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Dogmatic and Social Scientific Activism in the *Lochner* Era

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Abstract. The *Lochner* era has much to say about conceptions of judicial role and judicial activism, and can be used as an analytical example. I examine the era from the aspect of judicial reasoning. The analysis is composed of three main units. First, I point out a distinction between judicial and constitutional, as well as between single activist decisions and tendencies. Second, I sketch a theoretical framework that concerns the inclusion of social sciences into judicial reasoning. "Social scientific passivistic" reasoning features references to exact data from social sciences, and tends to uphold the legislative action in question. On the other hand, "social scientific activistic" reasoning refers to social scientific data and aims to strike down the legislative action in question. In a similar vein, "dogmatic activistic" reasoning is grounded on precedents and methods of legal interpretation, tending to strike down a legislative act, while "dogmatic passivistic" reasoning aims at upholding such an act. These categories are not mutually exclusive; however, they help to analyze constitutional decisions with directing attention to their nature behind their *prima facie* content. Finally, I apply the scheme to the Supreme Court's *Lochner* era constitutional adjudication.

Keywords: Lochner, judicial activism, Supreme Court, United States, constitutional reasoning

1. INTRODUCTION

Since the second half of the 20th century, judicial activism has become a heated topic, which may be considered as a natural outcome of the inherently political relevance of the issue. Although the problem already led to clashes between the legislature and the judiciary in the first decades of the 20th century – culminating in the scandal of the famous "court-packing plan" – it became most acute during and after the 1950s and 1960s, when the United States Supreme Court struck down a series of regulations affecting civil rights, thus revolutionizing a range of issues in constitutional law. "Judicial activism" came to be used as a sharp criticism against this tendency, referring mostly to the counter-majoritarian character of the Court's practice. For decades, this indicated little more than the dissatisfaction of the critic with the direction of one Supreme Court decision or another. It was only around the 1980s that a detached and theoretical treatment of the problem of judicial activism began to take place. My paper is intended to contribute to this debate.

This article consists of four main units. In Section 2, I explain two preliminary distinctions. In Section 3, I reflect upon the most important theoretical statements on, and characterizations of, judicial activism. In Section 4, I expound my own views. The core of this part does not focus primarily on a new definition of judicial activism (although naturally I do explain what characteristics of judicial practice constitute activism in my opinion), rather, I offer a categorization based on the existence or lack of references to scientific treatises in a judicial opinion. Finally, in Section 5, I briefly apply my scheme to a series of decisions handed down between the 1890s and 1937 by the so-called "*laissez-faire* Court".

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2. PRELIMINARY DISTINCTIONS IN THE ANALYSIS OF JUDICIAL ACTIVISM

Before coming to the central topic of the article, I would like to point out two distinctions that arise when one is dealing with the "activism" of a court.

2.1. Judicial and constitutional activism

The title of the article contains the expression "judicial". Although it is obviously "activism" that is emphasized here, its possible epithets, "judicial"[1] and "constitutional"[2] also deserve attention, because they have different meanings.

In contemporary legal scholarship, activism became inseparably connected with constitutional review of legislative acts. In the United States, constitutional adjudication is decentralized, belonging to the jurisdiction of ordinary courts. In Europe, it is centralized: it is practiced by a specialized body that is institutionally distinguished from the ordinary judicial system. In the latter case, the expression "judicial activism" includes a qualification of the activity of ordinary courts as well, irrespective of whether they take constitutional provisions into consideration during legal interpretation.[3]

It also deserves mentioning that if one associates the term "activism" with "illegitimate transgression of judicial authority", decisions that apply broad legal interpretation, have long-term effects, and restrict the working of another branch of power, can also be categorized as "activist".

"Constitutional activism" is a narrower term, which is related to the object, not the subject of activism. A constitution sets up the foundations of society, determines the relationship of the state and society, defines and secures fundamental rights, equal protection of the laws, and regulates the structure and functioning of the organization of the state.[4] In modern legal systems these rights also establish constitutional claims on the part of an injured party who wishes to have his or her injuries remedied (provided he or she is affected by the case to a certain degree). In my opinion, there are two reasons for the fact that such petitions are often based on fundamental rights, and these circumstances also explain why it seems plausible to characterize activism as "constitutional".

Firstly, constitutional interpretation – and specifically the interpretation of basic rights – is a field where jurisprudence and "external" considerations (like those of moral philosophy and economy) perceptibly interweave, in other words, law becomes more interdisciplinary and less autonomous.[5] Also, an average person identifies more easily with problems related to fundamental rights, than with those connected to the functioning of the state organization, and thus being more distantiated from everyday thought and concerns. It is more probable that the average person turns to a court deciding constitutional issues because he or she feels that, for instance, a certain provision of a certain act discriminates

[1] See most of the United States articles and books dealing with this subject.

[2] This is more characteristic of European studies, see eg Renata Uitz, 'Constitutional Activism and Deference through Judicial Reasoning: Confirming an Indeterminacy Thesis' (*Juridica International*, VII, 2002) < http://juridicainternational.eu/index.php?id=12577 > accessed 5 February 2015; Laurent Scheek, 'Constitutional Activism and Fundamental Rights in Europe: Common Interests through Transnational Socialisation' < http://polilexes.com/POLILEXES/textesdirects_files/constitutional_activism.pdf > accessed 5 February 2015

[3] Pokol (2006) 73.

[4] This is a verbatim translation of the definition in Takács (2010) 23.

[5] As to the general tendency, see Posner (1987) 761.

against him or her unconstitutionally among other similarly situated persons, or because it restricts his or her religious freedom unconstitutionally, than because it impairs the principle of the separation of powers or the distinction of state and federal jurisdiction.

Secondly – though not independently of the above stated – fundamental rights are abstract enough to be related to a great variety of legal disputes by petitioners. It does not take a top lawyer to deduce the opposition of a legal provision to the right to human dignity, the prohibition of discrimination, or the right to due process. In Hungary – and probably in most European countries – the right to human dignity and the prohibition of discrimination are recurring elements of petitions presented to the Constitutional Court.[6] In the United States, many petitions are entirely or partially grounded on the infringement of the freedom of speech, the impermissibility of the denial of life, liberty, and property without due process of law, and the equal protection of the laws.[7] Affected petitioners thus resort to possibilities provided by fundamental rights rather than to provisions regulating questions of, say, state organization.

2.2. Unique decisions and judicial trends

It is one thing to label a specific decision activist, and it is quite another to say that a court is activist in a given period, that is, on certain issues, its adjudication systematically shows traits that are indicative of activism one way or another. Focusing on certain specific decisions in themselves obscures the broader connections that pertain to the phenomenon of activism. For instance, such an attitude does not help at all to reveal the long-term effects of the decision or the frequency of decisions with a similar outcome or similar reasoning. On the other hand, paying attention only to broader trends may provide a false view by emphasizing only the quantitative aspects of the activism problem, for example, by showing only the statistical proportion of decisions striking down legislative acts, but without delving deeply into the argumentative features that appear in such decisions. These two approaches are, of course, necessarily connected, and are not mutually exclusive; what is more, it is highly beneficial that a researcher takes both of them into consideration, but nevertheless, I consider this analytical separation necessary, because it gains significance in discussing certain attempts at defining activism.[8]

3. APPROACHES TO THE DEFINITION OF JUDICIAL ACTIVISM

In this section, I am going to introduce three approaches to judicial activism. These are not necessarily original attempts at definition, rather, some of them are overviews of the implicit or explicit conceptions most commonly expressed.

[6] In Hungary, from January 1st, 2012, the right to human dignity is provided by Article II, the prohibition of discrimination is declared by Article XV of the Fundamental Law of Hungary *(Magyarország Alaptörvénye)*. Before the Fundamental Law was enacted, the formerly effective Act XX of 1949 of the Constitution *(az Alkotmányról szóló 1949. évi XX. törvény)* provided these fundamental rights in Paragraphs 54 and 70/A.

[7] Freedom of speech is provided by the First, the right to due process is guaranteed by the Fifth and Fourteenth (federal and state level), and the equal protection of the laws is provided by the Fourteenth Amendments to the Constitution of the United States.

[8] Cf. e.g. 3.2.2.

3.1. Wolfe and the development of judicial review

One of the most acknowledged authors who systematically discussed the problematics of judicial activism is Christopher Wolfe, whose definition of activism can be summarized in connection with the historical development of judicial review. Wolfe distinguishes between three forms of judicial review that appeared historically in succession. The first one, traditional judicial review, lasted from the birth of the United States to the end of the 19th century. This approach to constitutional interpretation is characterized by the conviction that the basic norm of the legal system is a coherent whole with a clearly identifiable meaning, and this meaning can be determined solely by the text and the possible intention of the framers. The former was the primary source of the meaning of the Constitution, while the latter was counted as a supplementary instrument in case of the insufficiency of the text. Besides, courts treated the Constitution – partly because of its written character, partly because of its crucial role as a source of law – as a directly applicable law, the primacy of which differs in no way from that of, say, a statute with respect to executive orders.[9]

Around the framing of the Constitution it was still debated whether judicial review had a right to exist. In the end, supporters of its legitimacy came out victorious, but its application turned out to be quite restricted. In this era, the Supreme Court typically refrained from striking down laws, as is traceable in *McCulloch v Maryland,* where Chief Justice Marshall declared that "it is a *constitution* we are expounding".[10] In this oft-cited sentence he indicated that a constitution should be interpreted restrictively, because such practice warrants that the legislature is not hampered in adequately solving the ever-changing problems of society.[11]

Traditional judicial review was followed by the transitional one, which was dated by Wolfe to the beginning of the 20th century, thus essentially identified with the "conservative activism" of the Supreme Court. This can be related to the ratification of the Fourteenth Amendment, and a change in the interpretation of certain of its provisions. This Amendment, prescribing for the states the requirement of due process and the equal protection of the laws, and protecting the "privileges and immunities" of United States citizens, was originally aimed at the protection of certain rights of newly freed slaves,[12] however, its general wording made it possible for its provisions to be applied in debates not directly related to the emancipation of freedmen, and these regulations, especially the Due Process Clause, became instruments of the protection of substantive legal rights. This change in interpretation made it possible for the Supreme Court to strike down certain laws – mostly state laws – based on the right to "liberty" – in this respect, mostly liberty of contract – and property. This judicial attitude rooted in an idea presupposing the existence of a certain "natural justice",[13] and the assailed regulation was measured to this justice.[14]

[9] Wolfe (1986) 41–51.

[10] "[I]t is a *constitution* we are expounding." 17 US (4 Wheat.) 407.

[11] This is emphasized by Scalia (1989) 852–853.

[12] Wolfe (1986) 125.

[13] Wolfe (1986) 147.

[14] Scholars mostly agree that one of the foundations of the American Constitution was the idea of classic natural law – the assumption of certain inalienable rights. This inspired the framers to ratify the Bill of Rights as well, the necessity of which was, by the way, hotly debated. The way of enforcing natural law is also a matter of debate. On the one hand, the written Constitution and its catalogue of rights are the results of the idea of natural law, because principles of moral philosophy became part of

The third type of judicial review in Wolfe's typology of modern judicial review according to him is a product of the Supreme Court's extension of fundamental rights in the 1950s. The main characteristic of this era is the lore of the "living Constitution", the notion that the abstract regulations of a constitution should always be interpreted in light of the specific time of application. The rationale of this thought is that changing times breed changing violations of the Constitution, a problem that can only be addressed by an ever-adapting practice. Modern judicial review is thus joined by a broad interpretation of the Constitution, originating in some higher principles. These principles may even be values outside the written text of the Constitution.[15] Also, in modern judicial review, standing is usually broadened.[16]

In this framework, a polarization of two conceptions of the role of a body conducting constitutional interpretation may be traced. Traditional judicial review may be characterized by judicial self-restraint, while modern judicial review may be characterized by judicial activism.[17] Under this approach, the difference between self-restraint and activism is not only in degree, but in quality, because they represent two radically different conceptions of power.

The positioning of transitional judicial review in this framework, however, remains uncertain. Wolfe argues that traditional review is characterized by a conscious abstaining from striking down laws, while the modern era is represented by judicial legislation: "Judicial activism, in this framework, is the exercise of 'legislative' power by courts in constitutional cases."[18] Meanwhile, the transitional era seems to be a mixture of the two others: On the one hand, the notion that judges should refrain from "legislation" was still vivid – and was often emphasized in opinions of the Court in the first decades of the 20th century –; on the other hand, findings of unconstitutionality sometimes significantly hampered legislative efforts and "social experiments". In other words, the Supreme Court did not assume a legislative role in any way, but it already became a hindrance to it.[19]

the written law; on the other hand, this inclusion into a written text implies its insufficiency, the possibility of legal gaps, which may require the utilization of sources beyond the Constitution. Some scholars claim that this reliance on extra-constitutional sources was already involved in the original conception of the framers. Others question this conviction. Sherry (1987) 1127–1177; Michael (1991) 421–490.

15 For example, Justice Brennan, in his concurring opinion in *Furman v Georgia,* a case dealing with the constitutionality of capital punishment, argues that the guiding principle in interpreting the Eighth Amendment (forbidding "cruel and unusual punishments") is human dignity, a value not explicitly named in the Constitution of the United States. Brennan argues that four further principles can be deduced from human dignity with respect to the Eighth Amendment. 1. Inflicting punishment, however lenient, for certain conditions (e.g. being sick) in itself violates human dignity. 2. Severe punishments must not be inflicted arbitrarily. 3. A severe punishment must not be unacceptable to contemporary society. 4. A severe punishment must not be excessive. 408 US 270–282 (1972).

16 The problems of standing shall be further elucidated in 3.3.3., in connection with *Roe v Wade*.

17 Wolfe (1997) 30.

18 Wolfe (1997) 30.

19 Wolfe somehow seems to reflect an oft-repeated premise that the Supreme Court systematically and consequently struck down acts of legislatures, even though statistics do not buttress such conclusions. For such a survey already from 1913, see Warren (1913) 294–313; for later analyses pointing out that the Supreme Court was in fact driven by a consequent notion of equality rather than a pure (or ruthless) *laissez-faire* ideology, see generally Gillman (1993).

3.2. Five approaches to activism in Kmiec's typology

Rather than offering a definition of his own, Keenan D. Kmiec distinguished five current conceptions of judicial activism. In this chapter, I am going to introduce these approaches with a minimal correction, and some of their flaws.[20]

3.2.1. Decision instead of other branches

The two approaches introduced in this section were treated separately by Kmiec, however, I think they should be treated as the two aspects of a same phenomenon: that one way or another, an activist court restricts the discretion of other branches of power: in one case, this restriction is negative (that is, declaring a legislative act unconstitutional), in the other, the substitution of a lacking decision takes place.

3.2.1.1. Striking down arguably constitutional actions of other branches

Activism is deemed problematic because of its inherent conflict with the majority principle, a problem referred to since Bickel as the "counter-majoritarian difficulty".[21] In fact, the problem becomes most visible in the relationship between courts and legislatures, and I am going to focus on this aspect, even though Kmiec includes the executive branch as well.[22]

Activism is not to be mistaken for the striking down of obviously unconstitutional actions. In an article, Frank Easterbrook treats activism and all types of striking down as the same (though perhaps he did not lack a certain irony),[23] when he, after examining a sample of fifty years, concludes that courts of both types (that is, either conservative or liberal) are activist to the same degree.[24] However, I agree with Kmiec that such an approach to activism is not very revealing.[25] On the one hand, striking down the assailed act in certain cases is quite natural by a body dealing with constitutional adjudication; on the other hand, there may be cases when an action is obviously in violation of the plain text of the Constitution (e.g. an act legalizing slavery). "Easy" and "hard" cases thus need to be taken into consideration.

Problems still do ensue. In *Buck v Bell,* the Court decided about the constitutionality of forced sterilization of imbeciles in Virginia. Justice Holmes delivered the opinion of the Court which was accepted with only one dissent.[26] Holmes argued that if the strong can be called to sacrifice their life for the community, a lesser sacrifice may properly be expected from its weaker members: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."[27] Later he writes one of the most condemned sentences in American constitutional history: "Three

[20] Kmiec (2004) 1463–1476.

[21] Bickel (1986) 16–23.

[22] Constitutional review may concern orders of the executive branch as well, as exemplified by *Myers v United States*, 272 US 52 (1926), the central question of which was whether the President has the power to dismiss executive officers without the agreement of a legislative body.

[23] Easterbrook (2002) 1407.

[24] Easterbrook (2002) 1409–1410.

[25] Kmiec (2004) 1464.

[26] This sole dissenter was Justice Butler, whose avowed Catholicism in fact made his choice predictable for his colleagues. See Leuchtenburg (1995) 14.

[27] 274 US 207 (1927).

generations of imbeciles are enough."[28] This latter utterance is especially revealing, because it seems to reflect a devotion to the spirit of the legislative action in question. Nowadays, Holmes' Social Darwinism is a well-known fact to anybody researching American constitutional law, and it seems quite plausible to detect his identification with the act in question beyond his famous (yet sometimes debated[29]) passivism. Several decades later, critics of the "conservative Court" also argued that the Court is more lenient towards acts in accordance with conservative or republican values.

A special case that may be treated here is the opposition of the court to an act that expresses historical traditions. *Planned Parenthood v Casey*[30] and *Lawrence v Texas*[31] both dealt with highly divisive issues – the former with abortion, the latter with the criminalization of consensual sexual relationships between consenting adults. *Casey* introduced the standard of "undue burden" to the regulation of abortion, thus digressing from *Roe v Wade*'s[32] trimester system. *Lawrence* overruled *Bowers v Hardwick*,[33] declaring the sanctioning of consensual homosexual relationships unconstitutional on privacy grounds.

In *Casey*, Justice Scalia dissented, arguing that the restriction of abortion is in accordance with the traditions of the American people.[34] This argument was brought up in the dissenting opinion of Chief Justice Rehnquist as well.[35] Here, the case is clear: Justice Scalia and the Chief Justice implicitly found it activistic for a court to oppose traditions.

In *Lawrence v Texas*, however, the role of traditions seems dubious. Speaking for the Court, Justice Kennedy stated that "[i]n our tradition the State is not omnipresent in the home".[36] Later he wrote that "it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter".[37] What he said, in other words, is that the criminalization of homosexuality cannot be grounded by tradition. He also argued that such regulations were not enforced against adults conducting consensual homosexual acts at home.[38] The importance of tradition in this argument may be sensed from the criticism of the abortion decisions: "Roe and Casey, of course, subjected the

[28] 274 US 207 (1927).

[29] Phillips (1999) 439–477.

[30] 505 US 833 (1992).

[31] 539 US 558 (2003).

[32] 410 US 113 (1973).

[33] 478 US 186 (1986).

[34] 505 US 980. Scalia also argued that as the Constitution does not expressly require the States to allow abortion, its restriction cannot be judged unconstitutional. His argumentation is reminiscent of Holmes. In Scalia's words, "[a] State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a 'liberty' in the absolute sense." 505 US 980. In his dissent to *Lochner v New York*, Justice Holmes wrote: "A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work." 198 US 76. Thus, both of them argue in fact that if an explicit constitutional prohibition in a certain question is lacking, and a reasonable person may find the respective regulation defendable, it cannot be deemed unconstitutional.

[35] "Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is 'fundamental.'" 505 US 952.

[36] 539 US 562.

[37] 539 US 568.

[38] 539 US 569.

restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition."[39]

In his dissent, Justice Scalia argued that in spite of Justice Kennedy's allegations, regulations against homosexual acts were enforced by authorities.[40] He also criticized the usage of the term "emerging awareness", condemning it because it "is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires."[41] What should be noted here is that a reliance on traditions may be illusory, because the identification of "tradition" also faces serious hardships.

3.2.1.2. Judicial legislation

In certain respects, judicial legislation is the opposite of striking down arguably constitutional actions of other branches: in this case, the judiciary, instead of placing a provision out of the effective legal system, inserts one into it.

The emergence of judicial legislation can be anticipated mostly in case of legal gaps, that is, in situations when the applicable legal regulation does not provide a clear answer. Constitutional law often faces such problems, because constitutional texts ought to be flexible. As Chief Justice Marshall declared in *McCulloch v Maryland,* "[a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[42] Ambiguity in meaning is inevitable. Of course, this makes "judicial legislation" inevitable as well, but its extent may be debated.

Miranda v Arizona is an illustrative example.[43] The Supreme Court settled some basic guidelines concerning the interrogation of a person in custody, the most important of which is that he or she has to be clearly informed about the right to remain silent, that anything he or she says will be used against him in court, about the right to consult with a lawyer and to have the lawyer with him during interrogation, and about the possibility of appointing a public defender to represent him. This decision is a typical example of the case when the judiciary prescribes positive duties to the legislator.[44] Chief Justice Warren, speaking for the Court, detailed the circumstances of custody and interrogation that wield an undue influence on the suspect even in the absence of physical abuse,[45] and he argued that these led to the violation of the Fifth Amendment's protection from self-incrimination. Later studies, however, seriously criticized the effectiveness of the *Miranda* doctrine. For instance, Cassell points out – citing Sam Gross – that "before *Miranda,* the typical way in which a

[39] 539 US 588.

[40] 539 US 598.

[41] 539 US 598.

[42] 17 US 407.

[43] 384 US 436 (1966)

[44] One may add, however, that some more extreme forms of judicial legislation also did occur. Cox describes a case when the proceeding court enumerated specific criteria of constitutionality in connection with the accommodation of asylum patients, like the sufficient amount of warm water or the adequate proportion of patients and nurses. Cox (1976) 96–98.

[45] 384 US 445–458.

miscarriage was discovered was that 'the actual criminal was arrested on an unrelated charge and, after being held in custody for a day or two, she confessed to the perpetration of all the crimes charged to the misidentified suspect.' Since that time, Gross concludes, such exonerations through true confessions appear to have declined significantly, with *Miranda* being a possible cause."[46] Judge Posner criticized the broad constitutional interpretation of the Supreme Court concerning defendant rights, stating that "a great upsurge in crime rates accompanied the 'Warren court's' adventurous rulings in criminal procedure, although the causality is deeply uncertain, there is some evidence that these rulings did cause crime rates to rise."[47] This example aptly shows how "extra rules" derived from the Constitution may restrict legislative action in a debatable way.

3.2.2. Ignoring precedent

The importance of precedents is derived from considerations of justice and legal certainty, identified by Schauer as the requirements of fairness and predictability.[48] Besides, Schauer emphasizes the effectiveness provided by precedents as later decision makers can rely on the arguments of earlier decisions, and the coherence resulting from following precedents may raise the dignity of the respective body.[49] A digression from a deeply established precedent therefore may cause great stirring among lay and professional audiences alike.

Kmiec introduces this approach by sketching two relationships, namely that of "horizontal versus vertical", and "constitutional versus statutory versus common law" precedents.[50] This separation need not be addressed here, as my concern is solely with the relationship between constitutional precedents.

The relationship between *Plessy v Ferguson*[51] and *Brown v Board of Education*[52] is an illuminating instance of activism as ignoring precedent, which, however, also raises a problem immediately. As is well known, *Plessy* held racial segregation in public transport constitutional, in so far as the quality of the service is equal. This principle was first set aside by *Brown,* in connection with a discriminating school regulation in Topeka, Kansas.[53] For this reason, *Brown* is often regarded as activist, though mostly a "good" one.[54] This activist decision became a precedent, but on the basis of the current definition, a digression from it may inevitably count as activism, even if it is aimed to restrict the scope of judicial review practiced by the Supreme Court on the basis of constitutionally arguable reasons. For such reasons, this definition of activism is extremely malleable and relative.

3.2.3. Departures from accepted interpretive methodology

A great impetus for the systematic analysis of legal interpretation was Savigny's separation of four classic methods of interpretation, while in the 20th century, an important contribution

46 Cassell (1999) 532.

47 Posner (1995) 74.

48 Schauer (1987) 595–598.

49 Schauer (1987) 599–601.

50 Kmiec (2004) 1466–1471.

51 163 US 537 (1896).

52 347 US 483 (1954).

53 In this context, *Brown* is usually paired with *Plessy*, however, *Plessy* was not explicitly overruled by *Brown,* and the decision invalidating public transport segregation specifically was *Boynton v Virginia*, 364 US 454 (1960).

54 Swygert (1982) 456–457.

was provided by the Bielefeld Circle that distinguished eleven interpretive methods in Western countries.[55] It is now obvious that legal interpretation is not something conducted according to uniform and indisputable rules. This state of affairs entails two problems. Firstly, choosing from different methods of interpretation is a matter of legal philosophical premises, and the legal thought of a given country influences its practice of legal interpretation as well. But such preferences are not constant in the long run. For example, in the first decades of the 20th century, natural law premises affecting the constitutional adjudication of the Supreme Court were replaced by a more pragmatic-self-restrained approach. Disregarding these considerations would result in labeling *West Coast Hotel v Parrish*[56] an activist decision – an unusual conclusion, to say the least. Later, the rise of originalism called attention to the "original intent" of the framers (whatever way one may identify this) – once again disfavoring broad interpretation. Digressions on behalf of a more restrictive interpretive method may thus, this way, be seen as activist decisions.

Second, as Kmiec also mentions, no real or reassuring professional consensus exists regarding proper methods of legal interpretation.[57] Of course, this is basically true, but I think it should be corrected in two aspects. On the one hand, this is mostly true of the United States, where the community of legal professionals shows an unparalleled variety in social background, schooling, and other relevant characteristics, which is perceptible in the variety of interpretive approaches as well. On the other hand, despite this variety, the main judicial body of the United States follows a more or less coherent practice which is mostly followed by lesser courts, too. The duty of adhering to precedent helps to ensure a relative certainty amidst the manifoldness.

3.2.4. Result-oriented judging

Kmiec considers this attempt at definition the most suitable one.[58] Indeed, it helps to bridge the difficulties ensuing from connecting activism to striking down certain actions. The specific result that the judge presumably aspires to reach may be achieved either by striking down or by upholding the respective action. The emphasis is on the intent of the judge, instead of the outward result. This aspect, however, makes the approach speculative, too, as we are in effect forced to make presumptions on the content of the judge's mind.

3.3. Dimensions of judicial activism according to Lindquist and Cross

In 2009, Stefanie A. Lindquist and Frank B. Cross published their research measuring judicial activism statistically. Its first chapter deals with the possible approaches to activism. Here, the authors do not write about its definitions, rather, they enumerate its four dimensions.

3.3.1. Majoritarianism and deference to other governmental actors

This dimension, focusing on the counter-majoritarian difficulty, can be identified with Kmiec's "striking down" definition. The authors consider this dimension unfit for empirical analysis, because it implies hardly identifiable poles, namely those of judicial "minimalism"

[55] Summers et al. (1991) 464–465.
[56] 300 US 379 (1937)
[57] Kmiec (2004) 1474.
[58] Kmiec (2004) 1476.

and "maximalism".[59] The former means an effort to digress from accepted doctrines as little as possible, introducing a gradual change where necessary. In the latter case, the judge does not refrain from radical changes.

3.3.2. Interpretive stability and fidelity

This aspect seems to refer to the degree of adhering to authoritative texts in general,[60] therefore it is broader than Kmiec's "ignoring precedent". In my view, this label is more fitting, because it involves more types of objectified grounds of legal interpretation, like the text itself, precedents, or documented legislative history. Perhaps legislative intent may be partially deemed an exception, as this intent may be identified in the subjective (and hypothesized) intent of the framers, too. This partial exception, however, does not discredit the overall picture. Also, it needs to be mentioned that in most cases the enumerated instruments serve to interpret the text of a legal regulation.

3.3.3. Institutional aggrandizement

According to Cross and Lindquist, institutional aggrandizement takes place when a court examines questions it excluded from judicial scrutiny in earlier instances for certain reasons.[61] This approach is new to the aforementioned ones, and is of specific interest.

One way of extending the range of examinable questions is the reinterpretation of the Court's self-imposed restrictions. In *Baker v Carr,*[62] referred to by the authors, the petitioners argued that the state of Tennessee reapportioned the seats of the General Assembly among the 95 counties in a disproportionate way, and thus they suffered a "debasement of their votes". The Court struck down this rule on the ground of the Equal Protection Clause. By taking this step, the Court abandoned its "political questions" doctrine, which was maintained in *Colegrove v Green*,[63] a judgment cited by the representatives of the State, and in which the examination of a similar question was dismissed on the grounds of political questions.[64] The Court disregarded this precedent,[65] arguing that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question".[66]

[59] Lindquist et al. (2009) 35–36.

[60] Lindquist et al. (2009) 36–37.

[61] Lindquist et al. (2009) 37.

[62] 369 US 186 (1962).

[63] 328 US 549 (1946).

[64] 328 US 554–556.

[65] Lindquist and Cross mistakenly write that in *Baker v Carr,* the Court overruled *Colegrove v Green.* Lindquist and Cross (2009) 37. But although *Colegrove* naturally fell out of practice, its inapplicability was not "officially" declared by the Supreme Court, and the decision was simply ignored.

[66] 369 US 209. Speaking for the Court, Justice Brennan referred to a number of precedents in which the Court dealt with similar issues on the merits, political questions notwithstanding. These, however, are all *per curiam* decisions, mostly unanimous ones, with only a couple of sentences serving as reasoning. There are only two exceptions. The opinion in *South v Peters,* 339 US 276 (1950), is about one page long, however, it does not deal in any way with the degree to which courts may examine issues of franchise on the merits. In *MacDougall v Green,* 335 US 281 (1948), it seems clear that the petition is dismissed, even though the Court dwells for about two and a half pages on the considerations that make the regulation in question reasonable. It may be mentioned that these two latter decisions are not unanimous, this fact, however, has no bearing on what has been written so far.

In *Baker v Carr*, the Court broadened its authority to deal with questions previously excluded from scrutiny. But the broadening of authority has occurred in other ways too. In *Roe v Wade*, the Court decided the issue on the merits, even though, in Epstein's opinion, the case of the female petitioner was a typical case of mootness, as she already gave birth to her child. According to Justice Blackmun, who delivered the opinion of the Court, declaring the case moot would lead to an absurd result, for "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete".[67] Of course, there are serious considerations in favor of this viewpoint, because an opposite decision would inevitably exclude certain persons from the possibility of initiating constitutional review. However, a more serious dilemma arises: the legal involvement of Norma McCorvey was questionable, as the assailed regulation ordered the punishment only of persons who assisted a woman in an abortion. In a strict sense, only persons performing abortion on a woman could have been affected by the Texas statute.[68]

3.3.4. Result-oriented judging

While Kmiec considered this definition as the most suitable one, Cross and Lindquist said that it only provides ground for political accusations of activism, and thus leads to the blurring of the concept, because no consequence can be drawn from it, except regarding the political-ideological alignment of the critic.[69]

4. DOGMATIC AND SCIENTIFIC ACTIVISM AND PASSIVISM: ONE POSSIBLE TYPOLOGY

What can be told of the enumerated definitional attempts is that they can be classified as focusing either on the outward result of the court's conduct ("externally oriented approaches"), or the judge's inner motives ("internally oriented approaches"). Most possible definitions are externally oriented, as is the case with "decision instead of other branches", "ignoring precedent (or other authoritative texts)", "institutional aggrandizement", or Wolfe's "modern judicial review", while "result-oriented judging" is internally oriented. Of course, these possible approaches in themselves cannot grasp the complexity of judicial activism. Both focal points bear importance in such an attempt, albeit in a different way. Externally oriented approaches emphasize objective, perceptible features that appear as a result of activist judicial conduct. This is inevitable if one wishes to set up a definitional framework. Internally oriented approaches aim at tracing the specific intent of the judge, which is also important in identifying seemingly non-activist conduct (like declining to strike down an act from ideological reasons, as described in 3.2.1.1.); however, such inner motives are by the nature of things very hard to prove. For this reason, I am inclined to agree with Lindquist and Cross in that accusations of activism on this ground reflect only the ideological standpoint of the accuser.

In my view, judicial activism can be best defined as a systematic judicial invalidation of acts of other branches (most commonly those of the legislature), which is buttressed by a reasoning applying a broad interpretation of the respective constitution. The focus is thus

[67] 410 US 125. For Epstein's critique see Epstein (1973) 162.

[68] It deserves mentioning that there was indeed such a petitioner in the case. Of course, the story of Norma McCorvey, subjected to a series of hardships in her life, is much more memorable for the public. E.g. Hitchcock (2007).

[69] Lindquist et al. (2009) 39.

twofold: firstly, it is placed on the pure result (invalidation), secondly, on the legal reasons that led to this result. Thus one may avoid the fallacies that can ensue from restricting analysis to only one external circumstance (like identifying activism solely with invalidations, without regard to the clearness of the constitutional text), and view the problem in a more refined way. It must be mentioned that by this definition, I omit the instances when a court is self-restraining due to ideological reasons. This is not because I deny such a possibility, rather, because I consider activism as a judicial conduct that positively seeks to overstep the judicial role understood solely as the applier of law. A self-restraining judge, though perhaps acting from ideological reasons, does not overstep these limits.

I think activism can be categorized further on the basis of the reasoning of activist decisions. Decisions of the Supreme Court (or any body dealing with constitutional adjudication, for that matter) sometimes refer to scientific works of one kind or another. This ensues from the nature of things: constitutional adjudication – not unlike regular adjudication – concerns all areas of life. Although a court reviewing the constitutionality of an act does not have – indeed, it is forbidden – to examine the facts of the case before it, it cannot avoid other factual issues: it has to be informed of the general facts of the situation which concern the case. Regular courts do not necessarily face this problem, because legal rules tend to be more or less specific, thus providing more restrictive guidelines. Constitutional provisions are, however, abstract, and require concretization, which ought to be done with regard to the relevant facts of the issue at hand. Taking just a fleeting glance at some cases cited above, one can see a wide variety of problems arising: racial segregation and schooling, abortion, reproductive rights, and the situation of the fetus, economic regulation, same-sex relationships and their (presumed or real) effect on society's morals. All these fields are addressed in detail by representatives of different systems of knowledge: sociologists, medics, economists. The judge whose work is to concretize constitutional norms is advised to consult these fields of science in order to be able to compare such norms with the reality they are intended to regulate.

Thus, the typology I wish to introduce here is based on the presence of such references to scientific treatises. I understand "scientific treatises" to mean mostly analyses in the social sciences, because many constitutional cases (especially the ones that stir harsh debates) are connected with questions related to these fields, but natural sciences are not excluded. The issues enumerated in the previous paragraph show a connection with both fields.

"Dogmatic activist" decisions contain arguments of a speculative nature. This means that beside striking down the assailed provision and applying a broad interpretation, they state facts in an *a priori* way, by relying on "common sense", "obvious" or "well-known" circumstances. Such facts or circumstances are the presupposition of the material equality of contracting parties in connection with freedom of contract (that is, beside formal equality, parties are presumed to be conscious and rational actors, who are able to estimate the consequences of their decisions, to protect their own interests, and to choose the alternative that is the best for them), or to the contrary, the presupposition that one party will misuse his or her advantageous position during the making of a contract. On the other hand, "dogmatic passivist" decisions, besides upholding the respective provision based upon a narrow interpretation, use similar speculative statements of facts.

On the other hand, "scientific activist" decisions explicitly refer to scientific data to buttress a broad interpretation aimed at striking down a provision. "Scientific passivist" decisions also apply such express references, but this is used to uphold the respective rule.

As written above, it is irrelevant whether the cited work belongs to social or natural sciences. It must be added that such an argumentation does not need to be unobjectionable from a scientific standpoint. In this context, the crucial feature is not that the judge declares the indubitable truth in a question outside jurisprudence, but that he or she involves such external viewpoints to make his or her opinion more convincing.

The question may arise as to where references to jurisprudential works would belong. In my opinion, the emphasis here is that the reference is made to a work that is external to jurisprudence. Therefore, if an opinion contains reference only to jurisprudential works, it is still to be considered "dogmatic".

5. THE APPLICATION OF THE SCHEME TO THE "*LAISSEZ-FAIRE* COURT"

Taking a look at the tendencies of the Supreme Court's constitutional adjudication in the first decades of the 20th century, it seems quite clear that in proportion, the Court turned down far less market regulating acts than it actually upheld. Also, it seems that the Court was following a consequential (though perhaps outdated) mode of interpretation.[70] Turning to the reasoning of such decisions, the following tendencies deserve emphasis.

There were certain issues that could obviously be subject to regulation in the opinion of the Court. Such issues were the restriction of the trade of certain harmful wares (mostly "spirituous and intoxicating liquors"), the regulation of the quality of food, or later, the quality of roads. Decisions concerning these matters regularly show a pattern of upholding the impugned law. For instance, in *Clark Distilling Co. v Western Maryland Railway Co. and State of West Virginia,* Chief Justice White declared the following: "That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open."[71] Similarly, in *Mangano Co. v Hamilton,* Justice Sutherland stated that "[i]n respect of the equal protection clause it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation".[72] Such forceful language indicates that the Court considered certain issues as belonging to a broad legislative discretion due to their importance.

The Court often expressed its view that the evaluation of the wisdom of the legislative act before it is beyond its competence and authority, and this statement constituted an important part of its reasoning. Two examples that corroborate this statement are *Gant v Oklahoma City* and *Pacific States Box & Basket Co. v White*. In the former, Justice Sutherland emphasized that "[w]hether the judgment of the common council of the city in the present case was wise, or whether the requirement will produce hardship in particular instances, are matters with which this court has nothing to do".[73] In the latter – the opinion of the Court delivered by Justice Brandeis – it is declared that „[w]ith the wisdom of such a regulation we have, of course, no concern".[74] These and other similar utterances demonstrate that the Court was heedful of emphasizing that it acknowledged and respected the boundaries set by the separation of powers.

[70] These statements seem corroborated by Warren (1913) and Gillman (1993).
[71] 242 US 320 (1917).
[72] 292 US 43 (1934).
[73] 289 US 102 (1933).
[74] 296 US 182 (1935).

The Court frequently relied on precedents in its opinions, which is not so surprising in itself, however, it deserves mentioning that sometimes this reliance seems to fulfill the specific purpose of giving a greater weight to the reasoning, and making the conclusion seem necessary and inevitable. *Nebbia v New York*[75] spectacularly illustrates this point: the majority opinion (delivered by Justice Roberts) and the dissent both enumerate precedential authorities to support their conclusion, and the debate between them focuses on the proper interpretation of the cited decisions.

The Court regularly expressed its abstinence from deeming "scientific precision" a condition of constitutionality. For instance, in *Ohio Oil Co. v Conway,* it expressed the view that "[i]n levying such taxes [i.e. a severance tax on crude petroleum at specific rates per barrel] the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value".[76] A similar utterance can be found in *Sproles v Binford:* "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."[77] Such instruments of argumentation also led to underpin a passivist attitude.

It seems that the Court considered it its duty to find a constitutional interpretation to the acts before it, and to uphold it if there is such an alternative. Such a conviction is manifest in *Plymouth Coal Co. v Pennsylvania:* "it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority".[78] It may be remarked that sometimes the Court made exceptions to this practice, for instance, in *Yick Wo v Hopkins,*[79] a frequently cited case, the assailed municipal ordinance was struck down, because, although it contained neutral regulations, it conferred an arbitrary power to authorities, which indeed abused it. Nevertheless, the Court's efforts to discover a constitutional interpretation whenever possible are traceable throughout its early 20th century practice.

The Court was prone to take local conditions into consideration, and this inclination also led to the upholding of the assailed act. This is the case with *Advance-Rumely Thresher Co. v Jackson,* in which the Court upheld the statute before it with regard to the specific circumstances in the respective state.[80]

The Court was naturally also inclined to accept beliefs or convictions pertaining to social roles. In no decision is this inclination more manifest than *Muller v Oregon,* in which Justice Brewer, who delivered the opinion of the Court, wrote that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious".[81] It should be added that Brewer also took Brandeis' long *amicus curiae* brief into consideration, but it seems clear that even without the

[75] 291 US 502 (1934).
[76] 281 US 159 (1930).
[77] 286 US 388 (1932).
[78] 232 US 546 (1914).
[79] 118 US 356 (1886).
[80] 287 US 289–290 (1932).
[81] 208 US 421 (1908).

argumentation included in that document, the then widespread belief concerning women's social role quite palpably anticipated a similar utterance and result.

What has been written can be summarized as follows. The patterns of argumentation detectable in the practice of the Court in the first decades of the 20th century show that it mostly applied a dogmatic passivist mode of reasoning. The opinions obviously contained constitutional legal reasoning, and besides that, there are certain presumptions that also influenced the outcome. Scientific argumentation was rare, and it seems that it appeared mostly in Brandeis' opinions.[82] Also, certain single decisions show traits of dogmatic activism, like *Lochner v New York*.[83] Aside from these, however, it seems that the argumentative style of the Supreme Court can mostly be described as dogmatic passivist.

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[82] Instances of this are Brandeis' dissents in *New State Ice Co. v Liebmann*, 285 US 280 (1932), or *Louis K. Liggett Co. v Lee*, 288 US 541 (1933).

[83] 198 US 45 (1905)

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