoric. Legal-positivist theories of adjudication, like Hart’s, expose judges as policy-makers and show that judging is not only about “law” when the law is indeterminate; at least, they demonstrate that judging is not only about *positive* law when legal rules are indeterminate. Yet, given the widespread belief that courts should be no more than the mouth of the law, few people are likely to be pleased by what such theories reveal about the judges and their decisions. Especially in situations where the courts have issued important rulings on divisive issues, the thesis that judges enjoy broad discretion in the application of indeterminate legal rules is likely to stir up criticism of the courts and to put the judges in a very uncomfortable position. Hence, the

³³ In that regard, it is important to note here that expressions like “constitution”, “democracy” or the “rule of law”, just as expressions like “right”, “liberty”, or “law” have the nature of amphibologies. While they are commonly used to refer to properties or states of affair, they also have positive connotations that cast a favourable light on the political structures with which they are associated. Thus the utterance “X is a democracy” will usually be interpreted as describing some properties of X, but in many cases it will also imply “X is good”. These kinds of connotations are quite problematic from a scientific point of view because, even if our purpose is strictly descriptive, any description of a state of affair using these terms runs the risk of being interpreted as a value judgement on that state of affair. So, in order to avoid the controversies that this sort of interpretation invariably triggers, we may decide not to employ these expressions at all and to replace them with perfectly neutral substitutes. For example, instead of saying “democracy”, we could say “system whereby the addressees of public policies are themselves involved in the definition of these policies”. As this example illustrates, however, the obvious downside of this solution is that the typical reader or listener will find it more difficult to make sense of what we say, precisely because amphibologies like “democracy” or the “rule of law” have been basic categories of political thought for centuries and still forms the horizon from which most people make sense of their political reality. That solution, therefore, seems to be appropriate and justified only when we deal with expressions that have connotations which are so strong that they will hamper any sober discussion of the issues addressed whatsoever. On the other hand, considerations of accessibility and readability should prevail where sounding controversial might be effectively prevented by the attachment of an explicit statement that the term is not intended to carry any value judgement. I adopt the latter strategy here with respect to “democracy”, the “rule of law”, “constitution”, “constitutionalism”, and “law”.

best rhetorical strategy, for those who want to defend the courts and their rulings, is to argue not just that it is possible to adopt a different ontology of law from whose perspective judges have no discretion, but also that other ontologies of law are wrong. Doing so will suggest that judging is about, and only about, applying the “law” and that any other claim to the contrary is necessarily wrong because the unique correct definition of “law” is the definition under which law is inseparable from morality. As I have hinted above, Dworkin’s attack on H.L.A. Hart can be interpreted as an application of this strategy. Dworkin was not ready to accept Hart’s claim that his and Hart’s projects were distinct enterprises and that there is “enough room for both in jurisprudence” (Hart 1994). In the American context, where the Supreme Court was subject to sharp criticism, Dworkin wanted to monopolise the use of the label “law” for his Supreme-Court-friendly theory of adjudication.

That, however, is (clever) propaganda rather than science (at least in the modern, Popperian, sense of the term). What is problematic is the starting-point of this controversy about the “true” definition of law, namely the assumption that definitions are in the business of being true or false. Conceptual realism – the view that concepts should be treated as truth-functional – is questionable in theory and, at any rate, unworkable in practice. It is a questionable philosophical doctrine because we should not assume the existence of an entity (such as conceptual facts, whatever they might be) unless we have good reasons to do so. That is, basically, the principle of ontological parsimony known as Ockham’s razor: if we can coherently explain a practice without making some ontological assumption about the existence of an entity, we should refrain from doing so (Spade 2006). Since we already have a coherent account of the use of concepts and definitions that does not posit the existence of conceptual facts, we should therefore refrain from positing the existence of such facts. Conceptual realism is also unworkable in practice because, even if we admit the existence of conceptual facts, there are no intersubjectively transmissible criteria available that could enable us to adjudicate between competing definitions – between competing representations of the conceptual facts. In a nutshell, the objection is: if you believe in conceptual realism, then please show me where and how I can observe your conceptual reality! Of course, nobody, and certainly not Ronald Dworkin, has offered any convincing refutation of that objection.

So, as it turns out, there is no good reason to accept the Inseparability Thesis. Worse yet for the proponents of natural law theories of adjudication, I actually see good reasons to question the scientific viability of the natural law enterprise even if we consider it independently of the Inseparability Thesis. Indeed, natural law theories of adjudication seem to presuppose a form of moral realism (see e.g. Dworkin 2004) which is as questionable as the form of conceptual realism I have just discussed. The problem is essentially epistemological. For, even if we admit some form of moral realism and admit that moral propositions are truth-functional (are in the business of being true or false) – which is by no means a self-evident assumption –, we still need an epistemology: a set of intersubjectively transmissible criteria to arrive at reliable representations of the moral facts. But how can we observe and verify moral propositions? How do you prove that the proposition ‘slavery is wrong’ or ‘charity is good’ is an accurate representation of moral reality? No philosopher, nor any legal theorist, has yet offered a convincing solution to this problem. Actually, most contemporary philosophers in the analytic tradition reject moral realism and the idea that moral propositions are in the business of being true or false (see, for instance,

Blackburn 1994). By contrast, propositions describing positive norms can be treated as empirically falsifiable, because we have intersubjectively transmissible criteria to check their accuracy. If we say that it is not legally permissible to drive faster than 65 miles per hour on American motorways, we can go and read the statute book to check whether this is true. In the same way, we can check the accuracy of the proposition that ‘nobody who is less than 35 years of age may be elected to the office of President of the United States’ by reading the text of the U.S. Constitution. We only need to know the linguistic conventions that were used by the drafters of this document. And everybody, knowing the conventions, should reach the same conclusion.

The lack of a workable epistemology condemns natural theories as empirical theories. For scientific purpose, treating moral propositions as truth-functional is pointless. It is why we should differentiate between what is and what is not empirically falsifiable. That is precisely the distinction that underpins my distinction between prescriptive and legal-positivist theories of adjudication.

Rule-Scepticism: there are no such things as legal rules

The second objection I want to address here comes from the opposite corner of academia. Critical legal scholars, and legal theorists like Michel Troper or Roberto Guastini, claim that meaning and interpretation are purely subjective. The interpretation of speech acts is not a cognitive act. Rather, it is a volitive act. In other words, legal rules do not exist objectively, only subjectively. They exist only in the interpreter’s mind. Bishop Hoadley’s famous remark in his Sermon to the King aptly sums up this form of rule-scepticism: “Whoever hath an absolute authority to interpret any spoken or written laws, it is he who is truly the law-giver to all intent and purposes, and not the person who first wrote or spoke them”. What this entails for courts and judges is obvious. In this view, statutory and constitutional rules are nothing more than what the judges say they are. And this has nothing to do with any judicial tendency to ignore the rules. Rule-sceptics admit that judges may be sincerely committed to the letter of the law. But they argue that such commitments are illusory: The commands the judges will believe to be and will present as being the letter of the law will in fact be their own value judgements as to what the law ought to command. Thus the law is, and can only be, what the judges say it is. Needless to say, on this account of meaning and interpretation, there can be no descriptive theory of adjudication aiming at analysing the relations between the decisions of the courts and the norms that these decisions are supposed to apply since the latter norms do not objectively exist. To sustain their position, scholars subscribing to this kind of rule- or meaning-scepticism invoke the works of post-modern philosophers like Jacques Derrida, Michel Foucault, Roland Barthes, Stanley Fish, and Richard Rorty, or, alternatively, Saul Kripke’s sceptical reading of the late Wittgenstein (Kripke 1982).³⁴

³⁴ The defunct school of Scandinavian legal realism also subscribed to the proposition that legal language is totally indeterminate. This position was grounded in the (equally defunct) philosophical doctrine known as “logical positivism”. Advocating a verificationist definition of meaning, logical positivists held the view that a statement is meaningful if, and only if, it is empirically verifiable. Normative sentences, therefore, were viewed as meaningless, since they could not be verified.

Note that, contrary to a widespread belief, American legal realists, as opposed to their Scandinavian cousins, did not espouse any form of meaning-scepticism. They did claim that legal norms were not a major determinant of judicial decision-making. But they did so not because they assumed that

Rule-scepticism has far-reaching implications, not only for adjudication and the study of judicial decisions, but also for democracy, constitutionalism, and the rule of law.

The view that linguistic meaning is not and cannot be constitutively independent from the interpreter's mental states is fatal to the idea of democracy, for it suggests that the commands of the people or of their elected legislature cannot be obeyed. If the words and sentences used to express legislative obligations and prohibitions only have the meaning its interpreters want them to have, then a legislature is an instance of featherbedding and writing legislation is a waste of time. Similarly, rule-scepticism suggests that constitutions are not worth the paper they are written on and that constitutional conventions produce nothing but hot air. This implication is encapsulated in Chief Justice Hughes' famous remark that: "We are under a constitution, but the constitution is what the judges say it is". The rule of law does not fare any better under the rule-sceptic account of adjudication. It is nothing more than the rule of judges.

Obviously, all this seems rather counter-intuitive. Can we seriously believe that so many people are so utterly wrong about the role of legislatures and constitutional conventions? Do pressure groups really lobby legislators in vain? Do statesmen and politicians merely delude themselves when they spend money and energy to write and amend constitutions? From a purely analytic perspective, however, that rule-scepticism is counter-intuitive would not be a problem if the doctrine were logically consistent. But it is not. Rule-scepticism is inconsistent and, in last analysis, self-refuting because the denial that words and sentences have objective meaning leads to the conclusion that judicial decisions do not exist objectively. Judicial decisions are also expressed through words and sentences. So, by denying the objectivity of meaning, the rule-sceptic ends up denying the existence of judicial decisions. If interpretation is purely subjective, then so does the interpretation of judicial rulings. The rule-sceptic may accept this implication. But then her statement that 'the law, or the constitution, is what the judges say it is' becomes unintelligible. Indeed, if words and sentences just mean whatever we choose them to mean, then the law is no more what judges say it is than what anyone else says it is. The legal system and judicial pronouncements are just whatever anyone of us wants them to be. The rule-sceptic position is vulnerable to a further objection. If indeterminacy is a feature not solely of legal texts, but of all texts, the rule-sceptic faces the impossibility of enunciating her own position. In other words, if Derrida is right that the meaning of any text is totally indeterminate, then we can say that *De la grammatologie*, his major opus, is just a cookbook or that the writings of critical legal scholars are not about adjudication, but rather about, say, hiking. The fact that Derrida criticised John Searle (in *Limited, Inc*) for misreading his work – thus suggesting that, after all, there was such thing as a correct reading of his text – shows that he, too, could not live up to his own scepticism.

D. Legal-Positivist Theories of Adjudication

So far, I have devoted most of the present section to a defense of legal positivism. Yet I have not said much about how legal-positivist theories understand adjudication. Let us

constitutional and statutory rules are totally indeterminate, but because they assumed that the cases which are brought before the courts are precisely those vis-à-vis which these rules are indeterminate. (See Leiter 1998: 273, 2000: 278-301.)

have a look at two legal-positivist theories, namely the theory developed by H.L.A. Hart, and the one developed by Adolf Merkel, Hans Kelsen and their followers.

1. *Hart's Theory: judicial discretion and open texture*

Like Kelsen and Merkel, Hart tried to explain how we identify legal norms and, therefore, judicial decisions. He did so by modeling legal systems as the union of primary and secondary rules. In short, secondary rules (which, typically, are procedural rules) specify the criteria by which primary rules are identified as rules of the system. Hence what counts as a judicial ruling (which is a kind of primary rule) is determined by the secondary rules specifying the composition of judicial bodies, the procedure for the adoption of decisions and so on. Hart's main contribution to the study of adjudication, however, was his theory of judicial discretion. He drew on insights from the philosophy of language to show the link between the indeterminacy of legal language (what he called the "open texture" of legal rules) and the extent of judicial discretion. Where the meaning of legal provisions is determinate vis-à-vis the case at hand, Hart argued, judges have no discretion. In such "plain" cases, finding the solution of the case is purely a matter of cognition. By contrast, where legal provisions are indeterminate regarding the case at hand, judges will enjoy discretion in deciding whether the rule applies to the case or not (Hart 1961: ch. 7).

2. *Merkel, Kelsen, the Pure Theory of Law, and Adjudication*

Hart's ideas have been much more influential in the English-speaking world. And despite the fact that his writings postdate the publication of Merkel's work on the hierarchy of norms and the first edition of Kelsen's *Pure Theory of Law*³⁵, the "normativist" theory developed by the two Austrian legal theorists and further refined by their followers is much more sophisticated than the account of law and adjudication expounded by Hart in *The Concept of Law*. This difference in depth and sophistication is largely owing to a difference in ambition. Kelsen and Merkel wanted to lay down the ontological and epistemic foundations for a scientific discipline that would study law as a normative phenomenon. They also carefully worked out the consequences of their theory for judicial review and the separation of power. Hart, on the other hand, had a much more modest purpose in mind. He did not purport to offer a fully fledged methodology for the study of legal phenomena, nor a reinterpretation of the concept of the separation of power. Instead, *The Concept of Law* was supposed to offer an accessible answer to the question "what is a legal system?" from the point of view of ordinary language philosophy.

Apprehending legal systems as dynamic normative systems, Kelsen, Merkel, and their disciples, have developed a battery of concepts and tools which permit us to situate the courts and to analyse their operations in the legal system as a whole. The first of these tools is the theory of norm hierarchy. Like the distinction between primary and secondary rules in Hart's theory, the theory of norm hierarchy helps explain, via the concept of validity, how legal norms are produced and identified as such. The theory of norm hierarchy also offers, through the concepts of supremacy and conformity, an account of the mechanisms through which legal systems ensure the destruction of legal

³⁵ Actually, Hart borrowed many ideas from Kelsen, such as the distinction between primary and secondary rules.

norms by other legal norms: the abrogation of old laws by new ones, the primacy of certain norms over others in case of incompatibility, etc... Put differently, the theory of norm hierarchy helps to flesh out the notion of imputation by differentiating the various ways in which the norms of a legal system relate to each other. Besides fathering the theory of norm hierarchy, the “Viennese school of jurisprudence” also emphasized the necessity to distinguish the cognitive and the volitive dimensions of the application of legal norms by state authorities – whether legislative, executive, or judicial in character.

These concepts and theories have led Kelsen and others to revisit the traditional dichotomy between the creation and the application of law, and, in so doing, the concept of separation of powers:

The concept of ‘separation of powers’ designates a principle of political organization. It presupposes that the three so-called powers can be determined as three distinct coordinated functions of the state, and that it is possible to define boundary lines separating each of these three functions from the others. But this presupposition is not borne out by the facts. As we have seen, there are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coordinated but sub- and supra-ordinated. Further, it is not possible to define boundary lines separating these functions from each other, since the distinction between creation and application of law – underlying the dualism of legislative and executive power (in the broadest sense) – has only relative character, most acts of State being at the same time law-creating and law-applying acts. It is impossible to assign the creation of law to one organ and the application (execution) of law to another so exclusively that no organ would fulfil both functions simultaneously. (Kelsen 1946: 318-9).

Since administrative agencies and ordinary courts find themselves at the same level in the hierarchy of norms, they are viewed as performing the same legal function: applying legislative norms. Legislative bodies and administrative agencies may differ with respect to their composition and decision-making procedures, but their legal function is nonetheless the same: they apply general and abstract legal rules to individual cases. The same reasoning led Kelsen to the conclusion that constitutional courts are in fact co-legislatures since they operate at the same level of the hierarchy of norms as legislatures: the legal function of a constitutional court, as that of a legislature, is to apply general, abstract, and usually, vague constitutional norms to more concrete issues. Of course, constitutional courts or supreme courts endowed with the power of judicial review may differ greatly from legislative assemblies in their composition (but it is not necessarily the case: look at the French Constitutional Council) and internal organization. Yet they exercise the same sort of legal function. Kelsen, who was personally involved in the setting up of the first European constitutional court, the Austrian Constitutional Court (*Verfassungsgerichtshof*), explicitly stated that the power wielded by a constitutional court makes it a “negative legislator” (Kelsen 1928). When such a tribunal annuls an ordinary law, Kelsen contended, its decision has the same legal effect as a law repealing a pre-existing statute. More recently, using the same theoretical framework, some authors have claimed that, through the development of the

technique of admonitory decisions, some constitutional courts – most notably the GFCC – have turned themselves into positive co-legislatures (Behrendt 2006).

To determine the precise limits of judicial discretion and to analyse juridical argumentation with exactitude, the followers of Merkel and Kelsen have used the tools of linguistics and formal logic (Thaler 1982; Pfersmann 2005a, 2001). Refining the ideas of their intellectual mentors, they have shed light on important features of adjudication as well as key legal notions. First, giving concrete contours to Kelsen’s famous characterization of the legal norm as a framework within which different solutions are made available to the judge, they have analysed judicial discretion as a consequence of two linguistic phenomena: vagueness and ambiguity (Thaler 1982). Next, following the insistence of Merkel and Kelsen on the necessity to treat separately the cognitive and volitive elements involved in the application of legal rules by state authorities, they have, as it were, re-interpreted the notion of “interpretation”. From a linguistic perspective, a legal norm is a deontic proposition – that is, a proposition containing a deontic modality (denoting that something is mandatory, forbidden, or permitted). A deontic proposition is the meaning of an utterance. In a natural language (most legal norms are expressed in natural, rather than artificial, languages), the meaning of an utterance is more or less context-independent. Partly at least, the meaning of an utterance is a function of the words used (i.e. of lexical usages) and of the way these words are assembled (i.e. of syntax)³⁶. It is also, most of the time, partly context-dependent. The meaning of a sentence is also a function of its context of utterance. The same sentence will have a different meaning according to the context in which it is uttered. For example, if I utter the sentence “Do you have a table” in an Ikea store it will normally be ascribed a very different meaning than if I utter it in a restaurant. Now, normativist scholars have defined “interpretation” or “analytic interpretation” as the task of identifying the lexical, syntactical, and contextual determinants of meaning (Pfersmann 2005a). Thus defined, interpretation is a purely cognitive activity and the aim of the interpreter of a legal provision is to determine the contours of the normative proposition that it expresses. It also follows that a judicial ruling cannot be properly described as an “interpretation”. A judicial decision is not merely a description of the meaning of a legal provision, for the decision is itself a legal norm. Although a court must engage in interpretation to apply the legal rules correctly, the decision of a court is not – or at least, not only – an analytic interpretation. Even if a decision is based on a perfectly correct analytic interpretation, it is more than just an interpretation. It is also the result of the judges’ volition to act in accordance with that interpretation. Moreover, when – for lexical, syntactical, or contextual reasons – the meaning of a legal provision is indeterminate vis-à-vis the case at hand, the court’s decision will always reflect more than merely the judges’ choice to abide by the normative proposition enunciated by the legal provision. A legal norm has the structure of a conditional proposition:

For all x, if x is C, then it is obligatory that L (or alternatively: it is permitted, or forbidden, that L).

³⁶ Indeed, two sentences containing exactly the same words may nonetheless have distinct meanings. E.g.: “everybody loves someone” and “someone loves everybody”. Any theory of meaning must account for the syntactic dimension of language.

So, if *C* is indeterminate vis-à-vis *a*, the decision of the court will also reflect the judges' choice to apply or not to apply the legal consequence *L* to *a*. The decision will reflect how the judges have decided to specify the condition *C* vis-à-vis *a* – whether they have specified *C* so as to include *a* or, on the contrary, so as to exclude *a*. Specifying this, however, is not engaging in interpretation, because interpretation ends precisely wherever there is a choice to be made. Normativist scholars like Otto Pfersmann (2005a, 2005b) describe the volitive dimension of the application of legal rules – the choices involved in the application of general norms to concrete cases – as “concretization” (Pfersmann 2005b: 87-88). These concepts and the use of linguistic analysis help measure precisely the extent to which judicial pronouncements are imputable to the choices of the constitution-makers or the legislators. Lastly, theorists subscribing to the normativist strain of the legal-positivist paradigm have contrasted *judicial* and *legal* argumentation. When legal rules are indeterminate – that is, when the meaning of legal provisions is vague and/or ambiguous – vis-à-vis the cases brought before them, judges must find justifications for their decisions outside the legal system (Pfersmann 2005a). They need extra – by definition, non-legal – justifications to supplement their (indeterminate) legal justifications for action. To that extent, judicial argumentation will go beyond the limits of legal argumentation. In short, judicial argumentation overlaps but does not coincide with legal argumentation.

D. Relations between Legal-Positivist and Socio-Political Theories of Adjudication

The propositions of a socio-political theory cannot falsify the propositions of a legal-positivist theory. And, vice-versa, the proposition of a legal-positivist theory cannot falsify the proposition of a socio-political theory. In that regard, the two approaches are really complementary. Yet the legal-positivist approach is, in a sense, more basic. Not only is a judicial decision a legal norm. General legal norms – constitutions and ordinary laws – also regulate and, more importantly here, constitute courts. Judicial decisions can only be identified via other legal rules.³⁷ Any socio-political theory must presuppose, at least, a minimalist legal-positivist account of how judicial decisions are identified via other legal rules.³⁸ Acknowledging this, socio-political theories of judging may benefit from the insights of legal-positivist theories of adjudication. More specifically, to the extent that they purport to determine the effect of legal rules (precedents, or constitutional or statutory norms) on judicial behaviour, socio-political studies of judicial decision-making are likely to benefit most from the kind of linguistic analysis advocated by legal positivists.

³⁷ There is undeniably an important similarity between the view that legal rules have, at least for some of them, the nature of constitutive rules (in the sense of Searle 1985: 126-127) and the argument from sociological institutionalism that institutions have a cognitive dimension (see above, note 9). Constitutive legal rules – the legal norms through which the other norms of the legal system are identified – are cognitive institutions in the sense that they enable the addressees of the legal system to identify what counts as a legal norm. To use the game-metaphor, the constitutive legal rules are the institutions which constitute the legal game and enable the actors to make sense of the actions in this game.

³⁸ Brian Leiter makes a similar point concerning the relationship between American legal realism and the kind of legal positivism advocated by H.L.A. Hart. According to Leiter, far from being incompatible with Hart's position, the theory of adjudication defended by American legal realists “must presuppose a theory of law, one that is, in fact, a kind of [legal] positivism” (Leiter 2000: 279).

IV. The Prescriptive Approach

I shall be comparatively briefer in my discussion of the prescriptive approach. After a cursory look at the literature, I will examine the relationship between this approach and the two other.

A. *Ad Hoc* Versus General Political Philosophy

I have argued above that traditional legal scholarship can be viewed as a rhetorical enterprise. I think, however, that it may as well be characterised as a prescriptive enterprise. Many jurists explicitly acknowledge the prescriptive orientation of their work and some legal theorists – those who subscribe to the Inseparability Thesis in particular – even claim that legal scholarship is inherently prescriptive. Their prescriptions, however, are rarely informed by the works of political philosophers. Rather, the jurists have developed their own, separate, *ad hoc* political philosophy (see e.g. Dworkin 2004). On the other hand, mainstream political philosophers, perhaps put off by legal jargon and the obscurity of judicial opinions, have not shown much interest in courts and judges.

This lack of interest on the part of political philosophers combined with the tendency of lawyers to defend their positions in rhetorical rather than analytical terms explains why the debate on the merits and demerits of particular decisions or the institution of judicial review has been, by and large, sterile. On either side of any issue, the position of the other camp is, most of the time, not taken seriously, but, instead, dismissed out of hand, ridiculed, or caricatured. In Western Europe, the law professorate tends to support a strong judiciary. Constitutional scholars, in particular, are often the most vocal advocates of constitutional adjudication. They praise constitutional courts and the benevolent judges who happen to sit on them, while the opponents of the institution are branded as extremists and their views dismissed as those of the lunatic fringe (see e.g. Favoreu and Philip 2005). In the same register, the consensual tone of much of the literature on the ECJ seems at times to suggest that only a fool or a fascist could disagree with the Court. Arguably, there is more critical distance in legal scholarship on the other side of the Atlantic (Sadurski 2005). Yet, with a handful of exceptions (Bickel 1961; Ely 1980), the discussion on and around the Supreme Court and the pros and cons of judicial review has assumed a rather contentious, if not acrimonious, tone. Instead of carefully investigating and balancing the costs and benefits of the institution, its advocates habitually resort to emotional appeals to history and the protection of human rights (e.g. Perry 1982). Lambasting the judges and their “apologists” as “philosopher-kings”, sometimes likening the justices of the Supreme Court to Iran’s ayatollahs (see e.g. Graglia 1996, 2004), the opponents of judicial review do not always express themselves in a sober prose either.³⁹

Thanks to the influence of philosophers like Jeremy Waldron (1999) and Jürgen Habermas (1992), this may be changing however. Waldron’s nuanced but forceful case against judicial review now makes the job of its proponents significantly harder. No longer can one assume or present the virtues of the institution as self-evident. Nor can

³⁹ The normative law and economics literature is less rhetorical and more rigorously analytical. Yet the leaders of the law and economics movement – seemingly assuming that efficiency is a universally accepted moral standard – rarely, if ever, engage with mainstream political philosophy and what authors such as John Rawls have said about efficiency as a standard of justice and fairness.

one reject the view that a society's commitment to human rights need not translate into a commitment to a judicially enforced bill of rights as absurd, as some used to. Those who disagree with Waldron can hardly avoid engaging with his argument. Until now isolated from the more general politico-philosophical debate on the morality of political institutions and law-making, the prescriptive discourse on courts and judges may thus become more fully conversant with mainstream political philosophy.

B. The Relationship Between Prescriptive and Descriptive Approaches

Evaluative and prescriptive researches on courts and judges can only be fruitful if they are informed by a correct descriptive understanding of what courts and judges do. To decide whether we like or dislike what judges do, we need first to know, with the highest possible degree of exactitude, what they really do. As John Ferejohn points out:

[I]t seems impossible to engage in meaningful normative discourse – to criticize practice or give advice – without some conception of how political institutions either do or could be made to work. (Ferejohn 1995: 192.)

To find out what judges do or could do, we need socio-political as well as legal-positivist theories of adjudication – preferably good ones. Enlightenment political thinkers, from Montesquieu to Hamilton, tried to develop and to defend the principles of constitutionalism, the separation of powers, and judicial review. But the problem, as we have seen, was that their argument rested on a naïve understanding of adjudication. They presupposed a formalist theory of adjudication that modern linguistics has shown to be implausible in light of the indeterminacy of the semantics of natural languages. What is the force of an argument premised on such implausible premises?

Arguably, the force of Waldron's case against judicial review owes much to his more plausible socio-political (there are political disagreements among judges), legal (constitutional language is often indeterminate), and moral (moral realism is unworkable in practice) assumptions about what real-world courts and judges do (Waldron 1999). In a similar fashion, the most convincing attempts at justifying the practice of judicial review have been produced by scholars who, like John Hart Ely, acknowledged the fact that constitutional provisions are largely indeterminate and that judicial rulings cannot be defended on the assumption that judges are merely the mouth of the constitution (Ely 1980: ch. 2).

Conclusion

We can approach and study courts and judges from three different perspectives. And what we learn from these different perspectives contributes to our broader knowledge of adjudication. With a view to improving the interdisciplinary discussion and to facilitate the cross-fertilisation of the disciplines that study judicial institutions, I have tried to show that it is crucial to treat these approaches separately as focusing on distinct facets of judicial law-making. I think that we will understand courts and judges better and will be able to design better judicial institutions if we keep in mind the distinctions I have attempted to bring out when we use the insights and compare the findings of different theories.

At the outset, I said that the literature on courts and judges at large suffers from two shortcomings. For one, it is often unclear what the approach adopted by those who purport to say something on the topic is. That is true, in particular, for the “legal” literature. For another, there is a tendency on the part of political scientists and, to a lesser extent, on the part of legal scholars to ignore or to belittle the findings and insights of the other discipline. Obviously, this kind of attitude usually flows from a simplistic and partial view of the scholarship produced by the other discipline. In any case, however, arrogance is not helpful. While I think political scientists are right to reject traditional legal scholarship as an essentially rhetorical enterprise, I also think they would gain from reading the works of legal theorists such as Hart, Merkel, Kelsen, Walter or Pfersmann. It would sometimes prevent them from making unreasonable assumptions about the way legal systems work and the effects of judicial decisions. In trying to refute the view that Court of Justice’s activism had undermined intergovernmentalist theories of European integration, Geoffrey Garrett, for example, has argued that the Court of Justice would never issue decisions running counter to the interests of big Member States such as France and Germany. If the Court’s decisions would run counter to their interests, Garrett claims, the governments of these Member States would simply ignore the rulings (Garrett 1995). Yet the argument is premised on a wholly erroneous understanding of the preliminary ruling mechanism and its legal effects. Indeed, when the ECJ renders a preliminary ruling regarding the compatibility of national legislation with EU law, its decision is carried out by the national court which made the referral. That court will be willing to follow the ECJ’s ruling, for otherwise it would not have made a referral in the first place (except perhaps in specific cases where the Treaty of Rome makes referrals mandatory). But more importantly, if the ECJ rules a piece of national legislation contrary to EU law, the decision of the national court implementing the ruling will have the effect of invalidating the legislation. From the point of view of the national legal system, the legislation does not exist anymore and the national government cannot even try to implement it. Whatever its determination to pursue its policy, it cannot even try to enforce a law that no longer exists. In other words, as long as national courts cooperate with the ECJ, national governments – be they the governments of France and Germany – cannot ignore the Court of Justice’s pronouncements. Garrett’s argument overlooks the fact that legal norms, including judicial decisions, are constitutive rules in that they enable the actors to identify what counts as law (cf. Stone Sweet 2004: 116-7). Vanberg’s game theoretic model of constitutional court/legislature interactions also makes insufficiently thought out assumptions about the legal consequence of a constitutional court’s decision declaring a statute unconstitutional. His model proposes that, whenever the constitutional court has ruled a law unconstitutional, the legislature may always decide to evade the decision and go on to implement the policy despite the judicial veto (Vanberg 2005: 24-38). But again, the assumption that this strategy is always available to the legislature leaves out the fact that, at least in the European model of judicial review, a constitutional court’s declaration of unconstitutionality has the same effect as a statute abrogating another statute: the decision deprives the statute of legal existence and trying to implement it becomes pointless. As it turns out, legislative non-compliance must be something else than a pointless attempt to enforce a law that is no longer a law. This is what the examples of legislative evasion discussed by Vanberg (2005: 2-8) would suggest. Yet his failure to deal with the legal effects of judicial decisions makes his notion of “judicial veto” a little fuzzy. If the judicial veto is not the

declaration of unconstitutionality, then what is it? If it is, then how can a legislature evade a judicial veto? All this speaks for more interdisciplinary dialogue along the methodological lines laid out in the present article.

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