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# FEDERALISM AND CONSTITUTIONAL JUDICIAL REVIEW IN MEXICO AND THE UNITED STATES: A NORMATIVE ASSESSMENT OF TWO DIFFERENT JURISDICTIONAL SCHEMES

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Abstract. *This article argues that in federalist systems constitutional interpretation should be decentralized so that it is shared equally by federal and state level courts. It is commonly accepted that democracy and pluralism are two grounds for a federal system, since they allow experimentation in sub-national parts of the country and allow the legal system to reflect local differences. However, this rationale is often not extended to defend the decentralization of constitutional interpretation. The goal of this article is to present an argument in favor of this extension. Specifically, it explores the cases of Mexico and the United States, two federalist regimes which have resolved differently the issue of constitutional adjudication.*

Key Words: *Constitutional law, judicial review, federalism, comparative law, Mexico, United States, pluralism, democracy.*

Resumen. *Este artículo presenta una línea de argumentación para justificar en un sistema federal la descentralización de la jurisdicción constitucional igualmente entre jueces locales y federales. Son dos los principios que suelen justificar una Federación: el pluralismo y la democracia. La unión de ambos resulta en un sistema jurídico que acomoda las diferencias locales en los distintos contenidos de la ley. Sin embargo, estos principios no suelen extenderse al tema del control constitucional, en donde la menor o mayor centralización de esta función se suele determinar con base en variables distintas. El objetivo es explorar esta extensión. Para ello se analizan los sistemas de Estados Unidos y México, dos regímenes federales que han resuelto de manera distinta el tema de la descentralización del control constitucional.*

Palabras clave: *Derecho constitucional, control constitucional, federalismo, derecho comparado, México, Estados Unidos, pluralismo, democracia.*

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## I. Introduction

Federalism is a system of organization of power in which, unlike a unitary scheme, subnational entities are assigned parts of power, inaccessible to the national government. The criteria according to which we might measure the degree of achievement of the federal ideal are: the promotion of efficiency, individual choice, experimentation, citizen participation and the prevention of tyranny. The debate is whether these social goals are more likely to be reached by a federal regime, rather than by a unitary scheme.

From a normative framework, the social goods more likely to be provided by a federalist system are pluralism and democracy. The former, as Roderick M. Hill Jr. says, is defended on the basis that pluralism "allows groups with different political preferences and values to express their differences by controlling subparts of the nation through subnational government."[1] The different political preferences will be reflected in the different contents of the law and the danger of a "depredatory" majority is less likely to appear since power is disseminated. Federalism also strengthens democracy on the basis that it fosters the ideal of self-government: "[a]s the population of electoral districts declines, it may become cheaper for politicians to communicate with voters and for voters to lobby politicians."[2]

The purpose of this paper is not to challenge these assumptions. The aim, instead, is to explore whether these assumptions are capable of being extended to the issue of constitutional judicial review. Most of the arguments given in favor of and against decentralization are usually thought to apply only to "the political branches of the government;" that is, only to the legislative and the executive departments, but not to the judicial power.

My hypothesis is that the centralization or decentralization of constitutional interpretation between federal and state courts is fundamental to the success of political branches may have in defining their own power limits. It

[1] Roderick M. Hills, Jr., address given to the seminar "Federalism: Law, Policy & History", Fall 2009, NYU (Document on file with NYU School of Law).

[2] *See id.*

is hard to find defenders of a federal regime in the realm of constitutional interpretation relying on an adaptation of both principles of "pluralism" and "democracy". It is difficult to find theoretical positions that defend the premise that state judges exerting constitutional interpretation should be permitted to have different opinions to reflect in the law or to provide citizens with further tools of accountability.

Probably, this is due to the "nature" of the judicial function. It is not desirable to have judges responding to the different political opinions of the people. Actually, we usually defend the opposite value, that of the independence of courts to decide independently of any political pressure. The application of law is a task that demands principled reasoning more or less objectively grounded in norms, rules and standards, and therefore, the two principles of "pluralism" and "democracy" do not apply here since people's preferences are not to be taken into account either to justify heterogeneity in the adjudication of the law or to make judges accountable to the people. As the U.S. Supreme Court said when denying the application of the "one-person, one vote" rule for electing judges: "Judges do not represent people, they serve people. Thus, the efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."[3]

There is a robust debate, however, that focuses on federalism and constitutional interpretation. It does not revolve around the variables of "pluralism" or "democracy," but instead around a very specific kind of "efficiency:" the likelihood of a stronger disposition to protect individual rights in either state or federal courts. This debate is labeled as the question of "parity."[4] On one hand, some argue that federal judges are in an institutional context, like independence, tenure and better wages (all those derived from article III of the U.S. Constitution), in which they are better equipped to defend rights of the citizenry than state judges who are not guaranteed the same protections and are more linked to local politics. This is confirmed by the history of the federal judiciary in the United States. On the other hand, the argument is that in both jurisdictions judges are afforded the same kind of protections (and there is no reason to think that state judges are not trustworthy. Finally, there is a third position that questions the inherent value of having judges more likely to protect citizens against the government in most cases. This third position also focuses more on procedures rather than on outcomes.[5]

This debate about parity has had practical manifestations in the U.S. Supreme Court. The *Warren* Court aimed at extending the scope of federal jurisdiction over the states on the premise that this was a means necessary to protect constitutional rights, whereas the *Burger* Court had the opposite

[3] Wells v. Edwards, 347 F. Supp. 453 176 (M.D. La. 1972).

[4] *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1997).

[5] *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233 (1988).

goal, declaring that state courts were equally trustworthy in deciding the same kinds of cases.[6]

I do find persuasive Chemerensky's objection to this debate in terms of the efficiency of the federal/state jurisdiction, in the way that it "is permanently stalemated because parity is an empirical question —whether one court system is as good as another— for which there never can be any meaningful empirical measure"[7]. Nevertheless, I think that the debate can be brought to a more abstract level. Instead of measuring the likelihood of whether federal judges are more protective of individual rights as an empirical issue, the same claim could be made from a *functional* perspective. Along this line, Paul P. Peterson argues that there is a functional theory of federalism whereby the national government is said to deploy mainly "redistributive" actions, conversely to state officers who will deploy "developmental" ones. This is due to the fact that the national government respects the comparative advantages of local governments while states employ policies necessarily disciplined by market and political pressures. The national government with a national vision is able to allocate goods to achieve equality, after efficiency is handled by local authorities.[8] From the same theoretical standpoint, it is possible to argue for a functionalist role for federal judges that might justify what is otherwise difficult by empirical means.

But more than the "efficiency" of federalism, my concern centers more on the "democracy-and-pluralism" argument. In my view, there are some alternative ways to adapt these rationales to defend federalism in the realm of constitutional interpretation. But before exploring these possibilities, let me establish the foundations of this analysis by comparing two very similar federalist regimes with two opposite approaches to constitutional interpretation at the federal level.

## II. Constitutional Interpretation in Mexico

Like the United States, Mexico has a Constitution that establishes a federal system. Thus, there are 31 states and one Federal District (Mexico City) as the capital of the country. Coexisting with the states, there is a national government, whose power is divided between three departments (judicial, executive and legislative). Although the current Constitution has been valid since 1917, the structural part about the principle of division of powers and federalism, was brought almost untouched from the original constitution of 1857. This is important because most scholars, in one sense or another, agree

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[6] *See id.*

[7] *See id.*

[8] *See* Paul E. Peterson, The Price of Federalism 268 (The Brookings Institution Press, 1995).

that federalism and the division of powers in the Constitution of 1857 was imported from the U.S Constitution. The change incorporated in the current Constitution, in comparison with the former, has to do particularly with the social rights that gave rise to the Mexican Revolution of 1914-1917 (the right to public education, to minimum labor conditions, etc.). In the current Constitution, the structural definitions of the former Constitution of 1857, those substantially imported from the U.S. Constitution, have remained in place.

In this sense, it is easy to point out the constitutional features of Mexican federalism that resemble the U.S. model. In first place, like Amendment X of the U.S. Constitution, article 124 of the Mexican Constitution says "[t]he powers not expressly granted by this Constitution to federal officials are understood to be reserved to the States." In Mexico, the federal government is one of limited powers, which is to say that, as far as Congress is concerned, it can only employ those listed in article 73, and those assigned to the federal executive and the federal judiciary expressly listed elsewhere in the Constitution.[9] The states, on the other hand, follow a residual principle to determine their powers: they keep those that are not granted to the national government and are not explicitly prohibited to them.[10]

Nonetheless, there are two exceptions to this general formula: "general statutes" and "concurrent powers." According to the Mexican Supreme Court, the first concept consists of statutes issued by the federal Congress to regulate not only federal issues, but general ones, that also include state and municipal issues.[11] The second are powers given to Congress to legally determine some specific subject matters and the way states and municipalities might participate (health, education, civil protection, etc.). As long as every level of government is allowed to have some rulemaking on the same issue to the extent determined by Congress, they are called concurrent.[12]

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[9] This has been confirmed by the Mexican Supreme Court in ruling that federal law does not have a hierarchal relationship with state laws, but one of scopes of powers. *See* "Legislaciones federal y local. Entre ellas no existe relación jerárquica, sino competencia determinada por la constitución", Tercera Sala de la Suprema Corte de Justicia [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tesis de jurisprudencia, T. VII, marzo de 1991, p. 56 (Mex.).

[10] In addition, Mexico establishes what is considered a third level of government, the municipal one, to which article 115 of the Constitution gives express powers, out of the reach of both states and the federation. *See* "Controversia constitucional. Distribución de competencias entre la Federación, las entidades federativas y los municipios, Suprema Corte de Justicia [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, P.J. 81/98, T. VIII, diciembre de 2008, p. 788 (Mex.).

[11] "Leyes generales. Interpretación del artículo 133 constitucional", Pleno de la Suprema Corte de Justicia [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tesis VII/2007, T. XV, abril de 2007, p. 5 (Mex.).

[12] "Facultades concurrentes en el sistema jurídico mexicano. Sus características generales", Pleno de la Suprema Corte de Justicia [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, P.J. 142/2001, T. XV, enero de 2001 (Mex.)

In second place, like the "dormant commerce clause," the privileges and immunities clause and the full faith and credit clause in the U.S. Constitution, article 117, sections IV, V and VI of the Mexican Constitution prohibit states to: "[l]evy duty on persons or goods passing through their territory; [p]rohibit or levy duty upon, directly or indirectly, the entrance into or exit from their territory of any domestic or foreign goods; [t]ax the circulation of domestic or foreign goods by imposts or duties, the exemption of which is made by local customhouses, requiring inspection or registration of packages or documentation to accompany the goods." These provisions are complemented in article 121 which establishes: "[c]omplete faith and credence shall be given in each State of the Federation to the public acts, registries, and judicial proceedings of all the others. The Congress of the Union, through general laws, shall prescribe the manner of proving such acts, registries, and proceedings, and their effect."

Thus, in Mexico, states are barred from discriminating against other states. Congress, on the other hand, has the power to make of federalism an efficient model by preventing the prisoner's dilemma from leading to a "race to the bottom." This is to say, that the federal government is in the position to prevent states from adopting depredatory measures against their neighbors in order to gain advantages by attracting investment.[13] This is confirmed in article 73, sections IX and X, Congress is empowered: [t]o prevent the establishment of restrictions on commerce from State to State; [and] [t]o legislate throughout the Republic on […] commerce […]."

Finally, following the "supremacy clause" of the U.S. Constitution, article 133 of the Mexican Constitution says: "[t]his Constitution, the laws of the Congress of the Union that emanate thereof, and all treaties that have been made and shall be made in accordance therewith by the president of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States."

These main provisions of the Mexican Constitution show that its federalism shares structural features with U.S. federalism in terms of 1) vertical federalism (states with residual powers and a limited federal government), 2) horizontal federalism (states barred from discriminating against each other, while the federal government is empowered to regulate when states acting on their own are not able to achieve efficiency), and 3) constitutional-federalism, whereby states are subject to the Constitution and may not go against its provisions.

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[13] For further reference on this issue, see Mathew Potoski, *Clean Air Federalism: Do States Race to the Bottom?*, 61 Public Administration Review 3, 335-42 (2001); Craig Volden, *The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?*, 46 American Journal of Political Science 2, 352-63 (2002).

If we add to this framework those provisions that establish that state officials are to be elected by the people and the "guarantee clause," which commands states to adopt the principle of division of powers (article 116), we then have a Mexican federal regime that certainly follows the *Madisonian* ideal of a government with a "double security" (dividing power not only among three branches of power, but also among subnational entities),[14] which can be defended, like the U.S. model, based on the values not only of the prevention of tyranny, but also of efficiency, individual choice, the promotion of experimentation and citizen participation.

Having described this general context, we can move forward to describe constitutional interpretation in Mexico. In this field, the trend to decentralization did not reach the point of institutionalizing a "double security" according to Madison's thought since, as we'll see, only one "sovereign," that is, the national government, and not two, has the power to interpret the Constitution and strike down any law going against it. This notwithstanding the Supremacy Clause of article 133, which presumably would give local judges the active role of reviewing local law in light of the Constitution. State courts are barred from striking down legislation and, thus, from "experimenting" with different constructions of the Constitution. This scheme, as we shall point out, is more a product of judicial interpretation at the federal level rather than an explicit institutional arrangement set in the Constitution.

There are two provisions in the Constitution, the content of which has led the Mexican Supreme Court to conclude that in Mexico there shall not be a "diffused" constitutional judicial review, as set forth in articles 103, pursuant to 107, and 105 of the Constitution. Articles 103 and 107 regulate a constitutional procedure actionable by all persons claiming a personal grievance because of an act of the authority is deemed unconstitutional. This is known as the "*Amparo*" and in this procedure, "[t]he federal courts shall decide all controversies." Article 105, on the other hand, is the grounds for two procedures actionable only by either the heads of the powers of the national government, states, political subdivision, political parties or the General Attorney for claiming that the statutes or acts of other public entities are unconstitutional because there is either an encroachment against the principle of the separation of power or a violation of federalism. These are "*Controversias Constitucionales*" and "*Acciones de Inconstitucionalidad*" and shall be resolved by the Supreme Court.

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[14] *See* The Federalist, at 240-44 (Ernest O'Dell ed., DMS Group Publications, Levell Land TX, 2010) (In The Federalist 51, James Madison said: "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself").

The Mexican Supreme Court has determined constitutional interpretation as a bestowal of power to the federal courts, whose scope has to be drawn under the "residual clause" of article 124, according to which states only have those powers not vested on federal officers and not prohibited to them by the Constitution. As the procedures regulated in articles 103, 107 and 105 have a constitutional interpretation nature, the ensuing conclusion is that it is an "exclusive" and not a "concurrent" power.[15]

For many years, it was disputed that constitutional interpretation might nonetheless be labeled as "exclusive" in favor of federal courts. The Supremacy Clause is called to have independent value, and since state judges are bound by the Constitution, anything in the constitution or laws of any state to the contrary notwithstanding, there must be cases in which state judges might exert a minimum degree of constitutional judicial review. In the early 20th century, the Supreme Court's declaration that state courts might be able to refute the application of laws that "openly" and "directly" violate the Constitution seemed to support this doctrine.[16] However, in 1998, the Supreme Court rejected this possibility.

The Court determined that the Mexican supremacy clause provision, establishing that state judges shall be bound by the Constitution in spite of any local law to the contrary, is not to be construed literally, but by taking a "structural" and "systematic" approach. Thus, those procedures established within the scope of federal courts are the only means of challenging laws deemed unconstitutional since that was the design in mind of the framers of the Constitution when regulating those procedures, otherwise useless if state courts had the same power.[17]

After this decision, the Supreme Court ruled that a state jurisdiction scheme, given by state law, was constitutional, in which the highest court of the state of Veracruz was given the power to resolve state constitutional claims involving the individual rights incorporated thereof. The Court's argument was that the state legislature acted within its scope of competence because it did not grant to its judicial power any power to interpret on the basis of the Federal Constitution, but instead the right to adjudicate solely on

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[15] *See* "Garantías individuales, los tribunales locales no están facultados para resolver sobre violaciones a las", Tercera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Quinta Época, tesis aislada, T. CII, p. 615, amparo civil en revisión 8564/48 (Mex.).

[16] *See* "Constitución. Su aplicación por parte de las autoridades del fuero común cuando se encuentra contravenida por una ley ordinaria", Tercera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Sexta Época, tesis aislada, T. LX, p. 177, amparo directo 6098/55 (Mex.).

[17] *See* "Control difuso de la constitucionalidad de normas generales. No lo autoriza el artículo 133 de la Constitución", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Tesis P./l. 74/99, T. X, agosto de 1999, p. 5 (Mex.).

the basis of state law. The decision stated that as long as the highest court of Veracruz does not purport to interpret the federal constitution, it is free to have all jurisdiction the local legislature decides so.[18]

In this general framework, a second point should be explained. In Mexico, high state level court decisions pertaining to local statutory interpretation are not final. The constitutional jurisdiction vested exclusively in federal courts is thought to encompass the power to review state court final interpretations of state law, as long as the parties to the federal procedure claim that the constructions are wrong so as to result in a violation to the constitutional right of "due application of law". If parties meet this formal requirement, the statutory interpretation of state law becomes a constitutional question and federal judges must then define the proper construction of state law.

The grounds of the above are found in articles 14 and 16 of the Mexican Constitution. The former establishes "[n]o person shall be deprived of liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and *in accordance with laws* issued prior to the act." The second says: "[n]o one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority *stating the legal grounds and justification for the action taken*."

The conclusion is: if the Constitution says that citizens have the right to be free from suffering government interference, unless the government is acting "in accordance with laws" and in the middle "stating the legal grounds and justification for the action taken", the Constitution imposes to public powers the duty to justify that they are acting upon the correct interpretation of any statute, ordinance or any given sub-constitutional source, which is to say that the Constitution establishes the right to have authority's acts *correctly* grounded in any legal source (the right to legality) and the correctness of any legal interpretation (no matter the source) is subject to constitutional control. As a right of a constitutional nature, it therefore falls within federal constitutional jurisdiction to say what the correct construction of any given legal source is —not only constitutional—.[19]

This is particularly relevant for the two procedures regulated in the Constitution in article 105. In these procedures in which only public actors may qualify as plaintiffs ("*Controversias Constitucionales*" and "*Acciones de Inconstitucio-*

[18] *See* "Controversia constitucional. La facultad otorgada a la sala constitucional del Tribunal Superior de Justicia del Estado de Veracruz-Llave para conocer y resolver el juicio de protección de derechos humanos, previsto en la Constitución Política de esa entidad federativa, no invade la esfera de atribuciones de los tribunales de la Federación, pues aquél se limita a salvaguardar, exclusivamente, los derechos humanos que establece el propio ordenamiento local", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, T. XVI, mayo de 2002, controversia 16/2000, p. 903 (Mex.).

[19] *See* Ignacio Burgoa Orihuela, El juicio de amparo (Porrúa, México, 2008).

*nalidad*"), this is true as well, although these procedures are designed to settle issues relating to the constitutional principles the separation of powers and federalism. The Court's reasoning in these kinds of cases was far-reaching when it had to define its scope of power because from its inception, the Court said, federalism and the separation of powers have been about forms designed to protect individual liberty and the way subconstitutional sources are interpreted by public powers might affect the liberty of citizens, and since the Supreme Court is the guarantor of the Constitution which mandates the guarding of the Constitutional *thelos* of liberty, its constitutional jurisdiction includes the power to review the correct interpretation and application of local law (a subconstitutional source) according to their merits.[20]

The important point to have in mind is that constitutional litigation in the Mexican context not only includes battles over the meaning of provisions included in the constitutional text, like in the American system (constitutional challenges), but also the correct interpretation of statutes, ordinances, and the rest of norms of sub-constitutional hierarchy. That is to say that if someone feels he is affected by an act of an authority that is based on an statute that is improperly interpreted, this issue might become constitutional in its nature if presented as a violation of articles 14 and 16 ("legality challenges"). In the case of "*amparo*" this is normally the case since individuals have the constitutional right to have public power's acts duly justified in any legal ground used. It is also the case for the two other procedures, "*controversias constitucionales*" and "*acciones de inconstitucionalidad*", because federalism and the division of powers, as constitutional principles, include any acting of authorities threatening liberty, which certainly include the assessment of the correct interpretation of any legal source.

Some critics have argued that this implies an undue broadening of the Supreme Court's powers, since opening questions related to pure "legality" (those pertaining exclusively to the correct interpretation of sub-constitutional sources) as constitutional issues turns these trials into completely open-ended processes.[21] In addition, there are concerns about a work overload for federal judges, when every legality-related issue is able to be litigated within either constitutional procedure, since practically every cause of action, no matter how far it is from proffering a discussion of the Constitution, might end up in the federal judiciary for it to be solved as long as the norm or act challenged is alleged to be incorrectly interpreted going against the "right to legality".[22]

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[20] *See* "Controversia constitucional. El control de la regularidad constitucional a cargo de la Suprema Corte de Justicia de la Nación, autoriza el examen de todo tipo de violaciones a la Constitución federal", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tesis P./J. 98/99, T. X, septiembre de 1999, p. 703 (Mex.).

[21] *See* José Ramón Cossío Díaz, Bosquejos constitucionales 573-79 (Porrúa, México, 2004).

[22] José Ramón Cossío identifies this problem when the Court opened the issue in "*Controver-*

Carlos Arellano García argues that "the very means to control the constitutional status of public powers enactments becomes a means to control the legality of those very same enactments (to verify their correctly grounding in subconstitutional sources) because the constitution encompasses the "legality principle" (which demands a correct statutory-interpretation or of any other legal material)."[23] Meanwhile, Eduardo Pallares argues that the "*Amparo*" has a double nature: one that pertains to controlling the constitution and another that pertains to controlling legality. When it is aimed at controlling legality, it is an "*Amparo Judicial*" and, according to this author, this is explained by the historic tendency toward centralization that Mexico has experienced due to its Spanish tradition, and because of the largely perceived popular need to have higher courts for amending the injustices broadly committed at local levels.[24]

Felipe Tena Ramírez comments on this issue that in practice, the main means of constitutional judicial review in Mexico, the *Amparo*, has mainly become a way to check legality for the core aim of reviewing the "exact application of statutory law."[25] Stressing this feature, Ignacio Burgoa calls this means of constitutional judicial review an "extraordinary resource for protecting legality," which he believes is a logical implication of having the right to have the law (federal or local) exactly and duly applied to the cases at hand set forth in the Constitution.

As said before, not only in "*Amparo*" is this true, but also in "*Controversias Constitucionales*" and "*Acciones de Inconstitucionalidad*." Although constitutional issues come up more often in the latter trials, they accept legality-related challenges as well.[26]

The problem with the situation just described is not the underlying assertion that constitutional judicial review shall include a complete review of every legal underpinning (the correct interpretation of any legal source). This might seem to be a straightforward assertion at an abstract level: the constitutional order includes a concern for the Rule of Law in general. The problem some critics have identified is that this relationship is transferred to the idea

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*sias Constitucionales*" and "*Acciones de Inconstitucionalidad*" to problems dealing with legality. *See* José Ramón Cossío, *¿Otra tarea imposible?*, Anuario Iberoamericano de Justicia Constitucional 6, 623-50 (2002). Emilio Rabasa identifies the same problem. *See* Emilio Rabasa, El artículo 14, estudio constitucional, y el juicio constitucional, orígenes, teoría y extensión (Porrúa, 1955).

[23] Carlos Arellano García, El juicio de amparo 266-71 (Porrúa, 1982).

[24] *See* Eduardo Pallares, Diccionario teórico-práctico del juicio de amparo 146-47 (Porrúa, 1967).

[25] Felipe Tena Ramírez, Derecho constitucional mexicano 427-28 (Porrúa, 24th ed., 1990).

[26] For further reference, see generally José Ramón Cossío Díaz, La controversia constitucional (Porrúa, 2008); Joaquín Brage Camazano, La acción abstracta de inconstitucionalidad (UNAM, 2005).

that the power to review constitutional issues is exclusive to federal judges: this always places state judges under the scrutiny of federal judges as far as state statutory interpretation is concerned.

Based on this explanation, we can draw two conclusions:

1) In Mexican federalism, state judges and federal courts do not share constitutional jurisdiction. The power of constitutional review is vested exclusively in federal courts and the procedures established in articles 103, 105 and 107 are the only means to challenge the constitutionality of any law. In consequence, state courts are banned from striking down statutes on the basis of their violating the constitution. This rule is drawn out of a literal interpretation of the Supremacy Clause of article 133, but is set according to a systematic and structural construction of articles 103, 105 and 107 of the Constitution.
2) This exclusive federal scheme of constitutional jurisdiction includes a broad power to review every legal merit of public power´s enactments of every level (federal and state), since articles 14 and 16 turn statutory interpretation or of any other legal source into a constitutional issue. This removes from state courts the power to determine with *res judicata* effects the correct interpretation of state law, turning all their rulings subject to constitutional judicial review no matter how far their opinions are from discussing any provision of the Constitution. In exercising constitutional judicial review, then, federal courts are called to review state statutory interpretation given by state courts when parties claim there is a violation to these two constitutional provisions.

## III. Constitutional Interpretation in the United States of America

According to Chemerinsky, the Federal Judicial Power created by article III of the Constitution at the Constitutional Convention was first thought to meet a single purpose: to establish the powers of the National Government since there was a fear that state courts "might not fully enforce and implement federal policies, especially where there were likely to be a conflict between federal and states interests."[27] However, it was also argued that a federal judicial power would be useful in settling disagreements among states, and particularly, to establish a uniform interpretation of the Constitution and the Federal Statutes.

It is worth noticing that there was opposition to this argument at the Convention, on the grounds that many thought state courts capable of dealing with these issues without the need of federal courts. In the end, article III embodied a compromise: it establishes one Supreme Court and as many lower

[27] Erwin Chemerinsky, Federal Jurisdiction 7 (Aspen, 5th ed., 2007).

federal courts as Congress deems fitting so there would be a chance for Congress to reconsider the need for establishing lower federal courts, and thus leaving state courts to exert jurisdiction under the condition that their decisions could be reviewed by the Supreme Court along its appellate jurisdiction so defined by Congress.[28]

Article III of the Constitution grants power to the Federal Judicial Power to rule on cases "arising under the Constitution, treaties and laws of the United States," and the power to decide on controversies, which can be labeled in general terms, as those that arise among states (and their citizens), those pertaining to foreign law and those in which the Union has an interest. Since we are concerned with constitutional interpretation, we shall focus only on the rules related to this point.

It should be noted that article III does not give federal courts the power to declare neither federal law nor state law unconstitutional, let alone the exclusive power to exert this power. Equally important, as Chemerinsky notes, "article III does not specify the relationship between the jurisdiction of the federal and state courts."[29]

The underpinning of constitutional jurisdiction is found in the famous case *Marbury v. Madison*, in which, according to Chemerinsky, five principles were established: 1) the power of the federal courts to review the actions of the executive branch of government, 2) the doctrine of "political questions" not reviewable by federal courts, which are those committed at the discretion of political branches, in opposition to those in which individual rights are involved, 3) the assertion that article II creates the ceiling on the Supreme Court's original jurisdiction so Congress is not permitted to broaden this Court's jurisdiction, 4) the power of the federal courts to declare federal statues unconstitutional (It was argued "that the Court's authority to decide on cases arising under the Constitution implied the power to declare laws conflicting with the basic legal charter unconstitutional"), and 5) the Supreme Court as the authoritative interpreter of the Constitution. This assertion is supported by the famous premise that "it is emphatically the province and duty of the judicial department to say what the law is."[30]

While the Supreme Court established itself as the authoritative interpreter of the Constitution, it was implicitly recognized as an obvious fact that state courts would possess concurrent constitutional jurisdiction directly derived from article VI of the Constitution, which establishes that "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in

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[28] *See id*. at 50.

[29] *See id.*

[30] *See* Brest, Levinson et al., Processes of Constitutional Decisionmaking 108-21 (Aspen, 5th ed., 2006).

every states shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The relationship between the two kinds of judicial powers then is understood as follows: whereas federal judges have limited powers because "they are restricted in what cases they may adjudicate and may exercise jurisdiction only if it is specifically authorized," state courts "have general jurisdiction and may therefore hear all causes of action unless there is a statute denying them subject matter jurisdiction."[31]

The limited jurisdiction of federal courts is encompassed in the nine categories of cases listed in article III of the U.S. Constitution, and, as Chemerinsky affirms, those can be encompassed in two major provisions: 1) the authority to justify and enforce the powers of the federal government (including foreign policy), generally known as "federal question jurisdiction," and 2) the authority to serve in an interstate mediating role, settling controversies between states and their citizens, although with the limitation imposed by the Eleventh Amendment.[32]

Federal jurisdiction has been interpreted by the Supreme Court as follows: "claims under the Constitution of the United States, has been held to include all constitutional provisions except for the full faith and credit clause of article IV, S 1," which does not independently justify federal jurisdiction.[33]

This limited jurisdiction vested in federal courts is of paramount importance in the United States because it helps preserve the role of state courts, which, with their general jurisdiction, have the role of ruling on most of the conflicts arising in the community. This principle has had pervasive effects in Supreme Court doctrine, which has established that states have concurrent jurisdiction with federal courts over federal questions, unless exclusive power has been explicitly granted to federal judges. In the words of the Court: "the presumption of concurrent jurisdiction that lies at the core of our federal system."[34]

Moreover, if state courts are to carry out the principal judicial function, the Supreme Court has stated that when federal judges exercise one of their limited powers, they must take state court interpretations of state statutory and state constitutional provisions as binding to federal courts, for instance, in "diversity" cases, when they must apply state law.[35] This lies on the assumption that states' highest courts are the authoritative interpreter of the local law. This rule has had a far-reaching scope' for example, when the Supreme Court ruled that in the absence of disposing state law, federal judges should try to predict how the state's highest courts would most probably decide on

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[31] *See* Chemerinsky, *supra* note 27, at 265.

[32] *See id*. at 266.

[33] *Id.* at 275.

[34] *See* Taffin v. Levitt, 493 U.S. 455 (1990).

[35] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

the case at hand.[36] The latest rule on this issue was phrased by the Supreme Court in *Commissioner of Internal Revenue v. Bosh*: "[t]he State's Highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court."[37]

Still there is a constitutional provision that remains to be considered. The 11th Amendment that states that: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." This provision was introduced to grant an additional safeguard for states to protect their autonomy. As Chemerinsky says, it is an amendment based on a view that stresses the need for federal deference to state governments and for the use of federalism to protect states from federal encroachments.[38] However, the Supreme Court has established that the 11th Amendment does not prevent the United States Supreme Court from hearing claims against states as part of its appellate jurisdiction.[39]

Moreover, *Ex Parte Young* established the doctrine that this amendment did not bar federal courts from solving causes of actions regarding a federal question against states as long as the relief to yield remains prospective rather than retroactive on the basis that "[a]n injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."[40]

Following Chemerinsky, we can identify three doctrines that shed light upon the boundaries between federal judges and state courts that keep the former from intervening in final judgments made by the latter concerning state law: 1) the requirement that federal courts give *res judicata* effect to state courts decisions, 2) that federal courts shall not interfere with pending state court proceedings and 3) the *Rooker-Feldman*[41] doctrine, which provides that a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court based

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[36] *See* Fidelity Union Trust Co. v Field, 311 U.S. 169 (1940).

[37] Commissioner of Internal Revenue v. Bosh's Estate, 387 U.S. 456, 87 S.Ct. 1776, 18, L.Ed. 2d 886 (1967).

[38] Chemerinsky, *supra* note 27, at 419.

[39] *Id.* at 425.

[40] Ex Parte Young, 209 U.S. 123 S.Ct. 441, 52 L.Ed 714 (1908).

[41] *Rooker v. Fidelity Trust Co.* 263 U.S. 413 (1923), the plaintiff attempted to have a state court judgment declared null and void and the Supreme Court ruled that federal district courts have no jurisdiction to entertain a proceeding to reverse or modify a state court judgment; in District of Columbia Court of Appeals v. Feldman 460 U.S. 462 (1983), the Supreme Court ruled that a district court has no power to review the final judgments of a state court in judicial proceedings. *See* Chemerinsky, *supra* note 27, at 481.

on the losing party's claim that the state judgment itself violates the loser's federal rights.[42]

Then, we can conclude that the only way in which final state courts judgments can be reviewed is the appellate jurisdiction of the Supreme Court. Nonetheless, there are restraints to be respected, namely, those which advise to take seriously into consideration the state statutory and local constitutional constructions as granted.[43] In the rest of cases, final state courts decisions have preclusive effects, either by collateral estoppel[44] or by *res judicata*[45] doctrines.

As Chemerinsky affirms, "[b]ecause state courts decisions generally are not reviewable in the lower federal courts, only the Supreme Court can ensure the supremacy of federal law." This is when the Court revises state court decisions, a task only performed to decide questions of federal law, since the Supreme Court has not authority to decide matters of state law in reviewing the decisions of state judges. The rule followed by the Supreme Court is that review only might be granted when there is a substantial federal question.[46]

As noted, the Constitution does not establish the Supreme Court's power to review state court decisions. This is derived from different statutes. First, there is Section 25 of the Judiciary Act of 1789, which allowed the Supreme Court to review state court decisions by writ of error to the state's highest court in several specific situations (decisions ruling against federal law or federal government interests). As there is an exception to every rule, one can be found in *Standard Oil Co. of California v. Johnson*, in which the Supreme Court said it had the power to review issues on state law when they are intrinsically tied to a federal question.[47]

The appellate jurisdiction of the Supreme Court over state courts is in 28 U.S.C. S. 1257, which provides for a review of final judgments issued by the highest courts of a state in which a decision can be had (there are some exceptions to this finality rule that are mostly related to the concern of possible federal questions that need to be resolved by the Supreme Court).[48] In this respect, what is important is to highlight a doctrine that has already been

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[42] *Id*. at 481-82.

[43] We should note there is an exception consisting of the writ of *habeas corpus*, whereby districts judges can intervene in criminal proceedings when constitutional challenges are claimed. However, this is an arena where arguments of federalism are also made both for and against. For instance, there is the Supreme Court doctrine that 4th Amendment claims cannot be subject to federal trial. For further reference, see *id.*

[44] Once a court decides on an issue of fact or law necessary for a ruling, that decision precludes re-litigation of the same issue on a different cause of action between the same parties. *See id*. at 589.

[45] This doctrine bars parties from litigating in subsequent action issues that were or could have been litigated in earlier proceedings. *Id.*

[46] *Id*. at 656-57.

[47] *Id*. at 664.

[48] *Id*. at 685-97.

hinted at: independent and adequate state grounds. This doctrine asserts that the Supreme Court lacks the jurisdiction to review a state court decision if the outcome might be supported on grounds of local law regardless of the federal questions.[49]

Chemerinsky finds that this rule of review of state court decisions, interpreted under the independent and adequate state grounds doctrine, finds motive in a underlying purpose pertaining federalism: "[t]he argument is that any federal court reversal of a state court ruling is a possible source of friction. By confining review to instances where the Supreme Court decision might make a difference, the Courts avoid unnecessary tension between federal and state courts."[50] The exception to this doctrine, in accordance with *Marbury*, is found in claims that assert that a state law is unconstitutional.

In the U.S. system, deference to state courts has reached a broad scope. For instance, in procedures in which federal judges might review state court decisions (such *habeas corpus*), the Supreme Court has established that federal judges shall decline jurisdiction in order to allow state judges to clarify any ambiguous state law that would preclude federal judges from the task of solving constitutional questions.[51] Justice Frankfurter has justified this doctrine in the following terms: "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." Julie A. Davies goes further in interpreting this doctrine: "[f]riction is greater if the federal court invalidate a state law than if the state court voids its own statute. Additionally, misinterpretations of state law by a federal court are a potential source of friction between federal and state judiciaries."[52]

Based on the prior analysis we can draw two conclusions that are relevant to this paper:[53]

1) Constitutional jurisdiction is shared by federal courts and state courts, both having the power not only to interpret the Constitution, but also to strike down statutes going against the Constitution. In the case of federal courts, grounds are found in article III of the Constitution, which states that the judicial power of the national government, that is vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish, "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authori-

[49] *See* Murdock v. City of Memphis 87 U.S. (20 Wall.) 590, 22 L.ED. 429 (1875).

[50] *See* Chemerinsky, *supra* note 27, at 708.

[51] See the leading case, Railroad Commission of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1841).

[52] *See* Chemerinsky, *supra* note 27, at 708.

[53] For further reference on the subject, see Doernberg, Wingate and Zeigler, Federal Courts, Federalism and Separation of Powers (Thomson West, 4th ed., 2004).

ty." This is known as "federal questions," which includes "constitutional questions." The grounds for state constitutional jurisdiction are found in the Supremacy Clause, which establishes that "judges in every State shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

2) Nonetheless, state judges and federal judges are co-interpreters of the Constitution; the Supreme Court, in which is vested part of the federal judicial power, is the ultimate interpreter of the Constitution, which is to say that its constructions of the text in question are binding for any kind of judge. This power to impose its authoritative interpretation of the Constitution includes the power to review state court decisions, namely, in the form of appellate jurisdiction in the *writ of certiorary* (see 28 U.S.C. s. 1257), a power that has been also extended to lower federal judges in other procedures (such as the *habeas corpus* or original jurisdiction). However, the framework of reviewability in federal jurisdiction is very deferential. In this sense and as a general rule, neither federal judges nor the Supreme Court is able to interpret state law, and both instances have to take for granted state courts' interpretation of local law. In second place, federal constitutional jurisdiction is only to be exerted when state courts do not have the possibility of solving the issue on the grounds of state law, in which case, the issue is remanded to the Supreme Court. The idea is to exhaust not only all procedural chances to get the case solved, but also every kind of legal argument to solve the point in dispute at the local level.

## IV. Comparison

The distinction between the two systems is straightforward and twofold:

1) Whereas the Mexican system gives federal courts the exclusive power of constitutional judicial review, barring state courts from participating in this function in any degree, the U.S. system shares interpretation between state courts and federal judges, both being able to interpret the Constitution and to strike down any piece of legislation going against it, with the sole proviso that the Supreme Court reserves for itself the power to establish the authoritative interpretation of the Constitution, which is to say that the Supreme Court has the "last word" in a constitutional question, but not the "only one."
2) Whereas the Mexican system gives federal judges the power to review state court decisions pertaining to state law (interpretation of local statutes, for example) when presented as a constitutional violation, the U.S. system establishes a general ban on federal judges to review decisions grounded in state law when there is not involved a constitutional issue

properly understood. Moreover, in the American system if a case is reviewable by federal judges, because it proffers a constitutional question or a federal one, it may be remanded to state judges, instead of resolved at the federal level, if there are sufficient state law grounds to resolve the question. In the Mexican system, the application of state law on its own can involve constitutional questions, meanwhile for the American system the application of state laws on their own do not involve a constitutional question.

On the other hand, there are also two central similarities between both systems:

1) Both are federal schemes with horizontal and vertical structures of relationships between states and the national government that are principled in the ideas of a national government of limited powers, states with residual competences, and the non-discrimination principle.
2) Both federalisms are constitutionally determined. That is, states and the national government shall act according to what is stated in the Constitution, notwithstanding federal and state regulations to the contrary. Moreover, in both systems there is the same Supremacy Clause, which establishes that state judges shall give preference to constitutional law over state law (article VI of the U.S. Constitution-article 133 of the Mexican Constitution). Likewise, in both the federal judicial power jurisdiction shall extent to those cases arising under the Constitution (article III of the American Constitution-articles 103, 103, 107 of the Mexican Constitution).

Finally, there is a conclusion useful for the last part of this paper: in neither system is there a provision in the Constitution that gives or denies explicitly to either level of government the power to exert exclusive or concurrent constitutional review. In other words, in the case of the Mexican Constitution there is not any literal provision that qualifies the federal constitutional jurisdiction as "exclusive", since articles 103, 105 and 107 grant this power to the Federal Judiciary but there is no article which removes this power from the state courts nor is there one in the U.S. Constitution that qualifies the same jurisdiction as "concurrent" for both levels. Therefore, most of the main features of both systems rely on judicial interpretation of their Supreme Courts. From the point of view of the Constitutions, both Supreme Courts could later change their mind and adopt an scheme opposite to the present one; in the case of the United State the Court could determine the monopoly of federal courts over the interpretation of the Constitution, and in the case of Mexico the Supreme Court could decide that the same task in concurrently workable for state courts.

My argument is that in the end, both systems are the products of judicial doctrines that are not unequivocally grounded in the text of the Constitution and, as with any judicial interpretation, these doctrines are reviewable on the grounds of its underlying justifications.

## V. Pluralism, Democracy and Constitutional Jurisdiction

1. As stated at the beginning of this paper, pluralism justifies federalism since it allows different opinions to be reflected in the law. Of course, this is a claim particularly directed at legislatures: since subdivisions have control over subparts of the community, groups with different political weight in these localities, otherwise imperceptible in the national scope, will have a substantial chance of being represented in legislature and influencing the outcome of political processes.

In my opinion, an analogous argument, but cast at a different level, can be made about state judges and constitutional jurisdiction. The argument could have the following structure. Constitutional interpretation is in the middle with regard to the level of discretion. On one hand, it is not an absolute act of discretion, such as when a legislature must choose between two public policies. On the other hand, neither is it a mechanical application of the law, as we would expect from the task of some executive agencies in charge of enforcing certain statutes with very clear rules and an undisputed underlying purpose. In the words of Justice Kennedy, writing for a majority, in *Lawrence v. Texas*: "as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[54]

Robert Post argues that constitutional interpretation involves choosing one of three approaches: historical, doctrinal and responsive. To pick one of these methods is to choose an authority that justifies the force of law of the Constitution. If a historical approach is used, then the authority is placed in the pact made by the political forces that gathered to enact the Constitution, and those founding fathers's intent shall be obligatory. If a doctrinal approach is chosen, authority is placed on the Rule of Law and the stability, generality and steadiness of the use of precedents shall control. Finally, if a responsive approach is used, the *ethos* embodied in the general clauses of the Constitution shall determine the final sense in adjudicating the Constitution.[55]

In other words, interpreting the Constitution means choosing from among a *plurality* of modalities, each one rooted in a specific position facing the Constitution, which can be traced to and justified in a broader philosophy. This idea is not as new for U.S. judicial review as it is for Mexican judicial review. There are two salient cases along the same lines that illustrate this point.

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[54] *See* Brest, *supra* note 30.

[55] Robert Post, *Theories of Constitutional Interpretation*, Representations 30 (1990).

In the seminal case of *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court acknowledged that interpretation of statutes might involve the choosing from among different modalities. The choice, it was said, depends on choosing the one that accords with some underlying policy reasoning. The Court stated that there are some cases where the law is clear and unambiguous: "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress". But if the statute is silent or ambiguous with respect to the specific issue, the matter becomes one of a "permissible interpretation", a test that becomes one of rationality. The holding of the Court in this latter category of cases is that it would not substitute its judgment for that of the agencies in charged with administering a statute, unless "they are arbitrary, capricious, or manifestly contrary to the statute."[56]

Commenting on this latter case, Justice Scalia has claimed that interpretation of law, even in those cases in which an unambiguous outcome is claimed, there are political reasons that circumscribe one alternative over another: "[t]he traditional tools of statutory construction include not merely text and legislative history but also, quite specifically, the consideration of policy considerations. […] Policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron* —the step that determines, before deferring to agency judgment, whether the law is indeed ambiguous."[57]

The second case does not involve the relative indeterminacy of the law, but the nature of social perception of the world which might equally determine one reading of the Constitution over another. One such case is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court gave an important account of the principle of *stare decisis*, relevant to the case at hand for not overruling *Roe v. Wade*. The Court said that the rule of *stare decisis* is not an "inexorable command," but a judgment "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective cost of reaffirming and overruling a prior case." One of the several factors the Court announced was "whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification."[58]

Under this framework, in the case of *Casey*, the Court characterized its overruling of *Plessy* and *Lochner*, respectively, for *Brown* and *West Coast Hotel*. The reason for switching approaches was the change in the social perception of reality: in one case, "white supremacy" was refuted and in the other,

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[56] Breyer et al., Administrative Law and Regulatory Policy 242-46 (Aspen Publishers, 6th ed.).

[57] *See* Scalia, *Judicial Deference to Agency Interpretation of Law*, 1989 Duke L.J. 511.

[58] *See* Brest, *supra* note 30, at 1424-43.

"*laissez-faire*." A change in either a social or an economic perception might, in turn, influence a change in constitutional interpretation.

In this context, we can conclude that constitutional interpretation is not free from the demands of pluralism. Constitutions admit various serious grounds for interpretation. If we exclude state courts from constitutional jurisdiction and only grant that power to federal courts, we are impeding a wide range of people litigating from accessing important channels of expression. In the case of the United States, there are 50 channels open to welcome plurality, besides federal courts; in the case of Mexico, there are 32 channels closed to this possibility and only federal judges are open to this possibility.

As an example of the pluralism that might be brought about by the concurrence of constitutional jurisdiction, it is worth noting same-sex litigation that has been brought forward and resolved in several U.S. states. States like Vermont, Massachusetts, Hawaii and California have experimented with their individual interpretations of the "equal protection clause," either by appealing to the federal or local constitution to determine whether a ban on same-sex marriage is unconstitutional. This legal issue involves a lot of underlying competing policy reasons that may be grounded in different "permissible" constructions of the Constitution that have been accommodated within the judicial style of reasoned judgment.[59] This bundle of experience makes state courts "laboratories of constitutional interpretation," which along with the "laboratories of democracy," help produce more information than unitary states.[60] This is not to defend a chaos within constitutional interpretation among disconnected judges issuing rulings at different levels, but rather a dialogue of different points of views within a complex structure of power. In the end, the Supreme Court might give "uniformity" to the constitutional system, "stating what the Constitutions really says" but, this, after considering a rich and substantial exercise of discussion in the different judiciaries.

2. Likewise, in one attenuated sense, the principle of "democracy" displays an argument in favor of decentralizing constitutional jurisdiction. Citizen participation is furthered here, but not in the traditional way: people should not be expected to vote against state judges that do not think like the people do. This is the very kind of evil addressed by those institutional guarantees that ensure independence to judges. Judicial processes should not be equaled to the procedural lines of political processes. Nonetheless, I believe it might be that both political and judicial processes can be described as serving the same principle of participation.

Robert A. Dahl describes the main feature of the U.S. political process as follows: "I define the normal American political process as one in which there is a high probability that an active and legitimate group in the population can

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[59] *Id.* at 1545-68.

[60] Roderick M. Hills, Jr., *Federalism and Public Choice*, in Law and Public Choice 23 (Anne O'Connell & Dan Farber eds.) (unpublished article).

make itself heard effectively at some crucial stage in the process of decision."[61] In my opinion, Dahl's characterization of the political process falls under the philosophy that identifies democracy with deliberation. According to Robert A. Dahl, "the making of governmental decisions is not a majestic march of great majorities united upon certain matters of basic policy. It is the steady appeasement of relatively small groups."[62]

The principle of participation, in this sense, is not the mere fact of voting as a collective body for the sole purpose of counting how many supporters certain pre-political and fixed preferences have. Participation should be for reasons weighed in public discussion, a process that helps build, and not mirror, a social rule. Jeremy Waldron says that "[o]ne of the most striking features of modern legislatures is their size: we seem to go out of our way to ensure that a plurality of voices may be heard, but that many voices, a large variety of different dissenting voices, may be heard in the deliberation that takes places in the legislative chamber."[63]

If democracy is understood not as a right to vote, but as a right to participate in public deliberation that results in a decision that shapes social life, then state courts with constitutional judicial review competence proffer an arena to enhance the possibilities of citizen participation, otherwise not available if interpretation is exclusively given to federal courts, since arguments of policy (social, economical and political) might form legal argument that renders a law interpretation "permissible".

I think necessary to point out that the acceptance of "democracy" as a value that supports concurrence in the exercise of constitutional jurisdiction in a federal regime depends on the acceptance of the law as an arena for different "reasoned judgments," that are not excluded because of their different claims or underlying policies, but only if these judgments are not deemed "permissible interpretations" of the legal material. Law shall be conceived as a practice of deliberation that needs to meet some requirement of rationality. Of course, legal reasoning is a technical way of reasoning, but it does not exclude because of that the encompassing of social, economic and political claims. The U.S. legal experience has shed light on the fact of how constitutional interpretation has to do with advancing certain philosophies (liberal, conservatives or other tags that we might think of) in a way that accords to the ideal of the Rule of Law, and this is possible only because judicial review is an open practice that accommodates different voices.

If so, a conclusion can be easily drawn: a federal regime in which constitutional interpretation is shared by both state and federal judges enhances the chances of citizen participation by means of litigation capable of shaping

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[61] Robert A. Dahl, A Preface to Democratic Theory, Expanded Edition 145 (The University of Chicago Press, 2006).

[62] *Id.* at 146.

[63] Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373 (2004).

society in ways that are often unattainable by majorities, as in the case of overruling the white supremacy or attaining a new economic arrangement, as in the cases of *Brown* and *West Coast Hotel*.

When exerting constitutional judicial review, state courts help channel wide-ranging public discussion, enriched by many voices. It is true that in both federal schemes analyzed in this paper both Supreme Courts will ultimately always retain the power to interpret the Constitution with final effects, but, in a system like that of the United States and unlike that of Mexico, that final decision is followed by considerable plural discussion, probably initiated in one of the fifty states that open their courts to citizens so they can bring their views out for consideration. Pluralism and participation, in my view, support a scheme of constitutional adjudication shared by the national government and subnational entities.

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