

D.O.M.A.' s SECTION 3 IS UNCONSTITUTIONAL. A RESPONSE TO CHIEF JUSTICE SCALIA'S "WHAT ARE WE DOING?"*

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Summary: 1. Introduction; 2. The case U.S. 570__2013; 2.1. Chief Justice Scalia's dissenting opinion; 2.2 The Court's assessment of competence.; 3. The contemporary role of constitutional courts; 4. Conclusion

Abstract

The article analyzes the 570__2013 U.S. Supreme Court's case considering the objections made by Chief Justice Scalia on the merits and on the appropriateness of this judgment. In particular, references are made on the legitimacy of judicial review in cases involving a violation of fundamental principles. As argued, the aim of supreme judges in constitutional democratic systems is to protect individuals' rights despite the will of an electoral majority. Thus, this analysis discusses theories of judicial interpretation in order to stress the legitimacy of non-majoritarian decisions in a contemporary constitutional democracy.

1. Introduction.

This article examines the Supreme Court's 570 U.S. __2013 case¹, *United States v. Windsor*, discussing whether Chief Justice Scalia's dissenting opinion is well funded. This case is indeed quite unusual and controversial given the implications connected to the (re)definition of the Supreme Court's role as a democratic constitutional device in the United States, and in relation to the enhancement of the principle of equality despite the Congress' will².

As suggested by Justice Scalia, the Supreme Court could easily decide not to address the suit, avoiding to deal with the issue of same-sex marriage, and leaving in the Congress' hands the possibility – if willing to – to address equality claims on this subject. Nonetheless, the court has preferred to establish its competence and answer the claimants' demand for equal treatment.

In democratic constitutional systems the part played by a constitutional court is of crucial importance for two main reasons: (1) it ensures a resolution for those conflicts occurring between state's organs, i.e., it decides whether according to the constitution one institution has exclusive or concurring competence on a specific subject; (2) it rules on whether laws that are challenged before it are constitutional or, conversely, infringe rights enshrined in the constitution³.

Therefore, the role constitutional judges must be contextualized in order to verify whether restoring equality through judicial intervention is legitimate or not considering the prerogative of the legislator. Indeed, When a supreme court reshapes constitutional meanings, it has also to preserve the equilibrium within the system of separation of powers. The balance judicial review is able to preserve represents one of the main safeguard for democratic legal systems.

* Scritto sottoposto a *referee*.

¹ *United States v. Windsor*, *Executor of the Estate of Spyer, et al.* 570 U.S. __2013. From now on cited as *Windsor*.

² For an overview of the case, see I. MASSA PINTO, *Il potere di definire la sostanza veicolata dalla parola «matrimonio» tra politica e giurisdizione: note in margine alle recenti sentenze della Corte Suprema degli Stati Uniti*, in *Costituzionalismo.it*, fascicolo 2, 2013; A. SPERTI, *La Corte Suprema degli Stati Uniti compie un passo verso il riconoscimento del diritto al matrimonio delle coppie omosessuali*, in *www.forumcostituzionale.it* (1/7/2013).

³ G. BONGIOVANNI, G. GOZZI, *Democrazia*, in A. BARBERA (ed.), *Le basi filosofiche del costituzionalismo*, Laterza, Milano, 2005., pp.236-238.

This concept might sound in contrast with a purely procedural understanding of democracy, which conceives representation (through free elections) as the main guarantee for individuals' interests⁴.

However, a democratic regime is not 'by default' able to accomplish its duty of addressing individuals' demands for protection, especially in the case of minority groups. In a number of occasions, an electoral majority might disregard «the others' interests» without infringing democratic rules⁵. For this reason, judicial review might provide an essential (needed) support for underrepresented groups in contemporary democracies.

In particular, when family matters are concerned, the annexed implications connected with subconscious feelings regarding personal autonomy, motherhood, reproduction, masculinity, and sex-roles, are all challenged in light of societal changes.

When debating upon the opportunity of giving a legal status to same-sex unions, (either recognizing marriage or other types of legal institutions) the archetype of cultural gender relations is questioned.

Indeed, gender has been 'the key' for identifying the social status of sexes, first in marital relations, and then in society. The challenge posed by the consideration of different sexual attitudes is an element of pressure for standardized gender rules⁶. Love, sex, and individuals' expectations about the future are all involved in this debate⁷. In this context, homosexuality questions the dual and complementary relation between the male and the female as social (natural) unity.

As underlined by Koppelman, *the two stigmas – sex-inappropriateness and homosexuality – are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over the women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant [...] they appear to be guilty of some kind of insubordination*⁸.

Thus, the (un)willingness of constitutional judges to address, and have a final say on the issue of equality for same-sex marriage might be well explained by the very conflictual political environment surrounding this subject.

In the western world it is possible to list several examples of judicial deference concerning cases of same-sex unions' legal claims for recognition. The Italian case n.138/2010⁹, or the French case n.92/2010¹⁰ – which opposed to claims based on

⁴ See, A. J. LANGLOIS, *Human Rights without Democracy? A Critique of the Separationist Thesis*, in *Human Rights Quarterly*, vol. 25, n.4, 2003, p.1019; L. WHITEHEAD, *Democratization, Theory and Experience*, Oxford University Press, Oxford, 2002, p.20; R. DAHL, *On Democracy*, Yale University Press, New Haven, 1998, p. 38; S.P. HUNTINGTON, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1991, p.7; D. HELD, *Models of Democracy*, Polity Press, Oxford, 1987, p.2.

⁵ R. TONIATTI, *Minoranze e minoranze protette: modelli costituzionali comparati*, in T. BONAZZI, M. DUNNE (eds), *Cittadinanza e diritti nelle società multiculturali*, Il Mulino, Bologna, 1994, p.275.

⁶ M. DI BARI, *Same-sex unions in the EU system of protection of fundamental rights*, LAP Lambert, Saarbrücken, 2012, pp.95 ss.

⁷ B. PEZZINI, *Dentro il mestiere di vivere: uguali in natura o uguali in diritto*, Relazione al Convegno Amicus Curiae, 26 Febbraio 2010, Ferrara, available at: http://amicuscuriae.it/attach/superuser/docs/relazione_pezzini.pdf.

⁸ A. KOPPELMAN, *Romer v. Evans and Invidious Intent*, in *William & Mary Bill of Rights Journal*, vol. 6, n. 1, 1997, p. 129.

⁹ The Italian constitutional court argued that since an analysis *a fortiori* of foreign legal systems shows how it would be impossible to establish 'a single rule' in relation to homosexual life-partnerships, a judge would arbitrarily decide over a series of possible solutions (judgment n.138/2010, *considerato in diritto* 8). For this reason, the case was dismissed. See, R. ROMBOLI, *Per la Corte costituzionale le coppie omosessuali sono formazioni sociali, ma non possono accedere al matrimonio*, in *Foro it.*, 2010, I, p.1367; M. CROCE, *Diritti fondamentali programmatici, limiti all'interpretazione evolutiva e finalità procreativa del matrimonio: dalla Corte un deciso stop al matrimonio omosessuale*, in www.forumcostituzionale.it, 2010; F. DAL CANTO, *La Corte costituzionale e il matrimonio omosessuale*, in *Foro it.*, 2010, I, p.1369; L. D'ANGELO, *La Consulta al legislatore: questo matrimonio "nun s'ha da fare"*, in www.forumcostituzionale.it, 2010; F. CALZARETTI, *Coppie di persone dello stesso sesso: quali prospettive*, in www.forumcostituzionale.it, 2010; P. A. CAPOTOSTI, *Matrimonio tra persone dello stesso sesso: infondatezza versus inammissibilità nella sentenza n. 138 del 2010*, in *Quaderni costituzionali*, 2010, n. 2, pp.361 ss.

¹⁰ In this judgment the French *conseil constitutionnel* stated that: *'the right to lead a normal family life does not imply the right to marry for couples of the same sex; that, consequently, the provisions criticized do not infringe the right to lead a normal family life . [and] ... the principle of equality does not prevent the legislator from settling different situations in different ways, or from derogating from equality for the general interest, provided that in both cases the difference in treatment that results is either in*

rights-violation a 'lack of competence response' – have shown how judges might be reluctant to intervene on this very sensitive political issue.

2. The case 570 U.S. ___2013.

The 26th of June 2013 the Supreme Court of the United States has declared Section 3¹¹ of the Defense of Marriage Act (DOMA¹²) unconstitutional, considering its discriminatory nature under the Due Process Clause and the Fifth Amendment. The case originated by Edith Windsor an American citizen resident in the State of New York.

After registering her relationship with Thea Spyer according to the NYC's regulation (back in 1993), Windsor went to Canada to marry Spyer in 2007, and then the couple returned home in New York City.

In 2009 Spyer died and left her life-companion her entire estate¹³. Thus, Windsor applied for the federal estate tax exemption for survivor spouses, but she was banned to do so by DOMA, which explicitly excluded same-sex partners from the definition of 'spouses'.

The United States district court and the court of appeals ruled in favor of Windsor and order the federal government to pay a refund to the claimant. The decisions of the two courts were based on the assumption that Section 3 of the DOMA was unconstitutional.

Despite the attitude exhibited in previous cases, while Windsor's case was pending in court, the Attorney General of the United States notified the House of Representatives that the Department of Justice would no longer defend the constitutionality of DOMA's § 3, according to the President Obama's view¹⁴.

Nonetheless, though the President instructed the Department not to defend the legitimacy of DOMA, he also decided that Section 3 should have continued to be enforced by the Executive Branch (i.e. the ordered refund was not paid). The President's opinion was that '*the United States had an interest in defending Congress full and fair opportunity to participate in the litigation of those cases*'¹⁵. As a consequence, both the claimant and the Executive requested the Supreme Court to scrutinize the constitutionality of DOMA, or, using Scalia's words '*to say that [the lower courts'] judgment was correct*'¹⁶.

2.1. Chief Justice Scalia's dissenting opinion.

direct relationship with the subject of the law established thereby; that by maintaining the principle according to which marriage is the union of a man and a woman, the legislator has, in exercising his competence under Article 34 of the Constitution, deemed that the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family; that it is not for the Constitutional Council to substitute its judgment for that of the legislator regarding the consideration of this difference of situation'. Decision n.2010-92, delivered on 28 January 2011, para. 8. English translation available at <http://www.conseil-constitutionnel.fr/conseil>.

¹¹ Section 3 read: '*In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife*'. (1 U.S. C. §7)

¹² The Defense of Marriage Act was firstly introduced in May 1996 following both houses of the Congress' veto-proof majority vote, and then signed in September 1996 by Bill Clinton. This federal law permits States to refuse recognition to same-sex marriage granted under the law of other States. In addition, under Section 3 of the Act (now unconstitutional), it barred same-sex couples from being recognized as 'spouses' for the purpose of federal laws, thus excluding same-sex partners from the benefits usually associate to marriage (insurance benefits for government employees, social security for survivors, immigration, tax returns, etc.)

¹³ At that time, the State of New York neither recognized same-sex marriage domestically nor those celebrated abroad. However, in 2011 the *Marriage Equality Act* was approved, granting equal rights to opposite and same-sex partners.

¹⁴ *Report on enforcement of laws*, 28 U.S.C. 530D.

¹⁵ *Ibidem*, at 191-193.

¹⁶ Justice Scalia's dissenting opinion, 570 U.S. ___2013, p.5.

According to Justice Scalia, the Supreme Court simply lacked jurisdiction to review the decision of the courts below. In his view, this case was primarily about power, i.e. about the separation of powers principle. The court could not and should not get involved since the judicial power should have not invalidated an act democratically adopted by the Congress. In Scalia's view, the court has behave as an institution 'eager – hungry – to tell everyone its view of the legal question at the heart of this case'¹⁷.

Particularly, if one considers that Windsor won the case in both the district and appeals courts, there should have been no reason to intervene. As Scalia suggested, 'declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free standing role at all. We perform that role incidentally – by accident, as it were – when that is necessary to resolve the dispute before us. Then, and only then, does it become "the province and duty of the judicial department to say what the law is"¹⁸'.

Moreover, following Scalia reasoning, the U.S. Constitution does not forbid the government to enforce traditional and moral sexual norms, and 'even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid – indeed, downright boring – justifying rationales for this legislation [...], [and]"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'¹⁹

This position is very clear-cut and it is rooted in the understanding of judicial power as a residual element for the functioning of democratic constitutional systems. A perspective that denies the importance of constitutional judges as a democratic safeguard against the violation of constitutional (minority) rights.

Scalia's postulation regarding the absolute importance (prevalence) of the Congress in deciding «who is entitled of what», is modeled on the assumption that in a democratic system the 'free market of ideas' is sufficient to safeguard each and every position in society²⁰. Democratic participation is the ultimate guarantee for individuals' rights²¹. A standpoint which perfectly seizes what in legal doctrine is called the «counter-majoritarian difficulty²²».

This concern emerges particularly in those environments characterized by political pluralism, where constitutional courts might favor differentiation through judicial law-making, or might prompt conformity²³. In both cases judicial review might undergo criticism.

In the first case, when granting non-majoritarian views legal recognition, a court can undermine the perception of constitutional judges' legitimacy. In the second case, a court can discourage the democratic political debate by diminishing pluralism, hence 'freezing' democracy on majoritarian positions²⁴.

¹⁷¹⁷ *Ibidem*, 570 U.S. ____ 2013 ,p.1.

¹⁸¹⁸ *Ibidem* ,p.3.

¹⁹¹⁹ *Ibidem*, pp.18-19.

²⁰²⁰ Y. DAWOOD, *The Antidomination Model and the Judicial Oversight of Democracy*, in *The Georgetown Law Journal*, vol.96, n.5, 2007, (pp. 1411-1485), p.1422.

²¹²¹ S. ISSACHAROFF, R.H. PILDES, *Politics as Markets: Partisan Lockups of the Democratic Process*, in *Stanford Law Review*, vol.50, n.3, 1998, (pp.643-717), p. 645ss

²²²² The definition 'counter-majoritarian difficulty' was first adopted by Bickel in 1961, who explained how judicial review could be conceived illegitimate to the extent it allows unelected individuals (judges) to overrule what elected representatives have decided. In this conception, democracy is assumed to be legitimate as far as it implements the majority's will; democracy is thus 'reduced' to its procedural dimension and the problem of enforcing constitutional rights even against the will of the temporary political majority is unconsidered. See generally, A. M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 2nd edition, 1986.

²³²³ M. SCHWARZSCHILD, *Pluralism, Conversation, and Judicial Restraint*, in *Northwestern University Law Review*, vol. 95, n.3, 2001, (pp. 961-976), pp.961-962.

In legal doctrine, some scholars emphasize how judicial law-making relates to compensation, i.e. constitutional interpretation operates as a «repairing device» against abuses²⁵. Thus, courts would not act as engines of principles, and judges would be in charge of shaping the meaning of constitutional values to make rights concretely available only when strictly needed and required (appropriate).

On the other hand, for those who support judicial intervention, since a constitutional democratic system is made of several political checks also on constitutional judges (e.g. the way judges are appointed) the counter-majoritarian dilemma is a moot point. In this scheme, the risk that courts would be totally out of line vis-à-vis the majority of the population is ill-founded²⁶.

In addition, other commentators instead of adopting a «counter-majoritarian dilemma» approach, refer to «non-majoritarian decision» as structural feature of democratic regimes. Thus, supreme courts are perceived as one of the main democratic instruments to preserve fundamental rights. Those who support this idea underline how in a modern constitutional democracy the non-majoritarian attitude of courts is inherently associated with the necessity of enhancing the scope of fundamental rights despite the mood of political majority.

This model represents a way of going beyond the idea that legislative enactment is always needed to acknowledge changes in society²⁷. In other words, in describing *constitutional democratic systems*, while the «counter-majoritarian dilemma» puts emphasis on the word '*democratic*' (meant as electoral representation), the «non-majoritarian attitude» concentrates on the word '*constitutional*', solving the problem of legitimacy of judicial review within the normalcy of constitutional checks and balances.

2.2. The Court's assessment of competence

As underlined above, when politically sensitive issues, such as the one concerning equal treatment for same-sex partners, are at stake, a court has primarily to assess whether it is competent to address the case, or whether it should dismiss the lawsuit recalling the attention of other constitutional powers (e.g. the legislative).

As Habermas argues, the main problem posed to judges is how to preserve simultaneously the certainty of law, its rightness, and the legitimacy of the judicial decision-making process²⁸. Since decisions at judicial level must be consistent in their rationality, constitutional judges must justify their decisions adopting a line of reasoning able to overcome the risk of losing legitimacy. Hence, the counter-majoritarian dilemma and the related issues of legitimacy for judicial intervention might become an obstacle for supreme courts.

In this case, the U.S. Supreme Court had first to establish its competence to decide on the constitutionality of DOMA's § 3, and then addressing the case on the merits.

²⁴24 As Schwarzschild underlines: 'When the courts reach out to constitutionalize a public question, the result, in principle, will be a single answer, not the plurality of answers that might coexist if the question were left to the "political" branches, state and federal. This suggests that pluralism will usually weigh in favor of judicial restraint, although even from a pluralist point of view circumstances will sometimes justify more active review. Such circumstances, logically, are those in which there would be even less pluralism without a judicially imposed constitutional norm than there would be with one.' M. SCHWARZSCHILD, *Ibid*, 2001, p.966.

²⁵25 R. W. BENNETT, *Counter-conversationalism and the sense of difficulty*, in *Northwestern University Law Review*, vol.95, n.3, 2001, (pp. 845-906), p. 848.

²⁶26 According to Ackerman, courts are able to achieve changes in constitutional understandings only when they have a supporting mobilized majority behind them. In between these 'constitutional moments', an 'ordinary' form of politics prevails, and courts are relegated to the mundane business of consolidating the 'momentous' changes and integrating them with what had transpired before. See, B. ACKERMAN, *We the People: Volume 2: Transformations*, Harvard University Press, Cambridge, 2000, pp.10 ss.

²⁷27 G. GENTILI, *A "Worldwide Rights" Culture": A comparative perspective on transjudicial communication, counter-majoritarian difficulty and same-sex marriage*, Working Paper presented at the International Conference Equality and Justice, LGBTI Rights in the XXI century, Florence 12-13 May 2011.

²⁸28 J. HABERMAS, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge, (translated by William Rehg), 1996, p. 199.

The central problem was to determine whether *Windsor* was or not a controversy enabling the Supreme Court's power «to say the final word». In fact, the government did not defend the constitutionality of DOMA on one hand, and refused to pay a refund on the other (i.e. it continued to enforce DOMA despite it deemed this federal Act unconstitutional) .

As a matter of facts, both parties of the trial were convinced of the unconstitutionality of DOMA's § 3. Additionally, both the district court and the court of appeals ruled in favor of Windsor, thus seemingly leaving no room for establishing a dispute before the Supreme Court.

According to Article III of the U.S. Constitution – as interpreted by supreme judges – the jurisdictional requirements to be fulfilled before placing an appeal are:

First, the plaintiff must have suffered an “injury in fact”— an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent”, not “conjectural” or “hypothetical”. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely”, as opposed to merely “speculative”, that the injury will be “redressed by a favorable decision²⁹”.

Along with jurisdictional requirements, the Supreme Court must consider the so called «prudential limits», i.e. a prudential standing which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction³⁰’.

Thus, as the Supreme Court has stated:

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is³¹”.

Besides, as far as marriage in concerned, the Supreme Court has noted how this specific subject has traditionally been treated as being within the authority of State, while the Congress has usually regulated (residual) features falling within the application of federal law (e.g. the definition of requirements for granting federal benefits, or immigration law). Therefore, the constitutionality of federal laws regulating marriage has always rested in the exigency of furthering specific, non-generic, federal policies.

In light of this assumption, the Supreme Court has considered DOMA possessing a far greater reach, and has observed how this federal Act is aimed at preventing the enjoyment of rights for those individuals the laws of New York and of other 11 States have sought to protect³². As specified by the court:

²⁹²⁹ Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

³⁰³⁰ Allen v. Wright, 468 U.S. 751 (1984).

³¹³¹ *Windsor*, p.12,

³²³² *Ibidem*, p.16.

Against this background DOMA rejects the long established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision³³.

The Court has also acknowledged how DOMA, by depriving those individuals who are in a lawful same-sex marriage of the same guarantees afforded to heterosexual married couples, constituted a deprivation of liberty prohibited under the Fifth Amendment's Due Process Clause. In other words, the Constitution protects against denying to any person the equal protection of the laws. To strengthen this assumption, the Court has underlined:

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment³⁴.

3. The contemporary role of constitutional courts

A constitutional court, at least formally, neither adds nor creates anything: norms enshrined in the constitution possess their specific meanings which have to be reminded whenever laws seem to ignore them. However, despite the meaning of constitutional provisions might seem self-evident, thus binding judges in their interpretation, the operation constitutional judges have to carry out is neither a mathematical equation nor an application of syllogism³⁵.

When analyzing constitutional courts' case law, what is immediately clear is that judicial decision-making is a complex process of balancing. Indeed, *'if no value can claim to have an inherently unconditional priority over other values, this weighting operation transforms the interpretation of established law into the business of realizing values by giving them concrete shape in relation to specific cases'*³⁶.

³³³³ *Ibidem*, p.18

³⁴³⁴ *Ibidem*, p.25

³⁵³⁵ D. ROUSSEAU, *The Constitutional Judge: Master or Slave of the Constitution?*, in M. ROSENFELD (ed.), *Ibid*, p.261

³⁶³⁶ J. HABERMAS, *Ibid*, p. 254,

In this respect, the example provided by the two Portuguese judgments on same-sex marriage, namely ruling 359/2009³⁷ and ruling 121/2010³⁸, shows how judicial interpretation is able to address differently the same issue depending on the question concerned. In fact, the *Tribunal Constitucional* has decided upon the right to marry for same-sex unions by acknowledging firstly that there was no constitutional obligation³⁹, and subsequently stating that there was no constitutional ban⁴⁰.

Therefore, justices are not in charge of discovering the true meaning of the constitution, and the normative understanding of principles might be subjected to different interpretations. Since provisions are made of words, these words are contextualized. However, words have their own meanings and this represents one of the main aspects/limits of judicial interpretation, i.e. meanings cannot be unlimitedly/unreasonably overstretched.

A legal provision is the literal transposition of a rule, or a value, which is not a concrete thing (though it leads to concrete consequences). It falls within the realm of intellectual activity, thus judges must preliminarily construe the meanings of these words and subsequently interpret them⁴¹. Then, the question on how the process of interpretation should be carried out becomes crucial.

One possibility is represented by textualism. According to this theory of statutory interpretation, the interpreter should consider the ordinary meaning of the words composing legal provisions. In doing so, the interpreter is more similar to a reader, i.e. any reference to 'history' or 'socio-political evolutions' is deemed unnecessary since interpretation is strictly linked to the meaning a person could objectively and reasonably attribute to the words of the provision.

In contrast with 'intentionalism', a legal theory according to which the interpreter should also consider the legislature's intentions beyond the mere literal transposition of a rule, textualism opposes that it would be unreasonable to conceive a 'genuine collective intent' of representatives, and considering legislative history as a tool for the interpretation of norms would offend the constitutionally mandated process of bicameralism⁴². In this theoretical frame, a constitutional judge is bound by the text and creative interpretation of constitutional principles would betray his/her mandate.

A similar but not identical line of reasoning is adopted by those who embrace 'originalism'. This approach has developed in the USA⁴³ and used as a driving principle by some judges. It is possible to distinguish two subcategories of originalism, namely 'the original intent theory' and 'the original meaning theory'. According to the former, a supreme court is in charge of reconstructing the intent of the drafter when interpreting constitutional provisions.

It follows that judges should ascertain as accurately as possible what drafters meant by the words they used. Therefore, clarification might be found in the legislative history of the bill, but any departure from the 'true and original' meaning is allowed. The latter, which tends to overlap textualism to some extent, holds that the interpretation of a

³⁷37 Ruling 359/2009, *Tribunal Constitucional*, delivered on 9 July 2009, English summary available at: www.tribunalconstitucional.pt/

³⁸38 Ruling n. 121/2010, *Tribunal Constitucional*, 8 April 2010, English integral version available at: www.tribunalconstitucional.pt/

³⁹39 Ruling n.359/2009, *Ibidem*, para.7-12.

⁴⁰40 Ruling n.121/2010, *Ibidem*, para 21.

⁴¹41 A. BARAK, *Hermeneutics and Constitutional Interpretation*, in M. ROSENFELD (ed.), *Ibid*, p.253.

⁴²42 J.F. MANNING, *Textualism as a Nondelegation Doctrine*, in *Columbia Law Review*, vol. 97, n.3, 1997, pp.674-677. See also, J. F. MANNING, *Textualism and Legislative Intent*, in *Virginia Law Review*, vol. 91, 2005, pp.419-420; E. M. DAVIS, *The Newer Textualism: Justice Alito's statutory interpretation*, in *Harvard Journal of Law & Public Policy*, vol.30, n. 3, 2007, p.988.

⁴³43 In the U.S., Justices of the Supreme Court Hugo Black, Antonin Scalia, and Clarence Thomas have embraced this theory. The term "originalism" has been most commonly used since the middle 1980s. Earlier discussions often used the term "interpretivism" to denote theories that sought to derive meaning from the constitutional text alone ("textualism"), or from the intentions of the originators ("intentionalism"). See., generally, J. H. ELY, *Democracy and Distrust: a Theory of Judicial Review*, Harvard University Press, Cambridge, reprinted version in 2002; G. BASSHAM, *Original Intent and the Constitution*, Rowman & Littlefield Publisher, New York, 1992.

constitution should be based on what a reasonable person, living at the time of its adoption, would have conceived as the actual meaning of the used words⁴⁴.

In both cases, originalism is a principle of interpretation that imposes constitutional courts to discover 'the original truth' of the constitution. The preservation of the legal system, the safeguard of the *status quo* is the primary aim of this theoretical approach. Thus, judges are not supposed to create, amend, or interpret laws entering into conflict with the legislative branch. Justice Scalia is likely to adhere to this view.

Consequently, the constitutional meanings of norms might not undergo an evolution adhering to transformations in society. Indeed, if the focal point of the interpretative reasoning rests on the framers' conception, judicial review (but also the legislative power) cannot legitimately enhance the scope of application of constitutional provisions maintaining their literal form. As a consequence, constitutional amendments would be necessary each time a new social demand emerges.

However, according to another school of thought, the meaning of constitutional provisions might change over the time given that a constitution should be understood as a 'living instrument'⁴⁵. Conceiving the constitution as a 'living constitution' allows the text to be adaptable to modern issues without forcing the legislative to pass new amendments (which are indeed procedurally complex and often require greater parliamentary majority). According to this perspective, the constitution is phrased in broad and flexible terms in order to promote a dynamic understanding of constitutional provisions.

In the western world, though accompanied by criticism by part of the legal scholarship, this conceptualization of the constitutional text has been effectively involved by supreme courts. Particularly in the European scenario, national, supranational and international courts have followed this line of reasoning, specifically in the field of fundamental rights protection⁴⁶.

This conception follows the idea that fundamental freedoms might be reinterpreted to the extent that even those claims previously considered unconceivable can find protection.

Adopting Dworkin's classification, while rules possess their own 'rigidity' as far as they identify concrete procedural aspects, principles are in need of interpretation due to their nature of general principles⁴⁷. A constitutional judge is hence in charge of operating a pragmatic recognition of changes in society in order to reconcile abstract literal provisions to concrete cases.

4. Conclusion

I support the argument against judicial intervention all the times judicial creative interpretations regard matters which are very sensitive in the public debate. In those cases, I believe the legislative power is in the best position to address an issue

⁴⁴L.J. STRANG, *The clash of rival and incompatible philosophical traditions within constitutional interpretation: originalism grounded in the central western philosophical tradition*, in *Harvard Journal of Law & Public Policy*, vol. 28, n. 3, 2005, pp. 909-910. See also, K. E. WHITTINGTON, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, Lawrence, University Press of Kansas, 2001, pp.30ss.

⁴⁵An example related to this theoretical approach is given by the Canadian Supreme Court in the case of same-sex marriage, when it applied the so called 'living tree doctrine'. In that case, the interveners had argued that the meaning of marriage is fixed into convention beyond the reach of the constitution and that the living tree doctrine is constrained within the 'natural limits' of interpretation and cannot be stretched to anything the court would like it to be. The Court rejects these claims, stating that they are not trying to find the definition of marriage, but are only looking if a proposed meaning is within the definition. The meaning of marriage is not fixed to what it meant in 1867, but rather it must evolve with Canadian society which currently represents a plurality of groups. [2004] 3 S.C.R. 698, 2004 SCC 79.

⁴⁶A. MOWBRAY, *The Creativity of the European Court of Human Rights*, in *Human Rights Law Review*, vol.5, n. 1, pp. 60-71; J. GOLDSWORTHY, T. CAMPBELL, *Judicial Power, Democracy and Legal Positivism*, Dartmouth, Aldershot, 2000; G. MORBIDELLI, *Ibid*, pp.173-175.

⁴⁷R. DWORKIN, *I diritti presi sul serio*, translated by G. Rebuffa, Il Mulino, Bologna, 1982, p. 82.

encompassing different opinions. The separation of power should always be preserved as the cornerstone of democratic regimes.

Nonetheless, the above analyzed case does not regard a creative interpretation. Here the case was about judicial review of an existing law discriminating among individuals on the basis of sexual orientation. The U.S. Supreme Court did not invent any right *ex novo*. Not even it did interfere with other powers illegitimately. In opposition to Justice Scalia's view, I contend that there was no room for 'self-restrain'. The case was about discrimination. The political power might well decide to differentiate between different sexual attitudes, but this cannot automatically lead to the conclusion that this choice respects the constitution.

DOMA's § 3 was considered unconstitutional by the district court and the court of appeals, which ordered a refund for Windsor; the Executive, though approving this position, continued to enforce the federal law. In this situation, Windsor was at the same time *de facto* suffering discrimination while *de jure* comforted on her claim for equal recognition as a married citizen.

The Supreme Court was not asked to decide on an abstract question, and it was competent to hear the case since the injury suffered by Windsor was real and imminent.

There was no demand of recognizing something which was not already there. Same-sex marriage is a reality in New York as well as in other 11 States of the Federation. Although the court did not explicitly refer to the exigency of applying a strict-scrutiny judicial review in this case, it did however weigh the government's interest against the constitutional guarantees offered by the Fifth Amendment.

As the Supreme Court affirmed, this case was not routine, it was a case of immediate importance to the Federal Government and to hundreds of thousands of persons. As the court has reminded, the U.S. Constitution's guarantee of equality '*must at the very least mean that a mere congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group*⁴⁸'.

As for the argument of appropriateness, or as Scalia would ask 'what are we doing?' the answer is a very easy one: the majority of judges in *Windsor* were applying constitutional guarantees without making prejudice prevailing over democratic principles. The same attitude judges showed when considering anti-miscegenation laws unconstitutional⁴⁹.

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⁴⁸ *Windsor*, p.20.

⁴⁹ I am referring to *Loving v. Virginia*, 388 U.S. 1 (1967) which invalidated laws prohibiting interracial marriage. This case was a landmark for civil rights. The Supreme Court's unanimous decision held this prohibition was unconstitutional, overturning *Pace v. Alabama* (1883) and ending all race-based legal restrictions on marriage in the United States.