



## THE COUNTER-MAJORITARIAN DIFFICULTY: BICKEL AND THE MEXICAN CASE\*

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*Quis custodiet custodes?*

**ABSTRACT.** *In this article, I analyze the counter-majoritarian difficulty and examine how it manifests itself in the Mexican case. I first summarize the problem originally formulated in Alexander Bickel's work "The Least Dangerous Branch." I then present some of the main objections against judicial control that have found their way into the debate surrounding the counter-majoritarian difficulty and give an overview of the main defenses of judicial control over the constitutionality of laws. Subsequently, I argue that given the particular nature of Mexico's history and its constitutional court, the debate on the antidemocratic nature of these control mechanisms has been and will be less intense than the one surrounding the U.S. Supreme Court and judicial review. I also analyze the different types of counter-majoritarian decisions regarding constitutional control which have been made in Mexico.*

**KEY WORDS:** *Countermajoritarian difficulty, judicial review, Constitutional Tribunal, democracy.*

**RESUMEN.** *En este artículo se analiza el argumento "contramayoritario" y se examina su manifestación en el caso mexicano. Inicialmente se plantea la formulación original del problema realizada por Alexander Bickel en "The Least Dangerous Branch". Posteriormente se presentan algunas de las principales objeciones contra el judicial review, que encuentran su lugar en el debate del argumento contramayoritario; se analizan de forma somera las principales*

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*defensas del control jurisdiccional de constitucionalidad de las leyes. De forma subsecuente, se argumenta que dada la naturaleza particular de la historia de México y su tribunal constitucional, el debate del caso mexicano ha sido y será menos intenso que el de su contraparte en Estados Unidos en relación con el judicial review. Finalmente se analizan los diferentes tipos de decisiones contramayoritarias en relación con el control jurisdiccional realizado por el tribunal constitucional mexicano.*

PALABRAS CLAVE: *Argumento contramayoritario, judicial review, Tribunal Constitucional, democracia.*

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### I. IN LIMINE

This article discusses the counter-majoritarian difficulty and applies it to the Mexican case. I will argue that there is not a single legitimating cause, but rather a conjunction of reasons that legitimize the exercise of jurisdictional control of constitutionality. I try to demonstrate that this conclusion is valid as a general idea and as a concrete legitimating defense in the Mexican case. I will try to demonstrate that the Mexican case can be inserted in the counter-majoritarian discussion, but given the nature and particularities of the Mexican system the discussion has a different quantity and quality. I also argue that there are numerous cases in the Mexican system where judicial counter-majoritarian decisions prevail.

The article is structured in the following manner: In the present section (I), I present the historical background of the counter-majoritarian difficulty and some of the circumstances which increased its interest in U.S. democratic theory. In (II) I carry out a review of the counter-majoritarian discussion and the authors involved in it using as a departure point the analyses of Ferreres and Friedman. In (III) I study the Mexican case arguing that the differences in history and function of Mexico's constitutional tribunal have produced a divergence in the nature of the counter-majoritarian argumentation. I analyze differences in the Mexican context and different types of counter-majoritarian decisions in Mexican constitutional process. Finally some conclusions are provided in (IV).

Judicial control over constitutionality is widely accepted nowadays; but this was not always the case. In the history of the expansion of judicial control, two defining moments stand out. The first is the famous 1803 *Marbury v. Madison* decision in which the U.S. Supreme Court established judicial supremacy. The second appears in 1920 when the first Constitutional Court of Austria began operating using Kelsen's model. There are however very important differences between the Kelsenian model and the U.S. judicial review. One of the main differences is marked by the circumstances surrounding the appearance of judicial review. While Kelsen's court was a product of a carefully scrutinized academic discussion about safeguarding the constitution,<sup>1</sup> in the U.S. judicial review was a result of jurisprudence, constitutional doctrine and politics.

Thousands of pages have been devoted to explaining, studying, analyzing and debating *Marbury v. Madison*. In this paper, I will not repeat what others have already done in a meticulous manner.<sup>2</sup> I will however describe the most relevant facts of Marshall's decision to better understand the nature of the countermajoritarian difficulty.

Appointing John Marshall as Chief Justice of the United States Supreme Court was a clear measure outgoing President John Adams took in an effort to restrict and limit incoming President Thomas Jefferson's political powers on assuming office. While in power, the Federalist-controlled Congress passed the Judiciary Act of 1801 which, among other things, increased the number of circuit courts, reduced the number of Supreme Court judges and gave the president the authority to appoint justices of the peace and federal judges. However, given the number of vacant positions, Adams's government was not able to deliver all commissions in time and simply assumed that the new Secretary of State James Madison would see that the corresponding documents were delivered. One of the newly appointed justices of peace, William Marbury, a staunch supporter of Adams, had been appointed justice of the peace for the District of Columbia and did not receive his commission before Jefferson's inauguration. Legally maneuvering in an obvious attempt to counteract Adams's strategy, Jefferson's government refused to deliver the commissions under a Judiciary Act of his own (1802).

When Marbury judicially pursued what he considered his right, recently appointed Chief Justice —and still acting Secretary of State— Marshall

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<sup>1</sup> For an excellent study on this discussion, See LETIZIA GIANFORMAGGIO, *ESTUDIOS SOBRE KELSEN* (2002). For instance, in the first essay of the book, Gianformaggio provides excellent comments on the discussion between Kelsen and Schmitt.

<sup>2</sup> For a detailed analysis, see Margaret Kelly, *Marbury v. Madison: An Analysis*, 1 H.C.Q.R. 58 (2005) (explaining the impact of the decision); John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) that describe the importance of *Marbury v. Madison* as constitutional adjudication and the modern conceptualization of judicial review.

faced a terrible dilemma:<sup>3</sup> either he decided in favor of Madison and therefore have the Court yield to the politically dominant ideology or of Marbury with the knowledge that the Supreme Court's decision would hardly be enforceable and the court's role as the final arbiter of the law would be both jeopardized and severely questioned. The court declared Section 13 of the Judiciary Act of 1789 unconstitutional and ruled that the court did not have binding authority over writs of mandamus.<sup>4</sup> In John Marshall's concluding words, the institution of judicial review was born:

So, if a law [*e.g.*, a statute or treaty] be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is *superior* to any ordinary act of the legislature, *the Constitution, and not such ordinary act, must govern the case* to which they both apply.<sup>5</sup>

Marshall's creation, or rather the court's *recognition* of judicial review, did not come easily. At first glance, Marshall's arguments seem logical. The Constitution is the basis of the U.S. legal system and therefore anything contradicting it should be treated as secondary. However, problems began to arise once the court used judicial review to invalidate federal legislation. How can a decision taken by a small group of justices prevail over the will of an entire country as expressed by their legitimate representatives?

The most elaborate version of the counter-majoritarian difficulty —the argument of the antidemocratic nature of judicial review— can be found in Alexander Bickel's classic book *The Least Dangerous Branch*. Bickel's argument sees judicial review as a counter-majoritarian force within the American system. In Bickel's opinion, Marshall tried to elude this difficulty by using the people and the nature of the Constitution as the grounds for the legitimacy of judicial review. Bickel's main point was that when the court exercised judicial review it was: "...[N]ot on behalf of the prevailing majority,

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<sup>3</sup> The problem was much more complex for Marshall since the commission Marbury was claiming had been signed by Marshall himself when acting as Adam's Secretary of State.

<sup>4</sup> Needless to say, Jefferson disagreed with the Court's decision. In his opinion, defending such a doctrine would be accepting the rule of judges over the Rule of Law. In our personal understanding, as a Democratic-Republican, Jefferson displayed much more faith in the people than his counterpart Adams. He believed a democracy could be improved by simply adding mechanisms of direct democracy. His disapproval of Marshall's decision was not due to a specific philosophical doctrine of constitutional adjudication, but rather was based on a different understanding of the meaning of the word *democracy*.

<sup>5</sup> 5 U.S. (1 Cr.) at 177-178 (emphasis added).

but against it.”<sup>6</sup> Alexander Bickel’s argument accusing judicial review of being antidemocratic was the clearest case against it made in a long time.<sup>7</sup> By the time Bickel’s book was published, the U.S. Supreme Court had produced a number of controversial decisions, enough to attract the attention of politicians, academics and members of the judiciary. Among these decisions were *Marbury v. Madison*,<sup>8</sup> *Dred Scott v. Sandford*,<sup>9</sup> the decisions invalidating New Deal legislation<sup>10</sup> (and Franklin D. Roosevelt’s “court-packing plan”),<sup>11</sup> *Brown v. Board of Education*<sup>12</sup> and of course

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<sup>6</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2nd ed., 1986).

<sup>7</sup> Many arguments have been used to discredit judicial review, which by nature is greatly influenced by politics, and has been therefore subject to attacks from various political branches.

<sup>8</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>9</sup> 60 U.S. (19 How) 393(1856). This decision had serious political implications that ultimately contributed to the U.S. Civil War. It was severely criticized, especially in the North, and was based on countermajoritarian terms. The court’s argument that people of African descent brought to the United States as slaves and their descendants were not protected by the U.S. Constitution and could never be U.S. citizens was an opinion held by a small portion of the population. The Court’s decision presumably went against the majority. See for example, Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHL.-KENT. L. REV. 97 (2007), which basically argues the importance of *Scott v. Sandford* as one of the detonators of the Civil War; see also Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000). Finkelman (261) calls *Scott v. Sandford* “the most politically divisive decision of the Supreme Court in our history” and analyzes the implications of all the circumstances prior to the Civil War, as well as why this decision is often referred to in U.S. constitutional law.

<sup>10</sup> A detailed explanation of this topic would be so extensive that several volumes could be written on it. Franklin Delano Roosevelt, the 32nd president of the United States (1933-1945), tried to offset the Great Depression in the United States with a series of policies called “The New Deal.” The Court systematically struck down all the New Deal programs, declaring them unconstitutional. This led to an open confrontation between Roosevelt and the Supreme Court, which ultimately resulted in various attempts to undermine the court’s autonomy (mainly the unsuccessful Judiciary Reorganization Bill of 1937, often called the court-packing plan). In the end, the Court became much more accepting of Roosevelt’s policies and gradually reversed its decisions. After serving four consecutive terms in office, the only president to ever do so, Roosevelt had appointed eight of the nine Supreme Court justices. During this period, the countermajoritarian argument was frequently used to question the court’s conservative ideology, which was notoriously at variance with the prevailing politics of the time.

<sup>11</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty Part Four: Law’s Politics*, 148 U. PA. L. REV. 971. On pages 973-981, Friedman gives a detailed description from a historical perspective of the New Deal legislation, the court-packing plan and the problems between Roosevelt and the Supreme Court, as well as reasons why certain aspects of the court-packing plan failed.

<sup>12</sup> 347 U.S. 483 (1954). This and the *Baker v. Carr* decisions are considered two landmark cases of the Warren Court. For an in-depth study of *Brown v. Board of Education*,

Baker v. Carr.<sup>13</sup> The common denominator in all these cases was that the court made a controversial decision which affected the entire country, so much so that the opposing side could affirm that it represented the opinion of the majority; therefore the court supposedly was acting against the will of the majority. In some cases, the opposition made this claim without it being precisely true. For example, Brown v. Board of Education was a decision that was widely accepted and therefore not countermajoritarian despite the arguments against it (mainly from the Southern states). However, decisions like the systematic invalidation of the New Deal legislation brought a series of critiques of the lack of the Court's legitimacy to decide against a firm majority.

The peculiar nature of the critique of counter-majoritarianism must be kept in mind. Its main objection does not center on the fact that the court's decision overrides a majority that theoretically represents the will of the people. If that were the only objection, then other counter-majoritarian controls, such as the power of veto in most presidential and parliamentary systems would be severely questioned. In considering mechanisms of counter-majoritarian control,<sup>14</sup> the veto has not received even half of the attention given to judicial review.<sup>15</sup>

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See Richard Delgado and Jean Stefancic, *The Racial Double Helix: Watson, Crick and Brown v. Board of Education*, 47 HOW. L. J. 476 (2004), in which the importance of Brown v. Board of Education is discussed and compared to the discovery of DNA (476).

<sup>13</sup> 369 U.S. 186 (1962). Interestingly enough, this case was decided the year Alexander Bickel's book was published.

<sup>14</sup> A simple example would be that of an elected president with 35% of all the effective votes with the rest of the effective votes (65%) divided among the other parties. If 40% of all the ballots were invalidated due to absenteeism, the president would have less than 27% of all possible votes, and yet would be able to exercise the power of veto. The nature of the veto is unquestionably countermajoritarian. I am indebted to Dr. Diego Valadés for this idea. Dr. Valadés argues that given the fact that the veto and jurisdictional control of the constitutionality of laws share the same countermajoritarian characteristics, there is something that makes constitutional justice substantially different from the veto so as to attract much more attention.

<sup>15</sup> The institution is quite interesting and many analogous conclusions may be drawn from a careful study of the structure of the veto as countermajoritarian. In a veto, the congress or parliament, the House of Representatives or the senate in most countries, have the ability to override a veto. For a careful study of the differences between presidentialism and parliamentarism (and the unique characteristics of the U.S. presidentialism system) regarding the topics discussed here, see Fred W. Riggs, *Presidentialism versus Parliamentarism: Implications for Representativeness and Legitimacy*, 18 INT'L. POL. SCI. REV. 254 (1997), especially (258) which discusses the specific case of U.S. presidentialism. On the nature of veto and congressional overrides in Latin America and the United States, see Manuel Alcántara Sáez & Francisco Sánchez López, *Veto, insistencia y control político en América Latina: una aproximación institucional*, 9 PERFILES LATINOAMERICANOS 153 (2001). The authors place special emphasis on congressional overrides and interesting conclusions can be drawn from the process of jurisdictional control and the complex power struggle that arises be-

Admittedly, certain court decisions that sometimes oppose a majority are not as questioned as others, and that is precisely one of the main features of the countermajoritarian argument. Following Friedman's analysis, countermajoritarian criticism of court decisions<sup>16</sup> tends to *emerge* when four factors converge: 1) the extent of the unpopularity of judicial decisions with a group that is large enough for the group to say it speaks for a majority; 2) the predominant public attitude toward democracy (favoring popular or direct democracy mechanisms); 3) the prevailing concept of the determinacy of judicial interpretation of the Constitution<sup>17</sup> and finally 4) whether these decisions are rendered during a period of judicial supremacy.<sup>18</sup> This fourth condition stands out in Friedman's work because it had been relatively ignored in previous works on the topic.

The main reason underlying the importance of judicial supremacy is that without it, countermajoritarian and controversial decisions can be simply ignored and defied; in the presence of such material power, interference from the will of the people cannot be disputed.<sup>19</sup> As will be discussed below, Mexico's deference to the countermajoritarian argument is largely based on the absence of this fourth factor.

In the following section, I will summarize the arguments that have been put forth against judicial review and analyze specific cases. The arguments presented by both sides and the possible objections to these arguments will be examined, even though I do not personally support the argument against judicial activism embodied in discussions of the counter-majoritarian difficulty. Nevertheless, I do think that the arguments are clear, important and not easily refuted.

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tween the legislative and judicial branches. Is it not a certain form of *override* (and an aggravated procedure) to reform the law or even the Constitution as to reverse a court's countermajoritarian decision?

<sup>16</sup> I am convinced this doctrine applies to constitutional courts, and as well to any form of jurisdictional control over the constitutionality of laws.

<sup>17</sup> I partially disagree with this. In my opinion, none of the preconditions for countermajoritarian criticism need an absolute concept of the determinacy of constitutional adjudication as a whole or an absolute theory of the constitutional precept of determinacy. It is sufficient for the group questioning the court's decision to have interpreted the constitutional article or doctrine in question and assume that it is widely accepted or shared by the community (academics, citizenry, judges), and for the corresponding interpretation presented in the controversial case to notoriously differ from the one previously shared without having to present a justified reason for said divergence (or claim that the divergence is a result of political considerations and therefore unjustified).

<sup>18</sup> Barry Friedman, *The History of Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 342 (1998). Friedman's analysis clearly focuses on the emergence of countermajoritarian criticism and not the reasons why it is criticized.

<sup>19</sup> *Id.* at 431-433. Friedman is one of the few authors who has studied the counter-majoritarian difficulty in U.S. democracy.



## II. THE COUNTER-MAJORITARIAN DIFFICULTY AND THE COUNTER-COUNTERMAJORITARIAN ARGUMENTS

When compared to the numerous arguments defending judicial control of constitutionality, the number of arguments against judicial activism are much fewer. This is namely due to two reasons. First, there is increased acceptance of judicial review and judicial control as a standard and inherent feature of the constitutional state. This distinctiveness is reflected in the number of constitutional courts established after World War II. Second, the main discussion of the countermajoritarian difficulty is made under particular concepts of democracy while other arguments against judicial review are presented in terms that ignore the democratic factor and should therefore not be considered countermajoritarian.<sup>20</sup>

In an excellent, recently published work, Victor Ferreres studies the counter-majoritarian argument and the Spanish case. He detects the reasons why counter-majoritarian objections against constitutional justice may arise. His analysis is similar to Friedman's<sup>21</sup> (who studied the context in which criticism appeared, but not the reasons) and is based on three aspects: *a*) the lesser degree of democratic legitimacy of constitutional judges; *b*) the rigidity of the Constitution and the legislative branch's inability to act against a constitutional judge's decision (*e.g.* the lack of congressional overrides) and *c*) the different possibilities of constitutional interpretation.<sup>22</sup> These aspects will be analyzed to guide us through the labyrinth of the countermajoritarian difficulty.

Why do we place constitutional justice in the hands of judges who cannot be held accountable and who are not elected by popular vote? The response to this question is perhaps found in the qualities of judges that other officials do not have (an argument favored by Bickel). It can also be argued that as long as we agree on the need for judicial control, constitutional

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<sup>20</sup> For example, some arguments attack constitutional judges' legitimate powers for constitutional adjudication, taken from a restricted concept of the division of power or even criticizing not the powers or the legitimacy of constitutional judges, but the extent to which their powers can be exerted —without taking into consideration the undemocratic nature of judges' decisions. All these reasons may be used against judicial review, but their nature is not countermajoritarian and should not be considered as such. Nowadays, for instance, I know of no author who has stated that judicial review or control should not be exercised because of its undemocratic character. (The only exception to my knowledge would be Robert Ivan Martin.) It is common, however, to try to determine the degree and nature of the type of control that may effectively be exercised by judicial review. The countermajoritarian argument is ultimately an obstacle, a nuisance deeply engrained in our modern democratic tradition.

<sup>21</sup> See Friedman, *supra* note 18.

<sup>22</sup> VÍCTOR FERRERES COMELLA, JUSTICIA CONSTITUCIONAL Y DEMOCRACIA 42-46 (1997).



judges seem to be the most reliable institution since other alternatives are not as dependable.<sup>23</sup>

It is important to bear in mind, however, that a judge may attain democratic legitimacy not only by being appointed democratically, but also by defending democracy. Ferreres's first condition considers both facets. The first is the level of legitimacy and undemocratic nature of constitutional judges and the second deals with the judicial branch's counterpart —the legislative branch. Ferreres states that judges have a lower degree of democratic legitimacy because they correctly presume that legislators are legitimated by a more democratic process than judges are (mainly in terms of accountability). But does a legislature truly represent the will of a nation? Or is its democratic legitimacy due to the process under which legislative power is attained and not because the exercise of its powers has been endowed with a democratic component? Many authors agree that the judiciary has been an institutional escape valve immersed in the crisis of political representation.<sup>24</sup> This quality may arise from the powers constitutional justice has to safeguard electoral procedures,<sup>25</sup> an important feature of constitutional democracy. However, it might just be that electoral processes are neither the ends nor the strict expressions of a democratic society or of democracy itself.<sup>26</sup> Many arguments have been put forward to counter this lack

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<sup>23</sup> Fernando Álvarez Álvarez, *Legitimidad democrática y control judicial de la constitucionalidad*, 17 DÍKAION 147, 157 (2003). Argues that since there is no acceptable alternative, constitutional judges are the appropriate institutional agents to exercise judicial control. The argument is common, but weak nonetheless. While other agents may not be the proper choices for constitutional control, it does not legitimize the power given to constitutional judges. The fact that other options are *worse* does not make it the *right* choice, neither does it remove the antidemocratic nature of constitutional judges. When Álvarez (158) states that "...there is no institutional alternative to the exercise of judicial control of constitutionality of laws," he might assume that theorists would stop insisting on the undemocratic nature of judges by realizing they are the best available choice. I myself do not think much of this objection, but I have not yet found a way to effectively counteract it. Perhaps the undemocratic nature of judges is a risk and a feature of constitutional justice that must simply be accepted.

<sup>24</sup> Roberto Bergalli, *Protagonismo judicial y representatividad política*, 15-16 DOXA 423, 442 (1994). Bergalli suggests that the democratic legitimacy of the judicial branch is not necessarily attained through procedural means, but because of its decision-making nature.

<sup>25</sup> See *id.* at 439. Bergalli's assumption in particular may be partly based on a careful reading of Ely's concept of a procedural Constitution.

<sup>26</sup> Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1920 (1991). Winters states that the countermajoritarian difficulty assumes that the electoral process in a democracy is definitive —and entirely representative— and that unelected judges are politically held unaccountable. Winter may simply be suggesting that neither of these premises are completely true and both are, at least, open to question. Winter's argument is quite interesting and well-grounded. Much can be said about the representative and definitive nature of democracy, as well as about the accountability of the unelected members of the judiciary branch.

of democratic legitimacy. When judicial control of constitutionality is exerted in political issues, political actors become more aware of the lack of democratic legitimacy. Only the transparency in the work of the court<sup>27</sup> and the judges' ability to defend their decisions stand in their favor. Much can also be said about the indirect, democratic way Supreme Court justices and constitutional judges in general are appointed. For example, in almost every country in Latin America, constitutional judges are appointed by joint decision between the executive and legislative branches.<sup>28</sup> This indirect democratic method of appointing<sup>29</sup> constitutional judges may help dissipate the criticism made about the antidemocratic nature of the judiciary.<sup>30</sup> The appointment process may help democratize the non-elected members of the judiciary itself, but the result largely depends on the political actors<sup>31</sup> and their political *attitudes*. Furthermore, it has been said that the relative undemocratic nature of the judiciary often makes it immune to political pressures and therefore, they sometimes tend to base their decisions more on principles and long-term considerations than elected officials do.<sup>32</sup> In Mexico, this argument is partially true. The judiciary has been known to be used by the government as a tool of control for the past 50 years. However,

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<sup>27</sup> See Antonio La Pergola, *Funciones del Tribunal Constitucional en la democracia*, 5 EXTERNADO 3 (1991).

<sup>28</sup> Base de Datos Políticos de las Américas (2008). Normas de la justicia. *Análisis comparativo de Constituciones de los regímenes presidenciales*, Georgetown University and Organization of American States, available at <http://pdba.georgetown.edu/Comp/Judicial/Constitucional/designacion.html>.

Interesting cases are for example Chile (where the Supreme Court participates in choosing its appointees); Ecuador (where considerations regarding gender parity and representation in the composition of the court is constitutionally mandatory) and Guatemala (where even the University of San Carlos participates in nominations, thus including the academic area).

<sup>29</sup> "[I]t could be argued that, if constitutional judges are not directly elected by the citizen, they are at least appointed by a directly elected body, such as, for example, parliament itself." Mark van Hoecke, *Judicial Review and Deliberative Democracy: A Circular Model of Law Creation and Legitimation*, 14 *RATIO JURIS* 415, 416 (2001).

<sup>30</sup> It is possible to contradict this assertion. When people vote, they are undoubtedly expressing their will. Their choices are clear. If a citizen chooses option "x," it can be said the voter wants option "x" to prevail and that option "x" is his will. However, when the president and the people's representatives vote, they do not directly represent the preferences of their constituents, but a combination of their constituents' preferences, their own political views, party interests and many other considerations that perhaps democratically and formally (but not materially) legitimate the appointees.

<sup>31</sup> See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty Part Five*, 112 *Y.L.J.* 155, 258 (2002).

<sup>32</sup> John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, Median Senator, and Countermajoritarian Difficulty*, 1 *SUP. CT. L. REV.* 257, 286 (2005). The authors explain the importance of immunity the non-elected members of the judiciary have, as opposed to that of elected officials.

in recent years, the judiciary has earned a reputation for impartiality. Nowadays, the federal judiciary is known for its efficiency and is considered much more trustworthy than state judiciaries. A great many trials end in an *amparo*, at which point the disputes go on to be resolved by a federal court and not a state court. By and large, the use of the *amparo* has federalized justice.

The last argument to be made against Ferreres's first objection can be found in Ely's *Democracy and Distrust*.<sup>33</sup> Fully aware of the undemocratic nature of judicial review, Ely proposes a democratic solution: judicial review should be focused on what Ely called "clearing the channels of political change,"<sup>34</sup> meaning that if it were to become a way of preserving American democracy, judicial review would be legitimate, to a certain extent.<sup>35</sup> In a democracy, judges should pay special attention to the mechanisms that express popular will<sup>36</sup> because "...unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and the denial of the vote seems the quintessential stoppage."<sup>37</sup> However, by stating what the *preeminent* function of judicial review should be, Ely infers that judicial review might also have another (secondary) function. The answer is simple: judicial review should not concern itself with the substantive content of laws as long as the laws do not violate the right to equal treatment within reasonable proportions so as not to result in any misrepresentation, which in Ely's opinion is at the core of the democratic process.<sup>38</sup>

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<sup>33</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>34</sup> See *id.* at 103-134; in particular 117.

<sup>35</sup> See LUIS ROBERTO BARROSO, *EL NEOCONSTITUCIONALISMO Y LA CONSTITUCIONALIZACIÓN DEL DERECHO* 61 (2008). Barroso states that legal interpretation seeks legitimacy to uphold the conditions needed to ensure a democratic state. However, he argues that it is the judge's duty to ensure 1) substantive values and 2) observance of the proper procedures of participation and deliberation. Ely would undoubtedly agree with the second condition, but only partially with the first.

<sup>36</sup> However, constitutional judges should not be overburdened with protecting democracy. Ely's theory apparently works well in the United States, but that does not necessarily mean it would work—or should work—in other countries. See DIETER NOHLEN, *DERECHO Y POLÍTICA EN SU CONTEXTO* 13-27 (2008). Nohlen (13) argues that the consolidation of democracy should not be the main goal of constitutional justice, especially in Latin American courts whose political position is not clearly established, because a very active role in the defense of democracy may simply endanger judicial supremacy or the judiciary as a whole.

<sup>37</sup> See Ely, *supra* note 33, at 117. Ely makes his point clear, *id.* at 117: Judicial review should focus on electoral cases and expressions of popular will, namely when voting or expression "(I) [A]re essential to the democratic process and (II) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo." Ely calls his theory a representation-reinforcing theory of judicial review, *id.* at 181.

<sup>38</sup> This is a powerful and yet problematic notion. See Ferreres, *supra* note 22, at 53-93. The author makes an in-depth analysis of Ely's work. Ferreres agrees with Ely's concept of

I believe the most important justification for assigning limited<sup>39</sup> democratic legitimacy to the non-elected members of the judiciary is contained in these lines. Other arguments concerning the lesser democratic legitimacy<sup>40</sup> of constitutional judges are not as well grounded.<sup>41</sup>

procedure as a plausible theory of the role of the judiciary, but considers Ely's concept of defending minority rights under an equal protection clause problematic. Ferreres argues (and I agree) that Ely's description of a judge as an arbiter in the democratic procedure gives way when a judge is also ordered to protect minorities against discrimination (even though discrimination is reflected in the democratic process by the figure of underrepresentation) because "...If the judge also protects people's right to not be discriminated in the distribution of goods, is not the judge in charge of a task that goes beyond being a simple arbiter?" (58). If a judge declares a law unconstitutional because it is discriminatory and unequal, he must analyze not only the procedure under which the law was approved, but also the substance of the law.

<sup>39</sup> One can easily recall certain issues that even majorities in a democracy should not have the power to decide. See Ernesto J. Vidal, *Justificación a la democracia y límites a la decisión por mayorías*, 1 DOXA 227 (1994).

<sup>40</sup> Robert Dahl's *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker* is a classic work on this topic. Dahl's argument does not center on whether the court is democratic or not, nor does it examine the legitimacy of its interpretation. He simply (and brilliantly) states that when the court renders its decisions, they usually follow the line of the views held by the prevailing political party, and that the role of the court as a defender of minority rights is fundamentally non-existent. However and even accepting Dahl's point of view, the Court can still be *ideally* seen as a defender of the rights of minorities and every countermajoritarian decision —the exception in Dahl's terminology— that the court takes is still objectionable under these same terms. Although Dahl's study was written many years ago (1957), Dahl's analysis is both timeless and noteworthy. See Robert Dahl, *La toma de decisiones en una democracia: la Suprema Corte como creadora de políticas nacionales*, in TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA 141 (SCJN), translated from the original: Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For a more recent study on the same topic, See Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

<sup>41</sup> See Juan Carlos Hitters, *Legitimación democrática del Poder Judicial y control de constitucionalidad*, 2 JUSTICIA 87, 421-427 (1987). In this essay, Hitters agrees with Cappelletti in that the judiciary has a certain degree of legitimacy because it is closer to the people since it solves their problems (which at least applies to the diffuse control of constitutionality or of non-elected members of the judiciary in general). However, I believe he is interpreting Cappelletti's thesis inaccurately. Hitters argues that "...the judiciary is closer to the people because it resolves the problems that the parties present to the courts every day." I assume this particular point of view was not entirely what Cappelletti meant. Even though it may be an effective argument for ordinary judges (and even then, the entire array of all possible problems and social situations is not presented before these courts), the argument becomes more ineffective the higher the judicial authority. This is largely based on systems with concentrated control over constitutional justice. In the case of Mexico, the argument simply does not apply. Is it possible to say that the limited number of *amparo* cases that come before the Mexican Supreme Court brings the court closer to the people and makes the court more knowledgeable of the reality and social problems than, say, representatives?

The second part of Ferreres's argument deals with the rigidity of the Constitution and the legislative branch's inability to oppose decisions made by the judiciary. Much has been said about this point, and the rigidity of the Constitution has clearly been one of the major concerns of academics of our times.<sup>42</sup>

Constitutional rigidity is an important factor in counter-majoritarian criticism because it is a major obstacle in overturning a judge's or a court's decision. We may safely say that this difficulty is the necessary result of the function of a Constitution. A Constitution *should* be rigid by nature.<sup>43</sup> A Constitution places organic rules and laws outside the realm of the political arena.<sup>44</sup> It is clear that one of the functions of a Constitution is to define limits.<sup>45</sup> Ferreres is right in arguing that the more flexible a Constitution, the less difficult it is to give a court or a constitutional court the final say in interpreting said Constitution.<sup>46</sup> A flexible Constitution provides an easy remedy against decisions of constitutional justice: simply reform the Constitution.

Constitutional rigidity and the consequential difficulty a legislature encounters in attempting to revert presumably counter-majoritarian decisions taken by constitutional judges or courts is quite common. Serious discussions have taken place in other countries besides the United States, such as Canada,<sup>47</sup>

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What about activists, doctors or law school and sociology professors? I believe Cappelletti was referring to a deeper sense of democratic legitimacy. It is harder for minorities to be heard in the House of Representatives—especially if it is a small group of minorities—than to be heard in a judicial process. Minorities can defend their right to equal treatment and protection in a court of law more effectively than in the political arena of Congress.

<sup>42</sup> Rigidity of the Constitution is the first of Guastini's conditions for the constitutionalization of law. See Riccardo Guastini, *La "constitucionalización" del ordenamiento jurídico*, in NEOCONSTITUCIONALISMO (Miguel Carbonell ed., 2003).

<sup>43</sup> Other than the Constitution of the United Kingdom, what other countries with a constitutional law tradition have a flexible Constitution? While I do not wish to engage in the complex debate of the particular case of the United Kingdom, it is generally accepted that constitutional rigidity is a positive characteristic of a constitutional State.

<sup>44</sup> See Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 20 (1999). Ides agrees with Chemerensky in that "...the Constitution purposely is a countermajoritarian document reflecting a distrust of government conducted entirely by majority rule..."

<sup>45</sup> PETER HÄBERLE, EL ESTADO CONSTITUCIONAL 228 (2007).

<sup>46</sup> Ferreres, *supra* note 22, at 44.

<sup>47</sup> See ROBERT IVAN MARTIN, *THE MOST DANGEROUS BRANCH: HOW THE SUPREME COURT OF CANADA HAS UNDERMINED OUR LAW AND OUR DEMOCRACY* (2003). Martin describes the work of the Supreme Court of Canada as tearing apart the constitution. In his opinion, judges rule on cases according to their own values and not guided by reasoned understanding of the principles of law (*id.* at 38), and it is therefore completely undemocratic. He also criticizes the lack of legitimacy of Canadian representatives (*id.* at 41), "Whatever flaws may exist in Canada's system, none is so serious as to justify replacing it by a rule of judges." Martin declares (*id.* at 23): "I believe that a useful and

France,<sup>48</sup> New Zealand,<sup>49</sup> Germany, Italy and Austria.<sup>50</sup> Dahl's argument<sup>51</sup> seems to work well against constitutional rigidity since a court or constitutional court —particularly in the case of the United States— is not able to delay policy implementation —or majoritarian decisions— for too long when there is full majoritarian support (as in the case of the New Deal). A delay in implementing a certain policy may arouse serious discussion about the court's decision and the control might be accepted as a rational argument by the relevant political actors.

Ferreres's final concern is that of the interpretive controversy over the Constitution. The democratic value of the Constitution is one of the main topics in modern debate. A key argument against judicial control has been that when a Constitution is enforced, a document that has not been democratically approved —or is so old that it lacks democratic consent in modern times— is being put into effect and hence should not have the value modern constitutionalism attributes to a Constitution.<sup>52</sup> This may be true of new Constitutions which may have been imposed —to a certain extent— in an authoritarian way, but in democratic societies that have developed a coherent constitutional theory over the years, the objection becomes ambiguous. We may also say that the interpretation given by constitutional judges is justified because the Constitution itself is controversial. It is not clear

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practical means of protecting our constitutional democracy would be to abolish the Supreme Court.”

<sup>48</sup> France has a Constitutional Council that exercises *a priori* control of the constitutionality of laws and a rigorous abstract review. An interesting situation occurred in 1981 when the new socialist government was faced with a council dominated by the opposition, most of whom were politicians, bearing close resemblance to the state of affairs during U.S. president Jefferson's term in office. For a better description of the case of France and the consequences of judicial review in French legislative politics, see Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 251-254 (1995).

<sup>49</sup> See K. J. Keith, *A Bill of Rights for New Zealand? Judicial Review versus Democracy*, 11 N.Z. L. REV. 307.

<sup>50</sup> See Mauro Cappelletti, *El formidable problema del control judicial y la contribución del análisis comparado*, in OBRAS 256-280 (Fernando Serrano Migallón ed., 2007).

<sup>51</sup> Dahl, *supra* note 40.

<sup>52</sup> The idea of the undemocratic nature of the Constitution is not new. For a study on pre-conditions of constitutional power and democracy, See Mauro Arturo Rivera León, *Los presupuestos democráticos del Poder Constituyente*, 1 REVISTA JURÍDICA DEPARTAMENTO DE DERECHO 109 (2008). In this article, I deal with the undemocratic character of the Constitution. I state that flexible mechanisms for constitutional reform must be implemented to mitigate the response to the reformed constitution. These mechanisms must be inclusive enough so as to help legitimize the constitution. Perhaps the Constitution signed in Philadelphia was not entirely democratic (African Americans, women, Native Americans, etc., were excluded), but there is no reasonable doubt that the U.S. Constitution is anything but democratic.



when the original sense of a constitutional article should prevail and when a new interpretation should emerge to adapt the Constitution to present-day circumstances. That decision is neither easy nor mechanical or logical-deductive. Naturally, this kind of constitutional interpretation implies power.<sup>53</sup> However, the concept of a judge's ideal interpretation is no more the *bouche de la loi*. Again, the criticism is aimed at the *criteria* and not its *legitimacy*. In Mexico, the court's interpretation has become less formalistic in recent years and more according to the interpretation of modern constitutionalism.

These arguments both attack and defend constitutional justice. However, there are other ways of justifying the control exerted by unelected members of the judiciary, mainly that of human rights protection. While Dahl's theory states that the court is not a protector of minority rights, it has also been argued that even if a court or a constitutional court does not materially act as a defender of human rights, that does not mean that its jurisdictional control is not legitimate when that control is exercised effectively. In fact, even though Dahl's depiction of the U.S. Supreme Court's way of exercising judicial review is quite majoritarian and in line with the dominant political power, as opposed to Carlos Santiago Nino's<sup>54</sup> thesis, I believe that they are enough cases—even by taking into account only those decisions made in the United States before 1957—to consider judicial review potentially legitimate.

We must be aware that any argument used must be based on a specific concept of democracy. Ferreres was aware of this and therefore he also studied the type of constitutional democracy that should be embraced in the Constitution. The counter-majoritarian difficulty is an antidemocratic objection, but one that assumes a certain and particular concept of democracy which might not be the most accurate one if one wants a deliberative

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<sup>53</sup> Roberto Gargarella, *La dificultad de defender el control judicial de las leyes*, 6 ISONOMÍA 59 (1997).

<sup>54</sup> CARLOS SANTIAGO NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL 680 (1994). Nino states that the protection of rights in no way restricts majoritarian decisions. The Argentinean author says that "It is perfectly conceivable, even if it were objectionable for other reasons, to have a legal system which recognizes individual rights even if their protection were left to the will of majorities in the democratic process and there were no judicial review of their decisions". However, I think that by accepting this thesis, Nino also has to accept the possibility of conceiving a particular system that recognizes individual rights even if the protection of these rights is left to the will of a monarch, a priest, law professors and scholars or even (why not?) the Führer, without any judicial review of their decisions. Rights are stated in constitutional terms because most constitutions conceive them as game-preservers and therefore outside the political arena. Some rights are game-preservers and some rights act as prerequisites of the game. For a description of the rights inherent to democracy as game-preservers, see NORBERTO BOBBIO, EL FUTURO DE LA DEMOCRACIA 24-27 (2004).



and representative democracy. I am not saying that the counter-majoritarian difficulty fully implies a populist notion of democracy, but perhaps it does to a small extent. Democracy is much more than the way decisions are made; substantive content in democracy that along with the procedural methods of decision making is a fundamental part of the essence of the constitutional State.<sup>55</sup> It should come as no surprise that only a few authors use the validity of the counter-majoritarian argument to recommend the elimination of judicial control. Even the supporters of judicial review are concerned about the countermajoritarian difficulty because they believe it to be an important argument, but not a decisive one. Nowadays, criticism of judicial control is of *degree* but not of *substance*. As Ely said "...so the point isn't so much one of expertise as it is one of perspective."<sup>56</sup>

### III. SOME CONSIDERATIONS ON MEXICO AND BICKEL

After discussing the counter-majoritarian difficulty and its origins, and analyzing an activist and independent court's revolutionary decision in *Marbury v. Madison* that established judicial review and constitutional supremacy, we will now delve into Mexican history to discover reasons that have caused such a divergence in the contexts between the United States and Mexico. I will make certain considerations which I think have influenced the differences between the two countries in terms of the countermajoritarian difficulty. However, I will not analyze all of them because a detailed description of all the circumstances would be a book in itself.

The Mexican Constitution of 1917 incorporated an important number of articles found in the Constitution of the United States of America. (It is no secret that entire articles in the Mexican Constitution of 1917 are exact translations of articles contained in the U.S. Constitution).<sup>57</sup> The system chosen was modeled after U.S. federalism, and even the Mexican Supreme

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<sup>55</sup> A similar idea has been expressed by Aharon Barak, a long time member of Israel's Supreme Court. Barak argues that if we conceive democracy as something other than majority decision-making, as in the case of protecting human rights —substantive democracy as opposed to formal or procedural democracy, judicial review is not antidemocratic. *See* AHARON BARAK, UN JUEZ REFLEXIONA SOBRE SU LABOR: EL PAPEL DE UN TRIBUNAL CONSTITUCIONAL EN UNA DEMOCRACIA 32 (2008).

<sup>56</sup> Ely, *supra* note 33, at 102. This refers to the argument that a constitutional judge's expertise may fail because some legislators are lawyers, politicians, philosophers and good academics themselves. Therefore, the judicial branch cannot claim to be more capable than the legislative branch —although it is sometimes possible to agree that the judicial branch seems much more capable.

<sup>57</sup> For a clear example, see Article 135 of the Mexican Constitution and Article VI of the U.S. Constitution. Both articles establish a supremacy clause. However, in the case of the United States, it was seen as textual support for the power of judicial review. In

Court —*Suprema Corte de Justicia de la Nación*— was named and structured under similar terms to that of its counterpart in the United States.

The amount of U.S. literature on the counter-majoritarian difficulty equals or exceeds the number of studies that have been produced in the rest of the world, even in countries with a relatively developed constitutional jurisdiction and complex constitutional courts. Why have U.S. scholars been so engrossed in this topic, and produced so much more literature about the counter-majoritarian difficulty while Mexican scholars have not?

A straightforward answer would be to look at Friedman's theory and analyze Mexico's judicial history using those criteria: 1) the extent to which judicial decisions are unpopular with a group of people that is large enough for the group to say it speaks for a majority; 2) the predominant public attitude toward democracy; 3) the prevailing concept of the determinacy of judicial interpretation of the Constitution, and finally 4) whether these decisions are rendered during a period of judicial supremacy.<sup>58</sup>

I believe Mexico's judicial history can be divided into two eras for the purpose of this analysis. The first era consists of the time before the Supreme Court was reformed to basically become a constitutional court. I think that we can safely say that there was a 10-year transition period that took place five years before and five years after said reform. The second era would then be after the 1994-1995 reform and the consequent change of the court structure, functions and composition. Those two eras —and perhaps the transition period as well— are essential for assessing the results of Mexican judicial control.

In the first era, judicial control in Mexico was non-existent. The use of the *amparo* worked well enough for defending citizens' liberties and guarantees, but only to a certain extent —as long as they did not go against the will of the prevailing power, but since *amparo* sentences had and have *inter partes* effects as opposed to *erga omnes* effects, its control was simply incidental and relative. In addition to this, the lack of a strong judicial branch explains why in the first era, Mexico did not have any serious discussion about the antidemocratic character of *amparo* sentences. Furthermore, the first era was overwhelmingly dominated by a single political party with a firm control of the presidency and an astonishing —perhaps illegal— absolute majority in congress. Therefore, it was extremely easy to impose judges for their ideological views or loyalty to the party. Moreover, it should be noted that although the Mexican Constitution is<sup>59</sup> and was —formally— rigid, it was

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Mexico's case, although it was the same article for the same purpose, it was not interpreted as such. This has made some Mexican theorists speculate on the limits of interpretation.

<sup>58</sup> Friedman, *supra* note 18.

<sup>59</sup> I think we can safely argue that the conditions that make a Constitution formally and materially rigid have only recently been fulfilled in Mexico due to increased pluralism

easy for the dominant party to amend it or reform it at leisure.<sup>60</sup> According to statistics from the Mexican Chamber of Deputies,<sup>61</sup> the Mexican Constitution has been reformed 187 times. Since various constitutional articles were modified or added in the same reform, Mexican academics agree that the number of reforms oscillate between 400 and 600. I believe that after this portrayal of the Mexican political environment in the first era, it is safe to assume that Friedman's first three conditions were not fulfilled and thus there was no countermajoritarian criticism whatsoever. As to the fourth condition, judicial supremacy was a complete myth in Mexico's first era of judicial control over the constitutionality of laws, and the judiciary would commonly capitulate to the executive branch of government.

Analyzing Friedman's prerequisites, it is possible to identify another important factor in the emergence of counter-majoritarian criticism toward a court's decision. Counter-majoritarian debates surface in societies that fulfill the pluralistic criteria in the composition of the executive and legislative branches. The pluralistic composition of the legislative and executive branches usually leads to a more representative and moderate composition of the judiciary. This condition can also be fulfilled by introducing inclusive mechanisms of high judicial official appointees who are more tolerant of opposing ideologies and thus more representative of the political environment.<sup>62</sup>

An even deeper distinction between Mexico and the United States may be drawn from the different natures of the types of control exerted by the two courts. The U.S. Supreme Court—as well as ordinary judges in the U.S. system—employ diffuse control mechanisms over constitutionality while in Mexico, the control is usually abstract and concentrated. Moreover and contrary to the situation in the United States, concentrated judicial control in Mexico is directly derived from the Mexican Constitution—Article 105 and its regulatory law—and not (as in the United States)

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in congress, the division of power and the lack of a congress majority. In the first era, however, the Constitution could have been formally rigid, but it was undoubtedly flexible.

<sup>60</sup> The perfect example of this is the case of José López Portillo's nationalization of the banking sector. To avoid a surfeit of *amparo* trials that his decision would have undoubtedly unleashed if legislated as a statute or ordinary law, he—literally he and not the Congress—reformed the Constitution as to include bank nationalization in the Constitution. This measure was very resourceful because there is no *amparo* against a constitutional law. The continuous reforms made to the Mexican Constitution go directly against Ferreres's second circumstance for the emergence of countermajoritarian criticism. See Ferreres, *supra* note 22.

<sup>61</sup> Available at [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm).

<sup>62</sup> However, as argued here, the representation of the political environment and popular opinion should not be part of the criteria—or at least not the main factor taken into account—for designating the judicial officials that perform the ultimate judicial control over the constitutionality of laws.

from the jurisprudential interpretation of the Constitution by a court that can be described as forward-looking. Therefore, since constitutional justice is contemplated in the Mexican Constitution and was enhanced by means of a democratic procedure, we can say that an important counter-majoritarian argument is invalid in the case of Mexico. This argument may seem strong,<sup>63</sup> but in fact, it is not. In an analysis of the case of Spain, Ferreres made a distinction between the democratic structure of an institution and the democratic procedure by which the institution is created. In Ferreres's opinion, the Spanish constitutional court is democratic in the second sense, but not in the first.<sup>64</sup>

In the second era, a different court can be seen: a stronger and more independent court that has produced interesting decisions<sup>65</sup> and showed that it may be capable of optimal performance in our burgeoning democracy. Mexican academics will be looking at the court very closely and the results will be seen in due time. We have already stated that in the first era Mexican review of the constitutionality of laws was limited to *amparo* sentences and only in a narrow sense. The reforms to the *amparo* proposed by the judiciary and the academic sector include the suppression of the *amparo* under the terms of Articles 14 and 16 of the Constitution and the inclusion of the *erga omnes* effects on *amparo* sentences. Given the nature of Mexico's constitutionality control, it is quite possible that this reform will take place within the next ten years. If this reform were effectively implemented, Mexico will have another countermajoritarian control in its system.

However, two interesting instruments emerged regarding the 1994 constitutional reforms: "*acción de inconstitucionalidad*" [Action of Unconstitutionality] and "*controversia constitucional*" [Constitutional Controversy], both of which are regulated in the regulatory law of Article 105 of the Mexican Constitution.

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<sup>63</sup> Barak also argues that the countermajoritarian difficulty is a problematic argument. One of the reasons is that constitutions in which judicial review is expressly stated should not leave any doubt as to the legitimacy of its control. See Barak, *supra* note 57. Perhaps Barak's analysis is restricted to democratically legitimate judicial review in a formal sense. Ferreres's analysis on the other hand, also deals with the inherent antidemocratic nature of the courts. See *infra* note 65.

<sup>64</sup> Ferreres, *supra* note 22, at 47. The same can be argued in the Mexican case. Even assuming that the procedure by which the Mexican constitutional court was created was entirely democratic, it is still possible to draw attention to the undemocratic nature of the composition of the court, as well as its procedures, methodology, inner rules and decisions.

<sup>65</sup> This is namely seen in a widely accepted decision, Action of Unconstitutionality 26/2006, in which the court declared the "Ley Federal de Telecomunicaciones" [Federal Telecommunications Law] and the "Ley Federal de Radio y Televisión" [Federal Radio and Television Law] partially unconstitutional. The decision was accurate and accepted almost unanimously by the academic sector and the general population. However, a complete evaluation of the court's second era and recent decisions is beyond the scope of this essay and perhaps will be the subject of future work.

A Constitutional Controversy is a trial that defends the federal system established in the Constitution, analyzing acts and general norms so as to determine whether they pass constitutional muster. The plaintiff may be an entity, a power or a branch of the government whose constitutional powers are being violated by a general law or a concrete act;<sup>66</sup> the defendant is the entity, power or branch that enacted the general or concrete law whose constitutionality is being questioned. The Constitutional Controversy was already a preexisting constitutional trial in the Mexican Constitution but it lacked the regulations imposed by the 1994 reforms. Before 1994, 26 constitutional controversies had already been decided using the Federal Code of Procedure, the Organic Law of the Supreme Court and several other laws as supplementary norms of the non-regulated Constitutional Controversy procedure. If the plaintiff can prove the validity of his claim, the court orders the defendant to stop the act or, in certain conditions, the relevant law analyzed may cease to be valid with *erga omnes* effects. In a concrete challenge to a specific act, the court's resolution has *inter partes* effects. Article 21 of the regulatory statute establishes the terms in which the lawsuit is to be filed.<sup>67</sup> However, a distinction should be made of the types of counter-majoritarian decisions that are made in a Constitutional Controversy. A procedural countermajoritarian decision takes place when the Court declares a specific act unconstitutional. When examining the acts, the Court does not supersede any legislative decision. Therefore, there are no grounds to argue that the decision invalidates a presumably majoritarian decision. Even in this case, it is dubious and should undergo a case-by-case review to determine whether a countermajoritarian decision has truly been made. A substantive countermajoritarian decision is made when the Court invalidates a law — a general norm. In this case, a Constitutional Controversy is similar to an Action of Unconstitutionality, differing namely in the motivation for invalidating the authoritative norm.<sup>68</sup>

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<sup>66</sup> A Constitutional Controversy may well be initiated to solve a problem involving territorial state limits. However, this case is completely irrelevant to the countermajoritarian decisions that interest us here. It can be argued that when the court rules on a controversy on state limits, its decision does not go against a majority because it is a technical matter (the same argument is also ineffective when applied to laws).

<sup>67</sup> This argument can also be employed to determine whether the terms set forth in the law can be countermajoritarian under certain conditions. If a constitutional controversy is not filed within the legal term: should an unconstitutional law —one that goes against the federal system— remain fixed because the time limit has expired? Does the passage of time validate the law?

<sup>68</sup> Motive is clear in a Constitutional Controversy: the law in question violates the federal system and represents a violation of the powers granted by the Constitution. In an Action of Unconstitutionality, the law would be invalidated for opposing an article or principle in the Constitution due to its generality.

The Action of Unconstitutionality, on the other hand, is a procedure in which a general law is examined in terms of its compliance with the Constitution. This abstract examination does not require the law to have been actually applied. The plaintiff may be a fraction (33 percent) of the legislative branch that enacted the law in question (a state or federal Congress, the Mexico City Assembly, etc.), the political parties filing complaints against electoral laws, the Attorney General (in all cases) and the National Human Rights Commissions against laws that violate human rights. If the plaintiff proves his case and wins by 8 votes, the law is declared unconstitutional with *erga omnes* effects.

Of these procedures, the Action of Unconstitutionality is at the core of our constitutional control, but the Constitutional Controversy plays an important role in protecting the federal system and the powers of the government provided for in the Constitution. There is a countermajoritarian element in both procedures.

A Constitutional Controversy is quite similar to an *amparo* but with the difference that in examining a general norm, the sentence will have *erga omnes* effect and thus exercise a countermajoritarian force in the system. In a Constitutional Controversy dealing with concrete acts, counter-majoritarianism may be restricted to the interpretation of the constitutional articles in which the defendant's and plaintiff's arguments are based. However, that interpretation will only be valid for that specific case, rendering an acceptable yet limited countermajoritarian decision that does not technically reflect general will (an act of Congress), but only the alleged interpretation of that will. Decisions on a Constitutional Controversy dealing with a general norm are susceptible to the same objections as judicial review and Actions of Unconstitutionality. The difference between a Constitutional Controversy in a general norm case and an Action of Unconstitutionality is that in a Constitutional Controversy, the court explores whether the defendant had the constitutional authority and attributes to promulgate such a norm in the case at hand or whether the norm violates the federal provisions in the Mexican Constitution. In an Action of Unconstitutionality, the Court carries out an abstract review of the constitutionality of the law. Furthermore, the minimum number of votes needed to declare a general norm invalid in a Constitutional Controversy is 8. If there are fewer than 8 votes, the Controversy is dismissed and the law is upheld. This procedure grants four justices veto powers. Even if a majority of the justices vote in favor of the invalidation of the law (7-4), the law will continue to be upheld. This veto power and obvious countermajoritarian force within the Court's decision-making process may be due to: *a*) a legislator wanting to avoid serious countermajoritarian issues that would arise if a simple majority could invalidate a law<sup>69</sup> and *b*)

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<sup>69</sup> This argument presents strange characteristics. If the 8 justice's majority was due to this reason, it is paradoxical that to avoid a countermajoritarian issue the legislator has

what Ferreres defines as a “*presumption of constitutionality*.” Thus, the legislator would only want to invalidate a law when its unconstitutionality is patent and the voting minimum would be established for this effect.

Actions of Unconstitutionality have their own countermajoritarian nature, which is observed in the number of justices who must vote to declare a law unconstitutional. Just as the Constitutional Controversy dealing with general norms, Actions of Unconstitutionality require an eight-vote majority. However, countermajoritarianism is even present in the authority needed to file an Action of Unconstitutionality. For example, only 33 percent of the legislative body that effectively promulgated the unconstitutional norm may demand its unconstitutionality (this only refers to a percentage because there are other actors with the authority to file this type of legal action). This means that a minority of the legislative body may ask another minority—the Court—to declare a law presumably passed by a legislative majority invalid. In this case, both the Court and the plaintiff wield authorized countermajority; a minority within the legislative body exerts countermajority by asking the Court to invalidate a law passed by a majority while the Court can exert either a majority—if it decides to uphold the law—or a countermajority—if it invalidates the law. Even if the law is upheld, the Court may do so by means of an internal countermajoritarian process using the veto power of four justices. Ironically, even a majoritarian decision made by the Court may be countermajoritarian.

The legitimacy of the Attorney General may be questioned as well. Directly under the President’s command, the Attorney General has the power to file an Action of Unconstitutionality in every case and against all types of laws. As such, the Attorney General has the authority to petition the court for a countermajoritarian decision regarding all laws and cases established by the corresponding regulatory law. This circumstance presents several peculiarities: 1) the Attorney General is a countermajoritarian force within the system. He can initiate an Action of Unconstitutionality as the sole plaintiff while the legislative branch needs the support of 33 percent of the body; 2) the purpose of legitimizing the Attorney General and not the President may seem odd, but can be explained by the fact that it is customary for the Attorney General to follow a direct order given by the President.<sup>70</sup> Therefore, given the legitimacy described above, an Action of Unconstitutionality is in the hands of the Executive, and therefore a countermajoritarian tool; 3) political parties and human rights commissions have legiti-

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simply introduced a countermajoritarian mechanism. This voting may be seen as a countermajoritarian mechanism against countermajoritarian decisions.

<sup>70</sup> I know no of Action of Unconstitutionality filed by the Attorney General without having received permission, the order, a petition, counsel or advice from the chief executive. The presidential capacity of asking for the invalidation of the will of a majority is a common feature of the Action of Unconstitutionality.



mate claims to file action in electoral laws and norms that violate human rights, thus allowing non-governmental organisms (even though if they are constitutionally established) to initiate a process to reverse laws enacted by government organs based on presumably majoritarian views.

The Mexican Supreme Court is in essence a constitutional court and therefore it may be subject to the same criticism, but it is rarely criticized for countermajoritarian reasons. Friedman's analysis and Ferreres's conditions clearly apply to the Mexican case. Much more analysis is needed and the Court's role in Mexican democracy will provide the material required for an analysis of this kind.

#### IV. EX MEA SENTENTIA

The counter-majoritarian difficulty is perhaps the strongest argument that has been put forward against constitutional justice. It is no mystery why this particular issue has received so much attention and has created a great deal of controversy. I think the natural progression of the argument is to soften as well as criticize the *uncontrolled* and *unprincipled* exercise of judicial control of constitutionality. Moreover, the argument has evolved from being a substantive-based argument to a degree-based one. I have no definite answer to the question of what criteria should be followed by a constitutional tribunal when exerting constitutional justice or the extent to which constitutional interpretation should be taken. Those questions, which were once *secondary* to the counter-majoritarian difficulty, are the great questions of constitutional law of our time. I cannot answer them because I have yet to find a solution that is not highly debatable. Assuming an answer to that particular question would mean espousing a particular view of democracy, of philosophy, of politics and of law.

In Mexico, the counter-majoritarian debate has been almost nonexistent due to political conditions that have prevented Ferreres's conditions from fully developing. However, in this article I have shown that discussion on the countermajoritarian difficult will soon appear in Mexico given 1) the new political context and the alternation in power; 2) a stronger judiciary; 3) the development of an intrinsic system of constitutionality control that includes Constitutional Controversy and Actions of Unconstitutionality—and probably in the future *amparo* with *erga omnes* effects—and 4) the constitutionalization of the Mexican legal system.

After giving an overview of the main arguments for and against constitutional justice in Mexico and in general, I come to the conclusion that constitutional justice is legitimate. This is not due to a single reason in itself, but rather because of the unique, complex and necessary role it plays in Mexican society. It is legitimate because: *a)* it protects minority rights—or

should do so— by interpreting and applying the rules and rights the majority has willfully left out of the political debate by establishing these rights in the Constitution; *b*) it ensures procedural and substantive rights that conform to the essence of a democratic regime, and namely because *c*) constitutional justice contributes to the true meaning of the word *Constitution*.