COLOMBIAN CONSTITUTIONALISM: CHALLENGING "JUDICIAL SUPREMACY" THROUGH PLURALISM[†]

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TABLE OF CONTENTS

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I. INTRODUCTION

The Colombian Constitutional Court has been highly regarded by comparative constitutional law scholars as one of the most powerful Courts in the world.[1] Although the Colombian Constitutional Court has been considered a landmark for progressive decisions, there are some underlying concerns that should be considered. The main aim of this paper is to shed some light over those concerns, and to propose an alternative interpretation of the Colombian Constitution that can mitigate the effects of a self-aggrandizing power of judicial review at the expense of the democratic institutions.

The main point is that a healthy, open, and critical attitude towards institutional design should be adopted, even when the institution is entrenched in the legal and cultural tradition of a country. Specifically, it should allow one to question the current institutional arrangements on normative grounds, as to be able to find its limitations. What is being discussed is not new at all, in fact, it is simply a reminder of Hume's opening statement in his essay, "That politics may be reduced to a science," in which he called for, when assessing a Constitution, the necessity to evaluate the institutional design it incorporates and not to rely, exclusively, on the character and conduct of governors.[2] The analysis proposed here is aimed at valuing the importance of institutional considerations in justifying political and legal actions. Such an assessment will focus on whether one institution renders a better outcome than another, and on the intrinsic values of the procedures that will yield different outcomes.[3]

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1 *See generally* Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?,* 29 DUKE J. COMP. & INT'L L. (forthcoming Fall 2018); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. L.J. 319 (2010).

2 DAVID HUME, *That Politics May be Reduced to a Science, in* ESSAYS: MORAL, POLITICAL, AND LITERARY 14 (Eugene F. Miller ed., Liberty Fund, Inc. 1986) (1742).

3 *See* JOSEPH RAZ, *On Authority and Interpretation of Constitutions, in* BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 323 (2009); *see also* Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266 (2004).

The 1991 Colombian Constitution contains a wide-ranging catalogue of rights, which includes the "classical" liberal rights, as well as socio-economic rights, and an unenumerated rights clause. This constitution is widely valued because it encompasses personal autonomy, pluralism, human dignity and democracy. These rights and values have been developed mainly by the Courts, thus leaving democratic institutions and mechanisms in the background. As a result, there is a need to think how the institutional design should work to fit the demands associated with such values. Although discussions on the design of institutions are mainly contextual and empirical,[4] and, as it will be shown, judicial review has been in Colombian constitutionalism for a long period of time, it is also worth taking a normative approach to show the different choices that can be made regarding political institutions and processes. In this respect, I propose a thought-experiment to shed light on the moral-political claims to the possibility of changes in the institutional design of countries moving toward a system of "judicial supremacy," as will be defined below.

Furthermore, it seems that Constitutional law has overshadowed the idea of constitutionalism as a means of empowering the people through the exercise of democracy. Such an idea has had a logical consequence: while the interest for research in the judiciary branch has increased, the interest in examining the legislative and the executive branch have decreased.[5] In order to justify this interest, it has been a common place in countries such as Colombia, Canada and Israel, to argue that these are the times of the "*new constitutionalism*,"[6] in which judges are the center of constitutional arrangements, and that they, and perhaps only them, are called to undertake the task of transforming and shaping a just society by

4 *See generally* ANDREI MARMOR, *Constitutional Interpretation, in* INTERPRETATION AND LEGAL THEORY (2nd ed. 2005) [hereinafter MARMOR, *Constitutional Interpretation*].

5 *See* JEREMY WALDRON, LAW AND DISAGREEMENT, OXFORD UNIVERSITY PRESS (2004); TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017); Santiago Garcia-Jaramillo and Camilo Valdivieso-Leon, *Transforming the Legislative: A Pending Task of Brazilian and Colombian Constitutionalism*, *in* 5 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS, CURITIBA 43-58 (2018).

6 One should be cautious when defining "new constitutionalism", as its meaning is debated. If it means that constitutions are written in the language of principles thus entailing some sort of moral content, and that a judicial branch is responsible for its interpretation, one must argue that Colombia has been experiencing some sort of this new constitutionalism since 1910. For a critical approach towards new constitutionalism, see generally Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So that Everything Would Remain the Same"*, 32 ISR. L. REV. 250 (1998); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004). For an assessment on new constitutionalism, see generally CARLOS BERNAL PULIDO, EL NEOCONSTITUCIONALISMO A DEBATE (2006).

applying the moral concepts included in the Constitution.[7] In following this approach to constitutionalism, one might be tempted to take the place of judicial exclusivists, and to see the Constitution as a "truly mysterious" document not being accessible to the layperson, but rather understandable only by experts on Constitutional law or experts in morality.[8]

New Constitutionalism[9] then seems to entail what in the United States has been called *judicial supremacy*.[10] In contrast with the extensive debate on judicial review and judicial supremacy in American constitutional jurisprudence, Colombian constitutional history—and its institutional designs containing many contextual peculiarities—has not

7 *See* Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 72 (2004) (this theory taken mainly from German Constitutional Law is not free of criticism. For instance, prominent German scholar, Ernst-Wolfgang Böckenförde argued that understanding the Constitution as the basic legal order of the community, gives the Constitution ". . . an all-around guiding function, and the balancing out of the various legal positions, to the extent that substantive legal content is at issue, is a task of the Constitutional Court. Since the guidelines of constitutional law are to that extent indeterminate, the Constitutional Court becomes, in its work of concretizing their scope, the master of the Constitution."), ERNST-WOLFGANG BÖCKENFORDE, *Fundamental Rights and Constitutional Principles*, *in* CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 235, 265 (Mirjam Künkler & Tine Stein eds. 2017). For a positive assessment of the Constitution as establishing an objective order, *see generally* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2010).

8 LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 1 (1993) (Tribe and Dorf are commenting on a speech given in 1984 by Justice Stevens, where he depicted the Constitution as a "mysterious document."), *see id.* (the authors argue that if the Constitution is to be perceived as a truly mysterious document, one might be tempted to think that to understand it, one needs to seek "the guidance of the high priests to discern its meaning. And who are the high priests of constitutional interpretation if not the Justices of the Supreme Court"), *id.*

9 It is hard to define what precisely is to be understood as "new constitutionalism." It is usually used to describe constitutions including long right's charters, judicial review, and opened-ended constitutional provision. *See generally* Mauro Barberis, *¿Existe el neoconstitucionalismo?, in* FILOSOFÍA DEL DERECHO CONSTITUCIONAL: CUESTIONES FUNDAMENTALES (Raúl Márquez Romero & Wendy Vanesa Rocha Cacho eds., 2015); CARLOS BERNAL PULIDO, EL NEOCONSTITUCIONALISMO Y LA NORMATIVIDAD DEL DERECHO (2009); MIGUEL CARBONELL & LEONARDO GARCÍA, EL CANON NEOCONSTITUCIONAL (2010); MIGUEL CARBONELL, NEOCONSTITUCIONALISMO (2003).

10 *See* Charles Black, *The Presidency and Congress*, 32 WASH & LEE L. REV. 841 (1975) (some scholars doubt the existence of such a thing in the United States. According to this argument, there are many escape hatches for the political actors from a constitutional interpretation made by the Court. For instance, some have argued that it is possible for Congress to restrict or remove jurisdiction from the Courts for some cases, thus acting as a democratic check on the Court, as suggested by Charles Black); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 274-277 (2009); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (another argument states that it is doubtful that the Court is as counter-majoritarian as it is usually portrayed); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 283 (2010).

been met with equivalent intensity in the same discussions.[11] It is not possible to completely isolate the Colombian Constitution from the normative discussions on judicial review and institutional design that have been vigorously developed in the United States, especially when taking into consideration that Colombia also has a long tradition of judicial review that is part of its constitutional culture, and that many of the features of this "new constitutionalism" have been developed by recourse to foreign theories of judicial review.

Since the institution of judicial review is entrenched in the Colombian cultural and legal framework, this paper first addresses the question of how this institutional arrangement appeared in the Colombian constitutional tradition. Next, I develop a definition of judicial supremacy for the Colombian case, that can be helpful in thinking through many other constitutional democracies. Finally, after acknowledging that judicial review is here to stay, I present an alternative claim towards constitutional interpretation and the role of constitutional courts.

II. COLOMBIAN JUDICIAL REVIEW AND INSTITUTIONAL DESIGN FROM 1910 TO 1991

A. The Appearance of Judicial Review: 1910

Colombia has a long tradition of judicial review dating to the late 19th and early 20th century.[12] Even if some works have argued that

11 Hirschl, *supra* note 7, at 73 (in fact, while the recourse to "new constitutionalism" is usually used to explain the powers of the Court, such explanations mainly fit what Ran Hirschl calls the "conventional theories of constitutional transformation." He explains that theories of "constitutional transformation" can be grouped into four categories: (1) evolutionist grounds ("an inevitable by-product of a new and near-universal prioritization of human rights in the wake of World War II"); (2) functionalist grounds ("the only institutional mechanism that enables opposition groups to monitor distrusted politicians and decision makers" in polities facing political polarization); (3) institutional economic models ("mechanisms to mitigate systemic collective action concerns such as commitment, enforcement, and information problems"); and (4) the "democratic proliferation" thesis); *id.* at 73, 74, 79, 82 (it is not the aim of this paper to explain the origins of Colombian new constitutionalism, but in order to raise some doubts on the conventional theories of justification, it can be considered that in 1944 constitutional Scholar Tulio Enrique Tascón stated, "[W]ith the establishment of judicial review of the legislation [in 1910] Colombia marked an advance in the public law of the world, and therefore, it is not the democratic constitutions of the postwar period – as Professor Boris Mirkine Guetzevitch mistakenly believes – to which this culmination of the rationalization of power is due"); TULIO ENRIQUE TASCÓN, HISTORIA DEL DERECHO CONSTITUCIONAL COLOMBIANO 216 (1951).

12 *See* JORGE GONZÁLEZ, ENTRE LA LEY Y LA CONSTITUCIÓN: UNA INTRODUCCIÓN HISTÓRICA A LA FUNCIÓN INSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA 1886-1915, at 83 (2007) ("In 1910, . . . the Legislative Act No. 3 of 1910 prescribed that the Court had the responsibility of guarding the integrity of the Constitution . . . that however does not mean that in Colombia there was no type of constitutional control over the actions of the legislative branch.

judicial review has its roots prior the 1886 constitution,[13] it is not until the 1910 amendment when it was formally established in the constitutional text and the power to exercise it given to the Supreme Court.[14]

In 1910, judicial review was formally entrenched in the Colombian Constitution.[15] During that year, the House of Representatives transformed into a constitutional assembly and undertook major constitutional reforms aimed at healing the wounds left by the Reyes regime between the liberal and the conservative political parties.[16] The discussions in the assembly addressed almost every important political topic at the time, and the arrangements of the new institutional design made up most of the discussions.[17] As far as the records show, there was great interest amongst the representatives to the Assembly to strengthen the democratic regime, to establish some fundamental rights as barriers against the encroachment of government, and to introduce strong limits

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According to section three of the twenty-second article of Statute 61 of 1886, the Supreme Court of Justice could decide on Bills that were approved by Congress and objected by the Executive branch on grounds of unconstitutionality…Therefore, it is necessary to clarify that what was achieved by the constitutional reform of 1910 is a mechanism of control accessible to the citizen and not only Executive branch.").

13 *See generally* ALFONSO LÓPEZ MICHELSEN, INTRODUCCIÓN AL ESTUDIO DE LA CONSTITUCIÓN DE COLOMBIA (1983); CARLOS RESTREPO PIEDRAHITA, TRES IDEAS CONSTITUCIONALES: SUPREMACÍA DE LA CONSTITUCIÓN, CORTE CONSTITUCIONAL Y OMBUDSMAN (1978).

14 *See* Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L & COMP. L. REV. 59, 68 (1995).

15 *See id.* (the first discussion on implementing judicial review began in 1909 in the House of Representatives, when the conservative regime of Rafael Reyes came to an end. Many of these projects were discussed in 1909 and were the basis for the discussions in the 1910 Assembly. For example, Proyecto de Acto Legislativo Reformatorio de la Constitución Nacional, art. 67, as proposed by Representative Nicolas Esguerra; Proyecto de Acto Legislativo Reformatorio de la Constitución Nacional, arts. 17, 18, as proposed by Representatives Carlos E. Restrepo, Esteban Jaramillo, Antonio José Cadavid and Lizandro Restrepo; Proyecto de Acto Legislativo Reformatorio de la Constitución Nacional, art. 4 as proposed by Joaquín A. Collazos and Manuel Bonilla; Proyecto de Acto Legislativo Reformatorio de la Constitución Nacional, art. 15 as proposed by Jose Vicente Concha—a conservative—although in his proposal of judicial review was limited only to acts of the executive branch, since he believed that judicial review of legislation would alter the balance of power. It should be noted that reference to the Constitutional Assembly should not be taken as a call to take an originalist approach toward constitutional interpretation. In this paper, they are only recourse to reaffirm that questions of institutional design and the moral consequences they entailed were taken seriously when discussing the Constitutional entrenchment).

16 The two traditionally hegemonic Colombian political parties were both founded in the XIX century and dominated national and regional elections until the appearance of the 1991 Constitution. *See generally* DAVID BUSHNELL, THE MAKING OF MODERN COLUMBIA: A NATION IN SPITE OF ITSELF (1993).

17 *See generally* Records and Annals of the 1910 Colombian Constitutional Assembly.

to the executive branch.[18] Similarly, there were many voices calling for a strong protection of "minorities"[19] at the time; such protection sought to be achieved through the design of election constituencies and Congress procedures.[20]

In the context of these amendments, Legislative Act No. 3[21] introduced, among other things, the constitutional supremacy clause,[22] the public unconstitutionality action,[23] the power of the Supreme Court to exercise judicial review of legislation,[24] and the "unconstitutionality exception."[25] Unfortunately, most of the records of the discussions are lost—transcriptions of the debates were poorly kept—but the most passionate defenders of judicial review during the assembly were the liberal delegates who were excluded from government during the times of the Reyes regime. At this stage, some delegates proposed a weak form of judicial review, which aimed to leave the last word on the meaning of the Constitution to an accountable and democratically elected institution: the Colombian Congress.[26]

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18 *Id.*

19 It is a truism that the "minorities" they had in mind do not encompass what we understand today with such a term, but it would have been interesting to see how constitutional history would have evolved with such design.

20 *See* Records of National Assembly, September 29, 1910, No. 62, 49 (some delegates set forward the argument that the institutional design had to ensure the protection of the minorities in order to be approved "[t]hat the minorities are represented is, perhaps, for me, the principal point of discussion . . . . It would help that, taking into consideration the existence of two congressional forums, in which the minorities will be represented (and if it is not so, then it cannot happen), that such representation is mandated by the law." There is also an interesting point in the discussions where one member of the assembly, asked for the institutional design to be made by bearing in mind that any of the political parties could eventually become also a minority: "Of course we accept the inclusion of the role of minorities since you arrogantly uphold your pompous status of being the majority just because you prevail in the elections and have the privilege to do so. However, the esteemed gentleman Esguerra has cautioned that no one knows today who the minority will be tomorrow"); Records of National Assembly, October 7, 1910, No. 67, 532 (in this sense, also the record from the sessions of July 28, 1910, show an interesting debate aimed to entrench a provision stating that a third of the representation of Congress, the Supreme Court, and any collegiate institution, should be granted to the "minorities").

21 L. 03/10, octubre 31, 1910, DIARIO OFICIAL [D.O.] (Colom.).

22 *Id.* art. 40.

23 *Id.* art. 41.

24 *Id.* art. 41.

25 *Id*.

26 There were some discussions in the assembly on whether to approve a strong or weak model of judicial review. Some projects advocated for giving to the Supreme Court the power to suspend the effects of law when a citizen argued that it violated the Constitution, while leaving the last word to Congress on the law's constitutionality. For instance, one of the projects stated: "By petition of any citizen or the Nation's Ombudsperson, it is the duty of the Supreme Court, subject to unanimous vote, to suspend the laws insofar as they are in violation of civil rights, and in any case obligated to inform the succeeding Congress for that body to ultimately decide on the declared

One might try to justify the appearance of judicial review in 1910, by partially appealing to the "Standard Argument" for judicial review, as described by Wilfrid Waluchow, which argues for the protection of individual interests and the protection of a minority group.[27] Perhaps it is not a coincidence that most of the defenders of judicial review were liberal politicians, and thus it is possible to understand this particular arrangement, as Ginsburg explains, as an "*insurance model of judicial review*," in which the "constitutional designers thus adopt a system of judicial review by independent courts to restrain future governments that they will not control,"[28] or at least to pose stronger barriers against being completely cast away from politics,[29] as they were under the Reyes regime.

However, this assembly left a model of judicial review with many features that deserve more thorough analysis. Specifically, its formal entrenchment within the constitutional text—and the possibility of being triggered by any citizen through an *actio popularis*—at first glance seems to reconcile constitutionalism and democracy,[30] but that again would be too optimistic, or even a precipitated conclusion as it shall be discussed below.

B. The 1991 Constitution: Reshaping Politics and Improving Democracy While Protecting Substantive Values

In 1991, a new Constitutional Assembly, which enjoyed the support of society, was summoned by President Cesar Gaviria.[31] As in 1910, the

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unconstitutionality." These discussions can be found mainly in the records from the Assembly of July 9 and 13 of 1910, *see generally* Records of National Assembly, July 9, 1910; *see generally* Records of National Assembly, July 13, 1910. In the end it was the "strong model" of leaving the final word only to the Supreme Court that was approved (Assembly of September 19 and 20 of 1910), *see generally* Records of National Assembly, September 19, 1910; *see generally* Records of National Assembly, September 20, 1910.

27 *See generally* WILFRID J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 150 (2009).

28 *See* Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES L. 49, 53 (2002).

29 It is interesting to note that during the 1910 Assembly, there were discussions on how to choose the Supreme Court Members, and that some of them were confirmed by the Assembly, as can be seen in the record of the debates of May 21 and 23, and July 9 and 13, 1910.

30 *See* Francisco G. Estrada & Santiago G. Jaramillo, *Por una colaboración armónica entre el juez constitucional y el poder político: Análisis desde la historia constitucional colombiana, in* 22 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 53 (Marie-Christine Fuchs & Christian Steiner eds., 2016) (previously affirming the proposition of the formal entrenchment within the constitutional text reconciles constitutionalism and democracy).

31 For a comprehensive account of this process, *see* JULIETA LEMAITRE, EL DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES 121-28 (2009).

context of the country was one of the main factors that determined the discussions of the representatives and the changes that were eventually included in the new constitutional text. At the end of the 20th century, Colombia faced great challenges at both the institutional and the social level, and the former 1886 Constitution was envisioned as an obstacle to change.[32]

In this sense, the 1991 Constitutional Assembly became an icon of peaceful transition, hope, and pluralism that sought to unite and create an inclusive dialogue between different sectors of the Colombian society that, until then, had been major enemies; even guerrilla groups, indigenous, and afro communities were given a seat at such assembly. Furthermore, the M-19 — a former guerrilla group — won a significant portion of the assembly seats.[33] The constitutional text introduced a variety of changes directed mainly at the protection of individual rights, and clearly modified the institutional design of the time. New public entities, such as the Constitutional Court and the public ombudsman,[34] were introduced, as well as more inclusive judicial procedures for the enforcement and protection of fundamental rights, such as the *accion popular*, *accion de grupo*, and *accion de tutela*.

The institutional design adopted was complex: the Constitutional Court was created as a "powerful court," but entrusted with an exhaustive list of functions, such as judicial review of laws, judicial review on procedural grounds of constitutional amendments, and as a check on the executive branch during "times of emergency."[35] Similarly, as the Court in charge of the fundamental rights adjudication, it undertook the review of the expedite protection of such rights via *accion de tutela* by other courts. However, the article which grants these powers contains an unusual formula in the constitutional text. It states that the Court shall exercise its powers in the "*precise and strict terms*" of such article.[36] Such a formula should be regarded as a rule of interpretation, perhaps one of the few rules of interpretation that the Constitution itself contains. This rule should be understood as implying that the enumerated powers of the Constitutional Court are the only ones the Court has, and that when such

32 *Id.* at 124.

33 In fact, it was the second most powerful political party at the Constitutional Assembly, just after the traditional Liberal Party, *see id.*

34 There is a complex institutional design in this point. There is an office of an Inspector General (*Procurador General*), who upholds the common good, and the Ombudsman Office (*Defensoría del Pueblo*), which is basically in charge of promoting human rights.

35 CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 214, 241.

36 CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 241.

article prescribes either substantial or procedural judicial review the Court should stay within those boundaries.

On the other hand, when the Constitution consecrated the principle of separation of powers, it also stated that the executive, legislative, and judiciary branches have "separate functions," but are bound to a "*harmonic collaboration*"[37] in order to fulfill the main goals and principles included in the Constitution. One can argue that "*harmonic collaboration*" is a contested term[38] whose content is not clear, and that reasonable disagreement will arise when interpreting it. The last thing that could be inferred from this formula is that the Constitution ascribed its institutional design to some form of judicial supremacy, or to any other branch, different from the people themselves. Such a principle of judicial supremacy cannot be logically derived from a Constitution that seeks to promote democracy[39] rather than to act just as an antidote[40] to it.

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37 *See* Constitutional Assembly Records, Delegate Rodríguez Céspedes (1991) (not only was there a call for a "perfect balance between the three branches of government" in 1991 Constitutional Assembly Records, Delegate Hugo Escobar Sierra (1991) at Volume 25 p. 56, but there was also a call to suppress "the intervention of one branch in the other's functions." At P.6. In addition, there was also a plea to leave behind archaic political theories regarding the functioning of government, especially to leave behind the all too ". . . simplistic and basic three way division of power . . . the classic functions of legislating, enforcing the legislation, and applying judicially, that still remain in our constitutional texts which conserve the traditional spirit and old doctrine of the separation and three-way classification of power, has now transfigured into a none absolute separation of power entailing a rational and harmonic collaboration . . . the State, in practice, regarding its organization and functions, has surpassed the traditional doctrines and has modernized to a stage where the actual distribution of power in three branches of government, truthfully, has no place in theory or in practice in the modern State); 1991 Constitutional Assembly Records, Delegates Hernando Herrera Vergara, Carlos Lleras de la Fuente, Antonio Navarro Wolff, José Matías Ortiz, Abel Rodríguez (1991) at Volume 59. P.4.

38 *See* W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167 (1956); Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577 (2013) [hereinafter Marmor, *Meaning and Belief in Constitutional Interpretation*].

39 1991 Constitutional Assembly Records, Delegate Eduardo Espinosa Facio-Lince (1991) at Volume 26. P. 26 (referencing the historical opportunity before the Constitutional Assembly to shift the course of the Nation, Delegate Eduardo Espinosa deliberates on the urgent changes to be made: "It is essential for the country that the diverse set of political actors, social classes, and ethnicities represented in the Assembly, establish a framework that will enable our constitutional order to consecrate a more pluralistic, democratic, and egalitarian rule without altering the constituted powers…we submit a series of propositions that fundamentally part from the necessity to deepen and widen democracy in the tissues of our social relations so we can implant a social state of rule that guarantees the participation of all political and social groups of our nation…We understand democracy as the establishment of a State which enables the people to exercise their sovereignty. It is clear that our present normative framework does not allow such exercise; therefore, it is necessary to entrench basic principles in our Constitution that will provide for the necessary structure").

40 *See* Mandel, *supra* note 6, at 252 (the term "antidote" is used as proposed by Michael Mandel).

Popular sovereignty cannot be regarded as a simple slogan if one appreciates that the Constitution imbeds democracy in its Preamble as a fundamental principle, and as an essential goal of the State. Moreover, the 1991 Constitution includes a wide range of tools for direct democracy to participate in the political process in all its stages, even to amend the Constitution. Finally, and most importantly, it leaves the people the power to review constitutional amendments passed by Congress when they refer to the fundamental rights and its constitutional guarantees, the popular participation procedures, or when they deal with the legislative branch.[41]

III. THE SCOPE OF THE OBJECTION: JUDICIAL SUPREMACY OR A SELF-AGGRANDIZING POWER OF JUDICIAL REVIEW

As it can be seen, in the Colombian institutional design, the constitutional court's boundaries are then well defined in the Constitution, which calls it to be in "harmonic collaboration"[42] with the other branches of government, whose powers are also enumerated in the text. It might be a truism to state that when the power of judicial review is granted, there is a supremacy of the judiciary over the democratic institutions; however, it is also important to note that some constitutional arrangements, like the Colombian, try to mitigate this by precluding the ways and scope to exercise judicial review, as well as by leaving some escape hatches, so that the final word on constitutional issues remains within democratic institutions[43] or for the people.

If the Court acts within these boundaries, the principled objections against judicial review may simply not fade away, but will be mitigated to an extent provided that citizens would still have some "escape hatches" to exercise their sovereignty and to not "suffocate the political dimension

41 *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 153 (it is important to note that while the constitution grants the Constitutional Court the power to review constitutional amendments on procedural grounds, it leaves the people to oppose through a referendum a constitutional amendment passed by congress, undertaking then a political and moral debate. However, since 2003, the Court has given to itself the power to undertake a substantive review of constitutional amendments); Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03 (Colom.), *translated in* COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 341 (Manuel José Cepeda Espinosa & David Landau eds., 2017).

42 *See* 1991 Constitutional Assembly Records, Delegates Hernando Herrera Vergara, Carlos Lleras de la Fuente, Antonio Navarro Wolff, José Matías Ortiz, Abel Rodríguez (1991) at Volume 59. P.4.

43 *See Canada's Notwithstanding Clause — What's That Again?*, CBC NEWS, (Sept. 10, 2018, 5:06 PM), https://www.cbc.ca/news/canada/canada-constitution-notwithstanding-factsheet-ford-1.4817751 (an example of this is the Canadian notwithstanding clause).

of the Constitution."[44] In fact, it is possible to think on an institutional design that includes judicial review but provides considerable opportunity for a shared constitutional interpretation, where a cooperative process is undertaken by all the constitutional actors with humility and respect for the pronouncements of the others.[45] Thus, a system of what I will characterize as judicial supremacy entails: (1) the Courts defining for themselves the scope of their powers at the expense of the democratic procedures, even when such powers have been enumerated and delineated by the Constitution in strict and precise terms, (using the Colombian constitution's wording); (2) a system where the Court does not enroll into a process of "dialogue" or "harmonic collaboration" with the other branches of government, but rather defines by itself what the final meaning of a Constitutional provision is, as well as the sole means to concretize such provisions; and (3) where the Court undertakes the substantial review of constitutional amendments, thus closing the "escape hatches" to mitigate judicial review decisions.

Over the years, the Colombian Constitutional Court has expanded the scope of its powers.[46] For example, when undertaking the review of the Constitutional amendments, it has expanded them from procedural grounds—as explicitly granted in the Constitution—to substantial grounds. This does not take into account that the Constitution included a check on the power granted to the legislature to amend the Constitution, by a recourse to a referendum to be summoned by the people. On the other hand, due to this expansion in the scope of judicial review, the Constitution is less regarded as a framework that can be developed by the legislature and even by other judicial actors, but rather a document which contains the answers to all sort of problems, from administrative to civil and commercial law to arbitration, thus leaving the final word on these matters to the Constitutional Court, even when the Constitutional arrangements leave these questions to be defined by other judicial and non-judicial actors.[47]

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44 Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL.
L. REV. 1027, 1041 (2004).

45 *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation,* 2000 SUP. CT. REV. 61 (2000).

46 *See generally* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 235, 237(3).

47 *See id.* art. 235, 237(3) (it should be noted that Colombia has a complex design regarding the judiciary branch. At the highest level, there is a Council of State, broadly in charge of review of administrative action, and a Supreme Court in charge of litigation regarding civil, labor and criminal litigation).

It is possible to imagine a system in which courts can act as "guardians" of the deliberative conditions of the democratic process, for example by assessing the equal consideration of arguments presented in the legislative branch by its members, or by undertaking a limited review aimed at reinforcing the equality of participation of disenfranchised minorities or social groups. It is possible, also, to imagine a Court that can defer policy-making to government agencies, or Congress, when a question that falls within their boundaries reaches the Court, thus acting as a guardian of the contours of powers set in the Constitution, while leaving substantial room for institutional dialogue about the meaning of the Constitution outside of a single branch. For instance, when deciding cases that may involve public policy making, the Colombian Court has moved between these boundaries, at times deferring to policy makers and calling their attention to exercise their powers to mitigate fundamental rights violations[48] and acting as a guardian on the exercise of their constitutionally assigned functions, while at other times formulating specific policies to concretize a constitutional goal, thus defining its scope and the means to reach it.[49]

Additionally, Post and Siegel argued that even in a system entailing what has been called "judicial supremacy," citizens cannot be prevented from acting to alter the meaning of the Constitution by recourse to a variety of mechanisms, such as popular mobilization.[50] The Colombian institutional design paid a lot of attention to this by including ways in which citizens can influence the meaning of the Constitution—even at the Court's level—when including the *actio popularis*, and the possibility that any person can file *amicus curiae* in the judicial review process. The more the Constitution is portrayed as a complex document that encompasses a comprehensive moral theory, the harder it will be for the laymen to partake in the Constitutional debates and comply with the "requisites" that such an elevated view of the constitution demands.

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48 *See* Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.), *translated in* COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES, *supra* note 37, at 179-86 (the approach taken regarding the protection of rights of the displaced population, in the decision T-025 of 2004 has been regarded as an example of dialogue among the different branches of government. In this decision the Court, instead of making the policy by itself, summoned the different branches and call to undertake and exercise their constitutional powers in order to overcome a massive fundamental rights violation); *id.*

49 F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION & THE COURT PARTY 57 (2000) (this is similar to the Canadian case, where "[t]he Charter provides the occasion for judicial policymaking, but the document itself is not the most important explanation for that policymaking. Judges themselves have chosen to treat the Charter as granting them open-ended policymaking discretion").

50 Post & Siegel, *supra* note 44, at 1030.

All things considered, the definition provided here for "judicial supremacy," rejects the traditional construction of it as choice between binary concepts, where either you have "legislative/popular" or "judicial supremacy," but rather proposes an approach towards the term as a spectrum, considering how the judiciary self-aggrandizes its powers as to become a policy maker and to substantively pervade the ordinary democratic process,[51] and can have the negative impact of a passive citizenry that looks for lawyers to achieve social change through litigation, at the expense of popular mobilization and deliberative debate in democratic stages. Once the difference is traced, it makes a moral-political difference that ought to be considered.

IV. THE COLOMBIAN CASE: LEGITIMACY AND JUDICIAL REVIEW JUSTIFICATIONS

The Colombian system of judicial review has been defended and justified using the same arguments as in the United States literature in favor of judicial review, therefore, taking a comparative approach toward such theories should be useful in order to question or defend this particular institutional design. The arguments here will critically examine such approaches not empirically but mainly from a normative standpoint.[52]

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51 TOM CAMPBELL, PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS, AND DEMOCRACY 111-32 (2004) (this approach avoids what Tom Campbell defines as "negative activism" where judges do not apply clear constitutional provisions arguing some sort of "self-restraint." Providing a comprehensive account of Campbell's approach to the term activism).

52 RAZ, *supra* note 3, at 323-72 (one can expect all sorts of arguments to avoid the discussion that follows. The first imaginable argument will be that institutional design is context dependent as well as an empirical question. By the same token, a more sophisticated argument can be tempted to say that since judicial review is entrenched in the Constitution there is no need to undertake this discussion, somehow by recourse to Raz's *underdetermination* argument that the constitution is valid because it was so adopted. However, as it was pointed out, Raz himself does not deny the need for the question on institutional design which not only requires examining the structure of state organs and the division of powers enshrined in the Constitution but also the moral soundness of that structure. It is also tempting to state that that the Normal Justification Thesis is enough to legitimate an institution as judicial review. However, as Waldron, Marmor, and Christiano have shown, the question for legitimacy for authority does raise some questions which necessarily entail taking democracy into account); *see* ANDREI MARMOR, *Authority, Equality and Democracy*, 18 RATIO JURIS 315 (2005), *reprinted in* LAW IN THE AGE OF PLURALISM 57 (2007); JEREMY WALDRON, *Legislation, Authority, and Voting*, *in* LAW AND DISAGREEMENT 88 (1999); Christiano, *supra* note 3.

A. Constitutional Entrenchment as Pre-Commitment

A frequently used argument to defend judicial review is to show that it is a necessary consequence of having a written and rigid constitution. It is easy to imagine a defender of judicial review stating that a constitution is not a simple parchment barrier against power, and that an authority is needed to be the guardian of the procedures and values it entails. The defender may ask "who if not the courts can be that authority." Congress is, after all, full of politicians who only care for their reelection, and the executive branch is dependent on the moods of the majority. The written constitution argument can be complemented by calling upon the importance of the separation of powers and checks and balances in a democratic regime that takes pride in being a subject to the rule of law.

1. The Formalist Approach

Colombia has had many written constitutions.[53] An important work in constitutional law proposes that throughout most of our history political struggles were defined by imposing a Constitution against those who were defeated.[54] Despite that fact, not all the written constitutions included judicial review because the solemnity of written text alone does not entail it. There is no necessary consequence between having a written constitution and having judicial review. Even defenders of such institution as Dorf and Morrison argue that "in a constitution without judicial review, members of Congress themselves would have both a legal and a moral duty to abide by the limits written in a Constitution."[55] One should relax efforts aimed at showing judicial review as a necessary consequence of a written constitution.

The same goes for constitutional supremacy. A defender of judicial review may assert that due to the fact that the constitution is the "supreme law of the land"—or as the Colombian Constitution states the "norm of norms"—it ought to have some judicial protection as to secure it as the paramount of all laws. This can be a tempting argument to justify the existence of judicial review. Dorf and Morrison, however, argued:

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53 *See* William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 48-61 (1991) (for instance, nine at the national level enacted in 1821, 1830, 1832, 1843, 1853, 1858, 1863, 1886 and 1991).

54 *See* HERNANDO VALENCIA VILLA, CARTAS DE BATALLA: UNA CRÍTICA DEL CONSTITUCIONALISMO COLOMBIANO (1987).

55 MICHAEL C. DORF & TREVOR W. MORRISON, THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW 27-28 (2010).

> [S]upremacy by itself does nothing to establish judicial review. A written constitution (like the Dutch one) that vests final interpretative authority over the constitution in the legislature would still be supreme over ordinary law: In deliberations over whether to pass a bill, the argument that the bill conflicts with the constitution would, if accepted, provided dispositive grounds for rejecting the bill . . . .[56]

Based on these arguments, critics and defenders of judicial review seem to agree. Marmor states the following:

> Even if it is true that as a matter of law, constitutional provisions prevail over ordinary legislation, and it is also true that there must be some institution which has the power to determine, in concrete cases, whether such a conflict exists or not, it simply does not follow that this institution must be the supreme court . . . .[57]

Therefore, authorities acting under powers granted in the Constitution have the obligation to act within the scope of such authority, for "actions not authorized by law cannot be the actions of the government as government."[58]

Why then in Colombian constitutionalism is judicial review portrayed as a *necessary* feature of constitutional supremacy? The answer to this question comes from a peculiar law of our constitutional history; the 1886 Constitution did not originally include a supremacy clause, but the Law 153 of 1887 included a clause stating that a law passed after the enactment of the Constitution was presumed to be constitutional, and as a result it should be enforced even if it seemed to contradict the 1886 Constitution.[59] It was in 1910, in the same amendment where judicial review was adopted, when an express supremacy clause was added to the 1886 Constitution.[60] The fact that judicial review and the constitutional supremacy clause were adopted at the same historical time forces one to consider that one entails the other.

In the end, neither the written character of the Constitution, nor its supremacy, can be regarded as concluding arguments to justify judicial

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56 *Id*.

57 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 150.

58 JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 212 (2d ed. 2009) (this argument can easily be defended with our long tradition of including the "principle of legality" in our Constitution, which states that government authorities can exercise only the powers expressly conferred to them by the law).

59 L. 153/87, agosto 15, 1887, DIARIO OFICIAL [D.O.] (Colom.).

60 L. 3/87, agosto 15, 1887, DIARIO OFICIAL [D.O.] (Colom.).

review. The question of judicial review then turns more to a question of institutional design. As a matter of fact, judicial review was embedded in the 1910 amendment to the 1886 Constitution as well as in the 1991 Constitution.[61] Therefore, I will proceed to examine other justifications for this particular system of judicial review.

When addressing the question of judicial review as one of institutional design and whether having judicial review entrenched in the Constitution is desirable, it is easy for one's inquiries—perhaps most of the argument—to be empirical. As Marmor claims, when deciding to include judicial review in an institutional choice, "one major consideration must concern the likelihood that a supreme court will get the moral decision right, or at least, more frequently right than any other institutions."[62] It far exceeds the aim of this paper to take an empirical approach to answer this question.[63] However, from the normative grounds further considerations can be made.

2. The Argument for Pluralism

The first objection to judicial review that is commonly raised is the "argument of disagreement." According to this objection, the Constitution includes abstract rights and principles, which in a pluralistic society are subject to reasonable disagreement.[64] What follows is that given deep and pervasive disagreement about moral issues abstractly and broadly included in the Constitution, or even matters of public policy as in the Colombian constitution,[65] there is no justification for removing them from the democratic process.[66] This argument, developed mainly by Jeremy Waldron, calls for the matters of principle to be settled by elected and accountable institutions such as the legislatures.[67]

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61 L. 3/10, octubre 31, 1910, DIARIO OFICIAL [D.O.] (Colom.); CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 241.

62 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 154.

63 Some works have undertaken this empirical analysis. For a positive assessment of the work done by the Constitutional Court, see generally CESAR RODRIGUEZ GARAVITO & DIANA RODRIGUEZ FRANCO, CORTES Y CAMBIO SOCIAL (2010); DANIEL BONILLA MALDONADO, CONSTITUCIONALISMO DEL SUR GLOBAL (2015); TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017).

64 WALDRON, *supra* note 52, at 112.

65 For instance, consider that the Colombian Constitution includes rights as housing, healthcare and education, which ought to be developed by the executive and the legislature, *see* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 49, 51, 67.

66 Ronald Dworkin, *The Forum Principle,* 56 N.Y.U. L. REV. 469, 470 (1981).

67 WALDRON, *supra* note 52, at 91-93.

This objection is frequently rebutted by showing Courts as defenders of the people's rights—with such rights being shown as trumps on the majority—to be enforced by a counter majoritarian institution such as the Constitutional Courts.[68] Then the need of having judicial review becomes self-evident. It is not the aim of this paper to push into the "counter majoritarian difficulty"; but rather to focus on the argument of pluralism. If there is one consensus amongst scholars, lawyers, social movements, and even politicians, it is the fact that the 1991 Colombian Constitution is the result of a pluralistic convention.[69] Pluralism was raised as a constitutional value, precisely as a trump on the vision of a homogenous society that characterized our prior constitution. The 1991 Constitution is not only regarded as the result of a pluralist assembly, but also that pluralism itself was embedded as a fundamental principle. It shouldn't take a sophisticated sociological study to conclude that Colombia is made of a pluralistic society.

The 1991 Constitution includes a long declaration of rights, values, and principles that must be considered by the Court when exercising judicial review. As Marmor argues, the prevalence of the rights discourse is evidence of a pluralistic society,[70] provided that:

> [I]n homogeneous societies there is very little rights discourse; such societies normally share a common understanding of ultimate values, and consequently of the various duties people have, and they do not need this intermediary step from ultimate values to duties. Only in those societies where people do not share a common understanding of ultimate values, namely in pluralistic societies, that rights discourse is prevalent.[71]

One can consider the great number of rights, values, and principles included in the Colombian Constitution, as "*incompletely theorized*

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68 *See, e.g.*, Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014) (Waldron raises some doubts on their truly counter majoritarian spirit, provided that the decisions at courts are reached by a majority rule, and in highly controversial cases by "bare majorities" 5-4); Jeremy Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV. 1043 (2010).

69 Some groups did not partake of the convention. The highest representation at the convention came from the armed group FARC, and representation in the document was offered to armed groups at the time if they entered into peace talks with government.

70 *See* ANDREI MARMOR, *On the Limits of Rights*, 16 L. & PHIL. 1 (1997), *reprinted in* LAW IN THE AGE OF PLURALISM, at 215, 216-20 (this is connected to the interest theory of rights, which is explained by Marmor in his work) [hereinafter MARMOR, *On the Limits of Rights*].

71 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 152.

agreements"[72] rather than the result of clear consensus, since in the narrative of pluralism "if rights discourse is prevalent in a given society, it is mostly because there is little agreement on anything else, in particular, on the ultimate values people cherish."[73] The Constitution then is "undeniably plural and internally divided, but that should not be acknowledged as a sad reality, but may well be among its greatest strengths."[74] As a result, it is hard to picture a deep consensus on the contents and meanings of the rights and opened ended clauses entrenched of the Constitution. The question then turns from questioning the existence of such norms,[75] to questioning the role that different branches of government should approach in order to take them seriously.

Acknowledging pluralism and disagreement, as per the meaning of the open-ended clauses included in the Constitution,[76] cannot equate to not taking such rights seriously.[77] When making the institutional design for a political system, the question of how rights ought to be protected would be of primary consideration. The argument for pluralism tends to prefer settling questions of principle through the legislature[78] and the ordinary democratic process rather than in the courts, "[n]ot because they are more likely to be morally sound than the decisions of courts. But at

72 *See* Cass R. Sustein, *Incompletely Theorized Agreements Commentary,* 108 HARV. L. REV. 1733 (1994).

73 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 153.

74 TRIBE & DORF, *supra* note 8, at 26-27.

75 *See* Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. OF LEGAL STUD. 18 (1993).

76 *See* MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 67 (this should not be taken as absolute truth. "[E]ven in the political domain, not everything is potentially subject to reasonable, principle disagreement. A great many functions of political decisions in a modern society concern the resolution of such issues as collective action problems, cost-benefit analysis, the creation of public goods, and other tasks which have very little to do with principle disagreement").

77 One cannot lose sight that political participation is also a fundamental right in the Colombian Constitution, *see* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 40.

78 *See* Jeremy Waldron, *Political Legitimacy and Judicial Review*, 27 DÍKAION 7, 27 (2018) (also, as some authors have pointed out, discussions at legislative level with the involvement of citizens and their representatives might instantiate a culture of tolerance among citizens. Jeremy Waldron has stressed this argument by following the thoughts of the philosopher Bernard Williams and pointing out the difference between being able to say to a losing opponent, "well, you lost" and saying to him, "you were wrong" or "you were proved wrong." The former saying, "well you lost," is compatible with recognizing his position as honest and honorable; it's like saying, "better luck next time"); *id.* (in his view, the first attitude, being associated with the democratic and majoritarian procedures, and the last one being more common with "moral victories" associated with the process of interpretation of abstract terms by courts, a process that might send a message that such decisions might be reached in a sort of timeless fashion, declaring a timeless moral truth, as it were; with the problem for civil tolerance, that such a message conveys to the losing party that it has got its profound moral principles wrong); *see also* MARMOR, *supra* note 4.

least they have two advantages: for whatever its worth, they are democratic."[79] As Gavison has explained, in drifted democracies, courts can help to promote these discussions by having a limited role, as to be guardians of the rules of deliberation but not by taking most of the substantive decisions.[80] From this vision, it is hard to see how a constitutional project devoted to respect and promoting pluralism can at the same time imply a system of judicial supremacy.

3. Citizens as Hobbesian Predators

It also common to defend judicial review based on the argument of the "*Hobbesian predator*." This argument basically states that from time to time many people may become evil to themselves, and thus the Courts are ready to save the people from themselves by enforcing the pre-commitment entrenched in the Constitution.

Portraying the citizens as Hobbesian predators, however, will be hard to reconcile with a Constitution seeking to promote the democratic participation of its citizens. Moreover, it is hard to accommodate with a system that has an *actio popularis* for triggering judicial review. If the layperson is not worthy of trust, why then did we entrench in the Constitution democracy in the preamble, as a founding principle, and as an aim of the State? Furthermore, if the layperson is to be distrusted for taking the constitution seriously, why are they given the opportunity to trigger judicial review, and to defend the constitution through an *actio popularis*? Is this not at least an implicit recognition that the citizens are capable of taking the Constitution and rights seriously? If the people can propose one interpretation of the constitution to the Court, to be considered when striking down legislation, it is because their views also matter. This provides reason to believe that constitutional principles are not to be comprehended solely as the courts have understood them,[81] to think otherwise is to picture fellow citizens as so degenerate that they do not deserve the right of participating in questions of principle.

These particular features of the Colombian constitutional system and its judicial review design, far from treating people as "Hobbesian predators," portrays citizens as members of a civil polity who deserve respect. From a moral perspective this has deep implications, as Marmor argues:

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79 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 153.

80 Ruth Gavison, *The Role of Courts in Drifted Democracies,* 33 ISR. L. REV. 216 (1999).

81 TUSHNET, *supra* note 10, at 70.

> [C]itizens are bearers of rights and duties vis-a-vis the state and each other. Any liberal conception of citizenship should be committed to the view that citizens of a body politic should be regarded as having equal rights. Once we recognize a right that people should have as citizen of a body politic, we are committed to holding that at least in principle, they should have it equally.[82]

If the Colombian Constitution is committed to promoting political rights, then it must also be committed to their equal distribution among citizens.

It is tempting to say that the equal distribution of rights can be achieved by a system like the Colombian one, where constitutional litigation is opened to every citizen. Also, the Constitutional Court is opened to laypersons, since there are no standing requisites to trigger judicial review,[83] consequently giving citizens an equal distribution of power in the deliberation stage.[84] However, the equality associated with a sound democratic process should not be underestimated: for it is committed not only to the equality of opportunity in the deliberation–equal opportunity to influence a decision—but also to the equality in the stage of decision through an equal share of power.[85]

To support this argument, it should be noted that one of the main aims of the Colombian Constitution was to strengthen the democratic process. Such an aim can easily be ascribed to a theory of democracy based on egalitarian grounds.[86] Democracy then "can be seen as a commitment to an equal distribution of political power, and therefore, we can speak as a right to democracy, that is, as long as the latter is

82 MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 63.

83 *See* Corte Constitucional [C.C.] [Constitutional Court], Octubre 4, 2001, Sentencia C-1052/01 (Colom.) (since 2002 it is rather hard to file an unconstitutionality action. The Colombian Constitutional Court, in the decision C-1052, established some argumentation requisites, which make this action less accessible to citizens without some "lawyer skills").

84 *Id.* (citizens can set the agenda of the Court by means of the Public Unconstitutionality Action, can give arguments to the Court not only in the action but also by the public exercise of the Amicus Curiae that is opened to any citizen, not only to lawyers. In spite of this fact, the Court has made it more difficult to take standing before the Court through the Public Unconstitutionality Action by demanding some formal and technical demands on those actions, which may weaken the equal distribution of power associated with the equal opportunity of deliberation in constitutional issues).

85 For a discussion on equality of influence as a principle of fairness at the deliberation stage, see generally RONALD DWORKIN, SOVEREIGN VIRTUE: THEORY AND PRACTICE OF EQUALITY (2002); MARMOR, *Authority, Equality and Democracy, supra* note 52, at 72-76.

86 *See* MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 72-73.

understood as a right to a certain share in political power."[87] As a result, equal distribution of political power and opportunity to influence the debate and outcome of matters of principle seems to fit better within the ordinary democratic processes, especially in a Constitution that not only includes representative democracy, but also encompasses a wide range of institutional choices for its citizens to exercise direct democracy.[88]

4. The "Rule of Law" Argument

In less ambitious accounts, some scholars have argued that having constitutions, as well as an institution which interprets and secures it, may be instrumental to achieving predictability and stability of the constitutional regime and the legal order.[89] It is undeniable that the judiciary branch, including the Constitutional Court, should pay attention to the principle of *res judicata*, and respect precedent, like *stare decisis*, even in systems that are not part of a common law system but develop strong judicial review.[90] However, when the interpretation is made over open-texture norms, the room for discretion of the judges certainly increases.[91] One must take into account that judicial deliberation like all legal discussion cannot be reduced to scientific processes of deduction and induction, including decisions on moral principles at the constitutional level.

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87 *See* ANDREI MARMOR, *Do We Have a Right to Common Goods?*, 14 CAN. J. L. & JURIS. 213 (2001), *reprinted in* LAW IN THE AGE OF PLURALISM; [hereinafter MARMOR, *Do We Have a Right to Common Goods?*]; *see* MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 233, 244.

88 *See* MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 71-73 (as Marmor explains, if the equal distribution of political power is deeply tied to the ideal of personal autonomy, then it is a question of principle, but also it is an issue of institutional design: "Can we think of any alternative political structure that could guarantee a fair distribution of people's conditions of autonomy, without also providing them an equal opportunity to shape the outcomes of political decisions? I do not think so"); *id.* at 72 (the Colombian 1991 Constitution seems to agree with this appreciation. It not only entrenched judicial review, but also democracy as a founding principle, and gave the people the resources to take an active participation on democracy, even to overturn constitutional amendments passed by its representatives).

89 *See* WALUCHOW, *supra* note 27, at 270-71.

90 *See generally id.* For a critical approach, *see* ANDREI MARMOR, *Are Constitutions Legitimate?*, 20 CAN. J. L. & JURIS. 69 (2007), *reprinted in* LAW IN THE AGE OF PLURALISM [hereinafter MARMOR, *Are Constitutions Legitimate?*]; *see* MARMOR, *Authority, Equality and Democracy, supra* note 52, at 89; *see also* ANDREI MARMOR, *Should Like Cases Be Treated Alike?*, 11 LEGAL THEORY 27 (2005), *reprinted in* LAW IN THE AGE OF PLURALISM, *supra* note 52, at 183 [hereinafter MARMOR, *Should Like Cases Be Treated Alike?*].

91 *See* H.L.A. HART, THE CONCEPT OF LAW 128-32, 135 (3d ed. 2012) (this is not necessarily a bad consequence since law also needs some flexibility, as proposed by H.L.A. Hart).

Since judges disagree on matters of principle, it should be acknowledged that constitutional interpretation would be a difficult, maybe even unpredictable task. Judges might be tempted to recur to a comprehensive moral or philosophical theory,[92] thus leaving aside the fact that:

> [A] certain moral fragmentation of values and incoherence is inescapable if we are to respect pluralism as such. The whole point of respect for value pluralism is that we do not want to have a legal-political system whereby the winner (be it the ruling majority or the Supreme Court, for that matter), imposes its comprehensive moral view on the population.[93]

On a less abstract level, stability and predictability may sometimes be at odds with judicial review. First, some constitutional systems have "short" terms for the members of their constitutional courts. For instance, the Colombian Constitution designed a system in which justices serve for an eight-year term, after which new justices can bring in new views regarding the Constitution.[94] On the other hand, it has become common to call judges either "liberal," "progressive," or "conservatives."[95] Is not

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92 *See* ANDREI MARMOR, *The Immorality of Textualism,* 38 LOY. L.A. L. REV. 2063 (2005), *reprinted in* LAW IN THE AGE OF PLURALISM [hereinafter MARMOR, *The Immortality of Textualism*] (using these theories demand special pause and carefulness. For instance, consider a constitution that includes "human dignity" as a founding principle. It would be tempting for a constitutional or supreme court, to define such principle under the Kantian account of human dignity, thus stating that people should never be used only as a mean to an end. However, that understanding can be at odds with other actions undertaken by the same Court. For example, when in a particular case—where the faith of a human being is stake—the Court based in the individual's faith educates the legislature on how to do its job, it is not hard to argue that such person is being used only as means to an end).

93 ANDREI MARMOR, *Should We Value Legislative Integrity?*, *in* LAW IN THE AGE OF PLURALISM 39, 49 [hereinafter MARMOR, *Should We Value Legislative Integrity?*].

94 *See* Constitución Política de Colombia [C.E.] art. 233 (this is not undesirable, and can even be a feature of pluralism, as Marmor argues "[A] political society cannot speak with one moral voice because its moral voice is essentially fragmented and, taken as whole, profoundly incoherent. An attempt to impose coherence on it can only mean that some comprehensive doctrines will win the day while others will be suppressed. This cannot be a liberal ideal"), MARMOR, *The Immortality of Textualism*, *supra* note 92, at 50 (from this point of view, shouldn't a pluralistic political arrangement value such fragmentation, as to promote an open and reasonable deliberation and an equality of participation in the decision-making?); *id.* (the question of institutional design comes back to mind, at least from a normative point of view; aren't the ordinary democratic processes more open to such deliberation and participation?).

95 *See* TUSHNET, *supra* note 10, at 155, 163 (explaining "people routinely counter arguments against judicial review by saying that judicial review is not the problem, but that particular judges are" but "we cannot justify judicial review by invoking the hope that it will produce the results we desire—whatever those results are—because we can guarantee what judges will do. We cannot

this a sign of at least some lack of stability and predictability on their decisions? Such narratives seem to affirm that the meaning of the Constitution can change for no other reason than the composition of the Constitutional Court. If the decisions on the interpretation of the constitution rely only, or mostly, on the ideological approaches taken for the text interpretation, then stability and predictability as features of the rule of law would be seriously compromised. Finally, the slogan to which we tend to characterize the rule of law, as "*rule of laws not of men*,"[96] may become totally inverted.[97] In this sense, if it is true that "changing judges changes law," then it is uncertain whether the law controls judges or the other way around.[98]

5. The "Humble Defense"

Wilfrid Waluchow, while defending Canadian constitutionalism, argued that a constitutional pre-commitment is not the same as a consensus on the content of the substantive values and rights it entrenches.[99] As a result, the constitutional norms, considered flexible—or as Waluchow himself portrays them, living trees—need to be developed, and the Courts appear to have some institutional advantages for doing so.[100] Waluchow argues that there is a "constitutional morality in the community," being those authentic moral commitments of the

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guarantee that judges will act 'appropriately' when we appoint them, or by offering them a constitutional theory so compelling that it will induce them to routinely support outcomes they think unwise. Under these circumstances, the argument against judicial review cannot be met simply by hoping for better judges").

96 *See, e.g.*, ANDREI MARMOR, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1 (2004), *reprinted in* LAW IN THE AGE OF PLURALISM 3 [hereinafter MARMOR, *The Rule of Law and Its Limits*]; TOM BINGHAM, THE RULE OF LAW (2010) (there are many different accounts on the rule of law); Richard H. Fallon Jr., *"The Rule of Law" As a Concept in Constitutional Discourse,* 97 COLUM. L. REV. 1 (1997); Jeremy Waldron, *The Concept and the Rule of Law,* 43 GA. L. REV. 1 (2008).

97 This is not to imply that judges should not be allowed to have some discretion at interpreting the law. They have it, especially when interpreting open-ended and general provision like the ones a Constitution includes. But again, some caution is recommended. First, since Constitutions are packed with moral principles, judges are being called to make sound moral deliberation, while being no experts at it. On the other hand, pluralism calls the attention to the impossibility of having one comprehensive moral theory as to encompass the whole "social morality" or even the "constitutional morality"; as a result, judges may be called to take some restraint and defer such questions to more plural institutions.

98 ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES xvii (2012).

99 WALUCHOW, *supra* note 27, at 227.

100 *See id*.

people, which emerge from moral judgements in reflective equilibrium, and also, as a result of its social practices and its constitutional law.[101]

Although constitutional judges often base their decisions on moral grounds, that morality is the result of the commonly held commitments of the community that have been critically analyzed through a reflective equilibrium, not merely on moral opinions. Such commitments show a pledge to moral values that are deeply rooted in the society, even though in the upper layers of opinions there is disagreement on fundamental values. Waluchow argues that such differences are not as deep as authors like Waldron have tried to portray.[102] As Marmor explains, the purpose of this argument is to show that "constitutions purport to entrench matters of moral and political principles that reflect a deep level of consensus in the community."[103] As a result, when the courts strike down legislation, they are considering a sort of "popular moral commitment," thus applying, not denying, the commonly held ethics and constitutional morality of the community. Morality then not only takes a role in defining the validity of a norm, but also enhances the democratic credentials of such review.

Although this vision is aimed at proposing a humble defense of judicial review, it is hard to reconcile value pluralism with this view of constitutional morality.[104] Pluralism is grounded "on the observation that in pluralistic societies, people are deeply divided over their conception of the just and the good. And, crucially, that these moral controversies are, within certain limits, reasonable and therefore worthy of respect."[105] Denying the existence of these disagreements equates to ascribing to the constitution some comprehensive moral theory, which in the Colombian case equates to denying part of the constitution that we highly value: the fact that it "does not speak with one voice because there is no single voice that could possibly encompass the range of reasonable comprehensive moral doctrines held by the various segments of the society."[106]

Leaving the problem of pluralism aside, the defense of judicial review arguing that judges truly apply the deep consensus by finding the "constitutional morality of the community" can be problematic. Waluchow states that the concept of constitutional morality, in which Constitutional Courts should ground their decisions, is related to "the set

101 *Id*.

102 *See id.*

103 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 112.

104 *See* JOSEPH RAZ, *Autonomy and Pluralism*, *in* THE MORALITY OF FREEDOM 369 (1988).

105 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 116.

106 MARMOR, *Should We Value Legislative Integrity?*, *supra* note 93, at 51.

of moral norms and considered judgements properly attributable to the community as a whole and representing its true commitments, but with the following additional property: They are in some way tied to its constitutional law practices."[107] This conception justifies judicial review on the grounds that it must discover a communal moral self that stands as the common good. courts then should not depart from the majority but find their true commitments and enforce them.

First, "it is highly arguable that a nondemocratic process is best suited to reflect social consensus,"[108] but it also blurs the distinction between the legislature and the courts. As Marmor argues "the democratic legislature is the kind of institution which is bound to be sensitive to popular sentiment and widely shared views in the community. We do not need the Constitutional Courts to do more of the same."[109] There can be good reasons in favor of judicial review as a limited institution, as to correct some "peculiar pathologies" as "dysfunctional legislative institutions, corrupt political cultures, legacies of racism, and other forms of endemic prejudice," but this particular approach towards judicial review is grounded precisely in the comparative differences that can be made between the legislature and the judiciary.

However, it is valuable that Waluchow does not favor judicial supremacy and tries to construct a *humble* vision of constitutional judges.[110] Not only does he point out the fact that democratic procedures can be improved by amending them, but he also claims that there is always the possibility for the people and not the court to have the final word, either by exercising the "notwithstanding clause"[111] or by constitutional amendment.[112] It must be said that these important premises of Waluchow's defense of Constitutional Courts do not fit Colombian constitutionalism.

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107 WALUCHOW, *supra* note 27, at 227.

108 Andrei Marmor, *Randomized Judicial Review*, *in* DEMOCRATIZING CONSTITUTIONAL LAW 13 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016) [hereinafter Marmor, *Randomized Judicial Review*].

109 MARMOR, *Constitutional Interpretation*, *supra* note 4, at 162.

110 *See* WALUCHOW, *supra* note 27; MARMOR, *Authority, Equality, and Democracy*, *supra* note 52, at 1189 (Marmor raises some doubts that this is true).

111 GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 216 (2009) (Colombia does not have anything like the clause included in article 33 of the Canadian Constitution. However, one should note that even with the existence of that article some scholars have called for a model where the Constitution "is subject, on an ongoing basis, to re-negotiation by the legislature by the courts").

112 *See* WALUCHOW, *supra* note 27.

B. Protection of Minorities

The protection of minorities provides a strong argument in favor of establishing judicial review since the protection of vulnerable minorities[113] should be a primary concern of any democratic regime. Defenders of judicial review portray it as the most effective or unique way to achieve such protection. Constitutions include fundamental, moral rights, which are trumps against the majority.[114] As a result, Constitutional Courts should act as a counter-majoritarian institution, protecting vulnerable, insular, and persistent minorities from the "tyranny of the majority". Judges are depicted as being less vulnerable to pressures from popular sentiment,[115] and their independence from the executive, the legislative branch, and from the electoral democratic process is seen as a valuable asset that enables them to more effectively protect minorities than any other branch of government.[116]

As mentioned at the beginning of this paper, the need to create an institutional design that considers the "minorities" in Colombia can be traced back to the 1910 constitutional assembly, which was thought to be achieved mainly by a proportional system for the Congress apportionment. However, it is true that today that concept has expanded as to protect many groups that were included in the 1991 Constitution as subjects of special protection, and to include groups that are disenfranchised of power or are subject to social prejudice.[117] In a

113 CONSTITUTION POLITICA DE COLOMBIA [C.E.] art. 13 (defining the term minority is difficult, and many discussions have been raised around it. Proposing a definition will far exceed the aim of this paper, however for means of this section, we shall state that a minority here is regarded as a social group that is subject to strong social prejudice and lacks the possibility of a fair access to the regular democratic process. The Colombian Constitution for instance, in article 13, states some of the members of this category as those "discriminated and marginalized", and although these terms are also subject to reasonable disagreement, a reasonable contextual interpretation of these terms can be construed).

114 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 185 (1977).

115 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 112.

116 *See id.* at 108-111 (this argument can be expanded to the distrust towards majority rule. As a result, it must have some inherent limits. From an instrumental point of view, it is argued that democracy is justified if it leads to good decisions; therefore, there is nothing just in a democratic decision-making process. Since democracy does not always work, it is good to have a non-democratic institution if it is likely of yielding just results. From an intrinsic value standpoint, it can be acknowledged that the democratic decision-making process does have an intrinsic value by itself, but is inherently limited, and therefore those limits are safeguarded in a Constitution in order to be removed from the democratic process and entrusted through the distribution of power of such values to a non-elected institution like constitutional Courts. This depiction of the argument is shown and criticized by Andrei Marmor).

117 *See* Richard Parker, *"Here, the People Rule": A Constitutional Populist Manifesto* 27 VAL. U. L. REV. 531, 571 (1993) (even though, the existence of this groups should question us a society, it should not be used to portray the people as *Hobbesian predators.* Following some of Parker's

constitution that acknowledges democracy as a fundamental principle as well as the respect for human dignity, all people should be equally respected and their reasonable claims considered when deliberating and deciding. Even defending democracy on procedural grounds requires some commitment to equality in the decision-making process, regardless of being part of a majority or a minority group.[118]

The question that should be raised is not whether minority groups, especially those subject to persistent social prejudice and exclusion from the political process deserve consideration and protection in a constitutional regime, but rather what institutional design is more effective to achieve such protection. Today there is almost a consensus in constitutional law literature that the best institution to defend these minority groups are the constitutional court with some empirical evidence supports their idea. From a normative point of view, it is possible to defend a limited intervention of the courts[119] in order to strengthen democracy by enhancing, promoting, and empowering those who are subject to social prejudice and exclusion from the political process, the "insular and discrete minorities" as the famous footnote of the *Carolene Products* decision states.[120]

This limited approach to the exercise of judicial review is plausible and is aimed at protecting minorities "that are particularly weak or vulnerable and tend to persist as minorities for a considerable period *of time*."[121] It acts as an antidote for "laws affecting minorities against whom the majority is prejudiced," and therefore constrains judicial review to a rather small institution. This approach demands a great amount of self-

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argument, a compromise to protect the minorities does not entail portraying the majority, or better said, our fellow citizens, as childish, irrational, emotional, ignorant, irresponsible and so on, especially in a constitutional system, like the Colombian, that takes pride in being the result of a majoritarian and pluralist process, reached precisely through a democratic process).

118 *See* HANS KELSEN, THE ESSENCE AND VALUE OF DEMOCRACY (Nadia Urbinati & Carlo Invernizzi Accetti eds., Brian Graf trans., Rowman & Littlefield Publishers 2013) (1920).

119 *See* Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 COLO. L. REV. 923, 934 (2001) (Dorf and Issacharoff have argued that this theory also relies mainly in the self-restraint of judges. "Once one acknowledges a role for courts in correcting failures of the political process, there is a temptation to find such failures everywhere. Our point here is not, as Ely's liberal critics have argued, that a line between substance and process cannot be sustained. Even if such line can be plausibly drawn, the problem is that adherence to it depends entirely on the self-restraint of judges").

120 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (the most influential work developing this theory is the work of John Hart Ely, which states that judicial review should be limited to representation reinforcement in order to promote the constitutional principle of democratic participation); *see* Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005) (for a comprehensive account on this approach); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

121 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 106.

restraint in the Court's members.[122] However, this argument should be used with caution. As Marmor explains, this approach relies mostly on the good will and moral wisdom of the members of the Court, which might not be a stable mechanism for the protection of vulnerable minorities.[123] Even though judges are less vulnerable than politicians to pressure of popular sentiment, this premise may work sometimes while not in others.[124]

Also, from a normative perspective the possibility of a protection of the minorities' rights by majoritarian procedures should not be undervalued. When adopting the Constitution the majority also gave up some of its power in order to secure a better democratic regime, and unless we believe that the Constitution framers were extraordinary people whom we will never be able to replicate,[125] there is no reason to believe that these generations will not be able to give up some power to construct a fair system of government, this is particularly true for an institutional design like the 1991 Constitution that seeks to empower democratic decision making, rather than to hinder it. Marmor, also stresses an argument here that is similarly defended by Kelsen in his theory of democracy,[126] "political actors operate under a partial veil of ignorance: those who from the majority today know that they may find themselves in the minority in the future."[127]

These arguments are not conclusive, and it is possible to rebut them by arguing that judicial review has given many societies, the Colombian included, "good" decisions, something which is undeniable. However, equally as important as producing good decisions, some attention should also be paid to the fairness of the procedures to reach such decisions. The aim here is not to call for the disappearance of judicial review, but to place the attention on how a system of "judicial supremacy" raises some doubts not only on moral-political grounds but also regarding institutional design.

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122 *See* TUSHNET, *supra* note 10, at 160 (Mark Tushnet casts some doubts on the real possibilities of having this approach. "[I]n principle judicial review ought to be available to guarantee the preconditions for populist constitutional law such as voting. But if we follow that principle we are likely to get judicial review that is really small, dealing with informal exclusions and pariah groups, or really big, dealing with informal exclusions resulting from economic circumstances. The theoretical approach we began with generates quite contradictory results in particular cases depending on how expansively the judges understand the approach").

123 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 107.

124 *See id.*

125 *See id*.

126 *See* KELSEN, *supra* note 118.

127 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 107.

C. Dysfunctional Legislative Branch[128]

In order to defend judicial review, legislators are usually portrayed as self-interested individuals seeking only to win reelection and maximize their private interests. Thus, they are seen as untrustworthy people, and even more, as people who cannot take the constitution and its values and rights seriously.[129] They are not only depicted as being vulnerable to the public opinion as a result of being dependent on the electoral democratic process, but also as a Congress that itself is a dysfunctional institution worried only about bargaining but not achieving the well-being of the citizens. Congress is shown as being unable to have discussions of principle, while the judiciary is a "forum of principles."[130]

In Colombia, it is hard to rebut this argument from an empirical standpoint. The Colombian Congress is not a particularly dear institution to many Colombians and has also faced scandals that have raised serious questions on the legitimacy of the institution. But once again, one should not generalize, as there are legislators who take their job and the Constitution seriously, and who participate in debates and propose laws from a *bona fide* approach. On the other hand, it is not the objective of this section to undertake an empirical defense of Congress, but to show that a "rosy picture,"[131] or an aspirational idea[132] of Congress should be constructed.

Even if courts play a central role in modern constitutional theory, it must be acknowledged that Congress has not disappeared from constitutional arrangements. Congress, in a Constitution like the Colombian one, *is not a supreme institution*. It is limited by the

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128 For a more comprehensive account on legislative constitutionalism in the Colombian context see, Santiago Garcia-Jaramillo and Camilo Valdivieso-Leon, *Transforming the Legislative: A Pending Task of Brazilian and Colombian Constitutionalism*, *in* 5 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS, CURITIBA (2018).

129 *See* Parker, *supra* note 117; *see also* WALDRON, *supra* note 52; Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

130 Dworkin, *supra* note 66, at 470.

131 The phrase "rosy picture" is usually used to describe courts.

132 *See* Michael C. Dorf, *The Aspirational Constitution,* 77 GEO. WASH. L. REV. 1631, 1634 (2009) (I have borrowed this term from Michael C. Dorf, who uses it to describe a theory for the justification of constitutional rights); *id.* (according to this theory, Constitutions include aspirational rights, which are typically established as the culmination of a struggle to change the *status quo*, rather than to enshrine well-accepted fundamental values. Something similar can be said of Colombian institutional designs); *id.* at 1644 (in 1991, the Colombian Congress was a pariah institution weakened by the hyper-presidentialism that in the 1886 Constitution, and a prisoner of two hegemonic parties, which no longer represented the interests of the Colombian people. As some of the Constitutional Assembly debates show, the aim of the reforms introduced to the legislative branch not only aimed at changing this *status quo* of congress, but moreover had the aspiration of transforming it into a truly representative, pluralist, and deliberative institution).

constitution, as "this desirable limitation of the power of the legislature should not be taken to mean that is has lost its status as the best reflection within government of the source of political power-the people."[133] There is an urgent need to construct a narrative of Congress as an institution that, in the light of pluralism and disagreement, can truly respect the equality of all citizens by the democratic process of decision-making, by giving them the opportunity of having their interests equally considered,[134] and by giving them the possibility to influence the decision stage. Thus, there is a need to recover the willingness of citizens to engage in a deliberative process with those who they disagree, in the political arena and not only through litigation.[135]

This section should be understood as a call upon scholars, lawyers, and citizens to rescue the place of Congress in a democratic regime. It asks that we think and propose formulas[136] to rescue this institution from the ostracism to which it has been condemned, but certainly, this cannot be achieved when constitutional literature is mainly worried about how the courts decide, what is the best-balancing formula, or what comprehensive moral theory judges must embrace. It should be realized that judges are no Hercules, but rather human beings just like the legislators;[137] if the former are capable of reaching sound decisions for

133 Ruth Gavinson, *Legislatures and the Phases and Components of Constitutionalism, in* THE LEAST EXAMINED BRANCH 198, 213 (Richard W. Bauman & Tsvi Kahana eds., 2006).

134 *See* Christiano, *supra* note 3 (Thomas Christiano has constructed a persuasive argument in favor legislative-democratic authority. According to the last condition exposed by Christiano, democratic assemblies have genuine legitimacy if there is reasonable disagreement on the justice of the legislation at issue); *id.* (as a result, one is tempted to think that given disagreement most decisions on legislation should be considered as instantiating pure procedural justice, and that the fairness of the decision procedure is the decisive factor for its legitimacy since we do not have any other independent criteria at hand to value the soundness of its result); MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 87 (Marmor discusses this point by stating that the fact that controversy and pluralism do not necessarily render all the aspects of democratic process close enough to procedural justice, since "[c]ontroversy by itself does entail warranted skepticism. However, to the extent that skepticism about criteria for sound political results is objectively warranted in particular cases, the fairness of the decision procedure may become decisive in determining the reasons for following an authoritative decision"); *id.* (even with the doubts raised by Marmor, it can be concluded that a holistic approach toward legitimacy is needed, and when it is being considered attention should be paid not only to the likeness of yielding good decisions, but also to the fairness of the procedures to reach them).

135 A comprehensive account of this discussion, see generally MORTON & KNOPFF, *supra* note 49.

136 *See* Gavinson, *supra* note 1333, at 213.

137 *See* TUSHNET, *supra* note 10, at 56 (Tushnet makes an important point in this regard. A mistake made by one judge sitting in a Court of nine will be costlier than the mistakes of a few in Congress); *id.* (according to Tushnet, because there are fewer justices than congressmen, "at any time, a single justice may be more influential in the smaller group than a single senator or member of the House of Representatives"); *id.*

the community, a well-working-legislature should also be able to do so, adding to it the legitimacy[138] that is associated with representativeness, accountability, and the respect for diverse and contending voices as a result of value pluralism.[139] Thus, it is easy to imagine the defender of judicial review with a rebuttal to these arguments stating that is naïve to think that such a legislative institution can be achieved.

Building an aspiration idea of Congress can instantiate a healthy discussion on the legal and constitutional reforms that are needed to reshape the institution. Such an "aspirational idea" of Congress should acknowledge value pluralism as entailed by the Constitution. As a result, the Constitution includes abstract and open-ended clauses that are undeniably contested concepts.[140] Acknowledging this leads to the question of who should shape those general constitutional provisions. In a pluralist society, committed to some form of equal distribution of political power,[141] the answer seems to be in favor of the people themselves or through their elected and accountable representatives.

The aim of this work is not to provide a comprehensive description of what reforms should be undertaken to have well-ordered legislative branch. However, a sound institutional design of Congress must construe it as a truly deliberative institution that not only hears, but also values the voices of the minority groups, of regional interests, and of the laymen; it should be an institution with clear and easy to understand rules of deliberation that enhance debate and allow the intensity of preference to be duly channeled while also respecting equality at the decision stage. The electoral arrangements should be constructed in a way that allows elections to be truly ruled by the principle of one-person one-vote and not to be distorted through the flow of money to politics. Congress should be committed to deliberation, as Vermeule and Garrett explain:

> [D]eliberation exploits the collective character of legislatures in ways that can, in principle, improve Congress's constitutional performance. Among the concrete benefits of deliberation are its tendencies to

138 *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution,* 118 HARV. L. REV. 1787 (2005) (political legitimacy is not its only source, as Richard H. Fallon argues; however, it cannot be undervalued in a democratic regime).

139 *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999) (providing a comprehensive account of the values associated with legislation).

140 *See* Marmor, *Meaning and Belief in Constitutional Interpretation*, *supra* note 38, at 595 ("The general constitutional provisions containing abstract moral-political principles, according to this view, might be seen as a kind of vague and general framework, setting the language in which moral-political concerns need to be phrased, but leaving the content of the relevant expressions free for us to shape as we deem right at any given time."); *see generally* W.B. Gallie, *supra* note 38.

141 *See* MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 57.

> encourage the revelation of private information, to expose extreme, polarized viewpoints to the moderating effect of diverse arguments, to legitimate outcomes by providing reasons to defeated parties, and to require the articulation of public-spirited justification for legislator's votes . . . . In addition, deliberation makes congressional decision-making more accessible and transparent to the public, which increases accountability of the decision makers and may enhance the perceived legitimacy of the outcome.[142]

Finally, a culture of accountability must be promoted among citizens, so that the self-interest of reelection can be connected to the broader interest of respect for the constitution and people's rights.

Thus, by writing positively about Congress, things will become better. Constitutional and legal reforms are needed, not only in the institutional design of Congress, but also in the rules of politics. Moreover, change will require promoting an active political culture that is respectful of disagreement, of the protection of rights, and of the processes of elections and self-government. These are certainly hard challenges, but it is worthy to undertake them rather than relying only on the good faith of transitory judicial majorities, as strengthening those institutions allows us to deliberate and decide by ourselves questions of principles while maintaining a faithful commitment to constitutions that establish human dignity, equality, democracy, and respect for the people's autonomy.[143]

Finally, it is important to note that judicial supremacy might be at odds with promoting a "well ordered" or "good shaped" legislature. Sometimes the argument for judicial supremacy departs from the presumption that "if legislators know in advance that a piece of legislation they seek to enact is likely to be struck down as unconstitutional, they would refrain from trying to enact it," but as Marmor explains,

> [T]hat is just not necessarily, or even typically, the case; scholars have long pointed out that legislators often go ahead with an act they expect to be struck down as unconstitutional because it gives them the populist political benefit vis-à-vis their constituents without actually

142 Garrett & Vermeule, *supra* note 129, at 1291.

143 A cynical argument can be constructed to say that people are more comfortable having someone to blame for their wrong decision than taking responsibility for themselves. If such a picture of a polite citizens can be drawn, then the ideal of self-government is flawed.

> bearing the responsibility for the unwanted consequences of the proposed legislation.[144]

Again, this shall not be taken as a conclusive argument for "*taking the Constitution away from the Courts*," since this is partly an empirical question, but it should ask for a breather on the promoting judicial supremacy.

Perhaps the only conclusion that can be derived from the previous arguments is that constitutional decision-making should not only consider the quality of an outcome, but also the quality and fairness of the procedure to reach it. It has been shown that in a society committed to value pluralism and personal autonomy, democratic procedures should be valued as a unique, public way of realizing equality among citizens without requiring agreement on the specific outcome of the decision-making to be legitimate.[145] However, these comments on institutional design also point out the limits of democratic authority, especially when they result in a violation of equality,[146] thus asking the courts to take an active role as a catalyzer of the regrettable flaws, that sometimes may pervade democratic decision-making. These considerations should give some restrain to the over-cheering of judicial review and open the minds of constitution-makers and scholars to constructing aspirational narratives of how institutional designs and political culture ought to be improved and made into reality in pluralistic polities.

V. AN ALTERNATIVE INTERPRETATIVE CLAIM: A HUMBLE INTERPRETATION OF JUDICIAL REVIEW

This section will shorty examine the question of how judges should approach their power of judicial review, especially in those constitutional democracies where the power of judicial review is defined in the constitutional text.[147]

The first question to address is whether judges should exercise self-restraint or take an activist approach to the way they exercise their legal competence of judicial review. To answer this question, some specifics

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144 Marmor, *Randomized Judicial Review*, *supra* note 108, at 23.

145 This line of thought follows mainly the theory of legitimacy and authority grounded in equality as proposed by Thomas Christiano and Andrei Marmor. *See generally* Christiano, *supra* note 3; MARMOR, *Authority, Equality and Democracy*, *supra* note 52.

146 *See generally* Christiano, *supra* note 3 (this follows the following argument for the limits to democratic authority proposed by Thomas Christiano).

147 This section should not be read as being so ambitious as to propose a theory of constitutional interpretation.

must be made clear. First, as has been shown, the Colombian system of judicial review is explicitly included in the 1991 Constitution with "*strict and precise terms*" on how it ought to be exercised.[148] Second, some specifications must be made on the word "activism." This term has been used in a pejorative manner, to say that the court is overreaching its powers, in a celebratory manner, as to state that the Court is taking a "progressive" constitutional interpretation,[149] and to celebrate the willingness of a court to confront opposition and engage in a conflict with the other political branches of the government or with certain segments of the population.[150]

As Marmor explains, when the term "activism" is used to denote a progressive agenda, then the term is associated with the "moral or political agenda of the Court" rather than with its passivity or activism, since "[t]he nature of the moral objective does not determine the nature of constitutional interpretation strategy which is required to achieve it."[151] The second popular concept of activism, as willingness to confront opposition, is also questioned by Marmor, who states,

> activism in this sense is neither related to the content of the moral views in question, nor does it entail anything about the nature of constitutional interpretation, as such . . . . Activism, in this sense, simply means the willingness to confront political opposition. What the opposition is, and what it takes to confront it, is entirely context dependent.[152]

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148 CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 241.

149 TRIBE & DORF, *supra* note 8, at 28 (even more, since the Constitution is made to encompass and to peacefully allow the coexistence of conflicting visions, one cannot ad scribe constitutional interpretation, as a whole, only to "progressive" or conservatives views. As Tribe and Dorf say, when talking about constitutional interpretation in the United States, "whatever else it may be, the Constitution certainly is not a charter for maximizing the influence of the federal judiciary in defense of liberal or, for that matter, conservative causes. Any mode of "interpretation" that distorts constitutional parts in support of any such whole is really not a mode of interpretation at all").

150 *See* MARMOR, *Constitutional Interpretation*, *supra* note 4, at 166.

151 *See id.* (Marmor expands this argument by giving some empirical examples from U.S. Supreme Court cases: "In this sense, we could say, for instance, that the Warren court was liberal and progressive, and the Rehnquist court is conservative. The moral and political agenda of the court, however, does not entail anything about the kind of constitutional interpretation which would be required to effectuate the relevant agenda. Sometimes, by exercising restraint or just not doing much, you get to advance a conservative agenda, at other times, you do not. The US [S]upreme [C]ourt during the Lochner era, for example, was activist in pursuing a very conservative agenda. It all depends on the base line and the relevant circumstances"); *id.* (we must not confuse the legitimacy of review with one concrete political agenda; otherwise, it may render it as an illegitimate institution when a preferred set of desires is not represented by constitutional interpretation, even if it is faithful to the constitutional text); *see id.*

152 *Id.*

It is important to note, as obvious as it may be, that activism or passivity by a court does not necessarily entail a progressive or conservative agenda;[153] activism can be driven by any moral/political agenda, and as such has to be valued in every particular context.

Once this is clear–and bearing in mind the moral-political objections that can be raised to the justification and institutional design of judicial review—it is possible to ask if self-restraint is the best approach for judges in the constitutional adjudication domain. At this point, most of the critics of judicial review, and especially those of judicial supremacy, will be ready to say yes, however Marmor gives the following answer:

> Constitutional issues are mostly (or, at least, very often) moral issues. A sound constitutional decision has to be morally sound. In constitutional cases, judges have the power to make a significant moral difference. The doubts we raised about constitutionalism entail that judges should not have that kind of power. But they do not entail that if judges do have the power, then they should refrain from making the moral decision that is warranted under the circumstances. Consider the following example: Suppose that decisions about hiring new faculty ought to be done in a deliberative, inclusive, quasi-democratic process that includes the entire faculty. As it happens, however, in school X, such decisions are made only by the dean. (Assume that this is given, that there is no way in which the dean or anybody else can change this.) Now consider the following dilemma that the dean faces: There are two candidates for one hiring slot; one of the candidates is academically (and in all other relevant respects) better than the other. Or so the dean has good reasons to believe. She also has good reasons to believe that the faculty would have chosen the other, inferior, candidate. How should the dean decide? The argument under consideration would have us conclude that since the dean's authority to make such decisions is morally questionable, she should bow to the presumed wishes of the faculty and reach a decision that is, on the merits of the case, inferior. But I can see no good reason to substantiate such a conclusion. If it is given that the dean is the only one who has the authority to make the decision, doubtful as this authority may be, the right conclusion is that the dean should reach the best possible decision on the merits of the case. Otherwise, we just compile one error on top of the other: We will have a bad process and bad results. If the bad process cannot be changed, at least we should aspire to get the best possible results. Admittedly, the analogy with judicial review is not entirely accurate. In some constitutional cases judges have the option of actually rolling the decision back into the

153 *See* CAMPBELL, *supra* note 51.

> democratic playfield. If that is an option, I see no argument against it.[154]

I will not argue against Marmor that judges should exercise their powers to best of their abilities and aiming to reach sound or good decisions—whatever that may mean according to each context. However, when reading this paragraph, I advise some caution.

First, it is false that a Constitutional Court is the only institution that can make such decisions, as Marmor himself acknowledges at the end of the example.[155] Furthermore, in some institutional designs—such as the Colombian design—the powers to be exercised by such courts are delineated by the Constitution, and as any legal competence, are limited to be exercised in "*precise and strict terms.*"[156] From the dean's analogy, activism can be understood as an authorization for surpassing those precise and strict terms under the excuse of reaching sound moral decisions, thus expanding what was meant to be a constraint.

To put it in the terms of Marmor's example, suppose that the dean reaches a good decision when hiring a new faculty member, even by surpassing a deliberative, inclusive, and quasi-democratic process. Perhaps the school members will be happy with the decisions reached by the dean. Assume now that, according to the school rules, there are other decisions that must be taken by a "school council," which is a deliberative, inclusive, quasi-democratic group that sometimes, but not always, arrives at good decisions. Wouldn't it be tempting to ask the dean to start deciding those cases too? Isn't it possible to think that, given the soundness of one decision, the dean might feel at least tempted to start making more decisions out of the scope where she began?[157] In the end, there is no clear boundary between being an activist within a prescribed domain and being an activist outside of the boundaries of that domain. Maybe I am pushing this example too hard, and perhaps my argument can be rebutted by saying that the dean may be interfering in favor of the school's common good, to overcome a dysfunctional "school council," or that simply she just cares too much for the school's well-being. Some

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154 MARMOR, *Are Constitutions Legitimate?*, *supra* note 90, at 120.

155 *See id.*

156 This is not to call for textualism in Constitutional interpretation, nor a formalistic approach, but instead to point out that if we value constitutions as much as we say, the text of it should also matter.

157 For instance, take the example of the review of constitutional amendments: the Colombian Constitutional Court was granted the power to review them only on substantive grounds. But the argument that the Constitution has some "implicit principles" that are *unamendable* has expanded the scope of its review beyond substantive grounds.

of these arguments are plausible, and I must acknowledge that at least a couple of them may serve as a limited argument in favor of judicial review, but it cannot mean leaving all the decisions that should be taken by a deliberative, inclusive, and quasi-democratic process in the hands of a dean. It may be better to sit down and try to take the necessary steps to improve the design of that council, even if that involves making some tremendous efforts.

Furthermore, even if Marmor's argument is not meant to go that far, this paragraph can be understood as a call to see any matter of a law as a hard case of constitutional law.[158] Thus, understanding the Constitution "as a kind of seamless web, a 'brood omnipresence' that speaks to us with a single, simple, sacred voice expressing unitary vision of an ideal political society."[159]

This may lead to what can be called as an "*hyper-constitutionalization argument*"[160] which can be regarded as part of the consolidation of a narrative in favor of moving toward judicial supremacy while obscuring the text of the Constitution itself.[161] There is a growing attitude among constitutional experts to portray constitutional law as an

158 *See* HANS KELSEN, QUIEN DEBE SER EL DEFENSOR DE LA CONSTITUCIÓN (1969) (one can imagine a rebuttal to this argument stating that, from a Kelsenian point of view, any discussion on a matter of law will leave to the Constitution. It is in the top—under the *grundnorm*—of the *chain of validity*); *id.* (however, one has to remind the arguer that when Kelsen proposed his theory of the "defender of the Constitution" in a Constitutional Court, he was cautious to say that Constitutions left on the hands of such guardians should be drafted in a way that avoided including many abstract concepts—he even used "liberty," "equality," and "justice" as terms that had to be avoided); *See id.* (for instance, those are terms that are now contested. Kelsen believed that those terms increased the discretion of judges thus opening the door to the possibility of displacing the power from parliament to the Courts); *id.* (if we look at most modern Constitutions, including the Colombian one, it can be affirmed that Kelsen's advice was simply ignored); *id.*

159 TRIBE & DORF, *supra* note 8, at 24.

160 *See* Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000) (this happened, for example after 1991 when the Colombian Constitutional Court reviewed the legislation to attune it with the new constitutional order; instead of declaring unconstitutional most of the previous legislation, the Court issued several decisions applying some kind of severance, portraying its actions as deferent to the Legislature. However, this can have the opposite effect. Also, when the Court started to judicially enforce social and economic rights, the deference towards the policy-making executive and legislative branches was seriously reduced, although some recent decisions have started to overrule this approach); *see, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], marzo 9, 2015, Sentencia T-091/18 (Colom.).

161 *See* TRIBE & DORF, *supra* note 8, at 20-30 (in their theory of constitutional interpretation, Tribe and Dorf proposed that *hyper-integration* was not the correct way of reading the Constitution. They feared the dis-integration fallacy, which would mean reading things from the Constitution in order to bring the document into line with a theory); *id*. (I am afraid this is much of what reading the Constitution as to entail judicial supremacy means in the Colombian case. In order to affirm judicial supremacy, one must get away from the direct participation mechanisms and the entrenchment of democracy as a principle).

all-encompassing branch of law. The Constitution irradiates the whole social context.[162] If this argument is to be understood, in a "humble" approach, as meaning that all citizens must take rights and discussions on principle seriously, I certainly can subscribe to that vision. However, such argument has been used the other way around, to show that nowadays we are subject to a "*rule of lawyers*."[163] Since the Constitution is not portrayed as a document for the laymen, but a complex, almost "sacred book" encompassing an intricate comprehensive moral philosophy that only experts can understand and interpret; lawyers—especially experts in constitutional law—are shown as the only ones who know how the legal system works and can effectively achieve social change.[164]

Moreover, since constitutional law is portrayed as encompassing all areas of law and social life, judicial review may become an institution that does not only act as a check in a system of separation of powers, or as antidote to some regrettable pathologies of the democratic system, but as an institution that starts to expand its power. If judicial review was included in the Constitution, as in the Colombian case, to check the desires of the executive and the legislative branches as per the expansion of their powers, some attention should also be paid to a pervasive judiciary. The Colombian constitutional designers thought that a parchment barrier enumerating the powers granted to the Constitutional Court and stating that they should exercise in "strict and precise terms" would be enough to serve one of the main aims of any constitution: to limit and constrain power, regardless of its branch.[165] But this is hard to achieve, even with a parchment barrier, if judicial review is depicted as the ultimate feature of a democratic system. Perhaps the long Colombian

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162 BÖCKENFÖRDE, *supra* note 7, at 259 (this term is taken from German jurisprudence. However, the prominent scholar and former member of Germany's Constitutional Tribunal, Ernst-Wolfgang Böckenförde, is critical of this approach. Stating that it will imply "a change in the allocation of powers and a shift in the center of gravity between them. What takes place is a gradual transition from a parliamentary, legislating state to a constitutional court-based, jurisdiction state. This transition occurs through the emergence of fundamental rights as objective constitutional principles and the competency of the Constitutional Court to concretize them. The task of the Federal Constitutional Court shifts to that extent from law-applying adjudication to constitution-based *jurisdictio* in the old sense, which pre-dates the separation of . . . powers."). For a comprehensive criticism based mainly on institutional design, *see id.* at 266. For a critique on philosophical grounds, *see id.* at 217.

163 MICHAEL C. DORF, NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY-FIRST CENTURY 235 (2006).

164 *See* TUSHNET, *supra* note 10, at 141 ("[L]awyers are likely to overestimate the contributions we can make to social progress, for obvious and understandable reasons. Cautions about what we can actually accomplish help deflate our sense that we are essential contributors to social change.").

165 Jeremy Waldron, *Constitutionalism: A Skeptical View*, SCHOLARSHIP @ GEO. L. 1 (2010), *available at* https://scholarship.law.georgetown.edu/hartlecture/4/.

tradition of constitutionally entrenched judicial review and our pride in supposedly having a "strong democratic history" generates certain perceptions that one equates with the other; even if one holds this to be true, the questions on institutional design should not be thrown under the rug.

Finally, Marmor's proposal, when being considered in reference to institutional designs that enumerate the scope of the exercise of judicial review, should be understood as a call to reach the "best possible results" inside the boundaries within those powers that were granted to the Constitutional Court, instead of in a self-aggrandizing manner. Furthermore, it should be taken as a call to exercise review with a modest approach, conscious of the tensions it may create with certain valuable constitutional principles, such as democracy and pluralism, and therefore to be aware that even if the opened-ended provisions included in the Constitution leave room for a strong exercise of judicial discretion, there is no need to confine all the questions of principle to constitutional adjudication.[166]

To sum up, the interpreters of the Constitution, in the context of a pluralist society, should be cautious as not to take advantage of their discretion in order to "superimpose their own preferred vision of what the Constitution is 'really' meant to do, and then to sweep aside all aspects of its text, history, and structure that do not quite fit the preferred grand design,"[167] but rather leave an open room for political deliberation. Judicial review can be exercised first as a tool to enforce "*existence conditions*" of non-constitutional law—as a part of a system of checks and balances[168]—emphasizing the review of procedures of legislature, and deliberation—such as careful consideration, and equality of participation—while leaving substantive power to legislate.[169]

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166 *See* TRIBE & DORF, *supra* note 8, at 29-30 (it seems like a truism when Tribe and Dorf proposed that the Constitution "at the very least, establishes strong presumption in favor of leaving most policy choices to democratic majorities in the absence of some applicable prohibition"); *id.* (if that is considered a truism in a Constitution like the American one which does not entrench democracy as a principle, nor does include political participation as a fundamental right, in contrast with the Colombian one, and neither includes the comprehensive catalogue of direct democratic participation mechanisms which are included the Colombian, it should sound more like a truism in the context of the second one. However, Colombian constitutionalism does not recognize the existence of "political questions," which is usually an argument stressed by defenders of judicial review in the United States to argue that there is no such a thing as "judicial supremacy").

167 *Id.* at 25.

168 And thus, as a healthy check on the hyper-presidentialism in a country like Colombia, when undertaking the review of the executive actions under states of emergency, or when extraordinary powers to legislate are given by Congress to the President.

169 *See* Jeffrey Goldsworthy, *Structural Judicial Review and the Objection from Democracy,* 60 U. TORONTO L.J. 137 (2010) (discussing judicial review and the objection from democracy).

Second, judicial review can be used as an antidote to the prejudice and exclusion of minorities from the democratic process, demanding judges to have an active role when enforcing the intelligible framework that has been created to allow democratic participation, especially when it is aimed at guaranteeing equality of participation, equal electoral capacity, freedom of speech, and government accountability.[170] It can be argued, that these are essentially contested terms by themselves, however, a rule-governed democratic process is needed in order to solve coordination-process within a determinate society.[171] Thus, judges should avoid seeing unlimited flaws in democratic process, as to enlarge their discretion powers by recourse to this framework. As proposed here, judicial intervention should be the exception (an antidote), to enhance democratic participation, and not the rule (or the paramount of democratic government).

Thus, this section, without providing a comprehensive constitutional interpretation theory, should shed some light on what a humble theory of constitutional interpretation would comprise. First, for constitution makers it is important to include a comprehensive enumeration of Constitutional Court's scope of action, as clear legal instructions with a high level of specification,[172] as *directed powers* in the notion advanced by Raz,[173] making it clear when such powers are to be exercised with a substantial or procedural scope, and thus deferring must of the substance to the ordinary democratic procedures. On the other side, this should call constitution makers to think about the ordinary democratic procedures in ways that allow minority groups to be included (i.e., election rules, special constituencies) and to promote their ability to bargain and compromise in the legislatures and in the direct democracy mechanisms (i.e., supermajorities, participation thresholds). Within this framework, judges should avoid over-interpreting[174] their directed powers, or self-aggrandizing them, especially when in doing so, they aim at implementing their particular morality, instead of having a fidelity to the

170 *See* CAMPBELL, *supra* note 51, at 259-261.

171 *See* WALDRON, *supra* note 52 (Waldron advances an argument in this respect. However, I tend to agree with Waluchow's observation that this argument can imply a "Cartesian dilemma" where disagreement can be raised against the right of participation or the "democratic conditions"); WALUCHOW, *supra* note 27 (as a result, I take the argument advanced by Tom Campbell and Richard Stacey in the need for a clear set of rules governing democracy, and a modest intervention of the judiciary to uphold them); CAMPBELL, *supra* note 51; Richard Stacey, *Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism*, 30 OXFORD J. LEGAL STUD. 749 (2010).

172 *See* ANDREI MARMOR, PHILOSOPHY OF LAW 42 (2011).

173 *See id.* at 93 (for a descriptive account on this term).

174 *See generally id.* (providing a comprehensive critic on the law as interpretation).

law of their community as their source of legal authority. Failure to do so, will create what I call the "*watchmen paradox*" where judges over-reach their powers arguing that the constitution should be taken seriously, while departing in such a high degree from the constitutional text and the parchment barriers established for the judiciary that they end up not taking the constitution seriously themselves.

In established constitutional democracies, where parchment barriers for the judiciary are delignated, it is not "self-restraint" that is asked from judges undertaking constitutional interpretation, but fidelity to the constitution. However, when in presence of constitutions, encompassing a generous catalogue of rights, and including highly general legal instructions as well as an elevated number of essentially contested terms,[175] judges should not pretend to interpret all of them, and thus self-restraint should be understood as to avoid policy-making and completely obstructing the democratic process.

VI. RETHINKING INSTITUTIONAL DESIGN: A THOUGHT EXPERIMENT

Let me propose an imaginary example in which the possibility of having a humble constitutional interpretation in a system that includes a strong system of judicial review fails. As a result, the conditions ascribed to the "judicial supremacy" spectrum continue their self-aggrandizing tendency, and the democratic elected branches of government as well as the direct mechanisms of democracy continue to be disenfranchised. In such a system, people will become dependent on judicial decisions in many of the aspects that were initially designed to be undertaken by the ordinary democratic processes, such as ordinary policy-making, and thus lose their energetic engagement with the process of constitutional self-governance. It can also be assumed that, due to the activism of the court during the last decades, the laymen have become familiar with the rights discourse, and there is a culture of "rights protection" in the society.[176] Our imaginary court also lacks a strong check from any other branch of government and has the power to substantially review constitutional amendments as well as the exercise of any ordinary democratic mechanism.

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175 I have intentionally avoided using the term "principles," since in Colombian constitutionalism, as well as in most of "new constitutionalism" accounts, constitutional provisions are to be regarded as principles, and to be interpreted, mostly, by judges. For an account on the terms "legal instructions" and their levels of specification or generality, *see generally id*.

176 There are many doubts among scholars that this is a necessary consequence of judicial review, but it can be assumed for the sake of this thought experiment.

Would it not be desirable to include something as a non-withstanding clause in this system? Such a clause could be construed as to give the legislatures the possibility to over-ride a constitutional interpretation made by the court. Using such a check would require a qualified majority in the legislature,[177] as well as clear statement on the reasons for doing it, therefore demanding the legislators to assume the political responsibility that it entails. For instance, one can add that an override must be ratified by Congress at the beginning of each term, thus promoting constitutional interpretation among non-judicial actors, as well as political accountability, that can result in improvement of citizens political deliberation.

An objection to our experiment can be construed by saying that the whole point of having a court is to absolutely take some questions away from the domain of majoritarian politics, but as described above, this undervalues many of the ideals associated with pluralism and self-government, as well as over-estimates the counter-majoritarian possibilities of courts.[178] Such argument also underestimates the role that social movements, and popular deliberation can play in constitutional interpretation, as Dorf states "before an argument or emotional appeal succeeds in changing the minds of lawmakers (including judges) it must first change the minds of a mass of the public."[179]

On the other hand, some critics of the Canadian notwithstanding clause state that is barely used. However, this does not have to be demonized. Given our assumptions of the self-aggrandizing scope of our imaginary court, wouldn't such clause act as a healthy check on the court? Perhaps if it is rarely used, is because citizens do not exercise much political pressure to their representatives as to exercise it. But having this additional check, as mechanism not impossible to be exercised, can promote a dialogue among the different branches of government, while

177 In fact, giving a strong weight to the minority votes, will enhance their chances to reasoning, bargaining and compromise. For example, Marmor and Waluchow coincide in the fact that supermajorities might be helpful in reinforcing the power of minorities in representative bodies. MARMOR, *Authority, Equality and Democracy*, *supra* note 52, at 78 (as Marmor states, "we sometimes need a supermajority decision procedure as a corrective measure when certain social forces make it very unlikely that a simple majority voting rule will implement an equal distribution of political power"); *see also* WALUCHOW, *supra* note 27.

178 *See, e.g.*, FRIEDMAN, *supra* note 10, at 274-77 (it also should be noted that some authors in the United States—again defenders and critics of judicial review—have noted that courts may not be as counter-majoritarian as it is thought that they are. Noting that a court might be insufficiently counter-majoritarian as to protect minority rights when they are truly threatened); TUSHNET, *supra* note 10; Dorf, *supra* note 10.

179 Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan,* 90 CAL. L. REV. 791, 807 (2002).

leaving the final word on the people, and making legislators more accountable for taking constitutional interpretation seriously.[180]

VII. CONCLUSION

If this thought-experiment is plausible, then it is hard to justify the passivity among scholars to acknowledge the limits of what courts can achieve, or as Tom Gerarld Daly recently put it, to "move beyond our court obsession."[181] There is no need to despise Constitutional Courts to affirm that one should be skeptical, at least to some degree, of their legitimacy in pluralistic and democratic societies, and that healthy skepticism should call upon us to undertake profound researches and proposals regarding institutional design.[182]

The proposed approach to a judicial review, then, is a humble one. It must be acknowledged that even if it is formally entrenched in a constitution, one must not "read out" of the constitution the fact that it is a legal competence, and that as such, it can only be exercised within the boundaries of the actions authorized by it. Similarly, it must be taken into account that many constitutions which entrench the judicial review, such as the Colombian Constitution, are highly democratic charters, and even though the entirety of the Constitution is not about democracy, it certainly has a prominent role. As a result, the means to enhance ordinary democratic institutions that are not in good shape cannot be avoided by simply yielding in the fact that judicial review produces "good results," but rather it is necessary to undertake legal and constitutional reform to put in order such institutions that enhance the civil deliberation of citizens as equals.

It is necessary to realize as well that one of the most valuable principles of a constitution is value pluralism. Therefore, instead of

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180 *See* Jeffrey Goldsworthy, *Judicial Review, Legislative Override and Democracy* 38 WAKE FOREST L. REV. 451, 453 (2003).

181 DALY, *supra* note 63, at 302.

182 *See* CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 136–37 (Liberty Fund, Inc. 2007) (1940) (perhaps this is all too idealistic, and it is easy to imagine a rebuttal with something like this phrase by Charles Howard McIlwain in 1947: "We must leave open the possibility of an appeal from the people drunk to the people sober, if individual and minority rights are to be protected in the periods of excitement and hysteria from which we unfortunately are not immune." However, such an argument can be answered by using McIlwain's own words, stating that not only attention should be paid to the former, but that some work in achieving a "balance between *jurisdiction* and *gubernaculum*," among will and law is needed, in order to affirm "the legal limits to arbitrary power and a complete political responsibility of government to the governed," and this will certainly require questioning even the dearest institutions of an existing constitutional democracy, as well as proposing idealized institutional designs that are worth achieving); *id.*

finding a "coherent political theory" or "coherent political philosophy,"[183] however sympathetic and human, we might find its substance in its text. It must be acknowledged that "it seems almost a contradiction in terms to suppose that one could read a constitution composed as ours and think it were an expression of any unified philosophy,"[184] and thus a humble and restrained action from the judges when deciding constitutional adjudication is required, leaving some questions of principle to be decided by the people themselves as well as their representatives, hence avoiding an hyper-inclusive interpretation of a constitution by courts that makes of every question of law—and why not of politics—a question of constitutional law.

A humble theory of judicial review, as proposed here, highlights the following points on institutional design: (1) the understanding of the Court, as an additional check on Congress and sometimes on the executive, but mainly confined to the review of the "existence conditions"[185] of non-constitutional law, when undertaking procedural review, and also by a well-reasoned exercise of discretion when reading the essentially contested terms that are included in the Constitution, when undertaking substantial review,[186] preferably deferring some of those questions to the legislative branch; (2) to acknowledge that the Constitution does not entail judicial supremacy, and as such, the need to undertake, not only research and academic debates on how to strengthen the elected and accountable branches of government but also legal and constitutional reforms to achieve such goal; and (3) to acknowledge that judicial review is better to be defended as an antidote to regrettable dysfunctions in the democratic process, but as any antidote, should be taken with caution. Otherwise, as the critics have argued, one might

183 TRIBE & DORF, *supra* note 8, at 28 (quoting David Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 452 (1985)).

184 *Id.* at 29 (this line of Tribe and Dorf addresses the US Constitution, as to emphasize that it has been constructed over a long period of time, encompassing many moral theories. However, it can easily be conveyed to the Colombian constitutional context, if one considers the pluralist and democratic origin of the 1991 Assembly).

185 *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1108–10 (2003) (I took the term from an article written by Adler and Dorf); *id. (*the term can be briefly defined as the conditions included in a Constitution, which determines what counts as non-constitutional law); *id.*

186 Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism,* 98 COLUM. L. REV. 267, 389 (1998) (although it is not the aim of this paper to develop a comprehensive theory of Constitutional Interpretation, it is time to move away from the obsession with proportionally and explore different approaches to constitutional interpretation. One worthy to be analyzed is the experimentalist, in which "courts can serve democracy better not only because they presume to provide fewer definitive answers to legal, social and ultimately political questions, but also because they can inquire into more of the political actor's own deliberative capacities").

become "poisoned" with too much of it[187] The results of such poisoning can entail unwanted consequences like the disenfranchisement of people from politics, a strong backlash for "progressive decisions," the passiveness of the social movements, and maybe, as some critics have proposed, it may help render our democratic institutions less accountable and responsible, knowing that someone is out there to "help them" correct their mistakes. If this interpretative account fails, then the proposed thought-experiment, needs to be further developed, as a starting point to a healthy discussion on the moral-political need to reshape institutional designs in societies moving toward "judicial supremacy."

Constructing a humble theory of judicial review also entails a modest approach to Constitutional law. Constitutional lawyers should not be portrayed as "all-knowers," who are the bearers of a comprehensive moral and philosophical theory packed with the only correct answers.[188] From academia, all efforts should be made in order to teach the Constitution as a document for the laymen and consider their reasonable interpretations of the text and open the constitutional debates on filling the opened-ended provisions of the Constitution to all areas of knowledge, not regarding the constitutional text as a mysterious which gives interpretative clues only to experts in constitutional law. People should not be portrayed as "Hobbesian predators" but as citizens who share *vis-a-vis* the same rights and duties, and who are to be empowered to partake in questions of principle not only through constitutional litigation, but by active political participation, in democratic processes which respect value pluralism, and respect the preferences of the common citizens, both majoritarian and minority, expressed under fair deliberative procedures.

187 *See* Mandel, *supra* note 6.

188 JEREMY WALDRON, *The Irrelevance of Moral Objectivity, in* LAW AND DISAGREEMENT, *supra* note 52, at 164, 164-68.