CONSTITUTIONALLY REQUIRED JUDICIAL ACTIVISM: RE-EXAMINING THE ROLE OF COURTS IN MODERN CONSTITUTIONAL ADJUDICATION*

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I. INTRODUCTION

In this Article, I tackle the role of courts and the enforcement of modern constitutions, such as the ones found in many U.S. states, and how this impacts our notions of *the judicial role*. Here, the contrast between older constitutional models, such as the one currently in existence at the federal level and more modern constitutions that many states and countries have adopted is considerable and most apparent. As we are about to see, the mostly content-free federal constitution *tends* to create a more passive role for courts. On the other hand, content-heavy modern state and foreign constitutions *tend* to require more active judicial intervention into policy matters. As a result, substantive constitutional content makes all the difference. In turn, this requires a re-examination into the role of courts as to constitutional adjudication and democratic self-governance.

This Article argues that state courts, as well as many of their foreign counterparts, need to stop imitating federal courts when it comes to enforcing their particular state or national constitutions, not just as a matter of *content* or *doctrine*, but in terms of how they approach their judicial role in the first place. Modern constitutions require modern courts, so imitating the U.S. federal court mindset is

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ill-advised. As a result, this contrast also makes clear that we should avoid making categorical statements on *the judicial role* based solely on the particular experiences of the federal system in the United States.

Courts are central to the enforcement of constitutional provisions. This is particularly true and essential in the case of modern constitutions.[1] Precisely because modern constitutions take positions as to important policy issues, as opposed to the more structural-oriented framework constitutions (like the U.S. Constitution), there is a greater risk of underuse and under-enforcement; that is, that constitutional policy provisions will not be adequately put into practice.

This creates a very particular challenge for judicial bodies or courts. Since older constitutions were of the framework type, courts were structured in ways that would correspond to that reality. As a result, the conceptualization of the so-called *judicial role* was premised on the function and operation of courts *in those types of constitutional systems*. The emergence of modern constitutions requires a re-examination of that conceptualization. Many of the premises, features, and descriptions of what courts can and should do—and thus, what they can't or shouldn't do—become inapplicable or even plainly wrong in the face of more modern constitutional systems.

In this Article, I deal with the following issues: (1) a critical analysis of current views as to the judicial role, the characteristics of judicial bodies, the concept of judicial review, and the so-called countermajoritarian difficulty, that is, the apparent democratic deficit that results from the judicial invalidation of legislative acts that are thought to reflect the majoritarian will; (2) the role of courts as negative and positive legislators, with emphasis on the traditional roles taken on by courts, as well as issues relating to institutional capacity and political accountability; (3) the impact of constitutional policy provisions in adjudication and the new duties imposed on courts, including constitutional requirements to intervene in policy questions; (4) the process of adjudication and decision-making; (5) the structural issues related to judicial bodies, including matters of justiciability, procedure, tools, and remedies; (6) the role of courts in democratic

[1] *See* Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. (forthcoming 2018) (describing how many of these modern constitutions can be described as *teleological* or *post-liberal*, in that they also include substantive policy provisions that require judicial enforcement).

governance, which requires a fresh look at the separation of powers and the relation between courts and other institutional actors; and, (7) the ideological byproducts of the interaction between courts and post-liberal constitutional systems.

A final introductory note is warranted. It is important that we distinguish between different dichotomies that are sometimes used interchangeably. I offer three binaries.

First, we have the issue of active versus passive. This is a quantitative analysis. An *active* court can be defined as one that is more likely to strike down or otherwise modify the actions taken by other branches of government. A *passive* court is one which routinely defers to legislative and executive judgment. Later on, I will come back to this issue to distinguish *active* from *activism*. Second, we have the constrained-unconstrained dichotomy. When a court bases its decision on the text and content of the constitution, it is *constrained* by it. When it loses its moorings and makes decisions using non-constitutional sources—such as its own judgment—it is *unconstrained*. Finally, we have the intervention-abstention distinction. When a court's decision has direct impact on issues of policy, it is *intervening*. When it chooses not to, it is *abstaining*.

As such, there are multiple scenarios that can materialize. For example, a court can be *active* and *interventionist,* but remain *constrained* by the Constitution. How? Because the Constitution requires that intervention. This is common when it comes to modern or teleological constitutions, such as the ones many U.S. states have adopted. We can also think of scenarios where a court can be *passive* and *abstaining* but, because it is ignoring a command of the constitution, it is also *unconstrained*. There is no inherent link between active-unconstrained-intervention on the one hand and passive-constrained-abstaining on the other.

The main proposal of this Article is that modern constitutional systems *require (through constraint)* more *active* courts that directly *intervene* in policy matters. In that sense, many of the premises normally used to characterize the judicial role are transformed. For example, we will see that more modern constitutions actually constrain courts by limiting their policy-*making* discretion, but *force* them to intervene in controversial policy matters whose resolution is pre-ordained by constitutional command. As a result, the classic activist-versus-restraint dichotomy is destroyed because, in these

systems, judicial restraint requires intervention, and judicial passivity would actually be a manifestation of unconstrained activism.

If courts accept this new paradigm, then modern constitutions can be fully enforced, including their policy-laden substantive provisions. This can yield several important benefits from a public policy standpoint. First, it furthers the possibility of democratic self-governance through the exercise of constitutional politics. Second, it strengthens the concept of the rule of law since it reassures the public that both their legislative and constitutional achievements and victories will not be ignored by judicial bodies. And third, courts will be free to adequately enforce their own constitutions without fear of being accused of engaging in unconstrained, and thus illegitimate, activism.

II. A LOOK AT COURTS IN GENERAL

In this section I offer a critical analysis of the mainstream normative views regarding the "judicial role." In particular, I will focus on (1) the current articulations of the judicial role; (2) the need to look beyond the U.S.-Federal experience; (3) the problems in terms of defining what is a court; (4) the concept of judicial review; and, (5) the implications as to the issue of the so-called counter-majoritarian difficulty, and the interaction between ordinary and constitutional politics. From this analysis, we can better understand that the current articulations of the judicial role are mostly context-specific and contingent. As a result, we cannot extract universal truths from these isolated experiences. On the contrary, a wider view is warranted, one which considers the recent developments in modern constitutionalism.

A. The Judicial Role: A Starting Point

The notion of *the judicial role* is somewhat elusive and contestable.[2] The main problem with the concept itself is that it seems to be built on the idea that courts have *inherent* functions or features. This would imply that there are roles which are *outside* the scope of what courts, as a normative matter, should do. Of course, this is inherently non-controversial since there must be judicial

[2] *See* THEODORE L. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS 35, (1987). ("[T]here is some difference of opinion about my conceptualization of judicial role—the main objection being that it is too narrow.").

characteristics that distinguish courts from legislatures and executive bodies. Something makes a court a court.[3]

But, *which* are those inherent functions is a more difficult question to answer. As Sarah Harding points out, "there is little literature on the nature of comparative judicial reasoning more generally."[4] This is related to the problem, which we will address later on, of the Federal-centric view of the conceptualization of the judicial role: "Scholars have devoted relatively little effort to constructing constitutional theory that is suitable for analyzing the work of courts outside the United States."[5] The concept of the judicial role cannot be an empty shell that means too much or too little. As Jerold Waltman suggests, "[c]ourts remain…both suspect and little understood."[6]

I suggest that the elusive nature of the judicial role is due to its multiple possibilities and articulations. Also, recent developments in constitutional theory itself, which have resulted in the multiple articulations of constitutionalism,[7] must be considered. But, given the generation of different dynamic processes, "adjudicative theory has had difficulty keeping in step with these developments."[8] This adds to the conceptual confusion that surrounds this term.

In other words, the issue of "what do courts do," and "how they do it," is still unresolved.[9] As Chad Oldfather suggests, "[a]djudication is a social construct created to serve different needs in different times and places and subject to continual modification as the needs of society evolve."[10] Just like with constitutionalism, the concept of the judicial role seems to be in constant flux, which requires jettisoning

[3] I divide this issue into two parts. Later on I will address the specific issue of what a *court* is. Here I focus on the broader concept of the *judicial* role or function. What is a court seems to be a narrower question than what is the judicial role in general.
[4] Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 410 (2003).
[5] David Landau, *Political Institutions and Judicial Role in Comparative Law*, 51 HARV. INT'L L.J. 319, 322 (2010).
[6] JEROLD L. WALTMAN & KENNETH M. HOLLAND, THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 1 (Jerold L. Waltman & Kenneth M. Holland eds., 1988).
[7] *See* Farinacci-Fernós, *supra* note 1.
[8] Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L. J. 121, 136 (2005).
[9] *Id.* (making reference to the "constant change" related to adjudicative theory and modern constitutional developments).
[10] *Id.* at 137.

the notion that the judicial role has a singular, settled, and unchanging definition. A re-examination seems appropriate.[11]

At this point, it is worth mentioning that in this Article we will address issues about the judicial role in general and the behavior of *constitutional courts* in particular.[12] As such, we wish to confront the issue of "understanding, explaining, and modeling judicial behavior" in the specific context of constitutional adjudication in systems that have adopted modern constitutions.[13]

We should also differentiate between what courts *have done* until now and what are, if any, the *inherent* features of courts or other judicial bodies. The former is purely descriptive while the latter is an elusive and complex normative question. Just because courts have done something historically does not mean that's all they can or should do. As Joanne Scott and Susan Sturm point out, "[r]ethinking the judicial role is not just a question of making sure of what courts are actually doing, but also of supplying some sort of framework for thinking about and evaluating that role."[14]

For example, just because courts in civil law countries have, as a historical matter, played a secondary role in terms of governance,[15] it is not *required* in the context of modern constitutional systems that have redefined the role of courts in the enforcement of the constitutional blueprint. In other words, just because some believe that "[i]n most political communities, courts play a secondary role in governing[,]"[16] it is not universally so. The emergence of post-liberal constitutionalism (which will be discussed in Section IV of this Article) may require a more active role for courts in constitutional

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[11] *See* Salma Yusuf, *The Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives*, 10 SEATTLE J. SOC. JUST. 753, 778 (2012).

[12] With "constitutional courts" I don't refer only to specialized tribunals charged with constitutional adjudication. This term also includes supreme courts to the extent that, in a particular constitutional system, these bodies are tasked with interpreting the constitution.

[13] *See* David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687 (2005).

[14] Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 566 (2007).

[15] *See* Landau, *supra* note 13, at 724 (making reference to "the traditional Latin American civil law conception of separation of powers and judicial role" that explains previous judicial passivity).

[16] WALTMAN & HOLLAND, *supra* note 6, at 6.

governance that impacts how we see courts in general. Many U.S. states have started down this path,

The problem with using discrete examples of past experiences as to the role played by courts as a normative explanation of what courts *should do in all situations* is not unique to civil law systems. The same can be said about the experiences in the United States, particularly at the federal level. The characterization of the judicial role in general should be made at a more conceptual level and not so context-specific, which carries the risk of confusing a particular experience with a universal truth.[17] On the contrary, it should take account of the *different* contextual possibilities that require a flexible conceptualization of what courts can or should do, depending on the specific constitutional system which they are charged with applying. In that sense, "courts tend to play . . . different roles in each political system."[18]

As a result, the answer to the question of what courts are supposed to do is (1) contingent on which particular articulation of constitutionalism we are dealing with, as well as which constitutional type is in place in a particular political community and (2) necessarily variable in other words, that there are *multiple* roles that courts can play. This may lead us to a broader and more flexible definition of what courts are and what they can or should do.[19] In the end, what constitutes the judicial role will depend on many other issues which transcend this relatively narrow question.[20] For example, it can depend on how we define the *purpose* of adjudication.[21]

Some seem to think that there is such a thing as a "proper role of judicial review."[22] This Article argues that there are *multiple*

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[17] *See* Andrew M. Siegel, *Alternative Visions of the Judicial Role: Symposium Introduction: Notes Towards an Alternative Vision of the Judicial Role*, 32 SEATTLE U. L. REV. 511, 512 (2009) ("The [U.S. Supreme] Court's course in these matters has been justified by–and perhaps propelled by–a particular vision of the judicial role.").

[18] WALTMAN & HOLLAND, *supra* note 6, at 1.

[19] *See* Oldfather, *supra* note 8, at 148 (making reference to a "broader conception of the judicial role.").

[20] Harding, *supra* note 4, at 428–29 ("[J]udges who feel it is important to craft rules that they suppose to be value-free also view their judicial role as being a mouthpiece for the unambiguous text of the law, including the Constitution.").

[21] *See* Oldfather, *supra* note 8, at 127.

[22] Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 962 (2011).

possibilities for what constitutes the judicial role. What is *proper* depends on the particular constitutional system.

It would also seem that since the "[d]ebates over the proper functions of courts have focused primarily on delineating the outer bounds of judicial authority,"[23] less focus has been given to the inner components of that authority. Still, the literature is not wholly barren. For example, Scott and Sturm state that, while it is difficult to "establish precise definitions or boundaries," the "judicial function is to prompt—and create occasions for—normatively motivated inquiry and remediation by relevant non-judicial actors in response to signals of problematic conducts or practices."[24] Of course, as we saw, this will depend on how individual judges see both their role as members of a court and the role of the court itself: "[J]udicial role theory holds that judges differ in their views as to the proper functions of courts and the norms of judicial decision making."[25]

B. Looking Beyond the Federal Constitution

As we saw, one of the problems when addressing the issue of what courts can and should do is that many normative proposals are based on the context-specific U.S.-Federal experience. As Theodore Becker explains, there has been an "overriding emphasis on the American system."[26] As a result, the scholarship has suffered an "acute case of American myopia."[27] In that sense, we should adopt Tom Ginsburg's proposal to "expand our thinking about the relationship between democracy and law, particularly outside the relatively stable North American and western European contexts that have informed most theorizing to date."[28] This includes U.S. states. A comprehensive descriptive and normative proposal should separate itself from discrete, specific experiences: "American constitutional theory rests

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[23] Oldfather, *supra* note 8, at 122.
[24] Scott & Sturm, *supra* note 14, at 571.
[25] Rick A. Swanson, *Judicial Role in State High Courts*, 94 JUDICATURE 169 (2011); *cf*. John M. Scheb, Terry Bowen & Gary Anderson, *Ideologies, Role Orientations, and Behavior in the State Courts of Last Resort*, 19 AM. POL. Q. 324 (1991).
[26] BECKER, *supra* note 2, at 1.
[27] *Id.* at 3. *See also* Issacharoff, *supra* note 22, at 963; Jack Wade Nowlin, *Conceptualizing the Dangers of the 'Least Dangerous' Branch: A Typology of Judicial Constitutional Violation*, 39 CONN. L. REV. 1211, 1213 (2007); Oldfather, *supra* note 8, at 137; Siegel, *supra* note 17, at 511–12, 514.
[28] Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 L. & SOC. INQUIRY 720 (2012).

on a set of assumptions about political institutions that does not hold true in many developing-world democracies."[29]

Another problem of this U.S.-Federal centric view is that other countries and U.S. states have followed suit and have modeled their judicial role on this specific experience,[30] *even if their particular constitutional systems are considerably different from the federal one*. This can result in a mismatch that can be detrimental to the particular constitutional system.[31] We should remember that judicial review is not a pure U.S.-Federal invention and that different constitutional systems impact the way in which courts operate in varying contexts.[32] As Waltman explains, "the immense role played by courts in the United States has *inhibited* political scientists there from seeing the important functions judicial institutions perform in other polities."[33] That insular approach to developing a comprehensive definition for the judicial role should be abandoned.

C. What is a Court?

This is probably one of the hardest questions to answer as part of the effort to develop a definition for the judicial role. It is also one of the most important because "the concept of judicial function is frequently employed synonymously with the concept of court."[34] Two immediate concepts come to mind: adjudication (which goes to "what") and legal reasoning (which goes to "how"). This is crucial when addressing the issue of the impact that post-liberal teleological constitutions have on courts. Are the bodies charged with their implementation still considered courts? This Article argues yes. But,

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[29] Landau, *supra* note 5, at 320, 323 (stating also that "the extensive American literature on judicial role is unsuitable for many developing countries."). This can be read both ways. One problematic reading seems to rest on the assumption that the U.S. experience is more advanced than others, hence the incompatibility. Yet, I prefer to focus on the more general issue that different systems require different definitions for the judicial role, depending on the content of the particular constitutional structure.

[30] *See* Harding, *supra* note 4, at 410; KENNETH M. HOLLAND ET AL., JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 1 (Kenneth M. Holland ed., 1991).

[31] *See* Landau*, The Two Discourses, supra* note 13, at 688.

[32] *See* Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 261–62 (2008).

[33] WALTMAN & HOLLAND, *supra* note 6, at 1 (emphasis added).

[34] BECKER, *supra* note 2, at 4.

before we dive into that particular interaction, let's take a more general look at the literature about the elusive concept of *court-ness*.[35]

Becker emphasizes the structural and functional aspects of courts, in what he labels the "sociological concept of function."[36] From that perspective, he offers the following definition:

> A court is (1) a [person] or body of [persons] (2) with power to decide a dispute, (3) before whom the parties or advocates or their surrogates present the facts of the dispute and cite existent, expressed, primary normative principles (in statutes, constitutions, rules, previous cases) that (4) are applied by that man or those men, (5) who believe that they should listen to the presentation of the facts and apply such cited normative principles impartially, objectively, or with detachment. . . , and (6) that they may so decide, and (7) as an independent body.[37]

So far, so good. This definition is consistent with the two main ingredients we mentioned before: adjudication and legal reasoning. The former focuses on the act of resolving a controversy, while the latter deals with the method used in such action, which can be characterized as "reasoned decisions."[38] But, in the administrative state era, adjudication and legal reasoning can be done by non-judicial actors, such as administrative agencies. We use the words "quasi", "pseudo," or "semi" to characterize these adjudicative bodies that are not properly thought of as judicial courts.[39]

Yet, this broad definition of "what a court is" seems adequate for our purposes. In particular, it allows courts to use as 'primary normative principles' the more ideologically-laden provisions of modern teleological constitutions. In those situations, because said ideologically-heavy provisions are legitimate normative principles, the bodies charged with adjudicating disputes to which they are applicable can still be characterized as courts. Finally, the *process* itself of adjudication and the use of legal reasoning derived from those normative principles allows us to characterize "a process as being judicial."[40]

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[35] *See* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1446 (2009).
[36] BECKER, *supra* note 2, at 7.
[37] *Id.* at 13.
[38] ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 46 (Oxford Univ. Press ed., 2000).
[39] BECKER, *supra* note 2, at 5.
[40] *Id.* at 64.

Because of historical experiences in Europe, constitutional courts are seen as distinct from ordinary courts. We will tackle this issue when analyzing the structure of courts. Yet, it should be said here that some systems even go as far as to characterize the bodies charged with constitutional review as "not [a] part of the judiciary."[41] Still, that distinction appears to be aimed at stressing the differences between the ordinary courts and the bodies that engage in constitutional review. But, from a functional point of view, as it relates to adjudication and legal reasoning, it seems that even these separate institutions can be labeled, to a sufficient extent, as courts.[42] For example, when the French Constitutional Council was first established, there was doubt as to whether it could be "considered as a genuine court."[43] The problem is that post-liberal teleological constitutions intentionally mix issues of law, politics, and policy as part of their substantive organization of society. As such, in those systems in particular, it would seem that "[c]onstitutional courts are inevitable political actors."[44] Yet, this does not deny them the characterization of being judicial bodies or courts.

Alec Stone Sweet states that "constitutional judges labor to portray their decision-making process as inherently 'judicial', and therefore meaningfully distinct from 'political' (i.e. legislative) processes."[45] The key here is to distinguish *content* from *process*. If a constitution is highly political or ideological, it will have a direct impact on the outcome of adjudication. In that sense, its content is transparently political. But, that is a separate question from whether the judicial body that engaged in said adjudication acted in a *purely* political fashion or if it, instead, *applied legal reasoning to those political*

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[41] VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 14 (2009).

[42] *Id.* at 16 (referring to the judicialization of these specialized bodies).

[43] TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 73 (2003). The qualifier "genuine" should be used carefully, since there is a fine, but very important, line between *different* types of "genuine" courts and *illegitimate* types of courts. Just because something is different does not mean it is illegitimate. At the same time, this should not lead us to radical indeterminacy or an *anything goes* mentality. *See also* SWEET, *supra* note 38, at 33–34.

[44] Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT'L & COMP. L. 539, 541 (2011); *see also* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast*, 2 INT'L J. CONST. LAW 633, 636 (2004) ("[C]onstitutional adjudication by special judges seems inherently political.").

[45] SWEET, *supra* note 38, at 143.

constitutional provisions. In the latter case, while the underlying normative principles were political in nature—like most, if not all, law is—the reasoning itself was legal or judicial, thus preserving the essential characterization of those bodies as courts.

The politicization of courts is the result of modern constitutional designers that, by including important policy elements in the constitution itself, allow courts to put these elements into effect by way of adjudication. But, in the end, they still function as courts. We should resist the temptation of withholding that characterization just because, as the result of the politicization of the *constitution*, the courts charged with their application assume a more political role. We should not forget that "[j]udicial review is by its very nature an activist function since it involves the judiciary in performing a number of key functions that directly affect the institutional shape and powers of the branches and levels of government."[46] This is particularly true in the context of modern constitutions where the constitutional structure and content *requires* that courts actively intervene in policy matters.

Some question if such a direct policy role is a judicial function at all.[47] This Article argues it is. As Rosenfeld states, "[u]nder all traditions . . . the constitution is conceived as *law* and constitutional interpretation is conceived as *legal interpretation*."[48] In that sense, politicized law is still law, in the same fashion that courts charged with enforcing ideologically-laden constitutional provisions are still courts. While Rosenfeld does warn that "[t]he more constitutional adjudication is *political*, the more it would seem to be in tension with the rule of law[,]"[49] applying more to the *form* of adjudication, and not the *content* of the applicable normative provisions. After all, Rosenfeld recognizes that law is the articulation of political views.[50]

D. The Notion(s) of Judicial Review

I now turn to perhaps the most important function carried out by courts, particularly in the constitutional context: judicial review. As

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[46] Brian Galligan, *Judicial Activism in Australia, in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 71 (Kenneth M. Holland ed., 1991).

[47] *See* KOOPMANS, *supra* note 43, at 53 (stating that certain policy functions are "hardly a judicial task.").

[48] Rosenfeld, *supra* note 44, at 646 (emphasis added). *See also* SWEET, *supra* note 38, at 27.

[49] Rosenfeld, *supra* note 44, at 638 (emphasis added).

[50] *Id.* at 639 ("making of law is political").

we will see when analyzing the specific interaction between judicial review and modern constitutions, the *scope* of judicial review will vary greatly depending on the content and structure of the particular constitutional system.[51] In other words, *what* is the object of judicial review depends on the specific constitution. Here we focus on judicial review as a more general concept, but with an eye towards constitutional review in particular.

Judicial review is an ambiguous concept: "Definitions of judicial review float about like so much flotsam."[52] I am skeptical that such a precise definition exists. There need not be one. Judicial review can mean many things in different contexts. This belief does not argue against its existence; on the contrary, it tells us that judicial review is a dynamic concept. We should embrace that possibility. As Alan Brewer-Carías explains, "in the contemporary world, the truth is that judicial review has progressively evolved, surpassing the former rigid character of courts only being negative legislators, as a result of the development of new principles that, at the time of Kelsen's proposals, were not on the agenda of constitutional courts and judges."[53]

According to Brewer-Carías, "[t]he main tool of constitutional courts is the power to interpret the Constitution to ensure its application, enforceability, and supremacy."[54] The scope and breadth of judicial intervention will depend on the specific content of the Constitution. Modern constitutional developments have pointed to an *expansive* view of constitutional review,[55] due in great part to the expansive *nature and content* of constitutions themselves. That said, some believe that the power of judicial review has its own inner

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[51] Armen Mazmanyan, Patricia Popelier & Werner Vandenbruwaene, *Constitutional Courts and Multilevel Governance in Europe, in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 3 (Patricia Popelier, Armen Mazmanyan & Werner Vandenbruwaene eds., 2013) (recognizing "how institutional changes have transformed the notion, shape and substance of constitutional review.").

[52] BECKER, *supra* note 2, at 204.

[53] ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY 31 (2011). I will return later to the issue of the positive-negative legislator distinction. *See also* Víctor Ferreres Comella, Commentary, *Courts in Latin America and the Constraints of the Civil Law Tradition*, 89 TEX. L. REV. 1967, 1974 (2011) ("That constitutional courts should simply be 'negative legislators' is written nowhere.").

[54] BREWER-CARÍAS, *supra* note 53, at 29; Ginsburg & Elkins, *supra* note 35, at 1431 (characterizing constitutional review as the paradigmatic power of constitutional courts).

[55] SWEET, *supra* note 38, at 2.

limitations, which can be structural or premised on rule of law concerns.[56]

In the end, constitutional review ensures that there is "a forum of principle where fundamental values are taken seriously."[57] Of course, from a purely conceptual point of view, there is no inherent necessity for a judicial body to be automatically charged with this task. As Tim Koopmans explains, "[t]he supremacy of the Constitution does not necessarily imply that the compatibility of statutes with constitutional provisions will have to be assessed by the courts or by a judicial body."[58] However, both historical practice and modern constitutional *designs* have settled that issue in favor of *judicial* constitutional review or enforcement. In other words, currently, both as a descriptive and normative matter, constitutional review is a task generally given to judicial bodies, broadly defined.

E. The Counter-majoritarian Difficulty and Disconnected Legislatures: Back to the Ordinary Constitutional Politics Distinction

Modern constitutions are premised on the notion that constitutional provisions are, or at least can be, *more* reflective of the popular will than ordinary legislation. As a result, when courts invalidate legislative enactments because of incompatibility with the constitution, it is not really a counter-majoritarian act. This leads us to a second issue that is closely connected to the counter-majoritarian difficulty: the notion of *disconnected legislatures* and the majoritarian potential of constitutional review.

The counter-majoritarian difficulty has mostly been characterized, as a conceptual matter, *as a necessary feature of constitutional review*. In turn, this characterization is premised on the context-specific notion that legislatures are the principal vehicles for popular preferences.[59]

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[56] Nowlin, *supra* note 27, at 1221.

[57] COMELLA, *supra* note 41, at 71.

[58] KOOPMANS, *supra* note 43, at 21, 77 (referencing, for example, the situation in the Netherlands, where "judicial supervision of the constitutionality [of statutes] was superfluous").

[59] KOOPMANS, *supra* note 43, at 105 (reminding us that "[t]he notion of 'popular will' is elusive"); *see also* Landau, *supra* note 5, at 319 ("The American focus on the anti-democratic nature of judicial action assumes a robust constitutional culture outside the courts and a legislature which does a decent job representing the popular will–both assumptions tend to be false in newer democracies."). They can also be false in so-called advanced democracies, including the United States.

Many political communities are skeptical that ordinary legislative politics will always reflect the popular will.[60] As such, we are forced to conclude that the counter-majoritarian nature of courts is only *partial*, since there are instances of constitutional review where courts are actually re-establishing the majoritarian will that resulted from the democratic exercise of constitutional politics. In that sense, courts engaged in constitutional review of legislation can be both counter-majoritarian and majoritarian.[61] Sometimes, it may be hard to distinguish between them: "Thus, strictly speaking, the counter-majoritarian objection has less to do with the unelected judicial power itself than with the problem of confining that power to a narrow range of clear cases."[62]

But, before addressing the specific issue of disconnected legislatures and constitutional politics, let's take a look at some relevant elements of the counter-majoritarian difficulty. As we are about to see, many of these elements take as a given that constitutional review of legislative acts is almost inherently counter-majoritarian in nature. I challenge that view.

For example, Tim Koopmans explains that "[t]he assumption is, of course, that the representative bodies truly translate the feelings of the electorate."[63] When that is true, judicial intervention that results in the invalidation of legislation is counter-majoritarian in nature. And to be sure, counter-majoritarian acts *are* part of the judicial role, particularly as it pertains to individual rights. It is considered a legitimate exception to majoritarian rule.[64] In these instances, courts must be careful not to overplay their hands and risk popular backlash.[65]

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[60] *See* Luis Roberto Barroso, *The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World*, 16 ILSA J. INT'L & COMP. L. 579, 591 (2010); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 465 (2008).

[61] *See* Armen Mazmanyan, *Majoritarianism, Deliberation and Accountability as Institutional Instincts of Constitutional Courts, in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 167 (Patricia Popelier, Armen Mazmanyan & Werner Vandenbruwaene eds., 2013).

[62] Rosenfeld, *supra* note 44, at 653.

[63] KOOPMANS, *supra* note 43, at 30.

[64] COMELLA, *supra* note 41, at 86–87.

[65] Michael Boudin, *The Real Role of Judges*, 86 B.U. L. REV. 1097, 1099 (2006); KOOPMANS, *supra* note 43, at 57 ("Judges may sometimes overplay their hand.");

If we take aside the issue of *necessary* counter-majoritarian acts that are aimed at protecting minority rights, as well as the majoritarian nature of constitutional review, we are left with the possibility of *illegitimate counter-majoritarian acts* which are the result of individual judges substituting *both* the judgments of constitutional designers and legislators for their own. In that sense, there are three important manifestations of judicial review. First, the issue of the *majoritarian* review: since constitutional politics can be more democratic and normatively superior to ordinary politics, when a court applies the former against the latter, it is actually *restoring* the popular will, thus acting in a majoritarian fashion. Second, the issue of *legitimate counter-majoritarian* review: because some individual rights are necessary for the democratic structure to work properly, and since these can't be left to the majority to decide upon, courts become the protectors of minority rights against imposing majorities. Finally, the issue of *illegitimate counter-majoritarian* review: where the court imposes its *own* preferences over the legislature.

Precisely because some political communities reject the idea that legislatures will always reflect the popular will,[66] several state constitutional designers included many policy provisions in the Constitution to guard against disconnected legislatures that could thwart deeply held popular preferences.[67] I now wish to address this proposal in the specific context of judicial review.

Michael Boudin proposes that "where the ordinary political process is itself unresponsive to the public will and *courts choose* what is popular, the pendulum swings back in favor of judicial power."[68] However, the key here is that it is *not* that *courts* are allowed to engage in *independent* law-making that trumps legislative enactments, but that the *constitution itself, via judicial enforcement, is the legitimate source of popular preference*. In other words, this is not an argument

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EMMETT MACFARLANE, GOVERNING FROM THE BENCH: THE SUPREME COURT OF CANADA AND THE JUDICIAL ROLE 161 (2013).

[66] *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 929 (2011) ("The decision to include socio-economic provisions in a state constitution thus is understood as a mandate to the legislature that narrows the scope of political discretion.").

[67] *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31 (2018).

[68] Boudin, *supra* note 65, at 1099 (emphasis added).

in favor of judicial replacement of legislative judgment, but, instead, of *judicial enforcement of popular judgment reflected in the Constitution itself*.

Malfunctioning legislatures come in many shapes and sizes: from disconnected legislators that don't reflect widely held policy preferences, to legislative bodies that simply breakdown as effective institutions.[69] In the latter instance, courts step in to temporarily fill the gap. In the former case, courts re-establish the constitutional policy preferences, which hold until the social majority corrects the disconnect, unless there is an evident shift in constitutional politics. But until that happens, courts have a responsibility to enforce the higher law. Too much deference to legislative judgment, in the face of contrary constitutional provisions, risks the under-enforcement of majoritarian preferences.[70] As Armen Mazmanyan suggests, "[t]he question that is necessarily to be asked is *which* majority we are speaking about when articulating the counter-majoritarian problem: the majority of representatives, or the majority of voters?"[71]

We should not forget that "[t]he Constitution [i]s the will of the People."[72] Therefore, as Ferreres-Comella explains, "[i]f, indeed, the constitution is the expression of a higher form of democratic politics than an ordinary statute enacted by the parliament, there is certainly a democratic gain if a court strikes down a statute that is unconstitutional."[73] I agree. So does Tim Koopmans: "The results of a general election will *sometimes* reveal what kinds of ideas a majority of voters had in mind, *but that is not necessarily so*."[74]

The ordinary-constitutional politics distinction divides the process of adopting policy preferences between constitution-making and legislative enactment. And because of constitutional supremacy, as

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[69] Manuel José Cepeda-Espinoza, Former J. of the Constitutional Court of Colom., Social and Economic Rights and the Colombian Constitutional Court, Remarks at the Texas Law Review Symposium: Latin American Constitutionalism (Mar. 4, 2011), *in* 89 TEX. L. REV. 1699, 1703 (2011); Landau*, supra* note 13, at 731; Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1521–22 (2010).

[70] *See* Harding, *supra* note 4, at 435.

[71] Mazmanyan, *supra* note 61, at 170 (going on to say that, "one can recall how often it is that the popular and representative majorities diverge significantly.") (emphasis added).

[72] COMELLA, *supra* note 41, at 91.

[73] *Id.* at 92.

[74] KOOPMANS, *supra* note 43, at 105–06 (emphasis added).

well as the higher degree of popular and democratic participation that *tends* to occur in modern constitutional creation, constitutional politics trump ordinary legislative judgments. In the particular case of many state constitutions, this requires legislatures to develop policy in accordance with the constitutional judgment. As a result, legislative discretion is narrowed.[75]

But that diminution of legislative power is *not* a grant of *independent* policy-making power to courts. It is a recognition of a constitutional preference that is merely enforced by courts. For example, if a particular community entrenches a ban on the death penalty in the constitutional text and a court strikes down a statute that would allow the death penalty in certain circumstances, it is not usurping legislative power. While in the end the legislation will be struck down, it is because the Constitution says so, not because of the individual preferences of a particular judge.

It should be noted that the phenomenon of disconnected legislatures it not limited to nascent democracies or transitional societies.[76] It can also manifest in self-described advanced democracies. For example, David Landau states that "judicial role and constitutional design *in new democracies* often work off of the premise that democratic institutions should be distrusted, and not just to protect insular minorities, but also *to carry out majoritarian will*."[77] I wholeheartedly agree, but I don't see the need to limit the normative claim only to new democracies. This skepticism of ordinary politics is inherent in teleological constitutions, but teleological constitutions are not only to be found in emerging democratic states. On the contrary, they can also be found in well-functioning democracies, including U.S. states. *The practical difference is that, in well-functioning democracies, courts will not be called upon too often to correct the malfunctioning of ordinary politics*. But this is a matter of degree, not kind.[78] In the end, all democracies, whether nascent or well-established, "may have systematic deficiencies in political

[75] *See* Helen Hershkoff & Stephen Loffredo, *supra* note 66, at 929.
[76] *See* David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501 (2014).
[77] *Id*. at 1502–03 (emphasis added).
[78] *Id*. at 1543 ("There are differences--in degree if not in kind--between different types of democracy.").

representation, accountability, and capacity" that require judicial correction.[79]

III. BACK TO THE BASICS: WHAT COURTS TRADITIONALLY HAVE DONE

In this section, I focus on the historical and current practices of judicial bodies in order to identify a starting point for a new normative model of the judicial role. In particular, I will tackle issues relating to (1) the traditional functions of courts; (2) their role in minority rights protection and the proper functioning of the democratic structure; (3) their role as negative legislators; and, (4) how positive rights and concerns about institutional capacity and political accountability have affected the mainstream views on the judicial role. From this analysis we can better understand the important differences between what courts do and have done from a descriptive point of view as opposed to a normative one. Once we adopt this important distinction, we can use the historical roles of courts as the beginning, but not the end, of what courts can and should do in the modern constitutional context.

A. Traditional Functions

It would be an understatement to suggest that courts have been around for a while. I believe that, precisely because of their longevity, sometimes we confuse descriptive elements with normative requirements. Still, it seems worthwhile to take a look at what the literature has identified as the traditional functions of courts. Maybe a workable middle-point could be that these traditional functions constitute the *minimum*, but not maximum, of what courts do. We should remember that "constitution drafters have given new courts a wide range of other tasks."[80] The challenge is to prevent *traditional* views about judicial functions from thwarting those additional tasks given by constitution makers.[81] As Joanne Scott and Susan Sturm suggest, "the traditional conception of the role of the judiciary is both descriptively and normatively limited."[82] Among the traditional functions of courts is the resolution of disputes, whether between

[79] *Id.* at 1508.
[80] Ginsburg & Elkins, *supra* note 35, at 1431.
[81] Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 891 (2008) ("[T]he institutional limitations of courts reflect their historical function . . . .").
[82] Scott & Sturm, *supra* note 14, at 568.

private parties or involving state actors.[83] The administration of criminal justice has also been a constant feature.[84] This relates to the over-arching adjudicative nature of judicial bodies.[85]

Another important responsibility of courts is statutory interpretation.[86] This is particularly so when the statute under review is related to some constitutional provision. Constitutionally-sensitive statutory interpretation has many implications, including broadening its scope of operation, as well as strengthening its normative force. Now, let's take a closer look at some of these functions.

B. Minority Rights and Democratic Structure

There is universal consensus in the literature that minority and individual rights protection is a fundamental judicial function.[87] In this context, there is emphasis on *political and civil* rights that are part of democratic self-government.

This brings us to a related issue: courts as guarantors of the adequate operation of the democratic framework. As with minority rights protection, supervision of the effective operation of the democratic structure is entrusted to courts because the pure majoritarian approach can produce dysfunctional results. In other words, we cannot trust the majority to ensure that the political process will be fair to all sectors of the political community. If there is a particular malfunction in the democratic structure, it is likely that said malfunction will perpetuate itself.

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[83] Boudin, *supra* note 64, at 1097; Ginsburg & Elkins, *supra* note 35, at 1457; Harding, *supra* note 4, at 445; Oldfather, *supra* note 8, at 139.

[84] Boudin, *supra* note 64, at 1097.

[85] Rosenfeld, *supra* note 44, at 2.

[86] *See* COMELLA, *supra* note 41, at 53; *see* Siegel, *supra* note 17, at 512 ("Judges exist to resolve disputes and answer technical questions about the meaning of statutes and discrete constitutional texts.").

[87] COMELLA, *supra* note 41, at 36; KOOPMANS, *supra* note 43, at 216; SWEET, *supra* note 38, at 29; CATHERINE VAN DE HEYNING, *Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalisation of the Convention Through Domestic Constitutional Adjudication*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 22 (2012); MARK VAN HOECKE, *Constitutional Courts and Deliberative Democracy*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 183 (2012); JEROLD L. WALTMAN, *Judicial Activism in England, in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 33, 43 (Kenneth Holland ed., 1991); Ginsburg & Elkins, *supra* note 35, at 1434; Harding, *supra* note 4, at 433.

That's where courts step-in with a legitimate exercise of its countermajoritarian power. As with minority rights protection, this type of intervention is considered a legitimate exception to the pure majoritarian rule.[88] This is part of the "role of courts in democratization and in democratic politics more broadly."[89] As Koopmans explains, the "failure of democratic process to work efficiently has led to a growth of judicial interference."[90]

However, it should be said that this intervention is mostly *procedural* instead of *substantive*. Once the *structural* devices of democratic self-government are working properly, it is up to the political institutions to adopt and develop policy. As such, the role of courts is limited to making sure that the structure is functioning adequately.[91] In that sense, courts act as "procedural watchdog[s]" making sure that the democratic rules have been followed and structures maintained.[92]

C. Negative Legislator

Constitutional courts are commonly characterized as negative legislators.[93] According to this view, they are not empowered to initiate legislation or generate policy. On the contrary, the traditional approach states that they are limited to striking down legislation or other government actions that are inconsistent with the constitution. They can invalidate laws but not create new ones. As Alec Stone Sweet describes the classic Kelsean model, legislatures are "creative," "positive," and "make law freely, limited only by *procedural* constitutional law."[94] On the other hand, he explains, constitutional judges are "negative" and in the limited circumstances when they engage in law-making, they "do not do so freely."[95]

There are many problems with this view. First, it runs contrary to long-standing traditions that give courts the power to develop policy in different areas of the law, particularly in non-constitutional

[88] COMELLA, *supra* note 41, at 87.
[89] Ginsburg, *supra* note 28, at 720.
[90] KOOPMANS, *supra* note 43, at 124.
[91] Issacharoff, *supra* note 22, at 963–64.
[92] Mazmanyan, *supra* note 61, at 13.
[93] *See* BECKER, *supra* note 2, at 204; BREWER-CARÍAS, *supra* note 53, at 5.
[94] *See* SWEET, *supra* note 38, at 35.
[95] *Id.*

contexts.[96] Second, as it relates to the rights issue, it does not account for (a) negative rights that have positive connotations, and (b) it discards the justiciability of positive rights that have been explicitly included by constitution-makers.[97] Third, it downplays the real-life effect of judicially-generated *doctrine* that, while not purely law-making, does develop legal norms in ways that transcend the mere role of the negative legislator. Fourth, it ignores the policy implications generated by modern constitutions when they are enforced by courts.[98]

Later on, I will discuss the policy-making power of constitutional courts. Also, I will separately discuss the issue of the enforcement of positive rights. Now I focus on the *minimum* function of courts as negative legislators. As can be appreciated, this implies that there is a growing consensus that courts are *not just* negative legislators: the idea "[t]hat the judicial structure engages in negative policy-making is quickly discounted as being a *relatively minor power*."[99] As Nuno Garaoupa and Tom Ginsburg explain, the "general trend has been towards expanding the competencies of constitutional courts over time well beyond Kelsen's simple model of the negative legislator."[100] However, it also suggests that there is *at least* a negative legislative function involved in the operation of constitutional courts, and this minimum negative power can be characterized as a *traditional* judicial function.[101] As with the procedural watchdog function, the negative legislator acts as a gate-keeper.[102]

But even this traditional function is revolutionized by modern constitutions. Because these constitutions include rules, standards, and principles applicable to a wide variety of policy matters, with which

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[96] This refers, for example, to the policy-making powers that courts had at common law.

[97] *See* Jorge M. Farinacci-Fernós, *Looking Beyond, supra* note 67.

[98] SWEET, *supra* note 38, at 58 (recognizing, "[c]onstitutional adjudication, however, is implicated in the exercise of legislative power. If in exercising review authority, the judges simply controlled the integrity of parliamentary procedures, and not the substance of legislation, the judges would be relatively minor policy-makers . . . [akin to Kelsen's 'negative legislator'].").

[99] *See* BECKER *supra* note 2, at 349.

[100] Garoupa & Ginsburg, *supra* note 44, at 540; *see also* SWEET, *supra* note 38, at 136 ("There is growing awareness, for example, that the distinction between the positive and the negative legislator cannot be sustained."); Rosenfeld, *supra* note 44, at 636 (noting that since World War II, courts have transcended their role as negative legislators "coming increasingly to resemble positive legislators").

[101] *See* BREWER-CARÍAS, *supra* note 53, at 10.

[102] *See* Scott & Sturm, *supra* note 14, at 566.

ordinary legislative acts must comply, courts can be forced to strike-down a whole array of legislative enactments because of incompatibility with the constitution. As a result, the negative legislator may become a *de facto* positive one by severely limiting the legislature's range of policy options.

Because the negative function of constitutional courts seems to be the least controversial—since it is merely striking down incompatible legislation—more modern constitutions are able to substantially impact policy changes by way of judicial invalidation of legislation that veers from the constitutionally-adopted policy choices. And while this may be debatable as a matter of optimal constitutional design, it seems difficult to propose that courts should simply abdicate their *basic* negative function and allow clearly incompatible legislation to plow through. In more modern systems, the negative legislator still has a substantial impact on the formulation and execution of policy.

Negative socio-economic rights are the easiest to enforce in court.[103] After all, negative rights "represent the traditional role of constitutions."[104] But just because they are *negative* does not mean they do not have an impact on policy and the substantive organization of society.

As a result, even if we take the narrow view that "[c]onstitutional review is the authority of an institution to *invalidate* the acts of government…on the grounds that these acts have violated constitutional rules, including rights[,]"[105] the *nature and scope* of policy provisions found in more modern constitutions forces courts to pass judgment on the substance of ordinary legislation on a wide array of policy matters, even if only to analyze its validity. Here, while the court limits itself to the negative legislator, the policy implications of that review are enormous.

D. Positive Rights Enforcement: Institutional Capacity and Political Accountability

Positive rights pose the most difficult challenge to judicial enforceability. The same applies to other types of positive obligations, whether on state or private entities. Once we dispel the notion that positive rights are, inherently, socio-economic in nature,[106] we need to

[103] *See* Farinacci-Fernós, *supra* note 67, at 42.
[104] Pascal, *supra* note 81, at 865.
[105] SWEET, *supra* note 38, at 21.
[106] *See generally* Farinacci-Fernós, *supra* note 67.

address the issue of the enforcement of positive rights as it pertains to the judicial role in general. We also need to address the possible obstacles to said enforcement that are articulated in institutional capacity and political accountability objections. Of course, the issue of political accountability *transcends* the enforcement of positive rights, but I start the analysis of the political accountability question within the context of positive rights and then move on to a broader take on the issue.

Many of the objections to the enforcement of positive rights are premised on the *verticality* and socio-economic nature of said rights. Yet, there is no inherent link between them, as positive rights can be both vertical and horizontal, and socio-economic rights can be negative or positive, as well as either vertical or horizontal.[107] Because of this, an analysis about the challenges related to the judicial enforcement of positive rights or duties must start from a more general perspective. As a discrete subgroup, it is worth taking a closer look at positive, vertical, and socio-economic rights in particular.

As a final note, it should be known that the enforcement of these types of rights is inherently linked to the issue of the scope of review given by courts to legislation; such as weak-form review, proportionality, reasonableness, deference, and the notion of institutional dialogue, among others.[108] I will discuss those issues later on; here I only focus on the specific challenge of positive rights in the context of judicial enforcement.

Before diving into the specific challenges and objections to the judicial enforcement of positive rights, we should take into account that, as an ideological and historical matter, there has been resistance to the notion of positive rights in general, and of their judicial enforcement in particular.[109] As David Landau observes, some feel that "certain policy domains should be off limits to the courts."[110] But, the reality is that constitutional makers have made *explicit* judgments to include these provisions in their respective constitutions with the

[107] *Id.*
[108] *See* Pascal, *supra* note 81, at 866.
[109] Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 375 (2008); Pascal, *supra* note 81, at 864.
[110] Landau, *supra* note 5, at 320.

understanding that they would be enforced by courts.[111] The problem has been that courts, because of the historical and ideological connotations of enforcing these types of provisions, have self-imposed considerable limitations in that respect.[112] And as Elizabeth Pascal warns, "[i]f social rights are truly unenforceable, they may be meaningless provisions in constitutions, or even undermine constitutional legitimacy."[113]

One of the main objections against the judicial enforcement of positive rights, particularly when they are of a vertical and socio-economic character, is the lack of institutional capacity of courts, especially compared to the legislative branch.[114] In other words, "[t]he judicial process does not lend itself to the collection and analysis of legislative facts necessary to formulate policy."[115] This includes a court's lack of manageable standards to select one option over another and impose it on the legislative branch.[116] It also takes into account the limitations of conventional laws of evidence in judicial proceedings.[117] Another challenge of courts when facing complex policy issues is lack of staff.[118] However, some have made the point that *judicial* bodies can take a page from *administrative* adjudicative bodies that *do* possess institutional capacity.[119] This includes the ability to obtain information independently and engage in fact-finding missions,[120] as well as relying on *amicus* briefs or information provided by other fact-gathering government agencies.[121]

Others downplay the institutional capacity issue. David Landau suggests that some courts have, in fact, been able to develop adequate

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[111] Christiansen, *supra* note 109, at 381 (referencing that objections to the "[i]nclusion of social rights was contested during [the South African constitutional making] process" were *rejected*).
[112] Christiansen, *supra* note 109, at 385.
[113] Pascal, *supra* note 81, at 864.
[114] Christiansen, *supra* note 109, at 374; Pascal, supra note 81, at 863; Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1234 (1995); Usman, *supra* note 69, at 1495; Hershkoff & Stephen Loffredo, *supra* note 66, at 934.
[115] MACFARLANE, *supra* note 65, at 137.
[116] Hershkoff & Loffredo, *supra* note 66, at 934.
[117] KOOPMANS, *supra* note 43, at 92.
[118] *See* MACFARLANE, *supra* note 65, at 72–78.
[119] KOOPMANS, *supra* note 43, at 92.
[120] *Id.*
[121] *Id.* at 92–93; *see also* Yusuf, *supra* note 11, at 763.

institutional capabilities.[122] This would suggest that there is no *inherent* lack of institutional capacity, just an acquired one. As Elizabeth Pascal explains, "the institutional limitations of courts reflect *their historical function*, rather than just the confines of separation of powers."[123] Historic instead of inherent. For his part, Chad Oldfather states that "contrary to the traditional belief that agencies and legislatures are better equipped for fact-gathering than courts, courts benefit from the adversarial system."[124]

The issue of lack of institutional capacity goes both to the ability to adequately come up with policy norms as a matter of legislative judgment, and to the issue of actually enforcing them from the bench. As Eric Christiansen explains, "[a]t a practical level the courts need the bureaucracy of the state to implement any significant change."[125] Also, enforcement requires courts "to get the support of social and political actors."[126] This is particularly so in the realm of vertical rights, where there are serious budgetary concerns.[127]

At this point, an important distinction is warranted. First, the problem of *enforcement* of positive rights. Second, a court's power to declare legislative *inaction* as unconstitutional. Since the main objections are levelled at the former issue—remedy and enforceability—I will mostly focus on that here. However, we should not underestimate the importance of a judicial declaration of unconstitutionality in the face of legislative inaction, even if there is a problem of remedy.[128] As Ginsburg and Elkins explain, "the slight distinction between negative and positive legislation breaks down completely when the court has the power to hold legislative omissions unconstitutional."[129] In this case, "[i]t is not much of a jump from this type of review to one that explicitly allows the constitutional court to propose legislation."[130] At the very least, some have suggested that "socio-economic [positive] rights enforcement should occur in a relatively deferential way: courts should point out where the

[122] Landau, *supra* note 5, at 322, 344.
[123] Pascal, *supra* note 81, at 891 (emphasis added).
[124] Oldfather, *supra* note 8, at 147. Of course, this is limited to instances where, in fact, the judicial process is structured as adversarial.
[125] Christiansen, *supra* note 109, at 390.
[126] Comella, *supra* note 53, at 1967.
[127] MACFARLANE, *supra* note 65, at 142.
[128] Schwartz, *supra* note 114, at 1239.
[129] Ginsburg & Elkins, *supra* note 35, at 1445.
[130] *Id.* at 1446.

legislature has failed to comply with constitutional principles, but should ensure that other branches of government take the lead in designing policy."[131]

However, some systems have been able to combine the enforcement of positive rights with maintaining democratic self-government.[132] Others have made this showing in subnational settings in the United States.[133] As a result, the viability of the judicial enforcement of positive rights has *transformed* what, until recently, was thought of as "unlike the role traditionally ascribed to the judiciary."[134] Moreover, *we should not forget that many of these positive rights already exist as statutory ones, and courts have been able to apply them over the past decades*.[135] From an enforcement standpoint, there should be no difference between statutory or constitutional positive rights. As Hershkoff and Lafredo explain, the inclusion of positive rights is "intended to alter the relation of the judiciary to the other branches of government, serving to expand or contract the jurisdictional space in which courts review and assess political outputs."[136] I will return to this issue when discussing the separation of powers question.

Finally, we turn to the issue of the political accountability of courts, or possible lack thereof, which is somewhat distinct from, although related to, the separation of powers question which will be discussed later, as well as to the issue of institutional dialogue.

The main question here is whether judicial enforcement of positive rights, with its obvious policy-making and value judgment implications, is anti-democratic.[137] This, in turn, sheds light on the broader issue as to the political controls over constitutional courts that, in the particular case of teleological constitutions, are empowered to intervene in vast areas of public policy. As Tim Koopmans explains, "the political process also implies an element of accountability, which

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[131] Landau, *supra* note 5, at 320.

[132] Christiansen, *supra* note 109, at 400 ("South Africa evidences that courts can adjudicate [positive] social rights without destroying the rule of law or the fiscal security of the country.").

[133] *See generally* Mary Ann Glandon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992); *see generally* Hershkoff & Loffredo, *supra* note 66.

[134] Christiansen, *supra* note 109, at 404.

[135] *See* Schwartz, *supra* note 114, at 1236.

[136] Hershkoff & Loffredo, *supra* note 66, at 929–30.

[137] *Id.* at 936; s*ee also* MACFARLANE, *supra* note 65, at 132; WALTMAN, *supra* note 6, at 1.

has no equivalent in judicial decision-making."[138] In a similar vein, Landau warns that there are "special concerns of democratic legitimacy" when judges interfere with "state priorities and make decisions involving large amounts of budgetary resources."[139] Still, others believe that accountability "is *inherent* in judicial office, and is especially inherent in constitutional courts."[140] As Miguel Schor suggests, "[s]ome constitutional courts are more accountable than others."[141]

Of course, the key is whether the court is exercising its own *unilateral and independent policy preferences or if it's implementing the constitutionally-adopted policy preferences of a social majority*. In the latter case, the problem of lack of accountability weakens, as the courts are merely putting into practice what constitutional makers adopted. Legitimacy lies then, not in *how* courts are structured, but in *what* they are doing; that is, whether they are substituting legislative judgment *with their own personal preferences or with the people's*. As we saw previously, when courts correct legislative deviation in a way that comports with constitutional requirements, courts are actually behaving in a majoritarian fashion. As Schor explains, "[t]he argument that courts are anti-democratic while legislators represent the people, moreover, paints with too broad a brush."[142] It all depends on what the constitution requires of courts in a particular system. In that sense, "[t]he acknowledgment of the majoritarian or representative function of constitutional courts paves the way for new perspectives for considering the rule of the courts in democratic governance."[143]

Yet, there is a legitimate interest in securing political accountability, which can be achieved through the adoption of structural controls over the courts that, while allowing for its operational independence, avoid judicial government.[144] These structural measures can achieve the necessary "political checks on the

[138] KOOPMANS, *supra* note 43, at 93.
[139] Landau, *supra* note 76, at 1550.
[140] Mazmanyan, *supra* note 61, at 168 (emphasis added).
[141] Schor, *supra* note 32, at 260.
[142] *Id.* at 273.
[143] Mazmanyan, *supra* note 61, at 179.
[144] *See generally* COMELLA, *supra* note 41, at 98–103; s*ee also* Harding, *supra* note 4, at 433 (referencing the notwithstanding clause in the Canadian system).

judiciary."[145] After all, "judicial decisions are hardly final, and . . . in practice they are subject to constant political checks and revisions."[146]

Courts *need* popular support to be effective. In that sense, courts must attract "the attention of citizens and their political representatives."[147] While not fully dependent on public opinion, this need signals the existence of some sort of political accountability as well.[148] In that sense, "[p]ublic trust in the courts can be another potent source of judicial policy-making."[149] In the end, a court's need for public acknowledgement of its own legitimacy serves as a political limit on what they do.[150] It can "also provide for new forms of legitimation."[151] As a result, these features reinforce each other: sufficient political accountability measures generate limitation and legitimacy. The search for legitimacy, for example, explains why courts offer reasoned decisions for their judgments.[152]

In the end, constitutional courts are neither inherently unrestrained and anti-democratic nor wholly susceptible to public opinion. Judicial legitimacy and political accountability involve an on-going process which is dynamic by nature. To that end, there is consensus that *some sort* of political accountability is preferred. The trick is to find it while preserving the core features of constitutional review that vindicates the binding provisions of the constitution.

IV. THE POST-LIBERAL REVOLUTION: A NEW ROLE FOR COURTS

In this section I address how modern constitutions have changed our understanding of the judicial role. In particular, I focus on the following issues: (1) the impact of teleological constitutions; (2) the rise of new legal and policy issues that are subject to judicial adjudication; (3) how modern constitutions require intervention in the name of constraint; and, (4) the blurring of the lines between law and politics that turn political views into enforceable law. As a result, the

[145] Nowlin, *supra* note 27, at 1222.
[146] Mazmanyan, *supra* note 61, at 168.
[147] COMELLA, *supra* note 41, at 34.
[148] MACFARLANE, *supra* note 65, at 173.
[149] *See* HOLLAND, supra note 30, at 10.
[150] H.G. Peter Wallach, *Judicial Activism in Germany*, *in* Judicial Activism in Comparative Perspective, *supra* note 30, at 155.
[151] Mazmanyan et al., *supra* note 51, at 12.
[152] *See* SWEET, *supra* note 38, at 24.

need for a broader view of the judicial role, that takes into consideration these new factors, becomes clear.

A. How Teleological Constitutions Impact the Judicial Role

As we saw, "in the contemporary world, the truth is that judicial review has progressively evolved, surpassing the former rigid character of courts only being negative legislators, as a result of the development of *new principles* that, at the time of Kelsen's proposals, were not on the agenda of constitutional courts and judges."[153] In other words, *modern* developments in constitutionalism, particularly the emergence of teleological constitutions, have directly impacted what courts are called upon to do.[154] In that sense, "constitutional justice has *expanded* in its mission and function, acquiring new subject areas and new roles and responsibilities."[155]

Policy-heavy constitutions challenge the notion of a wholly 'neutral' judiciary. While courts themselves should remain neutral as to the particular controversy and parties before them, the constitutional provisions they are charged with enforcing *are not policy neutral*. Finally, constitutional review will depend on the type of constitution that is in force and "the type of society to which the constitutional system applies."[156] This all points to a transformation of the judicial role as constitutional norms shifted from the formal to the substantive.[157]

As a result, we must analyze certain issues that emerge due to the interaction between teleological constitutions and the function of courts and "how institutional changes have transformed the notion, shape and substance of constitutional review."[158] Among these issues are: (1) the broadening of policy issues that are susceptible to judicial adjudication; (2) the requirement of judicial intervention in policy matters; (3) the need to re-define the concept of judicial activism; (4) the relation between law and politics; (5) the difference between applying and making policy; and, (6) the issue of the judicialization of law.

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[153] BREWER-CARÍAS, *supra* note 53, at 31 (emphasis added); s*ee also* Landau, *supra* note 5, at 324–25.
[154] *See* Comella, *supra* note 53, at 1968.
[155] Mazmanyan et al., *supra* note 51, at 3.
[156] KOOPMANS, *supra* note 43, at 283.
[157] *See generally* Rosenfeld, *supra* note 44.
[158] Mazmanyan et al., *supra* note 51, at 3.

B. New Issues

The less a constitution says, the less its courts must intervene. In other words, constitutional silence tends to give less justification for courts to act, particularly when intervening in policy matters or reviewing actions of the legislature or executive. On the flip side, the more a constitution says, the more active a court must be. Courts have a harder time staying passive when the constitution guarantees a broad range of rights or adopts multiple policy rules. Modern constitutions have a lot to say about a whole lot of issues. As a result, issues that were once thought of as outside the scope of judicial adjudication become justiciable.

In particular, courts that previously *had to refrain* from intervening in policy matters, now *must intervene*. As Theodore Becker explains, "[s]ometimes constitutions speak with directness and explicitness as to what kinds of acts the courts may and may not review."[159] Teleological constitutions speak this language and it's mostly in favor of greater intervention to make sure that constitutional commands are followed. In teleological systems, one of the biggest risks is that courts that are used to passivity may create a "risk of under-enforcement of constitutional rights."[160] As Jeffrey Omar Usman explains on U.S. state substantive constitutional provisions, "[s]trangely, there even appears to be an inverse relationship between the degree of enforcement by state courts and the seeming strength, when considered textually, of the constitutional provision at issue."[161] This seems to suggest that courts, because of historical practice, reject the new roles that *constitution-makers have expressly given them*.[162] This should be addressed and corrected.

In more modern systems, "it is almost impossible to think of an issue that doesn't potentially raise constitutional problems."[163] On the other hand, it is rare to find substantive policy issues in older constitutions. We will seldom find provisions dealing with labor relations, environmental protection, economic organization, or social structure. But these are the bread and butter of teleological

[159] BECKER, *supra* note 2, at 209.
[160] Harding, *supra* note 4, at 435.
[161] Usman, *supra* note 69, at 1497.
[162] *See* Oldfather, *supra* note 8, at 134 (referring to how courts still cling to their traditional roles, even though there has been a significant constitutional or institutional change).
[163] Landau, *supra* note 5, at 324–25.

constitutions. And because of the justiciable nature of these provisions, *courts* are required, as a constitutional matter, to intervene and put them into effect.

For example, scholars have suggested that "[c]ourts can act to vindicate . . . [a socio-economic] right while being especially careful to avoid invading the *proper* space of political actors."[164] Of course, what is the "proper" space for each institutional actor is not determined by some universal tenant of constitutional theory, *but by the specific choices made by constitution-makers*. So, when it is said that "certain policy domains should be off limits to the courts[,]"[165] that is a *design* issue and not a requirement of constitutionalism. As a result, when more substantive constitutions are adopted, those policy domains become part of the judicial sphere of action. In that sense, "American constitutional theory rests on a set of assumptions about political institutions that does not hold true in many developing-world democracies[,]"[166] to which I add, also doesn't hold true in a whole set of countries that have adopted teleological constitutions. In the end, there is a "need to constantly rethink and revisit the debate on justiciability with fresh perspective, in the wake of the constantly emerging developments, as they might prove to be crucial *to the perception of the judicial role*."[167]

As we saw previously, this is not wholly unheard of in framework systems. After all, the United States, Australia, and Canada, to take a few examples, have legal regimes that deal with labor relations, environmental protection, economic organization, or social structure. But, in these systems, those legal regimes are of a *statutory* nature, instead of a constitutional one, as we see in more modern systems. Does this make a difference? Partially. On the one hand, it doesn't; which only strengthens the case in favor of judicial intervention in these areas. After all, whether it's because the constitutional framers willed it so, or a legislature said so, courts will implement these legal regimes. On the other hand, promotion from statutory status to constitutional rank is not an idle move. First, it allows, and even requires, courts to intervene in these matters *in the absence, or even contrary to, legislative action*. Second, constitutionalization does not merely mean entrenchment as a procedural or structural matter, it

[164] Landau, *supra* note 76, at 1550 (emphasis added); Nowlin, *supra* note 27, at 1213.
[165] Landau, *supra* note 5, at 320.
[166] *Id.*
[167] Yusuf, *supra* note 11, at 755 (emphasis added).

elevates the substantive impact of a particular legal norm. One of the direct impacts of this reality is a considerably reduced, or even non-existent, notion of the political question doctrine.[168]

In the end, modern substantive constitutions broaden the scope of issues that are subject to constitutional adjudication and review by courts. This brings us to two important subjects: (1) required judicial intervention and (2) a re-examination of the activism-judicial restraint dichotomy. As we are about to see, *intervention does not equal activism*.[169]

C. An Obligation to Intervene

Modern teleological constitutions *require* active judicial intervention in policy matters. Later on, I will attempt to distinguish between judicial intervention based on the courts *creating* policy and intervention where the courts *apply interventionist constitutional policies*. Here, I focus on the idea of judicial intervention *as a constitutional requirement*.

This type of intervention is separate from, *but linked to*, the constitutional policy of general state intervention in social and economic affairs. In other words, since the constitution authorizes or requires *state* intervention—mostly by way of the legislature—into different policy areas, this, in turn, generates a separate duty for the *judiciary* to intervene as well. This intervention can take many shapes, such as the enforcement of a broad array of rights, which may be horizontal and socio-economic, for example.[170] In these circumstances, there may be "an expansion of judicial mandate at the expense of representative institutions."[171] This is not the result of some judicial power grab, but an intentional move on the part of constitution makers as a check on the possible failures of ordinary politics. In the end, some issues were "removed from the realm of ordinary politics" and placed in the charge of constitutional courts.[172] Yet, as we saw

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[168] *See* KOOPMANS, *supra* note 43, at 52, 98, 103; MACFARLANE, *supra* note 65, at 45–46.
[169] *See* WALTMAN, *supra* note 87, at 33.
[170] *See* Carl Baar, *Judicial Activism in Canada*, *in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 53 (1991) (explaining how the Canadian Charter of Rights has thrusted the Canadian Supreme Court "into policy matters"); *see also* KOOPMANS, *supra* note 43, at 103.
[171] Mazmanyan et al., *supra* note 51, at 11.
[172] Rosenfeld, *supra* note 44, at 641.

previously, the existence of political accountability measures prevents the inauguration of a government of judges.[173]

Constitutionally required judicial intervention in policy matters constitutes a revolution in terms of the judicial role. As Christiansen explains, "it must be admitted that the potential impact of courts in the area of social welfare sounds unlike the role traditionally ascribed to the judiciary."[174] In that sense, as Ferres Comella suggests, "[t]hat constitutional courts should simply be 'negative legislatures' is written nowhere."[175] Modern substantive constitutions 'write' a new role for courts; a more interventionist role. Following, I will address the specific issue of the *type* of intervention that is required as articulated in the standards of review used by courts.

In more modern systems, courts are both *required* and *authorized* to intervene in policy matters. And because they are enforcing constitutionally adopted policy preferences, they are not subject to attacks based on illegitimacy or countermajoritarian democratic deficit. In these circumstances, constitutional courts "are little detained by concerns over the authority of judicial review or the countermajoritarian consequences of constitutional challenge."[176] As a result, the issue of the desirability of judicial intervention is transferred to the realm of constitutional design and creation, instead of being articulated as an attack on the acts of the judiciary.[177] In these circumstances, do not blame the courts; blame the constitution. Because of constitutional command, "[t]he judge is not passive. . . he is active."[178]

But, as we saw, courts are not merely *authorized* to intervene, they are *required* to do so. Failure to do so erodes the will of constitution makers and risks constitutional under-enforcement.[179] This, in turn, brings us back to the judicial activism-restraint issue.

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[173] *See* SWEET, *supra* note 38, at 33.
[174] Christiansen, *supra* note 109, at 404.
[175] Comella, *supra* note 53, at 1974.
[176] Issacharoff, *supra* note 22, at 964.
[177] *See* MACFARLANE, *supra* note 65, at 2.
[178] Oldfather, *supra* note 8, at 146.
[179] *See* Usman, *supra* note 69, at 1519–20.

D. When Passivity is Unconstrained Activism and Intervention is Constrained

One of the gravest charges that can be levied against a court is that it engages in *judicial activism*; in contrast with the seemingly more desirable approach of *judicial restraint*. So far, so good. The problem is, what do we mean by activism as opposed to restraint? My concern is that too many times we define those terms only considering the framework constitutional model. As we saw, the less a constitution says, the less need or legitimacy for active judicial intervention. But, the opposite is also true: the more a constitution says, the more the need and legitimacy for active judicial intervention. Modern teleological constitutions *flip* the activism-restraint distinction. In particular, they show that there is no inherent correlation between intervention and activism on the one hand, and abstention and restraint on the other.[180]

Whether a court abstains or intervenes in a particular subject matter depends on what the constitution requires or authorizes. If a constitution requires judicial intervention, a court that does so *is not being activist*. On the contrary, it is exercising *constraint* because it is respecting the constitutional command and not substituting it with its own preferences. As such, when a court that is constitutionally required to intervene decides *not to,* it is actually behaving as an activist or unconstrained court because it is stepping outside the realm of the constitutional system and overstepping its constitutionally prescribed bounds. In that sense, I soundly reject Brewer-Carías' suggestion that interventionist courts "have been the most diabolical instruments of authoritarianism, legitimizing the actions contrary to the Constitution taken by the other branches of government."[181] Teleological constitutions challenge what appears to be the mainstream view among scholars as to the activism-restraint dichotomy. As I previewed, it looks like those mainstream views are premised on mostly *framework* constitutions.[182] If a court, without constitutional authorization, imposes its own views, then it is definitely behaving in an activist fashion. But, if the constitution

[180] *See* COMELLA, *supra* note 41, at 78.
[181] BREWER-CARÍAS, *supra* note 53, at 40.
[182] *See* Nowlin, *supra* note 27, at 1216–17; Holland, *supra* note 30, at 1 (emphasis added); John M. Scheb, Terry Bowen & Gary Anderson, *Ideology, Orientations, and Behavior in the State Court of Last Resort*, 19 AM. POL. Q. 324, 324 (1991); Waltman, *supra* note 87, at 34.

authorizes the court to use its independent judgment or, more importantly, *tells courts what to do in a way that requires judicial intervention in policy matters*, then the activist label does not stick. In this situation, the court is not usurping the legislature's power, but preventing the legislature from violating constitutional commands.[183] In the teleological context, we must remember that the rouge-ness of the court's action is not that it did too much, *but that it did too little by under-enforcing constitutional provisions*.[184] As such, the classical dichotomy of activism-restraint, as applied in the federal context, for example, should be discarded as a universal truth.

Active does not equal activism. If activism is measured by how many times a court strikes down legislation, then we are talking about a different meaning of activism that is wholly divorced from the negative notion that courts have become some sort of autocrats. In these cases, there is undoubtedly an *active* court, but not an *activist* court. These are two separate terms.

Brian Galligan defines judicial activism "as control or influence by the judiciary over political or administrative institutions, processes and outcomes."[185] It's déjà vu all over again. How can we label a court as activist if they are exercising a control or influence *that was explicitly granted by the constitution?* Moreover, how can we label a court as activist when the control or influence it's exercising is not *its own*, but the will of the constitution makers. If Galligan refers to *independent* judicial control over other political actors, then his definition of activism stands. But, that *only* applies to courts that attempt to impose *their* own preferences. When a court imposes the constitution makers' preferences, it merely acts as a conduit and not a generator of policy.

In the end, I agree with Tom Koopmans when he states that the activism-restraint tension is "an American invention" (particularly a federal one) which only applies to that and other similarly situated contexts, but is not a universal reality.[186] Be it because a particular constitutional system authorizes judicial policy-making or requires judicial intervention in policy matters to carry out the substantive preferences of the constitution makers, those interventionist courts are not activist in the pejorative sense of the word.

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[183] *See* Usman, *supra* note 69, at 1512–13.
[184] *See* Landau, *supra* note 13, at 732.
[185] Galligan, *supra* note 46, at 70.
[186] KOOPMANS, *supra* note 43, at 47.

Chad Oldfather makes similar remarks when he addresses the issue of "judicial inactivism."[187] To him, courts that exceed their role generate the same negative effects as courts that go below their assigned constitutional courts. I wholly agree; this measurement considers *both* what happens in framework systems where courts *exceed* their power and intervene on issues that are not constitutionally authorized and in teleological systems where courts *fail* to intervene even though they are constitutionally required to do so. What is proper for a court to do depends on the particular content of the constitutional system. There is no universal answer.

It all depends on what we mean by activism. One possibility is to measure it by the intensity of a court's involvement into policy issues. If that is so, then the issue of whether that involvement is constitutionally authorized or not is irrelevant, and activism becomes a pure descriptive word about the *active* nature of a court. Another possibility is that activism refers to whether a court diverges from the constitution when resolving a particular controversy, in which case the issue of constitutional authorization or requirement becomes central. If that is so, then whether that divergence is the result of action or omission is irrelevant.

This new approach to the activist-restraint dichotomy generates new challenges to the issue of *self-imposed* judicial limitations.[188] While self-imposed limitations may be healthy in some instances, when it results in constitutional under-enforcement, they can actually be counterproductive and somewhat illegitimate. Sometimes self-imposed modesty frustrates constitutional goals.[189]

E. Blurring the Law and Politics Distinction

Another line that is blurred by teleological constitutions is the separation between what is in the legal realm and what is political.[190] The general wisdom seems to be that legal questions are addressed by courts—in exclusion of political matters—and that political and policy issues are exclusively handled by legislatures and executive officials. Teleological constitutions take political, ideological, and policy issues *and turn them into judicially enforceable legal provisions and concepts*. As Tim Koopmans explains, in these circumstances the

[187] Oldfather, *supra* note 8, at 123.
[188] *See* Christiansen, *supra* note 109, at 385.
[189] *See id.* at 389.
[190] *See* Garoupa & Ginsburg, *supra* note 44, at 547; SWEET, *supra* note 38, at 135.

"lines between the political and the legal arguments, once considered as necessary, clear and distinct, are getting blurred as a result."[191] When that happens, the distinction becomes meaningless.

While it is legitimate for some constitutional systems to create a sharp separation between law and politics,[192] leaving most policy issues to ordinary legislative politics, it is also legitimate for teleological systems to eliminate that distinction by giving legal form to political views. After all, as we have seen in this Article, law is the result of politics. As such, those arguing for a strict separation between law and politics have to recognize the limited applicability of that proposal.[193] In modern systems, politics become legal norms, and these constitutions "often place the courts in the midst of politically charged controversies."[194] This multiplicity reminds us that "the relationship between courts and political institutions are, at present, in a state of flux."[195]

Michel Rosenfeld, in the context of this distinction, defines *legal* as the "application of a preexisting rule or standard."[196] In the same vein, he defines *political* as "choosing one from among many plausible principles or policies for the purposes of settling a constitutional issue."[197] In that case, when a political view is articulated as law, a court that enforces it *is performing a legal function*. This is so because, even though constitutional provisions are political in nature, the end-result is a legal instrument.[198] And, as Herman Schwartz explains:

> "[a]lthough it is indeed a legal document, a constitution is much more than that. It is the foundation charter of the political society, which draws on the experience of the past and the hopes for the future to create a set of mechanisms and values that are beyond the power of ordinary legislative majorities to change."[199]

This is particularly true in the context of teleological constitutions.

Also related to the law-politics distinction is the role of *ideology* in constitutional creation and adjudication. The constitutionalization

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[191] KOOPMANS, *supra* note 43, at 261.
[192] *See* Cepeda-Espinoza, *supra* note 69, at 1699.
[193] *See* KOOPMANS, *supra* note 43, at 53.
[194] Ginsburg & Elkins, *supra* note 35, at 1432.
[195] KOOPMANS, *supra* note 43, at 252; *see also* MACFARLANE, *supra* note 65, at 1.
[196] Rosenfeld, *supra* note 44, at 637.
[197] *Id.*
[198] *Id.*
[199] Schwartz, *supra* note 114, at 1242.

of ideological concepts challenges the traditional view of the "legal-as-opposed-to-political" approach. For example, Theodore Becker makes reference to "[a]nother situation that would have to be classified as lacking in expressed rules is to be found in the initial period following the Russian Revolution, when the early Soviet judges were empowered to interpret 'the interests of the proletariat.'"[200] Yet, I can find no normative argument that would prevent a court to interpret, as a legal concept, the "interests of the proletariat" as opposed to the "teachings" of Ataturk, "human dignity," or "reasonableness". These are all legally-enforceable standards. While the interests of the proletariat suppose *stronger and deeper* ideological implications, in the end all legal norms have some sort of ideological implications.

One of the risks of ideologically-charged constitutions is the potential for polarization. Older constitutions *tend* to be more ideologically neutral. Modern constitutions, particularly those that are overtly ideological, take positions on controversial issues. More importantly, they adopt social, economic, and political views that may not be shared by the entire community. As a result, they are open to *ideological attack*.

However, it is important that these differences are not disguised as *legal* arguments. In that sense, I have to strongly disagree with Brewer-Carías' characterization of the Venezuelan courts. We already saw his reference to the diabolical nature of interventionist courts, which seems to be more ideological than legally normative. He also states that the courts there have served as "reinforcement for an authoritarian government" without telling us why we should characterize that system as authoritarian in the first place.[201] It's given as an obvious premise, although it is more a political stance. Salma Yusuf's analysis of the enforcement of positive, vertical socio-economic rights in South Africa confirms the suspicion of ideological objections dressed as legal arguments. She states that "[t]he skepticism surrounding judicial enforcement of [economic, social, and cultural rights] *seemingly has more to do with ideological concerns*."[202]

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[200] BECKER, *supra* note 2, at 15.

[201] BREWER-CARÍAS, *supra* note 53, at 18, 63 (showing how his analysis of the recall referendum case seems most unreasonable and motivated by a political and ideological disagreement with the current constitutional system and government, instead of the product of legal analysis).

[202] Yusuf, *supra* note 11, at 764 (emphasis added).

V. ADJUDICATION: HOW COURTS MAKE DECISIONS

In this section I focus on the process of adjudication as a distinct manifestation of the judicial role. In particular, I address issues such as (1) the decision-making process of judicial bodies and (2) their policy-making powers. This allows us to fully grasp how to put into practice the normative proposals we articulated in the previous sections.

A. Decision-making Process

Courts are not the only bodies that adjudicate controversies or make decisions that affect the interests of disputing parties. But not every person or institution that makes such decisions is labelled a *court*. What, then, makes a court a court in terms of *how* it makes its decisions?[203] As Harding explains, "[c]onstitutional adjudication generates its own set of norms and methods."[204] This, in turn, is related to the issue of legal reasoning. In the context of constitutional courts, they apply "a type of reasoning that uses arguments based on constitutional law, in order to solve a case."[205]

There seems to be a multiplicity inherent in judicial decision-making, in that they have "to engage in a complex analysis that involves both normative and policy considerations."[206] According to Chad Oldfather, "[a] major difficulty with attempting to draw conclusions about the necessary components of an adjudicative duty is that, even when the inquiry is limited to the American system, there is no pre-existing, fixed concept of adjudication, or of its functions, against which to assess alternative forms."[207] This challenge can be even harder in teleological systems.

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[203] This issue is crucial to modern constitutions, since the bodies charged with their enforcements may sometimes be characterized as something other than courts. I challenge this view and which to show that what makes a court a court still applies in the post-liberal or teleological context.

[204] Harding, *supra* note 4, at 453. The author adds that these courts are also influenced by traditional common law methodological concerns in common law systems. *Id.*

[205] András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L. J. 1215, 1216 (2013).

[206] COMELLA, *supra* note 41, at 47, 48 (also referencing certain unwritten principles that are present in judicial adjudication).

[207] Oldfather, *supra* note 8, at 137.

But, the main element seems to be the exercise of legal *reasoning*, which allows the court to publicly articulate the reasons for its decision in order to persuade the broader political community that the decision was correct.[208] This is related to the previously discussed issue of the political accountability of courts. We should remember that "[e]very act of constitutional review is an act of constitutional decision-making."[209] And, in order to preserve legitimacy, courts "portray their decision-making as if it were a pure exercise of logic."[210] The key in teleological systems is to account for the substantive differences with the more classic framework model. As Victor Ferreres Comella suggests, "[i]n too many cases, the court resorts to traditional methods of legal reasoning which are no longer in keeping with the constitutional function the court must carry out."[211]

B. Judicial Policy-Making

This is a crucial subject, particularly as it relates to teleological constitutions and the difference between the implementation of constitutionally prescribed policy and the independent development of policy by courts. Previously I discussed this important distinction. Yet, whether it relates to framework constitutions or teleological systems, attention must be given to the issue of judicial policy-making. While I've argued that courts in teleological systems are charged with implementing the policy of the constitution-makers, and not the unilateral preferences of judges: judicial policy-making is an inescapable aspect of *any* constitutional system.

In framework constitutional systems, policy-making is the primary, if not exclusive, purview of legislatures and executive officials.[212] In teleological systems, that task is distributed between the constitutional lawmaker and ordinary legislatures. What about courts? My analysis of the policy-making powers of courts, and the objections that accompany that proposal, *are equally applicable to framework and teleological types*. As a normative matter, the dominant view is that:

> "The main tool of constitutional courts is the power to interpret the Constitution to ensure its application, enforceability, and

[208] *See* Mazmanyan et al., *supra* note 51, at 12; SWEET, *supra* note 38, at 29.
[209] SWEET, *supra* note 38, at 95.
[210] *Id.* at 143.
[211] Comella, *supra* note 53, at 1971.
[212] BECKER, *supra* note 2, at 4.

> supremacy by adapting the Constitution when changes and time requires such task but without assuming the role of a constitutional power or of the legislator –they cannot on a discretionary political basis create legal norms or provisions that cannot be deducted from the Constitution itself."[213]

As such, "[w]hen the court substitutes its own judgment for that of the government or legislature [to which I add the constitutional legislator], it cannot be doing anything other than policy making."[214]

It should be noted that a court's power to propose legislation or temporarily fill in gaps—for example, in the face of legislative inaction when there is a state obligation—is a *different* form of policy-making than when a court creates policy that contradicts the preferences of the constitution maker or the ordinary legislator.[215] The same can be said about the necessary development of *doctrine* that gives adequate effect to legal norms. [216] This includes the development of "[n]ew concepts…as new problems arise."[217] While doctrine is a form of policy-making, it is also different from adopting independent, substantive policy preferences.[218] This allows *some* room for judicial legislation, but in a limited fashion.[219]

In that sense, it seems almost inevitable that courts will engage in some sort of policy-making, even if it's limited to the development of doctrine, gap-filling, or traditional adjudication. As Oldfather explains, "[c]ourts make law in the course of resolving disputes."[220] This is what Stone Sweet calls creating policy through adjudication.[221]

As I stated, this type of policy-making is different than when courts simply substitute legislative judgment—whether constitutional or ordinary—with their own personal policy preferences. There is universal rejection of this approach to judicial decision-making or

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[213] BREWER-CARÍAS, *supra* note 53, at 29.
[214] Ginsburg & Elkins, *supra* note 35, at 1436.
[215] *See* Ginsburg & Elkins, *supra* note 35, at 1444; Issacharoff, *supra* note 22, at 984.
[216] *See* SWEET, *supra* note 38, at 146–47.
[217] KOOPMANS, *supra* note 43, at 51.
[218] *See* MACFARLANE, *supra* note 65, at 139–40.
[219] KOOPMANS, *supra* note 43, at 108–09.
[220] Oldfather, *supra* note 8, at 138.
[221] *See* SWEET, *supra* note 38, at 25.

even policy-making.[222] And there seems to be a need for judges to adopt that position and self-restrain.[223]

Finally, I wish to offer a few thoughts here as it relates to judicial policy-making. Courts, because of institutional and historical factors, can be both an instrument of social change *and* one affirming the *status quo*.[224] The state of popular mobilization, the current social balance of power, and the continued commitment to the constitutional project will directly influence which of these alternatives courts will take.[225] But, there seems to be some consensus in favor of allowing judges at minimum to prevent constitutional provisions from becoming arcane, anachronistic, and outdated.[226]

VI. GOVERNING WITH JUDGES IN TELEOLOGICAL CONSTITUTIONAL SYSTEMS

In this section, I address how the updated view on the judicial role and its enforcement of modern constitutions impacts the concept of democratic self-government. In particular, I focus on the following issues: (1) the operation of the separation of powers; (2) the institutional dialogue needed among the different structures of government; (3) the operation of deference in these new circumstances; and, (4) the adequate standards of review in modern constitutional adjudication.

Here I wish to focus on the interaction between courts and other institutional actors in a democratic setting. In particular, the relation between the judiciary and the legislature. In order to carry out this analysis, I will address the following issues: (1) the concept of the separation of powers; (2) institutional dialogue; (3) deference; and, (4) standards of review.

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[222] *See* BECKER, *supra* note 2, at 25; Garaoupa & Ginsburg, *supra* note 44, at 542; KOOPMANS, *supra* note 43, at 57, 94.
[223] *See* Yusuf, *supra* note 11, at 759.
[224] BECKER, *supra* note 2, at 113; Boudin, *supra* note 65, at 1098.
[225] Christiansen, *supra* note 109, at 390, 402; KOOPMANS, *supra* note 43, at 274 ("Judges are inherently conservative…It is their role to maintain the established legal order.").
[226] *See* BREWER-CARÍAS, *supra* note 53, at 50.

A. Separation of Powers: Courts as Instruments for the Execution of the Policy Preferences of Constitutional Legislators

Because courts are charged with applying *higher* law related to policy that trumps the wishes of ordinary legislators, there seems to be a redistribution of power that favors the judiciary at the expense of the legislative branch. But this description is incomplete and potentially misleading. On the one hand, since it is not the courts that are imposing *their* views over the legislature, it is not entirely true that courts are gaining power over the legislature. By acting as conduits of the constitution makers, it is the latter who are imposing their will over legislators. On the other hand, the practical effect of this setting is that courts, *as conduits for the no-longer-present constitutional makers*, gain an institutional or operational upper hand over the legislator. As such, when constitutional makers (1) entrench policy preferences that constitute higher law and limit the options open to legislatures and (2) charge courts with enforcing these preferences, they are, in effect, *rebalancing the classic notion of the separation of powers*. As with many other features related to constitutionalism, many of the conceptual definitions adopted by scholars are done *over contingent circumstances*, namely, framework constitutional systems.

Since older constitutional systems leave policy out of the constitutional text and structure, delegating the adoption of policy to the ordinary political process, the operation of the separation of powers, *in those circumstances,* results in a narrow role for courts in the development and application of policy, while leaving a very wide space for legislative action. But, in modern constitutional systems, that view of the separation of powers is incorrect.[227]

As such, we must conclude that there is no *single* conceptualization of the separation of powers; instead, there is a flexible landscape that changes depending on the specific structure designed by constitution makers. We should not cling to an undisputed articulation of the separation of powers.[228] Depending on what a particular constitution says, there will be a different articulation of the separation of powers doctrine and the scope of judicial review.[229] As David Landau explains, "[t]here is no standard answer to questions of judicial role, but instead a series of different approaches. Similarly,

[227] Mazmanyan et al., *supra* note 51, at 2–3; Yusuf, *supra* note 11, at 759.
[228] *See* COMELLA, *supra* note 41, at xiv; STONE SWEET, *supra* note 38, at 130.
[229] *See* KOOPMANS, *supra* note 43, at 99.

theories and practices of the separation of powers *have varied tremendously across time and across countries*."[230] Thus, while it's true that the separation of powers "both enable[s] and restrict[s] the exercise of judicial review,"[231] *how and to what extent* it does so will vary greatly across constitutional systems.

With that in mind, reference to an *abstract* notion of the separation of powers as an objection to court-led enforcement of the policy choices of constitutional makers—taking as a given that the population still clings to the original constitutional project—is totally misplaced. Also, it can create confusion, particularly in courts that are accustomed to only carrying out their *traditional* and *classic* functions, which generates a potential for substantial under-enforcement of constitutional provisions and preferences.[232] In those circumstances, courts that abstain from intervening in policy issues cannot find justification in the doctrine of separation of powers.[233]

Older constitutional systems seem to require that courts limit themselves to their traditional and historical functions of dispute resolution, administration of criminal justice, interpretation of legal norms adopted—mostly—by the legislature, and to acting as a negative constitutional legislator. This generates a *particular* articulation of the separation of powers that, in turn, limits the intervention of courts in policy matters.[234]

But, as we have seen, that is a very context-specific view of the separation of powers that does not constitute a universal truth. Modern constitutional systems recalibrate the separation of powers in a way that, while not necessarily conferring policy-making power on courts, does allow or require them to intervene in policy issues. As such, reference to the *framework* version of the separation of powers is inappropriate in teleological systems.[235]

Here is where it gets tricky. Writing about the separation of powers doctrine in the United States, Ginsburg and Elkins characterize that view as an "ardent fidelity to the separation-of-powers formalism that sees courts as *passive interpreters* rather than *lawmakers*."[236] But this

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[230] Landau, *supra* note 76, at 1531 (emphasis added).
[231] SWEET, *supra* note 38, at 32.
[232] *See* Hershkoff & Loffredo, *supra* note 66, at 942; Pascal, *supra* note 81, at 864.
[233] COMELLA, *supra* note 41, at 15; Pascal, *supra* note 81, at 891.
[234] *See* BREWER-CARÍAS, *supra* note 53, at 10.
[235] *Id.* at 36.
[236] Ginsburg & Elkins, *supra* note 35, at 1446 (emphasis added).

may constitute a false dichotomy in the face of a possible trichotomy.[237] On the one hand, passive interpreters; on the other hand, active lawmakers. Sometimes we can have *passive lawmakers and active interpreters*. In that sense, courts have no *independent* lawmaking power, making them passive in this regard. But, courts, armed with clear text, authoritative history, and substantive content, which are key elements of the original explication interpretive model, become active enforcers of the constitution.

B. Institutional Dialogue

In the end, the idea of a separation of powers is an approach to how the different branches of government interact among themselves. Teleological constitutions, by requiring judicial intervention into policy matters previously reserved exclusively to the legislature, generate a more complex relation among the branches. While this could result in constant clashes between them, the notion of inter-branch dialogue has gained strength.

As we saw, at a minimum, increased judicial review of the substantive choices made by legislators has influenced how legislatures act in the first place. In other words, during the lawmaking process, legislators consider what constitutional courts would do if asked to review their legislation.[238] But institutional dialogue has developed into a sophisticated dynamic whose precise details and effects are outside the scope of this project. Canada has led the way.[239] But, because Canada's constitution can be characterized as part of the liberal democratic framework family, the interaction between the dialogue model and teleological constitutions is still developing. South Africa represents the next step in this story.[240]

In essence, the dialogue model allows for a multi-level process of constitutional analysis that does not necessarily end when a constitutional court adjudicates a particular controversy. After passing judgment of the constitutionality of the challenged action—especially if it's against the government—constitutional courts engage the legislature in a cooperative process to solve the constitutional problem. As Emmet Macfarlane explains in the Canadian context,

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[237] *See* Landau, *supra* note 13, at 730.
[238] *See* BECKER, *supra* note 2, at 353; STONE SWEET, *supra* note 38, at 73.
[239] *See* Harding, *supra* note 4, at 412–27; MACFARLANE, *supra* note 65, at 48; *see also* WALLACH, *supra* note 146, at 157.
[240] *See* Yusuf, *supra* note 11, at 754.

"[t]he dialogue metaphor views legislatures as generally able to respond to court decisions either by amending impugned legislation or by temporarily suspending judicial decisions by using the Charter's notwithstanding clause."[241]

As a result of the dialogue model, "[c]ourts are in a dynamic relationship with other bodies involved in normative practice. They are actively constructing and being influenced by those practices."[242] In other words, the dialogue model is a two-way street where constitutional actors influence each other without eliminating constitutional supremacy or the essential tenets of judicial review. In that sense, "[a]s these interactions have grown over time, law-making and the construction of the constitutional law have tended to bind together, each power becoming at least constitutive of the other."[243]

C. Standards of Review: Deference and Scrutiny

The structure of teleological constitutions and general notions of the separation of powers do not specify exactly *how* constitutional courts should analyze legislation (or private action for that matter) in terms of standard of review. Interpretive methodologies tell us how to ascertain the legal meaning and effects of constitutional provisions, but they do not adequately guide courts as to the process of constitutional analysis itself in the context of adjudication. Still, we should keep in mind that the issues of *deference* and *standards of review* are very much conditioned on the particular constitutional structure. It all depends on the strength of the words and, in the particular case of teleological systems, the original explication of the framers.

The level of deference courts give legislatures will vary greatly. Those systems that adopt some sort of dialogue model allow for greater deference in the correction of constitutional violations.[244] This corresponds to professor Mark Tushnet's model of weak-form review.[245] Older constitutional systems, because there is little or no substantive policy context in the constitutional text, allow for the

[241] MACFARLANE, *supra* note 65, at 160.
[242] Scott & Sturm, *supra* note 14, at 570.
[243] SWEET, *supra* note 38, at 61; *see also* Yusuf, *supra* note 11, at 786.
[244] *See, e.g.*, Harding, *supra* note 4, at 433.
[245] Hershkoff & Loffredo, *supra* note 66, at 938–39.

greatest level of deference to legislative judgment.[246] Modern constitutional systems present a more complex situation. As negative legislators, *courts are their strongest*. And, when the constitutional policy preference is clear—whether due to text, original explication, or a combination of both—there is substantially less room for deference. But when it comes to the enforcement of the state's positive obligations—whether in terms of positive rights or policy rules—*courts are at their weakest*, limiting themselves to temporary gap-filling in cases of legislative inaction and as semi-negative legislators declaring that such inaction is unacceptable and must be remedied.[247] This is also similar to the weak-review model.[248] Reasonableness has been the most used standard of review in positive rights cases.[249]

In terms of the specific standards of review, I will not dive into a detailed analysis of the alternatives. I only focus on their *existence*. In other words, there are many alternatives available to courts. Proportionality analysis is the most common standard of constitutional review.[250] As Stone Sweet explains, the type of balancing done in proportionality analysis "leads judges to put themselves in the place of the legislature and to conduct legislative-style deliberations, which partly explains why we find constitutional courts so often commanding parliament to legislate in particular ways."[251] Also, depending on textual and explication particularities, stricter standards of review are also available and may even be required.

VII. THE STRUCTURE OF COURTS: FINAL COMMENTS ON ORGANIZATION, JUSTICIABILITY, PROCEDURE, AND REMEDIES

Reasons of space and relevance prevent me from offering a comprehensive discussion on how the structural aspects of judicial practice in constitutional cases interact with modern constitutional systems. But, for purposes of presenting at least a full picture of the

[246] Harding, *supra* note 4, at 447–48 (referencing the experience in the United States); KOOPMANS, *supra* note 43, at 68.
[247] *See* Landau, *supra* note 76, at 1548–49.
[248] *Compare* Pascal, *supra* note 81, at 866–68 (saying that state courts in the U.S. have *mostly* employed so-called equal protection scrutinies to justiciable positive rights, which amounts to a reasonableness test); *with* Usman, *supra* note 69, at 1508–09 (suggesting that there have been circumstances in which a strict scrutiny analysis has been used).
[249] Yusuf, *supra* note 11, at 786.
[250] *See* Harding, *supra* note 4, at 430.
[251] SWEET, *supra* note 38, at 98.

issues related to the judicial role and function, I offer the following remarks and observations. Other scholars have dived into this issue with great rigor and depth. I defer to them.

Among the issues related to the structure of courts is the matter of the competing models of constitutional courts, which are typically divided between the centralized and de-centralized systems, where the former rests on the existence of a single court responsible for constitutional review, while the latter allows ordinary courts to, at least with regards to the particular controversy before them, carry out constitutional review.[252] There are also questions relating to jurisdiction and standing.[253] Another variable is the option of allowing abstract or concrete review.[254]

Again, there are no universal answers and it is a question mostly left up to constitutional designers. In some instances, "constitutional courts ought to be conceptualized as specialized legislative organs, and constitutional review ought to be understood as one stage in the elaboration of statutes."[255] This is particularly true in the teleological context.

Another important issue refers to standing and access to courts. I argue that modern constitutions require courts to considerably liberalize the doctrines related to these concepts, in comparison with their older counterparts,[256] precisely because the constitution-makers counted on comprehensive judicial enforcement and, more to the point, the sheer breadth of coverage by teleological constitutions allows for many parties to point to a particular constitutional provision that grants them standing. The Indian Public Interest Litigation model is an offspring of this phenomenon.[257] In the end, it will all depend on the specifics of what the constitutional makers did (text) and said (original explication).[258]

Finally, I turn to the issues of actions, remedies, and additional tools available to courts. Among these are the *tutela* actions that have proliferated in Latin America, through which, for example, the

[252] *See* BECKER, *supra* note 2, at 205–06; COMELLA, *supra* note 41, at 3; Garaoupa & Ginsburg, *supra* note 44, at 539–40; Ginsburg & Elkins, *supra* note 35, at 1431.
[253] COMELLA, *supra* note 41, at 5.
[254] Garaoupa & Ginsburg, *supra* note 44, at 540; Ginsburg & Elkins, *supra* note 35, at 1448; SWEET, *supra* note 38, at 45–46.
[255] SWEET, *supra* note 38, at 61.
[256] *See* BECKER, *supra* note 2, at 207.
[257] Yusuf, *supra* note 11, at 781.
[258] *See* BECKER, *supra* note 2, at 205; BREWER-CARÍAS, *supra* note 53, at 16.

Colombian Constitutional Court "has had a lot of opportunities to intervene in the enforcement of social rights."[259] This Court in particular is known for crafting particularly strong remedies in constitutional cases.[260] Reminiscent of the negative-positive rights/obligations dichotomy I already mentioned, courts have also taken to suggesting or proposing measures to the legislature for their consideration.[261] Injunctive relief also allows courts to address the specific constitutional problem before them while the legislature comes up with a more comprehensive regime.[262] Advisory opinions are also available.[263] Yet, the issue of adequate remedies in cases of violation of policy-laden constitutional provisions found in teleological constitutions is still outstanding.[264] As Salma Yusuf explains, "[t]here is no history or legacy of awarding remedies for violations of [economic, social, and cultural rights]."[265] I'm confident that once we adequately understand the nature and effect of teleological constitutions, we will start to shed the traditional views associated with the older framework types and come up with new models of judicial enforcement that will allow these constitutions to live up to their full potential.

The objective of this Article was to call into question our current understandings of the judicial role, taking into account the content of modern constitutions, such as the ones adopted in some U.S. states and other countries. By rejecting fixed conceptualizations of that role based on isolated experiences and embracing the view that the proper operation of judicial bodies necessarily depends on the content and structure of the particular constitution at issue, we are able to adopt a dynamic concept of the judicial role that transcends its historical characteristics. The result should be a new role for courts in democratic self-government where the People are able to use judicial bodies to enforce the policy preferences entrenched, by the People themselves, in the Constitution.

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[259] Cepeda-Espinoza, *supra* note 69, at 1699.
[260] *Id.* at 1700.
[261] Ginsburg & Elkins, *supra* note 35, at 1440.
[262] Hershkoff & Loffredo, *supra* note 66, at 949–50.
[263] MACFARLANE, *supra* note 65, at 47.
[264] *See* Usman, *supra* note 69, at 1532.
[265] Yusuf, *supra* note 11, at 785.