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Constitutional Courts as Majoritarian Instruments

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Abstract: Constitutional courts are portrayed as counter-majoritarian institutions empowered to strike down ordinary legislation that is inconsistent with the constitution. This power is to be used sparingly, since it is seen as being in tension with basic democratic principles. Judicial review in these circumstances should be limited to minority rights protection and the enforcement of structural limitations that prevent majority rule excess. But this is only half the story. Depending on the democratic credentials of the particular constitution, courts that strike down legislation as inconsistent with the constitution can also be said to be engaging in majoritarian action. The characterization of constitutional courts as counter-majoritarian institutions is premised on: (1) the status of ordinary legislation as the quintessential majoritarian instrument, (2) the unelected nature of judges, (3) a narrow understanding of the concept of the ‘negative legislator’, and (4) the democratic deficit that results when judges impose their views over those enacted by parliament. This Article challenges these assumptions. First, this Article demonstrates that ordinary statutes adopted by elected legislatures are not necessarily the superior articulation of popular will. On the contrary, the democratization of modern constitution-making allows the constitution to acquire ultimate majoritarian status. Because of popular skepticism about the ability of ordinary politics to adequately reflect society’s views on important substantive policy matters, the People have repeatedly decided to bypass the legislative process and directly entrench these policy views in the constitutional text. As a result, it is the constitution that embodies popular will. Second, this Article dissects the so-called counter-majoritarian difficulty, in order to distinguish between illegitimate counter-majoritarian review and legitimate counter-majoritarian review. The former occurs when the constitutional court substitutes the legislature’s policy views with its own, thus generating an impermissible democratic deficit. The latter occurs when the constitutional court invalidates ordinary legislation that violates minority rights

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or exceeds the structural limits imposed by the constitution. In both instances, counter-majoritarian intervention is warranted, precisely, to make sure that democratic self-government through ordinary politics can be adequately carried out. Third, this Article suggests the existence of a third class of judicial review: legitimate majoritarian review. This is when a constitutional court invalidates ordinary statutes because the legislature attempted to substitute the will of the constitutional drafters with their own. In other words, in instances when the legislative body carries out an anti-majoritarian act by ignoring the policy choices made by the People and entrenched in the constitutional text. When a court strikes down legislation of this sort, it is actually re-establishing majoritarian self-rule by making sure that the constitution's policy commands are respected. In that sense, the court is not exercising independent judgment. Instead, it becomes the enforcement instrument of the majoritarian constitution to avoid legislative usurpation. This makes the un-elected nature of courts an almost irrelevant factor. Finally, this Article explores how the majoritarian potential of judicial review on constitutional matters interacts with the 'negative legislator' role of constitutional courts. In particular, how the 'negative legislator' should not be characterized, necessarily, as a limited one.

Keywords: constitutional courts, constitutional supremacy, judicial role

1 Introduction

Historically, constitutional courts have been characterized as (1) 'negative legislators' and (2) counter-majoritarian institutions. While conceptually separate, there is a temptation to bundle them up as a single phenomenon. One of the results of this combination is a view of constitutional courts as passive entities that merely strike down legal norms adopted by truly majoritarian institutions, such as legislatures, and only on rare occasions.

This view is premised on the notion that, almost by definition, statutes adopted by elected legislatures are majoritarian in nature, while judicial rulings that invalidate those statutes are necessarily counter-majoritarian. As a result, the legitimacy of judicial review is mostly based on important minority protection considerations and necessary controls of democratic excesses by way of structural limitations. Deviations by courts of this practice open them up to attack for engaging in illegitimate counter-majoritarian action that undermines democratic self-government.

But this dichotomy is far too limited and narrow. It is also incomplete. It is true that constitutional courts do engage in legitimate counter-majoritarian action,

particularly when it comes to rights protection and the enforcement of structural limitations on majority rule. But it is also true that constitutional courts can engage in majoritarian action when striking down statutes enacted by democratically elected parliaments. In other words, the negative legislator can also be a majoritarian one in the constitutional realm. How can this be so?

First, we must reject the acritical starting position that all the actions of a democratically elected parliament are, necessarily, the purest, optimal or ultimate form of the expression of majoritarian will. Of course, when constitutional courts replace the views of democratically elected parliaments with their own, they are, indeed, acting in an illegitimate counter-majoritarian fashion. This type of action is contrary to democratic self-government and should be generally rejected, unless it is expressly authorized by the constitution or required by the basic tenets of constitutionalism.¹

But it is also true that when elected legislatures replace the will of the constitutional legislator with their own, it is the legislature that is acting contrary to democratic self-government and acting in an illegitimate anti-majoritarian manner. As such, when a constitutional court invalidates the legislative action in order to restore the constitutional command, the constitutional court is actually reestablishing majoritarian rule. This goes against the notion that judicial review in general and constitutional courts in particular are inherently counter-majoritarian institutions.

This phenomenon requires closer study, including a critical analysis of the limits of representative democracy and ordinary politics, as opposed to the potentially stronger democratic and majoritarian credentials of direct democracy and constitutional politics. In particular, this requires distinguishing between We the People and their parliamentary representatives. By doing so, we can realize that legislative enactment is not the sole, and even less, superior, form of democratic self-government or majoritarian action.

In modern times, when We the People adopt a constitution, including its substantive content that may address important policy issues such as economic organization, social structure, labor rights, environmental protections, among others, they are engaging in direct, democratic self-government. In other words, the People are ruling themselves by directly entrenching their policy preferences and views in the highest mode of legal enactment -the constitution-, instead of merely electing representatives who, in turn, adopt policy through ordinary legislation. In that sense, the direct substantive entrenchment of policy in the constitution serves as an important backstop to the potential inadequacies and misfires of indirect, representative democracy.

¹ See Jorge M Farinacci-Fernós, 'Post-Liberal Constitutionalism' (2018) 54 *Tulsa L Rev* 1.

As a result, future legislative enactments must abide by the majoritarian preferences expressed by the sovereign – the People – in the constitutional text. It would be totally improper for a body of elected legislators to overrule the will of the People entrenched in the constitution. This would be the ultimate illegitimate anti-majoritarian action.² As such, when a parliamentary body, even an elected one, enacts legislation that is contrary to the commands of the constitution, particularly as to public policy issues that reflect the deeply held views of the social majority and that were entrenched in the constitutional text, it is up to the constitutional court to it strike down and restore the majoritarian expression contained in the constitution.³

In fact, it could be argued that one of the reasons many modern constitutions -that is, constitutions adopted mostly after World War II that address the organization of society itself and not just of government institutions, such as those in Latin America and Western Europe- include numerous substantive positions as to important policy issues is, precisely, because the People don't trust their elected legislators to adequately reflect or enact their views as to these fundamental policy matters. They have instead chosen to entrench these views directly in the constitution, bypassing and sidelining ordinary legislation.

In other words, the People themselves, through the constitutional text, adopt the most important substantive public policy positions, leaving to the elected legislature the more limited role of implementing those positions through *more* detailed legislation. But, in the end, the ultimate lawmaker and articulator of majoritarian will is We the People through the constitution, instead of elected legislators in an indirect, representative democracy.

In order to guarantee that the legislature will not thwart the democratically entrenched constitutional content or deviate substantially from it, the People empower the constitutional court to keep the legislature in check and within constitutionally-entrenched, majoritarian bounds. In that sense, the constitutional court becomes a tool of majoritarian rule. As a result, the constitutional court turns into an instrument of the People, designed to enforce the commands entrenched in the constitution against illegitimate usurpation by disconnected or unresponsive

² This view is based on the constitution's continued acceptance by the public as authoritative and reflective of popular will. See Jorge M Farinacci-Fernós, 'The Constitution is Dead! Long Live the Constitution!' (2020) 25 *Barry L Rev* 35.

³ See Michel Troper, 'The Logic of Justification of Judicial Review' (2003) 1 *Int'l J Const L* 99, 118–120.

legislatures that attempt to replace the People's directly expressed will in the constitution with their own.

Almost a century after their creation, constitutional courts play a pivotal role in democratic self-government. Sometimes, these courts are called upon to strike down majoritarian legislation in order to protect important minority rights or enforce structural limits on majoritarian rule. Both of these instances are meant to actually facilitate self-government through the exercise of ordinary politics. In particular, these legitimate counter-majoritarian interventions actually protect democratic coexistence. Still, in the end, they are correctly characterized as counter-majoritarian.

But other times, constitutional courts are called upon to strike down legislation that is contrary to the superior articulation of majoritarian self-rule, namely, the constitution. We must celebrate the important role constitutional courts play as guardians, not just of minority rights and democratic controls, but of majoritarian self-government through the constitution itself.

This Article will explore this proposal and is organized as follows: Part 1 is this Introduction. Part 2 will discuss the status of the constitution as the ultimate majoritarian instrument in modern society -as opposed to ordinary legislative enactment-, current skepticisms about representative democracy as the optimal model of democratic self-government, and the impact of substantive constitutional content on the role of constitutional courts. Part 3 will analyze the interaction between constitutional courts, including their historical role as negative legislators, and the People, the constitution and elected legislatures. Here, I will address the important distinctions between legitimate counter-majoritarianism, illegitimate counter-majoritarianism, and, in particular, legitimate majoritarianism. Part 4 will offer some final thoughts.

2 Constitutions as the Superior Articulation of Majoritarian Will

2.1 Introduction

Constitutional supremacy is a hardly novel idea. It is the foundation of judicial review, which allows a court to strike down legislation that is incompatible with the constitution. But what is sometimes missing, or at least brushed off too quickly, from the analysis as to the constitution's supremacy over ordinary legislation is the former's superior democratic, and thus majoritarian, credentials in contrast with the latter.

This means that constitutional supremacy is not just about formal legal or normative hierarchy.⁴ In modern times, this supremacy is the result of a political judgment that constitution-making can be seen as a higher form of democratic lawmaking,⁵ and that constitutions can truly reflect a particular society's deeply held policy preferences. In other words, that modern constitutions can, and in many instances have, become the ultimate majoritarian instrument. This characteristic distinguishes constitutions adopted in the last decades with their older counterparts, many of which don't even aspire to be policy instruments.

Although conceptually different, there is also a relative connection between modern constitution-making and substantive constitutional content. In particular, modern constitution-making tends to be more democratic and participatory than ordinary legislative enactment. As a result, this type of creation process tends to produce substantive policy content that is representative of a political community's views.⁶ When this holds true, then constitutions should be regarded as the highest form of majoritarian self-government, instead of automatically giving that distinction to ordinary legislation.

As we will discuss in Part 3, this would necessarily mean that when a constitutional court strikes down ordinary legislation as incompatible with the constitution, the court would be, in fact, re-establishing majoritarian rule instead of undermining it.⁷ This is so, because the clash would not be between the unelected court and the elected legislature, but between elected representatives of

4 See Edwin Meese III, 'The Supreme Court of the United States: Bulwark of a Limited Constitution' (1986) 27 S Tex L Rev 455, 465 ('The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law'); Víctor Ferreres-Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 91 ('The Constitution [i]s the will of the People'); Michael W McConnell, 'Tradition and Constitutionalism before the Constitution (1998) U Ill L Rev 173 ('The legitimacy of constitutional law, in this view, comes only from the faithful execution of the will of the People, who have an inherent right to self-government, as that will is expressed in the Constitution and laws'). See also Bruce A Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 Yale L J 1012, 1020-21.

5 Justin Blount, Zachary Elkins and Tom Ginsburg, 'Does the Process of Constitution-Making Matter', in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press 2012) 42 ('Nearly all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics').

6 See Zachary Elkins, Tom Ginsburg and Justin Blount, 'The Citizen as Founder: Public Participation in Constitutional Approval' (2008) 81 Temp L Rev 361, 363 (discussing the relationship between process and content).

7 See Jorge M Farinacci-Fernós, 'Constitutionally Required Judicial Activism: Re-Examining the Role of Courts in Modern Constitutional Adjudication' (2018) 28 Kan J of L & Pub Pol'y 36, 49 ('[W]hen courts invalidate legislative enactments because of incompatibility with the constitution, it is not really a counter-majoritarian act').

the People and We the People themselves, particularly in regards to their views, as articulated in the constitutional text. As Ferreres-Comella suggests, ‘[i]f, indeed, the constitution is the expression of a higher form of democratic politics than an ordinary statute enacted by the parliament, there is certainly a democratic gain if a court strikes down a statute that is unconstitutional.’⁸ This Article wishes to offer a conceptual defense of this basic idea.

The view that constitutions are a higher form of democratic lawmaking is premised on two notions. First, that modern constitutions are enacted through mechanisms that can be seen as more democratic and participatory, and thus majoritarian, than when an elected legislature adopts an ordinary statute. And second, that the content of modern constitutions is a better reflection of the policy preferences of a political community than the statutes enacted by their elected representatives. This requires a closer look as to each of these proposition.

2.2 Constitutional Politics as an Exercise of Democratic Self-Government

Modern constitutions tend to be adopted through substantially democratic and participatory mechanisms.⁹ And although there will be, like with ordinary legislative enactment, elected representatives acting on the People’s behalf during the deliberations of the constitution-making body, there are several reasons to believe that the exercise of constitutional politics constitutes a more democratic and participatory method of self-government, as opposed to ordinary politics that results in legislation.¹⁰ Many of these reasons stem from the success stories of constitutions. Writing a constitution in modern times is has become a big deal. When one is being written, the People tend to pay more attention. This endeavor can be the ultimate democratic exercise of constitutional politics.

Modern constitution making processes tend to be, unlike ordinary legislation, more public, participatory and democratic. The success of constitutional entrenchment as a mechanism of popular self-defense against disconnected or corrupt legislatures has resulted in more public interest and engagement in constitutional creation. In particular, entrenchment has become a valuable tool for the public to protect their policy preferences from future legislators that may hold

⁸ Ferreres-Comella (n 4) 92.

⁹ Blount, Elkins and Ginsburg (n 5) 36.

¹⁰ Hannah Lerner and David Landau, ‘Introduction to Comparative Constitution Making the State of the Field’ in David Landau and Hannah Lerner (eds), *Comparative Constitution Making* (Elgar 2019) 10 (‘The maxim that constitution making should be participatory has become one of the most prevalent in the field’).

different views. In other words, constitutional drafting has replaced ordinary legislation as the main vehicle for the adoption of policy choices, particularly in terms of the fundamental questions facing a particular society. General policy is constitutionalized while the details are left to the ordinary legislature through statutory enactment.

As a result, the stakes are considerable higher when drafting a modern constitution. It is no longer just about government structure, basic individual rights and other coordination or procedural considerations. Modern constitutions tend to include considerable substance in terms of policy issues.

This traces back to the People in two ways. First, it is the People in the first place who have allowed this to happen: frustrated with the ordinary legislative process, the People take matters into their own hands and entrench their own policy preferences directly in the constitutional text. Second, and a consequence of this, they take a leading role in modern constitutional drafting to make sure that it accurately reflects their policy preferences. We can affirm that modern constitutions can truly written by We the People.

This results in the People actually demanding that they be the driving engine of the process, not just limit themselves to being a passive actor. When this happens, the line between agent and principal blurs, with the drafters acting as mere conduits of popular will than as independent actors.

If this holds true, then the constitution can be fairly characterized as the direct work of We the People, while ordinary legislation would be seen merely as the indirect product of their elected representatives. From a purely democratic standpoint, norms that are adopted directly by the People themselves have more legitimacy, authority and majoritarian value than legislation adopted indirectly by the People's representatives. As Armen Mazmanyan explains, '[t]he question that is necessarily to be asked is which majority we are speaking about when articulating the counter-majoritarian problem: the majority of representatives, or the majority of voters?'¹¹

This approach is merely a reflection of the basic idea that a principal's actions have more normative weight than those taken by their agents. It is also premised on the idea that modern constitutions transcend the basic structures of representative democracy inherent in ordinary legislatures in terms of adopting law or policy by allowing the People to directly adopt their main legal instrument through participatory mechanisms.

11 Armen Mazmanyan, *Majoritarianism*, 'Deliberation and Accountability as Institutional Instincts of Constitutional Courts' in Patricia Popelier, Armen Mazmanyan and Werner Vandendriessche (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia Ltd 2013) 167.

In that sense, even from a purely descriptive perspective, constitution-making could have a stronger claim to democratic and majoritarian legitimacy than ordinary legislative enactment. As a result, ordinary legislation would no longer be seen as the quintessential majoritarian act. Instead, the constitution itself would acquire that characterization. As such, whenever a statute conflicts with the constitution, democratic values would require the constitution to come out victorious. In these instances, the constitution's triumph over ordinary legislation would actually strengthen majoritarian rule.

2.3 Modern Scepticisms about Ordinary Politics as the Main Vehicle for Majoritarian Rule on Substantive Issues

But there is more. The constitution's democratic and majoritarian credentials are not just the result of the normative value of its democratic and participatory drafting processes and mechanisms. Modern constitution making is also the result of frustration over the inadequacies of ordinary legislation and the shortcomings of representative democracy. As Tim Koopman suggests, "[t]he assumption is, of course, that the representative bodies translate the feelings of the electorate."¹² But that assumption can be justifiably questioned in modern times.¹³

Conceptually, ordinary legislation is approved in the People's name by their elected representatives, while a constitution is approved by We the People themselves through various democratic and participatory mechanism, which can be formal or informal. Normally, this would be enough to demonstrate the constitution's superior claim to majoritarian status.

But it is not just that constitutions are, inherently or conceptually, more democratic or majoritarian than their statutory counterparts. There are additional reasons for doubting the majoritarian credentials of today's ordinary politics, as part of the larger crisis of indirect, representative democracy.

This is so because the ordinary legislative process may be vulnerable to anti-majoritarian influence, such as lobbying by economically powerful minority interests, corruption and gerrymandering, among others.¹⁴ By contrast, modern constitution-making tends to be executed through processes and mechanisms that involve more popular accountability, supervision and participation. Thus, when a truly democratic process of constitution-making is carried out, its result can be

¹² Tom Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press 2003) 30.

¹³ See Farinacci-Fernós, 'Post-Liberal Constitutionalism' (n 1) 40–43.

¹⁴ *Ibid* 41.

more fairly described as majoritarian than any particular statute that was written by influential lobbyists and approved while public attention is scarce.¹⁵

Precisely because ordinary legislation can be high-jacked by powerful economic interests, constitution-making can become a more effective form of direct democratic self-government. In other words, the People are able to circumvent the intermediary legislature and, at least for the fundamental policy issues facing the particular political community, adopt a normatively supreme legal instrument that will reflect their deeply-held policy views as to those issues. This reinforces further the notion that constitutions are the ultimate majoritarian instrument.

An important byproduct of this structural crisis of representative democracy as the optimal mechanism for transforming popular will into legal and policy norms has been greater public engagement with their particular constitutional project. Since ordinary politics are no longer the most trustworthy or effective mechanism for self-government, communities are instead turning to constitution-making as a viable democratic alternative for policy deliberations.

In other words, constitutions are no longer seen as a mere instrument for the facilitation of ordinary politics through the organization of the state and the recognition of basic political rights, but as an exercise in substantive politics and direct democratic self-government. Through the constitution, the People aren't merely facilitating self-government; they are actively engaging in it.¹⁶ As Ulrich K Preuss suggests,

'constitutions sanctify democratic revolutions by solemnly confirming that through revolutionary actions, the people have recaptured their constituent power which is regarded as being unrestricted by any rules, institutions, or superior orders, and is directed only by its unrestrained willpower. Constitutions are the authentic embodiment and expression of this will.'¹⁷

As a result, modern constitutions are full of substantive policy provisions, ranging from a broad set of individual and collective rights, to enforceable policy commands on issues such as economic organization, labor relations, social services and environmental protection, among others.¹⁸ By doing so, We the People deprive ordinary legislatures and elected representatives the power to completely shape substantive policy on their behalf. On the contrary, the People have taken

¹⁵ Ibid.

¹⁶ Ackerman (n 4) 1022 ('Although constitutional politics is the highest kind of politics, it should be permitted to determine the nation's life only during rare periods of heightened political consciousness').

¹⁷ Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution' (1992) 14 *Cardozo L Rev* 639, 641.

¹⁸ See Farinacci-Fernós, *Constitutionally Required Judicial Activism* (n 7) 66.

that power away from their legislatures and have decided to directly entrench in their respective constitutions their most deeply held policy preferences; precisely so that a disconnected legislature cannot thwart them through future statutory enactment. In these circumstances, the legislature's task is more limited: turning the constitution's more general, but binding, policy content into detailed legislation. As a result, statutory enactment can be seen as subsidiary, accessorial or supplemental majoritarian action.

And since constitutions are now turning into substantive policy instruments, constitution-drafting has become, or at least should become, more democratic, public and participatory. When a politically engaged People exercise constitutional politics, which will probably result in the adoption of a policy-laden constitutional text, their attention increases so that those policy provisions reflect their deeply-held views. If the People are successful in this democratic exercise of constitutional politics, then the constitution will, in fact, reflect those policy views and, thus, become an undisputable manifestation of majoritarian will.

This creates an interesting causal situation that strengthens the constitution's role as the main vehicle of majoritarian self-government at the expense of ordinary statutory enactment. First, that popular skepticism about the ability of ordinary politics to adequately reflect majoritarian will as to important policy matters increases the likelihood for the democratic exercise of constitutional politics. Second, that this exercise will likely result in a constitutional text that adequately reflects the policy views of the community, with the direct and intentional result of limiting the legislature's discretion as to those policy matters. Third, that, as a result, the constitution replaces ordinary statutes as the main recipient of majoritarian popular will. Evidently, this will have a direct impact on the role of constitutional courts.

3 Constitutional Courts, the Negative Legislator and the Majoritarian/Counter-Majoritarian Challenges

3.1 Introduction

Now we turn to how the constitution's characterization as the main majoritarian instrument in a given society impacts the role and corresponding characterization of constitutional courts. In particular, why this requires a re-examination of the apparently 'limited' role of the court as a 'negative legislator', the so-called

counter-majoritarian problem or difficulty, and the majoritarian potential of constitutional courts in modern societies.

Undoubtedly, a constitutional court's potential majoritarian characterization will be contingent on the majoritarian credentials of the particular constitution that it's meant to enforce, particularly in contrast with ordinary legislation. In other words, constitutional courts are neither inherently majoritarian nor anti-majoritarian; it all depends on the relationship between the constitution and ordinary legislation in a particular society.¹⁹ The greater the democratic and majoritarian credentials of a particular constitution, the more likely that we can characterize a constitutional court's enforcement of that constitution as a majoritarian act.

In this Part, we assume the existence of the type of majoritarian constitution discussed in Part 2. In turn, we also assume that when this happens, the constitutional court's enforcement of that constitution can, and should, be characterized as a majoritarian act in itself, even when done against the legislature's will in the context of substantive issues that we generally associate with statutory enactment. This requires separating the 'negative legislator' from the counter-majoritarian problem or difficulty. A court can act as a positive legislator in a counter-majoritarian fashion, and it can also act as a negative legislator in a majoritarian manner. It is not a strict, one-way dichotomy.

As a result, we must analyze separately (1) the phenomenon of the 'negative legislator' in the context of majoritarian constitutions and (2) the differences between majoritarian, legitimate counter-majoritarian and illegitimate counter-majoritarian actions that can be taken by a court. We will do so in turn so as to appreciate their conceptual independence as well as their potential interaction in the context of modern constitutional enforcement.

3.2 The Powerful 'Negative Legislator'

'Constitutional courts are commonly characterized as negative legislators.'²⁰ This means that the main role of courts is to strike down legislation, as opposed to

¹⁹ Here I use the term anti-majoritarian in recognition of the possibility of instances in which ordinary legislative enactment has better majoritarian credentials than a particular community's constitution. While definitely an oddity in modern times, it cannot be conceptually discarded. If those instances when this is so, then a constitutional court's claim of majoritarian status as a result of their enforcement of the constitution is weakened.

²⁰ Farinacci-Fernós, 'Constitutionally Required Judicial Activism' (n 7) 56.

affirmatively creating it in the first place.²¹ The mainstream view is that the power to generate substantive policy belongs to legislative entities, whether an ordinary legislature or other similar body, while courts are merely called upon to analyze their compatibility with the existing constitution.²²

Even though there is reason for skepticism about this categorical distinction,²³ we should not make the additional mistake of concluding that ‘negative’ means ‘narrow’ or ‘limited’. On the contrary, precisely because many modern constitutions tend to adopt whole sets of enforceable substantive policy provisions, when a constitutional court exercises its ‘negative legislator’ function it is very much involving itself in a broad array of policy matters.²⁴ But this involvement is indirect and subordinate, as the court will be implementing the policy choices of the constitutional drafters, instead of its own. In these circumstances, the ‘negative legislator’ is limited by the constitutional drafter, but, at the same time, required to aggressively intervene in a substantial range of policy matters.²⁵

As we saw, the more the constitution says about policy matters, the less creative or positive the ordinary legislature can be. As such, the court as ‘negative legislator’ becomes more powerful by way of ‘judicial invalidation of legislation that veers from the constitutionally-adopted policy choices.’²⁶ But these choices are not made by the court. Instead, they are made by the constitutional legislator.²⁷ As a result, ‘[m]odern constitutional developments have pointed to an expansive view of constitutional review, due in great part to the expansive nature and content of constitutions themselves.’²⁸

In its most basic form, this requires striking down legislation that patently contradicts constitutional judgments about policy matters. This is particularly true in the context of constitutional prohibitions. When addressing a statute that runs

21 See Alec Stone Sweet, *Governing With Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 35.

22 *Ibid.*

23 See Farinacci-Fernós, ‘Constitutionally Required Judicial Activism’ (n 7) 56–57. See also Tom Ginsburg and Zachary Elkins, ‘Ancillary Powers of Constitutional Courts’ (2009) 87 *Tex L Rev* 1431, 1444–46.

24 Farinacci-Fernós, ‘Constitutionally Required Judicial Activism’ (n 7) 58 (‘In more modern times, the negative legislator still has a substantial impact on the formulation and execution of policy’).

25 *Ibid* 68 (‘Modern teleological constitutions *require* active judicial intervention in policy matters’) (Emphasis in original).

26 *Ibid* 58.

27 *Ibid* 68 (‘This is not the result of some judicial power grab, but an intentional move on the part of constitution makers as a check on the possible failures of ordinary politics’).

28 *Ibid* a48, cf Sweet (n 21) 2.

afoul of a particular constitutional prohibition, the ‘negative legislator’ is called upon to invalidate it. Here, the legislature still possesses considerable freedom to choose between non-prohibited alternatives, leaving a relatively narrower role for the ‘negative legislator’.

Constitutional prohibitions can address fundamental substantive policy issues. Suppose, for example, that a constitution prohibits the privatization of public beaches or other natural resources such as mines, forests, rivers, etc. Or even prohibits the privatization of nationalized industries, as was the case of the original Portuguese Constitution of 1976. While relatively precise and narrow in its effect, this type of provision addresses a substantially wide area of economic policy. If an ordinary legislature attempts to transfer ownership of a public entity to private hands, the ‘negative legislator’ is forced to intervene and strike down that legislative exercise.

Note that in this example the court would not be requiring the legislature to nationalize a private enterprise, which would be more in the realm of a positive legislator, but would simply be invalidating a statutory enactment that is inconsistent with the constitution’s command. In this case, while the court still lacks the creative power of the positive legislator, the impact of its ‘negative legislator’ role can still be substantial.

In its most expansive form, the ‘negative legislator’ can actually become a *de facto* positive legislator. This can happen, for example, when the scope of the constitutional command is so great that the legislature is only left with one policy option. Here, the court is required to strike down any attempt by the legislature to evade that single available option. The net result is that the court will be indirectly requiring the legislature to adopt that single possibility.²⁹

3.3 Counter-Majoritarian and Majoritarian Review

Naturally, a constitutional court’s ‘negative legislator’ role can put in direct tension with the legislature. According to Kelsen, ‘[t]he possibility of a law issued by the legislative organ being annulled by another organ constitutes a remarkable restriction of the former’s power. Such a possibility means that there is, besides the positive, a negative legislator, an organ which may be composed according to a totally different principle from that of the parliament elected by the people. Then

²⁹ Another scenario for a constitutional court as an authorized positive legislator is when a constitution adopts judicially enforceable positive rights. See Jorge M Farinacci-Fernós, ‘Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach’ (2018) 41 *Hastings Int’l & Comp L Rev* 31.

an antagonism between the two legislators, the positive and the negative is almost inevitable.³⁰

And because the legislature is an elected branch charged with the development of policy through statutory enactment seen as majoritarian in nature,³¹ when a non-elected court strikes down legislation it is thought to be acting in a counter-majoritarian fashion. This is characterized as the so-called counter-majoritarian problem or difficulty.³²

In general, counter-majoritarian review can be articulated in one of two ways. First, as ‘legitimate counter-majoritarian review’, which occurs when a court strikes down legislation in an attempt to protect ‘minority rights against imposing majorities.’³³ This is based on the notion that minority rights protection is a quintessential judicial role that serves as an accepted and necessary exception to majority rule.³⁴ As a result, this type of judicial intervention should be limited and used sparingly, allowing the legislature to rule unopposed, unless it discriminates against minorities or violates any of the constitution’s structural requirements or limitations, meant, precisely, to facilitate democratic self-government through legislative action. In other words, legitimate counter-majoritarian review is meant to strengthen democracy by keeping the legislature in check, whether through minority rights protection or enforcing structural limitations on majority rule. Thus, this type of judicial intervention is seen as a necessary evil, since it is still counter-majoritarian in nature.

The second articulation of the difficulty is ‘illegitimate counter-majoritarian review: where the court imposes its *own* preferences over the legislature.’³⁵ This type of intervention can lead to ‘juristocracy’ and is seen as contrary to democratic self-government.³⁶ Here, because the court is imposing its own preferences, instead of the constitution’s, it is undermining the actions of a body that has better democratic credentials: the legislature.

As such, that action can be described as clearly counter-majoritarian in nature. And unless there is some valid legal source that authorizes such action, it can also be characterized as illegitimate. This combination should result in the conclusion that the court’s actions must be prevented or, at least, condemned and corrected.

In the end, because in practice there may seem to be little daylight between legitimate and illegitimate counter-majoritarian review, the generalized view is

30 Hans Kelsen, *General Theory of Law and State* (1945) 268–269.

31 Lerner and Landau (n 10) 319 (referencing the presumption that legislatures reflect popular will).

32 Farinacci-Fernós, ‘Constitutionally Required Judicial Activism’ (n 7) 49.

33 Ibid 51.

34 Ibid 55 (‘There is universal consensus in the literature that minority and individual rights protection is a fundamental judicial function’). See *ibid* fn 87 for supporting sources.

35 (Emphasis added) *Ibid* 51.

36 See James Thou Gathii, ‘Beyond Samuel Moyn’s Counter-majoritarian Difficulty as a Model of Global Judicial Review’ (2019) 52 *Vand J Transnat’l L* 1237; Ran Hirschl, ‘Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming’ (2005) 84 *Tex L Rev* 471.

that the exercise of even legitimate counter-majoritarian review should be limited. In the end, whether legitimate or illegitimate, counter-majoritarian action should be rare and exceptional, as it clashes with the democratic process and the decisions made by elected institutions. In that sense, illegitimate counter-majoritarian action is condemned while legitimate counter-majoritarian action is mostly tolerated as a necessary evil to avoid democratic excesses. Even legitimate counter-majoritarian review should be used sparingly.

As a result of this dichotomy, whether legitimately or illegitimately, courts are therefore seen as inherently counter-majoritarian institutions, as opposed to legislatures, which are commonly and generally characterized as inherently majoritarian. But this dichotomy is far too narrow and limited. Just because a court engages in counter-majoritarian action, be it legitimate or illegitimate, does not mean that it is inherently counter-majoritarian. The fact that it can also engage in majoritarian action necessarily negates this proposal. Moreover, the same can be said about the view that characterizes legislatures as inherently majoritarian, particularly when its statutory enactments clash with a constitutional command that enjoys greater majoritarian credentials.

As we discussed in Part 2, statutory enactment is not necessarily the ultimate majoritarian act. In modern times, the constitution can actually be the ultimate majoritarian instrument. Therefore, when an ordinary legislature adopts a statute that is contrary to a constitution that enjoys superior majoritarian credentials, it is the legislature that is acting in an illegitimate anti-majoritarian fashion. This is the legislative equivalent of a court's attempt to substitute the legislature's judgment with its own by way of illegitimate counter-majoritarian intervention. In this scenario, the legislator would be attempting to substitute the constitutional body's judgment with its own, weakening democratic self-government.

3.4 The 'Negative Legislator' as a Majoritarian Actor

The remaining question is which body should step in and correct the situation when a legislature acts in an illegitimate anti-majoritarian fashion by subverting the constitution's commands. Constitutional drafters have opted to delegate that task to some type of judicial body, conceptually and historically characterized as constitutional courts.³⁷

This is also the foundation for the 'negative legislator' theory.³⁸ As Kelsen explains, '[t]he annulment of a law is a legislative function, as act so to speak of

³⁷ See Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *Geo LJ* 961, 967.

³⁸ Kelsen (n 30) 268–269.

negative legislation. A court which is competent to abolish laws individually or generally functions as a negative legislator.³⁹

Constitutional courts, even when exercising their more limited ‘negative legislator’ role, can also engage in legitimate majoritarian review.⁴⁰ This view is not a new one, though it has been sorely missed or insufficiently developed in academic and scholarly discussion. As stated in *Federalist No 78*:

‘Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.’⁴¹

As a result, if (1) the constitution can be adequately characterized as the ultimate majoritarian instrument in a given community as opposed to ordinary legislative enactment, and (2) the legislature adopts a statute that violates a constitutional command, any commitment to majoritarianism requires that the statute be struck down. Historically, that task has been delegated to courts. Modern constitutions expressly give those powers to some sort of judicial body.

But that power is different from independently empowering the court. As we saw, constitutional legislators recruit courts into service in order to enforce the constitutional legislators’ will. In that sense, a court’s power is limited to enforcing the majoritarian will expressed in the constitution.

This express delegation and constitutional control as to content negates another component of the counter-majoritarian difficulty: the notion of unelected judges thwarting the will of elected legislative bodies.⁴² But if the constitution is truly the ultimate majoritarian instrument, this argument seems upside down.

First of all, if a legislature contradicts the expressed will of the constitutional body, it is the legislature that is acting in an anti-majoritarian manner. This, in turn, demands that there be some legal mechanism for correcting this democratic deficit and restore the majoritarian command. Constitutional courts are ideally positioned to deal with this scenario.

Second, if a court strikes down a statute because of its incompatibility with the constitution, the court is not substituting the legislature’s will with its own. That would be an instance of illegitimate counter-majoritarian review. But if the court is merely enforcing the constitutional body’s will, then it is correcting the illegitimate

³⁹ *Ibid.*

⁴⁰ Farinacci-Fernós, ‘Constitutionally Required Judicial Activism’ (n 7) 51.

⁴¹ ‘*Federalist No 78*’.

⁴² See Steven P Croley, ‘The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law’ (1995) 62 *U Chi L Rev* 689, 693.

anti-majoritarian action of the legislature and would actually be reestablishing majoritarian preferences.

Third, if the constitution expressly empowers, or even requires, a court to strike down incompatible legislation, the unelected status of the judge becomes irrelevant. First of all, because it wouldn't matter if the entity invalidating the statute is an elected one; the constitution's hierarchical superiority and its status as the ultimate majoritarian instrument supplies all the normative force necessary to justify the invalidation of the offending statute, even if the latter is adopted by an elected body. Also, election is not the only source of legitimacy in this context: the constitution's express delegation of the power to invalidate statutes bestows legitimacy on the court as a creature of the majoritarian constitution, as long as it remains faithful to the judgments of the constitutional legislator.

What may generate confusion is when the issue under review is full of substantive policy considerations. Policy, we instinctively feel, is supposed to be within the realm of the legislature, not the judiciary. And this is true only when the constitution is silent as to a particular policy issue. But when the constitution *does* address a particular policy matter, then the legislature's room for maneuver is narrowed and the constitution enlists the courts to make sure that the legislature does not exceed or contradict the constitution's policy commands.

In these cases, the court does not impose its own policy preferences on the legislature; it simply makes sure that the policy preferences established by the constitutional legislator are obeyed by the ordinary legislature, taking as true that the constitutionalized policy preferences can still be characterized as majoritarian. But as long as the court is not imposing its own policy preferences, any disagreement with its decision to invalidate a statute as being inconsistent with the constitution must be channeled through the exercise of constitutional politics.⁴³ It should not be seen as a manifestation of the counter-majoritarian difficulty.

But because legitimate majoritarian review is a vital function of constitutional courts, we should jettison the view that constitutional courts are inherently counter-majoritarian institutions. On the contrary, they can harmoniously combine legitimate counter-majoritarian and legitimate majoritarian review as part of their institutional nature, even within the role of the 'negative legislator'.

4 Final Thoughts

Constitutional courts have played a crucial role in protecting minority rights, making sure that political actors stay within structural limits and that they do not

⁴³ See Farinacci-Fernós, 'The Constitution is Dead!' (n 2).

engage in democratic excesses. This is consistent with their characterization as counter-majoritarian bodies.

But, as we saw, this characterization is both narrow and incomplete. Constitutional courts can also engage in majoritarian action by re-establishing the constitution's substantive policy commands in situations when the ordinary legislature attempts to replace the will of the constitutional legislator with its own.

Both of these types of interventions are wholly compatible with the 'negative legislator' role where a judicial body lacks creative power as to the development of policy. But in the case of majoritarian review, this 'negative legislator' is a very active one; not because the court is empowered to impose its own policy preferences over the elected legislature, but because the constitution requires it to strike down ordinary legislation that is inconsistent with the majoritarian preferences entrenched in the constitution itself.

Also, as we saw, the concept of the 'negative legislator' is a relative one, because, depending on the space for maneuver given by constitutional drafters to legislative bodies as to particular policy questions, the court may well end up imposing a single policy choice on the legislature. But again, that imposition is *not* the result of an independent judicial power grab, but of the court acting as an agent of the constitutional legislator implementing the latter's will.

But even in the more limited view of the 'negative legislator', its interaction with legitimate majoritarian review requires a re-evaluation of the very nature of constitutional courts and their role in democratic self-government. Instead of just acting as a limiting check on legislative bodies when these overstep their bounds by discriminating against minorities or ignoring the structural framework of the constitution, constitutional courts can also act as majoritarian institutions that make sure that the policy preferences of the majority, as entrenched in the constitution, are respected by all political and social actors.

In the end, when a constitutional court strikes down ordinary legislation because it contravenes the policy choices entrenched in the constitutional text, and the constitution's majoritarian credentials are superior to that of the legislative branch, then the court can fairly be characterized as a majoritarian institution vital to making sure that democratic self-government is respected. When we the People write a constitution, and a legislature acts contrary to its commands, it is up to courts to correct this anti-majoritarian act by the elected branch and restore popular sovereignty. When this happens, the constitutional court acts as the ultimate majoritarian actor by assuring that the majoritarian constitution prevails.