

Responsive Judicial Review and J. H. Ely in the “Bed of Procrustes”

Control judicial sensible o receptivo y J. H. Ely en el “lecho de Procusto”

Leonardo García Jaramillo

Universidad EAFIT, Colombia

lgarciaj@eafit.edu.co

Abstract: Judicial review has proven to be an empowering device for minorities, enabling the articulation of their claims through constitutional language and compelling majorities to debate the merits of such claims. To capture contemporary threats to democratic responsiveness, Dixon’s responsive judicial review model builds on Ely’s political process, grounding judicial review in procedural enhancement and reinforced political representation. This article does not seek to critique Ely’s updated framework as a justification for weak or strong judicial review. Instead, it explores whether this model can provide a normative foundation for the urgently required responsive judicial review in Global South democracies. Despite well-considered cases and examples from the Global South—a commendable rarity in the parochial Global North literature in the field—Dixon’s model does not adequately characterize and normatively justify an exceptionally activist form of judicial review capable of addressing structural problems. In democracies with profound dysfunctions, the rationale for judicial review is rooted in systemic failures in public policy, a lack of institutional coordination, chronic budgetary insufficiency, and prolonged inaction by authorities to adopt necessary measures. The “Procrustean bed” metaphor illustrates the process of testing a model’s portability in the Global South as Dixon intends to do with Ely’s normative but minimal approach to judicial review. The predictive and explanatory potential of political and constitutional theories depends on specific political and social realities and constitutional history.

Keywords: judicial review, constitutional democracy, global south, judicial activism.

Resumen: El control judicial ha permitido a las minorías articular sus demandas en un lenguaje constitucional y ha obligado a las mayorías a debatir los méritos de dichas demandas. Para abordar las amenazas actuales a la capacidad de respuesta democrática, el modelo de control judicial de Dixon se basa en el proceso político de Ely, centrado en mejorar los

procedimientos y reforzar la representación política. No me interesa cuestionar el enfoque actualizado de Ely para justificar formas débiles o fuertes de control judicial, sino explorar su potencial para proporcionar la base normativa de una versión sensible o receptiva del control judicial que las democracias del Sur Global realmente necesitan. Independientemente de los casos y ejemplos del Sur Global bien considerados —una rareza encomiable en la literatura parroquial del Norte Global—, el modelo de Dixon no caracteriza adecuadamente ni justifica normativamente una forma excepcionalmente activista de revisión judicial capaz de abordar problemas estructurales. En democracias con profundas disfunciones, la justificación del control judicial se basa en fallas sistémicas de las políticas públicas, falta de coordinación institucional, insuficiencia presupuestaria crónica y prolongada incapacidad de las autoridades para adoptar las medidas necesarias. La metáfora del “lecho de Procusto” ilustra el proceso de poner a prueba la aplicabilidad de un modelo en el Sur Global, tal como pretende Dixon con el enfoque normativo, pero minimalista, de Ely respecto al control judicial. El potencial predictivo y explicativo de las teorías políticas y constitucionales para comprender y resolver problemas depende en gran medida de singularidades políticas y sociales, así como de la historia constitucional.

Palabras clave: revisión judicial, democracia constitucional, sur global, activismo judicial.

I. Introduction

In Greek mythology, Procrustes, the villainous son of Poseidon, managed a hospice in Attica. He was known for his kind behavior to travelers, offering them lodging. Once there, he tied them to an iron bed. If they were taller, he would amputate their lower or upper limbs, and if they were shorter, he would stretch and dislocate them until they fit the bed. The hero, Theseus, ultimately slain him in the same manner (Taleb, 2016; Muqet, 2024). This metaphor illuminates one-size-fits-all theoretical approaches that either ignore or, at best, show only limited sensitivity to contextual nuances or individual differences in areas such as law and politics. Forcing certain theories or concepts into different social or political frameworks often leads to inaccurate normative conclusions, with severe practical consequences. Constitutional and political theories do not emerge in a vacuum but in specific countries or regions in response to pressing problems. They stem from the complex interactions between knowledge and power.¹ Nevertheless, theoretical models of judicial review are often forced upon incompatible political and social realities. This article argues that, while a sophisticated update of Ely’s political process approach, Dixon’s responsive judicial review model or device² is unable to effectively represent and normatively support a strong —and, at times, activist— form of judicial review that addresses the most significant challenges facing the Global South.

Since its publication in 2023, *Responsive Judicial Review: Democracy and Dysfunction*

in the Modern Age has emerged as a significant contribution to contemporary scholarship on the factors influencing strong and weak forms of judicial review and their potential to détente with constitutional democracy (Gargarella, 2025; Velasco, 2023; Baldwin, 2025).³ If references to “responsive”⁴ judicial review have traditionally pointed to Nonet and Selznick (1978, 2001), they now also invite renewed attention to Dixon’s carefully researched and engaging book. It sparks important discussions, such as new forms of abusive constitutionalism. Dixon accurately warns that courts should exercise great caution when applying the doctrine of unconstitutional constitutional amendments —or not use it at all (Dixon and Landau, 2015; Dixon, 2023, pp. 15 and 49; chap. 4, sec. 5).⁵

The focus is judicial review, a subject “old and tired, but of increasing importance” (Dworkin, 2011, p. 398). The dysfunction of democracies, the crisis of liberalism, and the rise of new populism have intensified the debate over how judicial review should legitimately operate within specific political systems. When asked about the worst misconceptions about the Supreme Court in popular society, Chemerinsky answered: “The belief that the Justices are just applying the law and not making law. The belief that the justices are just umpires” (Kapur, 2014). Conversely, according to Chief Justice Roberts, “Judges are like umpires. Umpires do not make rules; they apply them. (...) They make sure everybody plays by the rules” (Roberts, 2005). But what should be the disposition of a Global South judge when rules are ambiguous or contradictory, or when they unfairly infringe on basic freedoms or insufficiently guarantee social rights? In constitutional states, the umpire-judge paradigm must give way to constructive interpretation and, in some cases, to activist adjudication.

Elaborating on Chemerinsky’s argument and questioning Ely’s minimal democratic conception of judicial review, restricted procedurally to the rules of democratic expression and participation, my initial premise is that judges in Global South societies must sometimes act as *players*, not just *umpires*. Administering justice and enforcing normatively dense constitutions does not require the same level of commitment and engagement from judges in Sydney or Oslo as it does in Mexico City or Bogotá. Adjudicating in well-organized societies with robust legal institutions that share the responsibility of guaranteeing basic rights stands in stark contrast to adjudicating in societies where judicial action is the only means of protecting those rights (Atienza, 2018).

A different institutional ethos geared toward democratic resilience and transformative constitutionalism is required. In addition to virtues such as impartiality, independence,

reasonableness, and consistency, judges must demonstrate further virtues in challenging social and political contexts, including audacity, resourcefulness, imagination, practical wisdom, empathy, and courage. These virtues are essential for confronting structural injustices and upholding the enforcement of measures adopted to remedy them in the long term (Widłak, 2025). In a nutshell, judicial activism is a decision-making philosophy by which courts transcend literal constitutional interpretation to expand rights and their scope of application to new situations, typically the domain of political bodies. This approach involves broad judicial discretion. Scholars understand judicial activism in two ways, depending on the theories of authority, constitutional interpretation, and democracy they embrace. First, it may mean that judges decide cases based on personal moral views and political preferences rather than on law, jurisprudence, and accepted interpretive methodologies (Global North). Alternatively, it can mean that courts defend constitutional rights when basic liberties are persistently and systematically infringed upon and social rights are insufficiently guaranteed (Global South). In such cases, activist actions may be seen as securing the effective enjoyment of rights.

Describing a judge as an activist in the Global South conveys a positive quality, suggesting that they take the judiciary’s essential function seriously: the enforcement of basic rights. “Prudent and well-balanced” judicial activism (C-209, 2016) is essential to this purpose and respectful of democracy, provided that decisions are reasonable, i.e., based on sufficient and relevant grounds. These decisions must also be justified by their universalizability, consistency, and respect for constitutional principles (Atienza, 1993, pp. 163-166 and 179; 2004, pp. 138-140). This positive conceptualization relates to progressivism in constitutional interpretation, granting the courts a more independent and principled role (Couso and Hilbink, 2011). It also relates to the judicial role in transforming society by materializing constitutional principles and values (Berizonce, 2010). This conceptualization is necessary to illustrate the form that judicial decisions must exceptionally adopt to remove severe and structural obstacles faced by the Global South minorities, whose rights have been forgotten or deliberately violated by the majority.

As a democratic core principle, collective self-government implies that judicial review should be limited to removing obstacles to the democratic decision-making process and protecting marginalized and insular minorities —i.e., not only factual minorities, but also those unable to form coalitions and achieve victories in the legislative process (Ely, 1980). The ordinary processes of democratic politics, Ely distrusted, tend to be incapable of protecting these groups. The procedural conceptualization of a minimal

democracy focuses on regular elections and the rights to freedom of expression and to vote. Constitutional review should not replace the outcomes of democratic processes but exclusively reinforce the principles of political representation and participation by remedying dysfunctions.

Dixon's responsive judicial review is a normative constitutional approach that portrays a modern evolution of Ely's "representation-reinforcement" and "political-process" doctrines. While Ely focused on clearing "channels of political change", Dixon expands this framework to address the contemporary dysfunction of democracy. It would be worth considering whether this theoretical framework could be acclimatized to analyze its viability in other contexts. Attempting to adapt this conceptualization within the constitutional state paradigm—in Global South societies—might force it into a "Procrustean bed". Dixon paradoxically endorses substantive versions of judicial review as in the cases of abortion and internally displaced persons in Colombia.

In Global South democracies, deferring to a clear majoritarian consensus frequently strips marginalized groups—displaced persons, prisoners, women, and indigenous populations—of their constitutional rights. Majorities often actively oppose or systematically disregard minority demands. If this hypothesis is true, then Dixon's model would have to stretch the "representation-reinforcement" and "political-process" doctrines to fit in the Procrustean bed of the Global South. Given the severity, depth, and persistence of basic human rights violations, strengthening mechanisms to improve political representation is insufficient. The Dixon model is too majoritarian and insufficiently protective of minority rights. However, the answer is threefold: if minority rights are clearly protected in constitutional provisions, then judges committed to enforcing them will be required to give effect to those protections in a strong counter-majoritarian manner.

II. Factual and normative premises in the judicial role debate

Contemporary democracies are experiencing severe dysfunctions. The erosion of democracy and the failure of liberalism are proclaimed throughout the West and have generated an avalanche of literature. Rosanvallon (2006) noted that one of the most studied phenomena in political science over the last two decades is the erosion of citizens' trust in their leaders and political institutions. Public outrage has increased over the failure of liberal democracy to deliver on its promises of achieving minimum levels of real equality and freedom. Political parties, both new and established, have been discredited, as has democracy itself as a form of government (Latinobarómetro,

2020; Ziblatt and Levitsky, 2018; Mounk, 2018; Graber et al., 2018; Runciman, 2018; Holmes, 2018; and Badger, 2022). “Liberal democracies have become the least common type of regime in the world, with a total of 29%” (V-Dem, 2025). Support for democracy remains at its lowest level since 1995 (48%), and support for authoritarian governments persists at its highest level ever recorded (17%) (Latinobarómetro, 2023; 2024).⁶

The historical afflictions faced by Global South democracies—including severe economic inequality, institutional weakness, violence, and deficits in social cohesion and political representation—exacerbate these circumstances. These structural pathologies constitute an unavoidable *factual premise* in the debate on the judiciary. The *normative premises* are the notion of the *constitutional State*, the *normative* conception of democracy, the *substantive* ideal of the rule of law, and the *pro homine* principle. Its distinctive and founding nature is not only grounded in scholarly debates but also in its explicit and repeated endorsement in recent decades across international, regional, and national legal systems in all countries that have enshrined it in their constitutions (Mazzarese, 2019).

Factual and normative premises determine the practice and legitimacy of the judicial role. In Global South constitutional states, courts must fulfill two mandates. The first is a “prohibition” mandate, which declares legislation that severely and unjustifiably restricts constitutional rights or principles as unconstitutional. The second is a “proactivity” mandate, under which structural orders, remedies, and monitoring measures are issued for insufficient action or inaction, based on laws or policies that do not sufficiently guarantee rights in a justified manner. The primary purpose of a constitutional state is the enforcement of rights. Public institutions must fulfill mandates that are not limited to punishing violations but also include adopting strategies to guarantee basic freedoms and social rights effectively. In the Global South, the “proactive” mandate implies that courts must act as activists in certain circumstances; otherwise, it would be considered a breach of their constitutional duty.

The normative premise also contains an ideological and political element characteristic of strong judicial review, especially towards severely marginalized and unequal minorities. According to the “correlativity thesis,” both civil and social rights must have equal fundamental legal status and be subject to some degree of justiciability. Protecting a minimum basis of material equality is a prerequisite for effectively enjoying civil rights and liberties (Sunstein and Holmes, 2000). Constitutional democracy implies liberalism rather than a doctrine that could support a status quo

constitutionalism. However, this liberalism is linked to egalitarian elements given the consideration of social rights as part of the “constitutional essentials” (Michelman, 2002 and 2022, part 3).

The purpose of social rights is to establish the material conditions necessary to achieve a minimum level of equality, which is essential for the effective exercise of basic liberties. With only civil rights and liberties, everyone would be equally free but not similarly empowered. Therefore, it is necessary to recognize social rights that enable people to act on their freedoms (Bobbio, 2003, pp. 541 ff.). The enforcement of social rights ensures the prerequisites for political democracy. The Colombian Constitutional Court has played a pivotal role in supporting this idea (Cepeda and Landau, 2017, chap. 6). Autonomy requires more than the formal freedom to do whatever one wants; it also requires the power to choose to do what one desires in accordance with one’s own conception of the good life. “Citizens have equal opportunities to exercise these rights only when they enjoy sufficient independence in their private and economic lives and can develop their identities in their preferred cultural environment. Experiences of exclusion, suffering, and discrimination teach us that classical civil rights acquire ‘equal value’ (Rawls) for all citizens only when supplemented by social and cultural rights” (Habermas, 2010, p. 468).

The correlativity thesis implies that dignity should also be conceived as the guarantee of the minimum material conditions of existence. Currently, dignity encompasses a more complex human dimension, including protection against laws, policies, administrative practices, and private actions that cause mistreatment and humiliation. Conceived comprehensively, dignity is the foundation of the “correlativity thesis” because it establishes the indivisibility of all human rights categories. “Only through collaboration can basic rights fulfill their moral promise to respect the human dignity of every person equally. This development also explains the recent conspicuous role played by this concept in the administration of justice [Rechtsprechung]” (Habermas, 2010, pp. 468-469).⁷

By protecting basic liberties and enshrining values such as these, liberalism has advocated for the decisive exercise of governmental power to achieve its objectives (Dworkin, 1986). The role of public authorities regarding the effective enjoyment of rights consists not only in guaranteeing spheres free from outside interference, but also in ensuring minimum material conditions of existence, from which the progressive enforcement of social rights emanates.⁸ This observation underscores that all state institutions must be committed to fully guaranteeing these rights. In the Global South,

upholding these rights depends on active state intervention and adequate resources.⁹

The substantive ideal of the rule of law “imparts a specific meaning, character, and objectives to the state organization as a whole, which is therefore binding on the authorities, who must guide their actions toward promoting decent living conditions for all people and resolving actual inequalities existing in society, with a view to establishing a just order” (T-772, 2003). Public authorities have an obligation to “correct social inequalities, facilitate the participation of weak and vulnerable sectors, and stimulate a progressive improvement in the material conditions of existence of the most depressed sectors of the population” (T-025, 2004). While it is recognized that this must be fulfilled through legislative measures, given that it is subject to budgetary assignments, this does not justify indefinitely postponing it until Congress addresses the problem.

The defense of strong and exceptionally activist judicial review does not justify bypassing the legislature; rather, it justifies intervening in a space deliberately abandoned or inter-institutionally misaligned and uncoordinated. These phenomena, pressing and real dysfunctions of Global South democracies, lead to rights infringement through action, inaction, or insufficient action. A conspicuous empirical grounding for legislative incapacity and inertia in Colombia, as a representative rather than merely illustrative case in the Global South, is the declaration of “unconstitutional states of affairs” (Cepeda and Landau, 2017, p. 382; Cepeda, 2022). This judicially created category has brought to light massive human rights violations. To avoid an overly normative reading of constitutional phenomena, regarding two of its most eloquent examples, it is worth emphasizing that a total of 9.6 million people have been forcibly displaced in Colombia since 1985. This equates to approximately one in five citizens (T-025, 2004). Likewise, in the face of a criminal policy “reactive, populist, ill-considered, volatile, inconsistent, and subordinate to security policy” (T-762, 2015), the Court also declared a state of affairs unconstitutional in prison matters to address the overpopulation equivalent to overcrowding of 28.4% (*Auto* 1677, 2025).

This category has been used by the Constitutional Court to describe situations involving massive, repeated, and extensive violations of basic rights. It responds to structural factors in various state entities. The determining factors are: (1) massive violations of basic rights affecting a large group of people continuously, which can lead to a mass litigation that overloads the judicial system; (2) prolonged omission by the authorities failing to fulfill their duties; (3) adoption of unconstitutional forms of action (or inaction); (4) absence of legislative, administrative, or budgetary measures (action plans,

public policy measures, specific laws); (5) a structural problems due to rights infringement not depending on a single entity but is the result of a failure in the entire state design; and (6) the need for intervention by multiple entities due to a coordinated effort (“inter-institutional dialogue”) that the Executive branch has not been able to lead on its own. The Court uses the concept of administrative “untidiness” or “dysfunction” to describe the inefficient management of public resources and the institutional crisis in specific sectors.

The massive volume of *tutelas* is another revealing indicator of omissions and blockages. At the beginning of 2026, the Court’s filing system already exceeded 11,800,000 *tutela* cases ruled on by judges nationwide. Of these cases, the Court has chosen to review nearly 50,000, including judgments on the merits and orders.¹⁰ Decisions in the context of an unconstitutional state of affairs not only diagnose the problem but also require prioritizing measures to protect the affected community or group, guaranteeing resource allocation, and adopting a territorial approach to strengthen the state’s presence in the most affected areas.

Finally, the legislative exclusion of same-sex couples from marital partnerships is a prime example of blind spots and democratic inertia in Colombia. The law excluded them outright. This exclusion resulted from failed legislative initiatives and repeated disregard of exhortations, constituting an unconstitutional omission. Due to a lack of political will, no fewer than 10 bills failed during the legislative process. As Dixon reconstructs (2023, p. 159), key decision C-577 of 2011 did not declare the challenged provisions unconstitutional; however, it urged Congress to regulate contracts that would allow same-sex couples to formalize their relationships and form families legally. The Court granted two years and specified that, if the corresponding legislation had not been passed by the end of that period, these couples could appear before a notary or judge to sign a contract allowing them to marry. The Court left ample room for legislative configuration. Thus, some bills proposed to extend marriage to same-sex couples while others established a new “civil union” with effects similar to marriage, but not equating the two (which some same-sex rights activists conceived as a form of discrimination).

In these factual and normative contexts, it seems increasingly difficult to confine judicial review to its weaker form, reduced to unblocking democratic processes in cases of clear majority consensus in favor of constitutional or legal change. The remaining question is what role constitutional courts should play when public authorities are negligent or act insufficiently, resulting in violations of social rights and, consequently,

the failure to guarantee civil rights and liberties. Dixon’s model, based on Ely’s enhanced interpretation, does not adequately represent or justify a form of judicial review capable of addressing structural problems in the Global South from a normative view. Claiming that the responsive model values minority rights does not clarify the extent to which our commitment to freedom, dignity, and equality should be realized in a specific national context.

III. Intensity of Judicial Scrutiny

In the case of severely dysfunctional democracies, Ely’s limits of judicial review are too narrow. The political-process approach limits the scope of judicial review. Rather than justifying this mechanism as an essential tool for fulfilling the positive mandates of basic rights and as a critical aim of a constitutional state, the approach reduces its potential. Even in the face of “repugnant laws” (Whittington, 2019), which cause or perpetuate stigmatization, discrimination, and abuse, it is not justified for this approach to take on a preeminent role by declaring such laws definitively invalid through a declaration of unconstitutionality. According to Ely, some such laws do not demonstrate a corrupt political process because those affected can still form new coalitions and compete to win further battles in the legislative arena. Adopting a normative stance in favor of a proactive judicial mandate, the political process approach focuses less on justifying judicial review within the political process and more on its limits (Cepeda and Landau, 2021, p. 522). Thus, reviewing the constitutionality of laws and policies is reduced to ensuring an open political process so that the democratically elected authorities can make fundamental political decisions on behalf of those they govern (Ely, 1978).

In each judicial review case, in accordance with the prohibition and proactivity mandates, it should be demonstrated that the “political process” is institutionally incapable of creating new subjective rights. When interpreting basic rights or systematically applying basic rights provisions to create unenumerated rights, the “judicial process” should operate with gradual intensity. Judicial review in accordance with the proactivity mandate should be incremental with respect to the constitutional construction of rights. According to an interpretivist, non-positivist concept of law, judges should not attempt to legislate as Congress would but rather identify the principles that best justify the law of the community as a whole and apply them to the case. Incrementalism implies not ruling out the possibility of Congress or the government intervening to address a given state of affairs. Judicial activism cannot become an ad hoc substitute for legislation and politics. A normative version of incrementalism

should follow two variables: (1) the type of basic rights whose guarantee is at risk or the real intensity of their infringement, and (2) the possibility of guaranteeing such rights through the political process within a reasonable timeframe and with a verifiable degree of success.

The intensity of judicial scrutiny and the remedies ordered by courts must be proportional to the variables by which political and legislative actions are likely to guarantee rights, rather than merely keeping the political process free of obstacles. The greater the level of inattention, neglect, or unjustified obstruction by the political process of realities critical to thousands or millions of individuals, the greater the degree of judicial intervention. The potential of judicial review to internalize the values of social and democratic responsiveness and receptivity is complex. Depending on their social and political contexts, they can take different institutional forms. “Rights-based” strong judicial review, as feared by Waldron (2018) and Gargarella (2022), insults democratic equality in cohesive societies with a rights-respecting ethos. In these societies, institutions help guarantee basic liberties and the essential core of social rights. There is also less dissociation between citizen demands and public policies.¹¹ According to Dworkin, “Judicial review may well be less necessary in nations where stable majorities have a strong record of protecting the legitimacy of their government by correctly identifying and respecting the rights of individuals and minorities. *Unfortunately, history discloses few such nations, even among the mature democracies (...)* Nothing guarantees in advance that judicial review either will or will not make a majoritarian community more legitimate and democratic” (Dworkin, 2011, p. 398, emphasis added).

The values of social and democratic responsiveness must be expressed in two ways in constitutional jurisprudence and optimized to the greatest extent possible through strategies such as remedies ordered and monitoring mechanisms. (1) The appropriate *timing* of strong judicial review is essential to transform society and avoid a social or political *backlash* that could overturn existing guarantees. Courts must exhaust all political avenues. The attitude of judges who assume a socially and politically responsive approach¹² should optimize the functions and powers of the state agencies involved. There should be opportunities for legislation and policy to respond to the formulated exhortations, ranging from initial decisions that identify rights violations and lead to action, to insufficient action or inaction, to decisions with more ambitious orders.

For this reason, it is worth noting that Obama (2006, chap. 2) refers to Justice Warren as a good judge aware of the social and cultural effects of judicial decisions. However, he argued that in today’s complex processes toward social change, the way constitutional

law operates in the courts must transcend activism, as conceived and defended during the Warren Court, to a progressivism conscious of the complex intersection between legal, moral, and sociological legitimacy, from which emerges incremental judicial activism due to its opportunities for deference to political bodies.¹³ Thus, fulfilling the proactivity mandate in this way may be more democratic and more effective for social transformation.

Where deeply entrenched cultural traditions undermine rights protection, incremental judicial interventions often prove to be the most viable catalyst for lasting transformation. “Gradual revolution through incremental changes may be the most effective way to achieve deeper and more lasting transformations” (Roberts and St. John, 2022, p. 131). Though small changes may seem minor individually, they can have transformative effects when viewed over time or in conjunction with the strategies of other actors. In the Global South, particularly in Colombia, strong and responsive judicial review has catalyzed and supported civil society organizations. It has shaped the political agenda by highlighting issues state agencies overlooked and by bringing to light topics not prioritized or framed in a biased or stereotypical manner. The court has fostered collaboration, provided resources, and established common ground, generating points of convergence between civil society movements and public institutions.

In some cases, constitutional jurisprudence has preceded social movements, prompting the media, academia, and significant sectors of the political and judicial spheres to follow its judgments. This shift notably catalyzed social transformation in the case of same-sex individuals and couples. It contributed to greater awareness among officials, opinion leaders, and the public about discrimination and the structural deficit in rights enforcement.

Constitutional jurisprudence must also embody the values of social responsiveness and democratic sensitivity (2) by protecting “marginalized and insular minorities” (Cepeda and Landau, 2021, p. 555). According to Ely, “the Supreme Court is not by definition politically responsible and ought to confine itself to safeguarding the rights and interests of those groups who are not well represented in the electoral process — minorities and the politically and economically disadvantaged” (Totenberg *et al.*, 1984, p. 645). A restrictive interpretation of which social groups qualify as “insular minorities” would render judicial review futile. For Ely, women did not constitute an insular group because they could form coalitions to participate effectively in the political process. “*The degree of contact between men and women could hardly be greater*” (Ely, 1980, p. 164). Regardless of how accurate this statement may have been in the United States during

the 1980s, it is clearly an inaccurate social diagnosis in the Global South societies. This kind of reductive conceptualization does not necessarily compromise other uses of the category, as Dixon intends. However, it must be clear how far it extends in accurately representing cases of rights violations in the Global South.

The intervention of courts guaranteeing the proactivity mandate has been essential to adopting measures that curb historical patterns of discrimination against populations such as women, internally displaced persons, the LGBTI community, and other minorities. While these groups could form coalitions to assert their claims in the political arena, the historical circumstances of their marginalization and exclusion render this impractical. To varying degrees, judicial process interventions highlight failures of the political process to address the demands of these populations, thereby enabling them to achieve some victories through electoral organization.

IV. Dixon's responsive judicial review

To some extent, Dixon downplays the democratic commitments of judicial review by centering the responsive model on ensuring the following: (1) regular, free, and fair multiparty elections; (2) political rights and freedoms; and (3) an effective system of institutional checks and balances, which constitute the “minimum core” of democracy. While Dixon's model does not encompass the courts' entire scope of functions, it emphasizes their primary responsibility to enforce “legal restrictions and requirements.” Nevertheless, a key distinction is drawn between threats that endanger the democratic minimum core and those that affect it without posing an existential risk. This distinction determines when a strong review is warranted, i.e., when threats to the democratic minimum core exist, versus when it is not, i.e., when they are absent (Dixon, 2023). The problem, central to the discussed argument, is that these democratic minimums are insufficiently demanding.

In the context of normative constitutionalism, the extent to which courts can act constructively is unclear, given a theory of authority that empowers them to establish and expand constitutional rights and provisions, as well as issue structural rulings accompanied by orders and monitoring mechanisms. Dixon suggests that courts implement constitutional review in a manner that strengthens democracy by grading the intensity and extent of review on a case-by-case basis. First, the political and social conditions necessary for judicial review to reinforce democratic representation must be identified. Second, the analysis must broaden beyond the United States Supreme Court, from which the political process approach emerged, to include comparative

analyses of other courts. Third, the scope of the study must extend to new threats to democracy that Ely could not have anticipated. Through constitutional review, courts must contribute to providing a democratic alternative to free and periodic elections with a party system. This alternative must guarantee basic rights and freedoms and maintain institutional checks and balances —the core of democracy.

The three-part methodological approach for courts to assume a role in protecting and advancing democracy is as follows: (1) Courts must identify whether the case at hand poses a risk to democracy. According to Dixon, risks that empower courts to intervene include: the *political monopoly of power* over electoral and institutional matters; the existence of legislative blind spots that notably benefit excluded sectors of the population; and *the inertia* that unjustifiably blocks and delays progress in constitutional change. These democratic dysfunctions render the realities of minorities invisible in the face of rights abuses and prevent their demands from being met due to pressure from cultural traditions or influential groups. (2) Courts must examine the restrictions on their jurisdiction and their legitimacy to exercise judicial review. Preconditions for a democratic judicial response are the independence of the courts, support from civil society, and the legal authority to correct democratic dysfunctions. To avoid generating dysfunctions even more pernicious to democracy than the ones they seek to resolve, judges must consider the political and legal contexts in each decision (Dixon, 2016-2017). Dixon specifically argues that judges must avoid decisions that generate changes beyond what the people are willing to endorse or support, or that parliaments have been unable to intervene in (“reverse inertia charges”). They must also avoid decisions that elicit social or political backlash or that weaken democracy by creating dynamics in which parliaments lose incentives to address constitutional issues. (3) Courts exercising constitutional review must reinforce the principle of democratic representation to ensure that the ruling is perceived, as widely as possible, as legitimate. Even if they correctly identify obstacles to democracy, they may undermine democracy in their attempt to overcome them. Judges have the responsibility to determine the most appropriate response, given their intellectual capacities, personal virtues, and political skills.

Following Tushnet (2003), Dixon conceptualized weak judicial review as a system in which courts do not enforce formal legal finality. The notion has evolved to encompass any form of review that is less than final, over the short to medium term, or revisable in nature (Dixon, 2023, p. 10). Among its many forms, Dixon highlights (1) narrow forms of judicial reasoning, (2) reliance on weakened remedies (e.g., suspended declarations

of invalidity), (3) engagement remedies or supervisory orders in which government officials take a leading role in adopting remedies, and (4) weakened *stare decisis* norms. Dixon celebrates abortion decisions of the Colombian Constitutional Court (C-355, 2006 and C-055, 2022) as weak-form examples of judicial review (Dixon, 2023, p. 236).

Both decisions represent broad forms of judicial reasoning, as they develop the normative density of provisions on equality, autonomy, and dignity, drawing on Kant and Alexy. Although the Court did not formally declare the criminal offense under review to be unconstitutional, it adopted a criterion practically as broad as that adopted by numerous legislations regarding the admissibility of abortion during the first trimester. There seems to be a non-sequitur between Ely's reinterpretation and the defense of substantive measures regarding the unconstitutional state of affairs of internally displaced persons in Colombia. Recognizing cases such as this one or abortion as forms of weak control is inaccurate. I hypothesize that Dixon relies too heavily on secondary sources that celebrate these decisions (Rodríguez, 2011). Yet, the theoretical assumptions of the responsive model prevent it from departing from Ely's minimal notions of democracy and judicial review.

The Court has not only followed strong *stare decisis* norms but has also consistently and expansively developed precedents. In the abortion case, for example, health is structured as a state of comprehensive well-being (mental and social), rather than as an imminent risk of death. Thus, the jurisprudence has elaborated the concept of comprehensive health, ruling that physicians cannot restrictively interpret "danger to health", which was previously determined (C-355, 2006) to be a condition for accessing abortion (T-209, 2008). The Court held that fetal viability is not grounds to deny an abortion if the woman's mental health is at risk (T-532, 2014). Additionally, the Court recognized the validity and sufficiency of psychologists' certificates attesting to the risk to mental health, and that forcing a woman to continue a pregnancy affecting her emotional balance is equivalent to cruel and inhuman treatment (T-388 of 2009). Access to abortion in these expanded circumstances is grounded as a constitutional right. In the 2022 decision C-055, abortion was decriminalized up to the 24th week of pregnancy, that is, almost until the end of the second trimester.

We are therefore not dealing with narrow forms of judicial reasoning, not with either reliance on weakened or engagement remedies. These precedents had also adopted a strong *stare decisis* principle. In a ruling that unified the criteria adopted in numerous decisions (SU-096, 2018), the Court insisted that health must be understood in a com-

prehensive sense. According to the Court, danger to mental health does not require serious psychiatric illness, but rather an impact on the woman’s well-being. Therefore, it is unclear how the logic of responsive judicial review aligns with these decisions.

V. Calibrating responsive judicial review

Dixon’s model seeks to balance judicial intervention with respect for democratic processes and legislative deliberation. The model actively engages with the needs of democratic majorities, focusing primarily on reinforcing political representation and conditioning judicial review to be more responsive to pro-majoritarian values. The role of the courts as facilitators of the majority’s will is limited to unblocking the democratic process when institutional obstacles or a lack of incentives prevent a majority consensus in favour of constitutional or legal change from being expressed, and the political system fails to respond. The main issue seems to be promoting and protecting the capacity of the democratic constitutional system to fulfill the needs and aspirations of democratic majorities.

The model may therefore be insensitive or not responsive enough to the fundamental issue faced by minorities in the Global South. The problem is not that politicians do nothing, nor that most of the population agrees to guarantee these rights. Rather, the problem is that if politicians respond to majoritarian opinions and will, they (frequently or systematically, depending on the context) will not defend the rights of displaced or missing persons, prisoners, women, or the terminally ill. Democratic majorities may oppose them or fail to demand their inclusion on the political agenda. Strong judicial review must assume a proactive or activist role, for example, when minorities substantiate and repeatedly claim that their rights have been breached for years, and the majority must be compelled to debate the merits of the claims.

Monitoring mechanisms for enforcing court orders, especially in structural cases, constitute a fundamental judicial stage for the transformative potential of constitutionalism in the Global South. Another essential condition is that civil society organizations and other political actors participate in the process. Responsive judges contribute to social transformation by creating or reconfiguring political spaces to achieve public policy objectives.¹⁴ Action, insufficient action, or inaction fosters greater political and social attention and deliberation regarding solutions to systemic violations of rights. Strong supervision involves creating extraordinary monitoring chambers, such as those for internally displaced persons and health rights cases in Colombia, and appointing representatives to oversee the implementation and effectiveness of remedies.

A weaker form would consist of issuing specific orders while relying on the designated body to comply.

The pro homine principle requires distinguishing between the justiciability of civil rights and liberties and social rights. Although both constitutional principles must be guaranteed to the greatest extent possible, factual and legal possibilities require that the former be guaranteed until an infringement on opposing liberties is demonstrated. In contrast, the latter must be guaranteed in its essential core. Judicial review is not the most important way of promoting democratic responsiveness, and courts are not the only important institution for this purpose (Dixon, 2022). Judges alone cannot, indeed, ensure full rights guarantees, nor can the judicial system alone provide sole protection of rights. Rights are complex phenomena that require political, economic, and social guarantees, as well as the coordination of different state agencies. In the case of social rights, an activist court can recognize their fundamental nature, thus establishing their structure and normative content incrementally. The court does not issue detailed orders or suggest a specific procedure; its involvement is moderate. When the Constitutional Court becomes involved in this way in the process of public policy, a social problem is included on the political agenda, and political institutions are summoned to an extensively deliberative judicial setting. Rather than mere *competence*, as Rodríguez and Rodríguez argue (2015, p. 31), judges have the *duty* to order the government to guarantee a minimum level of material well-being regarding social rights.

VI. Conclusion

Dixon expands and updates Ely's framework, which was originally limited to the U.S. context, by incorporating a comparative and global perspective. This new approach includes cases and rulings from South Africa, India, Colombia, and Central and Eastern Europe. New democratic dysfunctions are rightly reconstructed, namely, undemocratic monopolies of power, legislative blind spots, and democratic burdens of inertia. One of the core problems identified with the renewed responsive judicial review is the need to recognize three potential implementation risks. One of such risks is the "reverse burden of inertia," which arises when courts impose changes that the majority is unwilling to endorse or support.

However, in these cases, particularly, we must emphasize the constitution's normative character. The constitution is *counter-majoritarian* and, at times, *anti-majoritarian*. If we could rely on the majority to unconditionally protect basic rights, there would be no need for constitutional catalogs to recognize those rights or for courts to

guarantee them. If a theoretical model justifies strong judicial engagement only when a clear majority favors constitutional or legal change, the enforcement of certain rights is at serious risk. For example, dignity, equality, and autonomy in cases such as absolute euthanasia or abortion bans (even in cases of rape or obstetric emergency), same-sex marriage, prisoners, and the rights of internally displaced persons. Avoiding constitutional adjudication in cases that generate changes beyond what majorities are willing to support would negate the demonstrated educational significance of jurisprudence and block it from promoting moral progress in society. Constitutional jurisprudence might structure and frame cultural practices, attitudes, and traditions within the framework of constitutional principles and values.

In constitutional states, whose *raison d'être* demands the effective guarantee of their normative postulates, how should the judicial function respond to democratic dysfunctions in the Global South? Specifically, considering the “correlativity thesis” between civil rights and liberties and social rights, which dimensions of judicial review are most justifiable? As Dixon notes, a responsive model centered on strengthening democratic representation must be able to adopt both weak and strong dimensions. Clarifying the legitimate scope of activist judicial intervention is necessary to respond to context-specific challenges and minority claims adequately.

Courts do not exclude or replace the legislative branch when it deliberately or inadvertently fails to fulfill its legal duties and obligations. In practice, proactivity has often operated as an implicit delegation of power in matters that generate negative parliamentary inertia, even in stable democracies such as the United States (Breyer, 2008). The legitimacy of constitutional justice also stems from its responsiveness to structural violations of rights, its empirical, normative, theoretical, and comparative foundations, and its transformative impact. This transformative aspect is fundamental because, as Dixon rightly points out, the approach to the effectiveness of courts in counteracting the adverse effects of democratic dysfunctions, such as the political monopoly of power, blind spots, and inertia, is deeply pragmatic (Dixon, 2023, pp. 217 ff.).

During periods of activism, constitutional courts have provided the political and social spheres with the essential grammar to structure demands in constitutional terms against legislative measures that disproportionately affect rights or public policies lacking a rights-based approach. Courts implementing a strong, activist approach have created common frameworks for collective action, legitimized demands for justice on public and political agendas, and provided different actors with moral and legal language to articulate their claims. This jurisprudence has affected the struggles of organized

civil society groups (McCann, 1994, p. 285) and has contributed to transforming perceptions of gender, race, poverty, and sexual orientation. Throughout history, several responsive and responsible courts have catalyzed political action, unblocked and coordinated government agencies' actions, provided decision-making frameworks, issued orders and remedies—even of mild intensity—and provided valuable input for public and political discussion.¹⁵

Dixon's responsive judicial review model takes judicial capacity constraints seriously. Judges cannot, by themselves, offer a full guarantee of constitutional rights, nor can rights demand mainly judicial guarantees. Given that rights are complex phenomena, an accurate model should emphasize the crucial relationship between law and society from an appropriate constructivist perspective: the distinct impacts of national and regional rights protection systems. *Compliance* relates to direct, measurable effects, while *impact* refers to indirect, symbolic effects that extend beyond those directly involved. Constitutional jurisprudence can support profound transformations in social reality, primarily when courts address systemic problems and require coordination among institutions at multiple levels. Although enforcing rights is not solely the court's responsibility, the court's role remains essential. The legitimacy of rights protection largely depends on the public authority established by the courts. This approach to strong judicial review expands its capacities progressively by building political and sociological support.

Strong judicial review, especially if proactive or activist, carries the risk of political and social backlash or of becoming incompatible with the idea of democratic self-determination. However, these potential risks do not justify arguing for its dismantlement a priori (Alexy, 2019). After decades of debate and empirical evidence on the effects and impacts of strong and activist constitutional jurisprudence, adopting an instrumental perspective based on normative doctrine or theory is inexcusable. This approach allows for an assessment of the balances established by different courts in their implementation of this institution and the nature of their interactions with civil society and the political sphere. These balances should produce models that allow for the replication of normative arguments, good practices, and instruments of constitutional know-how. These models should take root more strongly in the region with contextual nuances.

Responsive and activist judges are motivated by the purposes, principles, and ideals of the law, as well as the real-world consequences of jurisprudence. They adjudicate contextually and realistically within the framework of legislative and jurisprudential

law. Seeking social transformation from norms and precedents, they conceive of their role within the boundaries of what is constitutionally prohibited, permitted, or mandated. They recognize the authoritative character of the legal system. Judges can sometimes be activists, as they are not oblivious to the realities of their time and the diverse contexts affected by their decisions. Therefore, they consider the purpose of norms in changing social realities and respond to democratic values, often employing different forms of experimentalism to preserve these purposes and values. We must always remain critically vigilant. Responsive judicial review asks judges to recognize the relationship between constitutional claims and democratic values and to balance boldness and prudence by articulating both active review and carefully calibrated restraint (Dixon, 2022).

Even though Dixon’s model suggests that democracy involves “thicker” commitments to rights, the court’s transformative role is ultimately pro-majoritarian. Instead of refining procedural models and confining judicial review to cases backed by a democratic majority, the future of a responsive form of judicial review may depend on arguing for how it could operate in the face of entrenched democratic dysfunction and systemic structural discrimination. Although Ely’s framework appears confined to Procrustes’ bed in the context of the Global South, the publication of this book and its Spanish translation represents a highly welcome contribution. It demonstrates sensitivity toward the Global South, is well-written, and rigorously presents its arguments by drawing on key conceptual frameworks and the most important recent works in the field.

References

- Alexy, R., 2019: “Revisión judicial de constitucionalidad como representación argumentativa” (L. García Jaramillo, trans.), in Id.: *Ensayos sobre la teoría de los principios y el juicio de proporcionalidad*, Palestra.
- Atienza, M., 2018: “Siete tesis sobre el activismo judicial”. Lecture. Colombian chapter, ICON-S. Bogotá, Sept. Available at: www.ambitojuridico.com/noticias/analisis/constitucional-y-derechos-humanos/siete-tesis-sobre-el-activismo-judicial (accessed 05-12-22).
- _____, 2004: *La guerra de las falacias*, Cajicá.
- _____, 1993: *Tras la justicia*, Ariel.

- Badger, A., 2022: *Why White Liberals Fail. Race and Southern Politics from FDR to Trump*, Harvard University Press.
- Baldwin, G., 2025: "Responsive Judicial Review: Democracy and Dysfunction in the Modern Age". *Cambridge Law Journal*, 84(1): 214-17.
- Benítez, V. F., 2026: "A Response to Luis Guillermo Guerrero: Demystifying the Unconstitutional Constitutional Amendment Doctrine in Colombia". I-CONnect Blog of the International Journal of Constitutional Law., Available at: www.iconnectblog.com/a-response-to-luis-guillermo-guerrero-demystifying-the-unconstitutional-constitutional-amendment-doctrine-in-colombia/ (accessed 06-03-2026).
- Berat, L., 1993: "Courting Justice: A Call for Judicial Activism in a Transformed South Africa". *Saint Louis University Law Journal*, 37(4): 849-869.
- Berizonce, R., 2010: "Activismo judicial y participación en la construcción de las políticas públicas". *Civil Procedure Review*, 1(3): 46-74.
- Bobbio, N., 2003: *Teoría general de la política* (A. de Cabo and G. Pisarello, Spa. trans.) Trotta.
- Botero, S., 2023: *Courts that Matter: Activists, Judges, and the Politics of Rights Enforcement*, Cambridge University Press.
- Breyer, S., 2008: *Active Liberty: Interpreting Our Democratic Constitution*, Oxford University Press.
- Cepeda, M. J., 2022: "The Unconstitutional State of Affairs Doctrine", in V. Jackson and Y. Dawood (eds.), *Constitutionalism and a Right to Effective Government?* Cambridge University Press.
- _____, 2021: "A Broad Read of Ely: Political Process Theory for Fragile Democracies". *International Journal of Constitutional Law*, 19(2): 548-568.
- _____, 2019: "Responsive Constitutionalism". *Annual Review of Law and Social Science*, 15: 21-40.
- _____, and D. Landau, 2017: *Colombian Constitutional Law*, Oxford University Press.
- Couso, J. and L. Hilbink, 2011: "From Quietism to Incipient Activism", in G. Helmke and J. Ríos Figueroa (eds.), *Courts in Latin America*, Cambridge University Press.

- Danermark, B., M. Ekström and J. C. Karlsson, 2019: *Explaining Society: Critical realism in the social sciences*, 2nd ed., Routledge.
- Dixon, R., 2023: *Responsive Judicial Review. Democracy and Dysfunction in the Modern Age*, Oxford University Press.
- _____, 2022: “In defense of responsive judicial review”. *National Law School of India Review*, 34(2): 104-115.
- _____, 2016-2017: “The Core Case for Weak-Form Judicial Review”. *Cardozo Law Review*, 38(6): 2194-2229.
- _____, and D. Landau, 2015: “Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment”. *International Journal of Constitutional Law*, 13(3): 606-638.
- Dworkin, R., 2011: *Justice for Hedgehogs*, Harvard University Press.
- _____, 1986: *A Matter of Principle*, Harvard University Press.
- Fallon, R., 2008: “The Core of an Uneasy Case for Judicial Review”. *Harvard Law Review*, 121(7): 1701-1735.
- García Jaramillo, L., 2026a: *El guardián sitiado: Función judicial, Estado constitucional y el engañoso argumento de la “democracia”*, Fontamara.
- _____, 2026b: “«Corporatist Judicial Activism» in Colombia: A Critique”. *I•CONnect. Blog of the International Journal of Constitutional Law*. Available at: www.iconnectblog.com/corporatist-judicial-activism-in-colombia-a-critique/ (accessed 05-02-26)
- Gargarella, R., 2025: “Responsive judicial review and democracy: Examining Rosalind Dixon’s theory of judicial review”. *International Journal of Constitutional Law*, 23(2): 653-663.
- _____, 2022: *The Law as a Conversation among Equals*, Cambridge University Press.
- Graber, M., S. Levinson, and M. Tushnet (eds.), 2018: *Constitutional democracy in crisis?* Oxford University Press.
- Habermas, J., 2010: “The Concept of Human Dignity and the Realistic Utopia of Human Rights”. *Metaphilosophy*, 41(4): 464-480.

- Ely, J. H., 1980: *Democracy and Distrust. A Theory of Judicial Review*, Harvard University Press.
- _____, 1978: “Constitutional Interpretivism, Its Allure and Impossibility”. *Indiana Law Journal*, 53(3): 400-448.
- Holmes, S., 2018: “How Democracies Perish”, in C. Sunstein (ed.), *Can It Happen Here? Authoritarianism in America*, Dey Street Books.
- Kapur, S., 2014: “How to Fix the Supreme Court: Lessons from A Disenchanted Legal Scholar”. Available at: <https://talkingpointsmemo.com/dc/erwin-chemerinsky-how-to-fix-the-supreme-court> (accessed 19-11-25).
- Latinobarómetro, 2024: *Informe 2024*. Available at: <https://www.latinobarometro.org/latinobarometro-2024>. (Accessed 12-05-2025).
- _____, 2023: *Informe 2023*. Available at: <https://www.latinobarometro.org/lat.jsp> (accessed 09-02-25).
- _____, 2020: *Informe 2020* Available at: <http://www.latinobarometro.org/latNewsShow.jsp>, p. 64 (accessed 09-12-21).
- Mazzarese, T., 2019: “La justicia del derecho según el constitucionalismo (inter)nacional frente a una pregunta desorientadora”. *Isonomía. Revista de teoría y filosofía del derecho*, 51: 116-142.
- McCann, M., 1994: *Rights at Work*, University of Chicago Press.
- Michelman, F., 2022: *Constitutional Essentials. On the Constitutional Theory of Political Liberalism*, Oxford University Press.
- _____, 2002: “Rawls on Constitutionalism and Constitutional Law”, in S. Freeman (ed.), *The Cambridge Companion to Rawls*, Cambridge University Press.
- Mounk, Y., 2018: *The People vs. Democracy*, Cambridge, Harvard University Press.
- Muqet, R., 2024: “The Procrustean Bed: Meaning, Origins, and Modern Usage”. Available at: <https://medium.com/@ranamuqet9810/the-procrustean-bed-meaning-origins-and-modern-usage-17b2200efff0> (accessed 15-19-25).
- Nonet, P. and R. A. Kagan, 2001: *Law & Society in Transition: Toward Responsive Law*, Routledge.

- _____, and P. Selznick, 1978: *Law and Society in Transition: Towards Responsive Law*, Harper and Row.
- Obama, B., 2006: *The Audacity of Hope*, Crown Publishers.
- Orrego Hoyos, G., 2025: “The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action”. Available at: <https://www.nyulawglobal.org/globalex/amparo1.html> (accessed 10-05-25).
- Ramelli, A., 2021: “Luces y sombras del ejercicio del test de sustitución en Colombia”. *Derecho del Estado*, 48: 31-50.
- Roberts, A. and T. St John, 2022: “Complex Designers and Emergent Design: Reforming the Investment Treaty System”. *The American Journal of International Law*, 116(1): 96-149.
- Roberts, J., 2005: “Opening statement during his nomination hearings before the Senate Judiciary Committee”. *CNN*. Available at: <https://edition.cnn.com/2005/POLITICS/09/12/roberts.statement/> (accessed 11-11-25).
- Rodríguez, C., 2011: “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America”. *Texas Law Review*, 89(7): 1670-1698.
- _____, and D. Rodríguez, 2015: *Juicio a la exclusión: El impacto de los tribunales sobre los derechos sociales en el Sur Global* (C. Morales, trans.), Siglo XXI.
- Rosanvallon, P., 2006: “Democracia y desconfianza”. *Revista de Estudios Políticos*, 134: 219-237.
- Roznai, Y., 2014: *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*. PhD Dissertation, London School of Economics. London. Available at: <https://researchonline.lse.ac.uk/id/eprint/132337/> (accessed 09-12-24).
- Runciman, D., 2018: *How Democracy Ends*, Profile Books.
- Shue, H., 1996: *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton University Press.
- Sunstein, C. and S. Holmes, 2000: *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton.
- Taleb, N. N., 2016: *The Bed of Procrustes: Philosophical and Practical Aphorisms*, Random

House.

Totenberg, N., S. Abrahamson, J. H. Ely, *et al.*, 1984: “Panel: Judicial Review and Constitutional Limitations”. *Golden Gate University Law Review*, 14(3): 646-665.

Tushnet, M., 2003: “Alternative Forms of Judicial Review”. *Michigan Law Review*, 101(8): 2781-2802.

Varieties of Democracy, 2025: “25 Years of Autocratization: Truncated Democracy?” Report on Democracy. Available at: https://v-dem.net/documents/62/V-Dem_Democracy_Report_2025_spanish_lowres.pdf (accessed 09-02-25).

Velasco, M., 2023: “On Dixon’s Responsive Theory of Judicial Review”. *National Law School of India Review*, 34(2): 61-67.

Waldron, J., 2018: “Entrevista al profesor Jeremy Waldron”. *Lecciones y Ensayos*, 101: 225-235.

_____, 2006: “The Core of the Case Against Judicial Review”. *Yale Law Journal*, 115(6): 1346-1486.

Whittington, K., 2019: *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present*, University Press of Kansas.

Widlak, T. (ed.), 2025: *Judicial Character in Hard Times*, Edward Elgar.

Yap, P. J. and R. Abeyratne, 2021: “Judicial self-dealing and unconstitutional constitutional amendments in South Asia”. *International Journal of Constitutional Law*, 19(1): 127-148.

Ziblatt, D. and S. Levitsky, 2018: *How Democracies Die*, Crown.

Notes

- 1 Although Waldron (2006), for example, has explicitly conditioned the acceptability of the “core of the case” against judicial review on a political community in which the proper functioning of its democratic institutions and commitment to individual and minority rights are satisfied, his approach continues to exercise a significant impact on constitutional debates in Latin America.
- 2 “Responsive judicial review” is a model or device, rather than a “theory,” as Dixon describes it. This matters beyond mere terminology. The conditions for intervention

do not establish a predictive epistemological framework. A predictive epistemological framework would have a broader interpretive or reconstructive function. Systematic models require a complex set of logically related concepts, propositions, and principles. These relationships enable us to describe, explain, or interpret a phenomenon (Danermark, Ekström, and Karlsson, 2019, pp. 135-164). For example, Dworkin’s “Law as Integrity” and Alexy’s “The Dual Nature of Law” theories include specific models of judicial review, though neither theory is limited to them.

- 3 Issues 3 and 4 of Vol. 48, 2023, of the *Review of Central and East European Law*, as well as Issue 2, Vol. 49, 2024, of the *Journal of Legal Philosophy*, were devoted to the book.
- 4 Spanish-language papers have inaccurately translated “responsive” as “*responsivo*.” This is an example of a partial false cognate. While “responsive” semantically only means relating to giving a response —and judges must always be responsive, otherwise they would be denying justice— the pragmatic uses in scholarly spheres are broader. Explaining the sense of qualifying judicial review with the adjective “responsive,” Dixon refers to courts not only answering petitions but also *actively promoting decisions that are sensitive to minority claims and consider their evolving legal and political contexts*. The core point is that “responsive” emphasizes the judiciary’s role in being sensitive to political and social needs and aspirations rather than merely providing any legal response —as “*responsivo*” means in its semantic and pragmatic uses.
- 5 Colombian constitutional jurisprudence provides eloquent examples of the abusive enforcement of the unconstitutional constitutional amendment doctrine. Cf. Benítez, 2026, García Jaramillo, 2026b.
- 6 Regardless of their ideological orientation, attacking and attempting to discredit high courts is part of the populist playbook. Constitutional courts have been frequent targets of attempts to eliminate or reduce their powers, typically judicial review and procedural remedies for constitutional rights enforcement through writs of *amparo* or *tutela* (Orrego Hoyos, 2025). Mexico is currently a representative case. Judges can’t grant general effects to provisional or definitive suspensions in amparo proceedings brought against general regulations. The right to file an amparo to individuals who can prove direct impact (*inter partes* effects) from the law or authority in question is restricted. Eliminating *Inter Communis* effects (which extended protections to third parties in similar circumstances) and *Inter Pares* effects (which extended protections to individuals affected by the same rights violation, even if they were not plaintiffs) undoubtedly represents a regression in the guarantee of basic rights. The 2024 constitutional amendment, which removed the entire judiciary, eliminated the merit-based judicial career track, and resulted in the appointment of judges and justices by popular vote, represents the final and most damaging chapter in this story. This reform fatally wounds the rule of law in Mexico, and there might be a risk that it will spread throughout the region (García Jaramillo, 2026a).
- 7 In translating the article, “jurisprudence” would have been a more accurate rendering of “*Rechtsprechung*” than “administration of justice”.
- 8 Decision C-251 of 1997. Decisions “T”, “C”, and “SU” refer to the Colombian

Constitutional Court.

- 9 Although a radical distinction between negative and positive rights is not sustainable, insofar as it does not reflect the realities of guaranteeing constitutional rights, in the debate over their justiciability, it is worth emphasizing the welfare nature of social rights to justify an appropriate measure of intervention (Shue, 1996).
- 10 Source: www.corteconstitucional.gov.co/relatoria/buscador-jurisprudencia.
- 11 Fallon (2008) argues, however, that even in more developed societies, judicial review has proven fundamental to the stability of democracy and the proper development of the rule of law.
- 12 Manuel José Cepeda (2019) reconstructs it in this way by recounting his own experience as Justice.
- 13 Authored by Laura Kalman (Department of History, University of California, Santa Barbara), will be soon published the Volume XIII of the History of the Supreme Court of the United States (Oliver Wendell Holmes Devise), dedicated to the Warren Court.
- 14 With empirical evidence, Botero (2023) contributes to shifting the recurrent thesis that judicial intervention in social rights displaces democratic politics. Rather, activist interventions, structured sensitively and responsively with minorities but also with the margins of political and legislative intervention, shape new political spaces that favor the achievement of public policy objectives and contribute to eradicating social systems of discrimination and abuse.
- 15 Cepeda Espinosa has put forward the “responsive constitutionalism” category in real-global south settings, describing a version of participatory constitution-making, institutional design, and adjudication processes. Courts’ competence and institutional capacity to address complex problems and promote substantive justice are linked to inviting organizations and experts to contribute to constitutional interpretation, construction, and implementation. See Cepeda, 2019.

Acknowledgments

A preliminary version of this paper was delivered at a workshop on *Responsive Judicial Review*. I would like to express my gratitude to Micaela Alterio for the invitation and to Rosalind Dixon for their valuable comments. Two anonymous reviewers provided significant contributions that helped improve this work, for which I am deeply grateful.

Submission: November 23, 2025

Revision: February 23, 2026

Acceptance: March 17, 2026