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The Role of Constitutional Courts: Limits of Judicial Activism and the Safeguarding of Democratic Processes

El papel de los Tribunales Constitucionales: *Límites del Activismo Judicial y la Salvaguardia de los Procesos Democráticos*

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Abstract: Federalism and the Rule of Law require a public body to assume a key role in constitutional oversight, a responsibility often assigned to the Courts across various models, such as the diffuse system in North America, the concentrated system in Europe, and hybrid systems like Brazil's. This paper not only examines this role but also considers how Courts may expand their influence, sometimes encroaching on legislative domains. While proponents of judicial activism argue for greater judicial independence in enforcing the Constitution, proceduralists contend that the Courts should primarily ensure the functioning of legitimate political processes. This study explores the boundaries of constitutional interpretation and the safeguards necessary to preserve judicial authority, relying on bibliographical and case law research, along with the deductive method.

Keywords: Constitutional jurisdiction, Constitutional interpretation, Judicial activism, Interpretative limits, Substantial and procedural theories.

Resumen: El federalismo y el Estado de Derecho requieren que un órgano público asuma

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un papel clave en la supervisión constitucional, una responsabilidad que a menudo se asigna a los tribunales en diversos modelos, como el sistema difuso en Norteamérica, el sistema concentrado en Europa y los sistemas híbridos como el de Brasil. Este artículo no solo examina este rol, sino que también considera cómo los tribunales pueden ampliar su influencia, a veces invadiendo dominios legislativos. Mientras que los defensores del activismo judicial argumentan a favor de una mayor independencia judicial en la aplicación de la Constitución, los procesalistas sostienen que los tribunales deben garantizar principalmente el funcionamiento de los procesos políticos legítimos. Este estudio explora los límites de la interpretación constitucional y las salvaguardias necesarias para preservar la autoridad judicial, basándose en investigaciones bibliográficas y jurisprudenciales, junto con el método deductivo.

Palabras clave: Jurisdicción constitucional, interpretación constitucional, activismo judicial, límites interpretativos, teorías sustanciales y procesales.

1. Introduction

Constitutional jurisdiction in modern times emerges as a natural extension of the Rule of Law. It serves as the mechanism that ensures the Constitution is effectively enforced, safeguarding it from being undermined by arbitrary or exceptional measures. More than that, constitutional jurisdiction guarantees the integrity of the constitutional framework, even when other branches of government attempt to alter its course.

In this sense, constitutional jurisdiction also functions as a safeguard for democracy. It preserves the foundations that democratically structure the state, preventing hasty or urgent circumstances from distorting constitutional interpretation or avoiding its application.

Additionally, it acts as a stabilizing force, ensuring that the winds of change do not erode the core principles that support the Constitution, regardless of shifting majorities or popular demands.

As the Constitution becomes more ingrained in society, its scope expands, bringing attention to the role played by Constitutional Courts—the ultimate interpreters of the Constitution. It is through their role that we experience the practical application of the Constitution, not only in theory but through the protection provided by constitutional jurisdiction.

Historically, the concept of constitutional review, even before Kelsen's theory of concentrated control, has been tied to the Rule of Law. Rooted in historical documents from England,

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the Rule of Law established legal standards that constrained both citizens and the state itself, preventing arbitrary actions by those in power. In the United States, this principle became known as the "reign of law", emphasizing that all are subject to the law.

This principle laid the groundwork for the idea that the Constitution is the highest law, governing all other legal frameworks. This gave rise to the theory of judicial review, which later shaped the development of constitutional jurisdiction.

The role of overseeing the laws and ensuring their compliance with the Constitution requires a designated public body. However, the notion that this responsibility should fall to the courts has not always been universally accepted. The guardianship of the Constitution has not always been seen, by the majority, as a judicial function.

The expansion of constitutional jurisdiction, driven by the progressive guidelines of modern constitutions, raises important questions: What are the limits of judicial lawmaking within the constitutional framework? Where is the boundary between interpreting the law and creating it?

In the context of judicial activism, it is important to recognize the ongoing debate about the role of the judiciary in a democracy. On one side, "substantialist theory" emphasizes constitutional exegesis and the values enshrined in the Constitution, allowing for a broader role for the courts.

On the other side, "proceduralist theory" argues for a more restrained judiciary, focused on ensuring the proper functioning of legitimate democratic processes rather than intervening in them. According to this view, the judiciary's role is to facilitate decision-making, stepping in only when necessary to clear procedural blockages.

In Brazil, the Supreme Court tends to follow a substantialist approach, whether due to the lack of political strength in the other branches, its constitutional mandate, or the dual system of constitutional review. The Court has often taken on a self-assigned role of responsibility in the country's democratic transition.

Examples of this can be seen in decisions that affect deeply personal matters, such as anencephalic abortion, electoral issues like party coalition rules, and cases involving fundamental guarantees, such as imprisonment after conviction in the second instance. In Brazil, it is clear that Supreme Court rulings can have a profound impact on society.

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In comparison, as Leonardo Martins notes, the German Federal Constitutional Court has often stepped in when political institutions have deferred contentious political issues to constitutional review, even before fully addressing them through the legislative process.

Rather than analyzing the circumstances that have led to this state of affairs, the goal here is to explore the role of constitutional jurisdiction in this context and how it intersects with judicial activism. Ultimately, what are the limits to the power of constitutional jurisdiction?

2. The control models in history

The first model of constitutionality control, still diffuse, was modestly established in the famous *Marbury v. Madison* (1803), without any provision for such a system in the U.S. Constitution, which granted, in general, jurisdiction over all cases involving law enforcement and equity under the Constitution (Article III, Section 2). This was partly because the Supreme Court's exercise of original jurisdiction did not rely on legal intervention by Congress[4]. Chief Justice John Marshall's[5] famous words encapsulate this principle: any law that conflicts with the Constitution is void, a matter that binds all judges to uphold.

According to this perspective, extremely important in understanding the role of judges in the fight for fundamental rights, and for other constitutional rights as well, the judge, in any instance, has the duty of observing the constitutionality of the law in specific cases.

At this point, the pioneering control of American constitutionality ended up overriding Locke's formula, for whom "[...] between the legislator and the people, no one on earth is the judge", admitting that judges can insert themselves in the midst of this relationship[6].

As it is necessary, despite the diffuse character, the control of constitutionality, coincidentally, was developed before the Supreme Court itself; although, it was not in fact the pioneer[7], which transformed the Judicial Review into something extremely symbolic. As the American

4 Taylor (1905), p. 44.

5 Marshal (1997), p. 29.

6 Canotilho (2007), p. 60.

7 "As for judicial precedents, at a later time, more specifically in the period from the Declaration of Independence (1776) to the creation of the Federal Constitution (1787), it was found that in some of the newly independentized sporadic cases of control of state laws were recorded in which the parameter of control were the new constitutions of these States – therefore, an authentic control of constitutionality. Such 'precedents' occur in state courts when the U.S. did not yet exist as a federal state. The general examples are those of Holmes v. Walton (1780), judged by the Supreme Court of New Jersey, and that of Commonwealth v. Caton (1782), judged by the Supreme Court of Virginia. It seems that since 1795 the federal courts have also been in control and declare null the state laws that violate the federal Constitution", Urbano (2016), p. 55.

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doctrine emphasizes, it is not just a Court, but "[...] a third of the government, representing an important part not only in deciding what the American people are today, but also the direction they will take tomorrow"[8].

In addition, Corwin notes that: "Possessing, though, all the formal attributes of a judicial court, the Supreme Court today exercises a so vast and undefined power in the censorship of legislation, both national and state, and in the interpretation of the former that the social philosophy of the nominees constitutes, very legitimately, matters of great importance for the authorities participating in the appointment, the President and the Senate"[9].

At the beginning of the 19th century, among the Germans, the conception of the *Rechstaat* was developed, restoring the idea of monarchical constitutionalism and revolutionary constitutionalism, based on popular sovereignty. Over time, this State ended up being characterized by the liberal essence, opposing the Police State, which regulates everything to assume a model in which citizens would become free and responsible for their purposes. The two rights regarded as fundamental, freedom (*Freiheit*) and property (*Eigentum*), could only be restricted by equally popular law of appeal. The State limited by law, that is, submitted to the "empire of the law" (*Herrschaft des Gesetzes*) ended up bringing in itself the need for judicial control of administrative activity[10].

Later, in 1920, Hans Kelsen, who was invited to help draft the Austrian Constitution, introduced what became known as the model of abstract constitutional review. He also established the Constitutional Court (*Verfassungsgerichtshof*) to examine the constitutionality of laws. Under this system, all laws deemed unconstitutional would be subject to review and possible annulment, but not in the same diffuse manner as the American model. This new system centralized the review of constitutionality, departing from the previously diffuse approach[11]. As Kelsen himself had stated, "[...]the centralization of the judicial review of the legislation was highly desirable in the interests of the authority of the Constitution"[12].

Its importance lies in the fact that any law declared unconstitutional is removed from the legal system, and its effects are immediately nullified for everyone, regardless of an objectivist perspective. This provides a direct method of addressing and eliminating unconstitutional laws.

8 Johnson (1962), p. 26.

9 Corwin (1959), p. 166.

10 Canotilho (2007), p. 97.

11 "Kelsen based on the idea already developed on constitutional jurisdiction, by instituting the concentrated model, actually revolutionizes constitutional justice, opening the European blockade to models that could be owed to the sovereignty of parliaments", Borges de Oliveira (2017), p. 23.

12 Kelsen (2007), p. 304.

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In general, the preponderant role of the Constitutional Courts shifts the issue of the correction of the rulings of the Courts to a role involving hard cases. According to Chief Justice William Howard Taft[13], the Supreme Court's role is to expand and stabilize legal principles in the benefits of U.S. citizens, tending to constitutional and other legal issues of public benefit.

It must always be in mind that the Constitution's preference for laws is not only a matter of normative hierarchy, but rather of the intention of the people than the intention of its agents[14]. As Ackerman[15] recalls, the "[...] elected politicians will not be able to weaken the solemn commitments of the people through the daily legislative creation", being necessary to seek decisive support in the people for the revision of pre-existing principles.

However, of course, it cannot be overlooked that the question of the existence of control based on the Fundamental Law is inherent to any and all Rule of Law, since from the point of view of the "maximum legality of the state function"[16]. As stated by Paulo Bonavides[17], the "[...] consequence of this hierarchy is the recognition of the 'constitutional super legality', which makes the Constitution the law of laws, the *lex legum*, that is, the highest legal expression of sovereignty".

Gilmar Mendes[18] points out, from Kelsen's teachings at the conference given to the Association of German Public Law Teachers, that the existence of a constitutional jurisdiction is the basis for ensuring guarantees of a clear legislative process and safeguarding, consequently, minorities in the face of the majority[19], in order to avoid, by simple judicial claim, that it is absolutely imposed on them.

The principle of democracy is not to prevent the existence of opposing solutions presented by participants in judicial disputes, but to ensure that these differences are heard and considered, leading to a resolution of conflicts. As O'Brien points out: "The power of the Court lies in its ability to persuade through its decisions and in its alignment with other political

13 Taft (1922), p. 6.

14 O'Brien (1991), p. 27. As Friedrich Müller (2005), p. 90, recalls: "The style of reasoning of constitutional policyrefers to measuring the consequences, the value consideration of content [...] Elements of constitutional policy provide valuable content points of view to the understanding and practical implementation of constitutional norms".

15 Ackerman (2009), p. 5.

16 Kelsen (2007), p. 239.

17 Bonavides (2008), p. 267.

18 Mendes (2007), p. 467.

19 Esteves (1995), p. 128.

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institutions and public opinion"[20].

3. The Kelsen-Schmitt controversy

The debate over the meaning of "constitutional jurisdiction", specifically the concentrated control of constitutionality, inevitably leads to Hans Kelsen, one of the greatest jurists of all time. His tireless efforts were crucial in bringing formal structure to the Austrian Constitution.

On this journey, Kelsen again encountered a confrontation over the response to the question "who should be the Guardian of the Constitution?"[21], a text he published in 1931, in which he faces, with his peculiar dexterity, Carl Schmitt's position that it would be up to the head of state to play the role of major constitutionalist. Thus, he asserts, about Schmitt, and his work "The Guardian of the Constitution"[22], how surprising[23].

Carl Schmitt made significant efforts to discredit the idea of the Judiciary as the natural guardian of the Constitution, a concept largely influenced by the U.S. Supreme Court. According to Schmitt, the functions of the U.S. Supreme Court were very different from those of the German courts[24].

As Gilberto Bercovici noted, Schmitt identified several obstacles to the Court's ability to control the constitutionality of laws: a) judicial control operates a posteriori; b) it is an accessory control that occurs incidentally, in a diffuse manner, through judicial rulings; c) such judicial rulings merely apply existing laws to specific facts; and d) therefore, it would be unacceptable for the judiciary to stand above the legislative body that creates the law.

Bercovici[25] said "in his view, a legal rule cannot be defended by another legal rule ('*Ein*

20 O'Brien (1986), p. 277.

21 Original: *Wer sun der Hüter Der Verfassungsein?,* In fashion *Die Justiz*. Heft 11-12, vol. VI, 576-628.

22 Original: *Hüter Der Verfassung*. In *BeiträgezumÖffentlichenRechte Der Gegenwart*, Ed. J. C. B. Mohr Siebeck, Tübingen, 1931. There is, however, a publication of the same text made earlier in 1929 and mention of the theme in two other articles: *Die Diktatur des ReichspräsidentenNach Artikel 48 der WeimarerVerfassung*, 1924, and *Of Reichsgericht Als HüterDerVerfassung*, 1929.

23 Kelsen (2007), p. 243: "[...] this writing takes from the regreasing of the oldest play of the constitutional theatre, that is, the thesis that the head of state, and no other public body, would be the competent guardian of the Constitution, in order to use again this already well dusty scenic prop in the democratic republic in general and in the Constitution of Weimar in particular".

24 Schmitt (1996), p. 12.

25 Bercovici (2003), p. 195.

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GesetzkannnichtHütereinesanderenGesetzes sein')". This view stems from the abstract logic of positivist normativism. In reality, it involves the application of norms to content, meaning the true issue lies in the content of legal norms. For Schmitt, since the central concern is determining the content of the law, the problem is one of legislation, not justice.

For Schmitt, it would only be permissible for the control of the constitutionality of laws to be conferred on a Court in a State of a "Judicialist" nature, that is, when absolutely all political issues were brought to the judiciary, it is worth saying, a State in which the "politicization of justice" (*Politisierung der Justiz*)[26] would apply. It should be emphasized, as Bercovici does, that Schmitt assumes that a constitution, with regard to constitutional materiality, does not have a legal essence, but rather in the political decision necessary for its creation[27].

Carl Schmitt also dismisses Parliament as a constitutional actor. In the German Total State, characterized by pluralistic control, Schmitt argues that "political parties make decision-making impossible." Furthermore, he believes that economic and social regulation—typical of Total States—is incompatible with liberal institutions like the parliamentary system"[28]. This rain of guidelines breaks with any unit of direction of Parliament that, as Schmitt recalls, cannot even deal with economic barriers, which he will say is the guardian of the Fundamental Law[29].

Therefore, this role could only be assigned to a power that stands above the others, acting neutrally, as envisioned in Benjamin Constant's[30] doctrinal framework. It could also be a power on the same level as the others, but with specific duties and responsibilities that position it as a guardian of the rest. According to Article 48 of the Weimar Constitution, this power would be vested in the President of the Reich[31]. Later, the President would be elected directly by the German people, which would give him democratic legitimacy to pursue the unity of constitutional understanding[32].

For Kelsen, at first, it is necessary to establish a premise when imagining the creation of an institution responsible for controlling the conformity of state acts to the Constitution: "[...]

26 Schmitt (1996), p. 22.

27 Bercovici (2003), p. 196.

28 Bercovici (2003), p. 197.

29 Schmitt (1996), p. 91.

30 Constant (2005).

31 Schmitt (1996), p. 132.

32 Schmitt (1996), p. 159. Still: "He defends the figure of the Head of State as a true defender of the Constitution because he has passed through the sieve of popular election, an aspect that would legitimize him to act independently in relation to the parties and as a truly supreme and neutral instance. However, the conversion of the Head of State into guardian of the Constitution holds a very clear ideological option because, instead of contributing to the defense of the constitutional system, it enables its violation on an argumentative basis of legitimation". Lorenzetto (2009), p. 1926.

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such control should not be entrusted to one of the organs whose acts must be controlled." Still: "[...] no instance is as unsuitable for such a function as precisely that to which the Constitution trusts – in whole or in part – the exercise of power which has, primarily, the legal opportunity and the political stimulus to increase it". It's just that basically "[...] no one can be a judge in their own cause"[33].

According to Kelsen, the conception that the Government should be the guardian of the Constitution is part of the thesis that the Monarch would be a neutral third party, to carry out objective analyses, above the two poles of power[34], according to Benjamin Constant's creation on the Moderating Power – *pouvoir neutre*-, used in Brazil by Dom Pedro I in the making of the Imperial Constitution of 1824, which, in practice, proved to be a source of abuse and arbitrariness by the Emperor[35].

The problem of supporting in this line of Constant, according to Kelsen, to assign the Reich President the role of Guardian of the Constitution, is that it is assumed that there are two distinct Executive powers: a liability and an asset, and only the liability would have a neutral nature. It is clear that this view is in no way fit for the profile of the President of the Reich, known in the Weimar Constitution, precisely because of the immense range of powers, depending on its Article 48, becoming, in addition to this "guard", a "[...] sovereign master of the State", something of all incompatible "[...] with the function of a guarantor of the Constitution"[36].

Thereafter, there was an enormous difficulty in understanding, within the theoretical sphere of the State as a legal above the political one, how they could be relegated to someone's activities that could be based on political guidelines[37]. Moreover, Schmitt attacked, above all, the fact that a constitutional court composed of a party proportionality would not have a judicial but political nature.

Kelsen skillfully refutes this argument. In his view, Schmitt wrongly assumes a contradiction between judicial and political functions, arguing that if the annulment of laws is a poli-

33 Kelsen (2007), p. 240.

34 Kelsen (2007), p. 241.

35 "How could the monarch, holder of a large portion or even of all the power of the State, be a neutral instance in relation to the exercise of such power, and the only one with a vocation for the control of its constitutionality? The objection that this is an intolerable contradiction would be totally misplaced since it would be to apply the category of scientific knowledge (legal science or state theory) to what can only be understood as political ideology". Kelsen (2007), p. 242.

36 Kelsen (2007), p. 245.

37 Lima (2013), p. 3: "In keeping with the proper proportions, this idea remains to this day, since the constitutional courts that were formed according to the model of the Supreme Court of the United States of America, as the Supreme Court of Brazil, maintain this type of understanding, in the hope of removing the heterogeneity of representative and democratic politics from the content of its compositions and decisions".

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tical act, it cannot also be a legal one. Kelsen counters, stating, "This notion is flawed because it assumes that the exercise of power ends with the legislative process"[38].

> The political nature of the judiciary becomes even stronger as legislative discretion, by its general nature, must inevitably defer to it. The notion that only legislation is political, and not the judiciary, is as mistaken as the belief that only legislation creates law, while the judiciary merely applies it. These are essentially two sides of the same misconception. When the legislature authorizes judges to weigh conflicting interests within certain boundaries and resolve disputes in favor of one side, it grants them the power to shape the law, thereby giving the judiciary the same 'political' character as the legislative process, if not more so.
>
> The difference between the political nature of legislation and that of the judiciary is one of degree, not kind. If jurisdiction were inherently non-political, then international courts would be impossible; or rather, decisions based on international law to resolve disputes between states—distinguished from internal conflicts primarily by their clearer display of power struggles—would need a different name[39].

Kelsen[40] asserts that the Supreme Court does nothing other than the German Courts "[...] when they exercise their right of control, that is, not applying to the specific case the laws considered unconstitutional". For him, in practical terms, the only difference is that the Court of Cassation does not annul the unconstitutional law for only one specific case, but rather in the abstract: "Schmitt cannot deny that a court, when it rejects the application of an unconstitutional law, thus suppressing its validity for the specific case, functions in practice as guarantor of the Constitution, even if it is not granted the grand title of "guardian of the Constitution"[41].

As the clear victor in this debate, constitutional history has strongly endorsed the concept of constitutional jurisdiction, which is widely regarded as the power that should naturally assume the role of guarding the Constitution. Moreover, particularly in the United States, attempts to depoliticize the Supreme Court have gradually faltered through a series of landmark rulings, where the Court inevitably expanded beyond its purely judicial function. Notable cases include *Marbury v. Madison* (1803), *Luther v. Borden* (1849), *Dred Scott v. Sandford* (1857), *Brown v. Board of Education* (1954), and *Cooper v. Aaron* (1958).

38 Kelsen (2007), p. 250.

39 Kelsen (2007), p. 251.

40 Kelsen (2007), p. 249.

41 Kelsen (2007), p. 250.

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In this sense, the teaching of Professor Gomes Canotilho[42] is salutary: "Firstly, a refusal of justice or decline of jurisdiction of the Constitutional Court should not be accepted just because the matter is political and must be decided by political bodies. Secondly, as has already been said, the problem lies not in, through constitutional control, doing politics but rather in assessing according to the legal and material parameters of the constitution, the constitutionality of politics.

Constitutional jurisdiction has, to a large extent, the purpose of appreciating the constitutionality of the "political". This does not, of course, mean that it becomes a simple "political jurisdiction", because it must always decide according to the material parameters set out in the norms and principles of the constitution. Consequently, only when there are legal and constitutional parameters for political conduct can the TC assess the violation of those parameters".

One of the key aspects of constitutional jurisdiction is its ability to strengthen democracy, particularly when the judicial process encourages broad debate on the issues at hand, including public hearings and the exercise of its counter-majoritarian role. This highlights an important political dimension of the Court's function. As Canotilho[43] points out, the objective is not to prevent the existence of political-value judgments, but to guide them within the judicial function[44].

It is evident that, regardless of the political content analyzed by the Court, it always adheres to a rational justification for its decisions. This rational framework serves as a tool to assess the political nature of the Court's rulings and whether they might, at times, overstep into the legislative domain. Attempting to separate politics from the work of those tasked with interpreting the most political document of a society—its Constitution—would be entirely unrealistic[45].

However, as we will explore later, rational justification is often not enough to limit the

42 Canotilho (2007), p. 1309.

43 Canotilho (2007), p. 1309.

44 Moreover, it is worth the observation of Rui Barbosa: "An issue can be distinctly political, highly political, according to some, even purely political outside the fields of justice, and yet, in coating the form of an election, be in the jurisdiction of the courts, provided that the act, executive or legislative, against which it is demanded, hurts the Constitution, harming or denying a right enshrined therein" (1910), p. 178.

45 "He must believe that he is a mere automaton, which does not produce law creatively, but rather just 'finds' law already formed, 'finds' a decision already existing in the law. Such doctrine was unmasked long ago. It is therefore not so strange that Schmitt, having used this theory of automatism to separate, as a principle, jurisdiction as mere law enforcement and legislation as the creation of law, and after it has assured him the main theoretical argument in his fight against constitutional jurisdiction – 'a law is not a sentence, a judgment is not a law' -, put it aside, emphatically declaring: 'In every decision, even in that of a court that resolves a case by subsuming a material fact, there is an element of pure decision that cannot be deduced from the content of the law.'" Kelsen (2007), p. 258.

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Court's progression toward lawmaking. In fact, there is a fine line between interpretation and creation, and this distinction is key to understanding the role of the Constitutional Court.

4. Interpretation and construction: between the procedural and the substantial, activism is born

The distinction between the interpretation and creation of law by the courts, particularly Constitutional Courts, is a contentious issue among legal scholars. Much of the debate stems from the question of whether a clear dividing line exists—a line that is often considered both non—existent and imprecise.

Judges and courts labeled as "activists" or "substantialists" are frequently accused of overstepping their judicial role and venturing into the legislative domain by "creating" law. But this raises a deeper question: Is law creation simply a form of activism, or is it an inherent part of every judicial interpretation? Furthermore, if the latter is true, does interpretation involve only creativity, or is there room for both law creation and application within its scope?

Concerns about judicial activism are echoed by scholars like Bruce Ackerman, who argues that dualist democracy does not permit the Superior Courts to shape moral frameworks, as doing so risks disrupting the natural flow of social change.

"It is not proper for the special jurisdiction of judges and jurists to lead the people progressively towards new and higher values. This is the task of citizens who can, after investing a lot of energy, succeed (or fail) in the task of obtaining the consent of the majority of their compatriots. What judges and jurists can do is preserve the achievements of popular sovereignty during the long periods of our public existence, when citizenship is not mobilized for great constitutional achievements"[46].

In October 1928, in a lecture given to the International Institute of Public Law[47], in discussing the decisional profile of constitutional jurisdiction, Kelsen emphasized that much of the confusion surrounding legal arguments arises from an ontological mix-up with legislation. In this view, jurisdiction, operating outside of the law, is limited to applying pre-existing rights or, more specifically, the legislation itself. The act of creation, therefore, is reduced to merely

46 Ackerman (2006), p. 195.

47 The text on the exhibition and debates was first published in French (*La garantiejurisdictionelle de la Constitution*), in the *Revue of Droit Public Politique et Science* n. 35, pp. 197-257, in 1928. Later, in 1929, it was published in German (*Wesen und Entwicklungder Staatsgerichtsbarkeit*) in the *Veröffentlichungender Vereinigungder deutschenStaatsrechtslehrer*, Heft 5, pp. 31-88.

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applying the facts to the law[48].

For him, however, the gulf that is created between the creation of the law and its execution is incomprehensible. Both creation and enforcement play a dual role in creating and applying the right: "Legislation and enforcement are not two coordinated state functions, but two hierarchical stages of the process of creating the law, and two intermediate steps"[49].

The whole process that culminates in the application of law begins with the influence of the international legal order on the constituent Powers, going through the reflections in normative acts and, again, in administrative acts and judgments, finally achieving material enforceable acts.

Throughout this process, the law becomes the creator of its own rights, while enforceable actions—though never fully separated from the rights that blur their boundaries—lead to a continuous cycle of state creation and re-creation. As a result, every stage of this process reflects the creative and collective will, which is inevitably influenced by the dynamics of the modern state[50].

According to the Constitution, as a positive fundamental rule, its regulation of the *infra* legislation is noted, so that such legislation becomes an application of constitutional law. However, for the decrees and regulations that sum up the legal content, the legislation is the creative source of the Law, while the decree is, in relation to the legislation, application, but, for the administrative act that applies it, it will be created[51].

Furthermore, the law takes shape along a path that begins with the Constitution and culminates in enforceable actions. At each step toward execution, the space for creativity diminishes, while the role of application increases. Each level produces law for those below it and reproduces the law received from those above. In this framework, judicial rulings face greater limitations on creativity, but the element of creation never entirely disappears.

It is precisely this relationship with the higher-grade standard that the regularity of the norm is investigated. "Guarantees of the Constitution therefore mean guaranteeing the regularity of the rules immediately subject to the Constitution, that is, essentially, guarantees of the constitutionality of laws"[52].

48 Kelsen (2007), p. 124.

49 Kelsen (2007), p. 124.

50 Borges de Oliveira (2015), p. 159.

51 Kelsen (2007), p. 125.

52 Kelsen (2007), p. 126.

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The interpretation goes through a necessarily creative process, not least because the decision is not restricted to pointing out the correct interpretation, but should also rule out divergences, even if subliminally. In this path of interpretative choice, the result that appears absolutely opposite to the norm will be left as a clear creation. As Mendes, Coelho, and Branco[53] assert, "[...] it is one thing to creatively attribute meanings to the rules of Law, and another, quite distinct, is to deconstruct them, but still to say that this is interpretation".

It is important to note that in modern constitutional states, which follow Montesquieu's traditional tripartite division of powers, legislative activity is the responsibility of the Legislature, typically carried out by representatives elected by the people. When other branches of government engage in unchecked and disproportionate lawmaking, it distorts the very essence of the Rule of Law.

In the longing to create a fine line between the judicial creation of Law and pure legislation, Cappelletti[54] argues that the legislative work of the Judiciary holds some peculiarities that make it different from the Legislature itself: a) judges must be super parties, that is, decide on cases in which they do not participate or have interest, free from the pressures of the parties; b) the case must always clearly present its contradictory character, allowing an appropriate manifestation of all parties before an impartial judge; c) the judicial process requires actors to move it, not starting it*ex officio*.

The purpose of constitutional review is, of course, to enforce the Constitution, with a particular focus on protecting fundamental rights. In this role, the Judiciary acts as a negative legislator, but its actions are always constrained by the limits set by the Constitution itself. "The problem is always the interpretation that changes the meaning of the constitutional norm as well as the legal creation without any basis in the Constitution"[55].

Aligned with substantial theory, as supported by Cappelletti, Ely advocates for the near-complete withdrawal of the Judiciary from political decision-making, limiting its role to clearing obstacles to legitimate democratic processes through his theory of democracy reinforcement.

Ely's perspective is rooted in a procedural view of the Judiciary's role in democracy, where its primary function is to ensure the proper functioning of the democratic process, without interfering in the substance of political decisions.

53 Mendes *et al.* (2008), p. 92.

54 Cappelletti (1999), p. 75.

55 Borges de Oliveira (2015), p. 161.

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There would be no justification, according to Ely[56], for the belief that the values of jurists should prevail over those belonging to democratically elected representatives[57]. And if those represented did not agree with their options, they could show their dissatisfaction in the elections.

Thus, the Judiciary should allow democracy to follow its natural course, stepping in only when flaws in the process create mistrust, in order to safeguard its free exercise. As Ely explains: "It's not fair to claim that the government is 'working poorly' just because it sometimes produces results we disagree with, no matter how strong our disagreement may be. And to suggest that it produces outcomes the 'people' disagree with—or would disagree with 'if they understood'—is often little more than a delusional projection. In a representative democracy, value judgments should be made by elected representatives, and if the majority disapproves of their actions, they can remove them through voting. The real malfunction occurs when the process itself no longer deserves our trust. This happens when (1) those in power obstruct the channels of political change to maintain their position and keep others excluded, or (2) when representatives of the majority systematically disadvantage a minority, not because they explicitly deny them voice or vote, but out of mere hostility or a refusal to recognize shared interests. In doing so, they deny this minority the protection that the representative system offers to other groups"[58].

Ely's[59] also criticizes the "moral reading of the Constitution", given the fact that it is more sensitive to the purely personal choices of each justice. Such criticisms deserve high consideration because they have opened a homogeneous concern, even among those most activists, that the Court should not even exceed its judicial field and put itself in the position of legislator, and it is not desirable that judges make use of their moral options to justify collective decisions.

Much of the interpretative construction of a creative nature comes from the section of constitutional hermeneutics. In other words, the interpretative bases as a support for the expansion of the constitutional text. Furthermore, Hesse[60] reveals that the openness and brea-

56 Ely (2010), p. 8.

57 "When a Court invalidates an act of political powers based on the Constitution, however, it is *rejecting* the decision of the political powers, and in general does so in such a way that it is not subject to 'correction' by the ordinary legislative procedure. Thus, this is the central function, which is at the same time the central problem of judicial control of constitutionality: a body that has not been elected, or that is not endowed with any significant degree of political responsibility, tells the representatives elected by the people that they cannot govern as they wish". Ely (2010), p. 8.

58 Ely (2010), p. 137.

59 Ely (2010), p. 78.

60 Hesse (1998), p. 54.

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dth of the Constitution bring practical problems in the interpretation developed in the area of constitutional jurisdiction.

But he points out: "*The task of interpretation* is to find the constitutionally result "accurate" in a rational and controllable procedure, to substantiate this rational and controllable result and thus create legal certainty and predictability – not, for example, only to decide because of the decision"[61].

Theoretically, what enables abuse also acts as a form of control. The rational justification of judicial decisions serves as the best measure of whether the judiciary is overstepping its bounds, not only for legal scholars who engage with the courts daily but also for the general public, who can judge whether to accept or reject the legal outcomes.

The interaction between law and the cultural world, the constitutional framework of principles, and the challenges faced by judges when interpreting ambiguous or evolving meanings must also be considered when demanding objectivity or strictly rational reasoning. The interpretative process, which navigates between the literal text of the law and real-life situations, cannot be overlooked when evaluating judicial behavior. However, as Cappelletti points out, creative interpretation does not equate to "unrestricted freedom" in decision-making[62].

Constitutional jurisdiction is not a risk, but rather a necessity for the development of a democratic state, as long as the boundaries that prevent the Judiciary from becoming a legislative body are respected.

As Grant Gilmore[63] teaches, activism in the United States stood out under Chief Earl Warren, but preceded it greatly, developing both in the spheres of Public Law and Private Law, both in state and federal courts. The precedents of the post-Civil War, accustomed to abstractions and unitary theories, were questioned by the doctrinal formulations of importance and gradually gave way to a review of the Judicial posture[64].

It is worth remembering Baum's[65] assertion about that historical moment: "Even today, about half of the Court's decisions refer to laws rather than the Constitution, and these decisions on laws often have activist components".

61 Hesse (1998), p. 55.

62 Cappelletti (1999), p. 26.

63 Gilmore (1978), p. 108.

64 Gilmore (1978), p. 108.

65 Baum (1987), p. 269.

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However, even in Germany, where the Bundesverfassungsgericht holds significant power, the constitutionalization of legal interpretation is observed within certain limits. This is because excessive constitutionalization can lead to the suspension of all Private Law and unchecked judicial activism, which undermines the principles of the separation of powers and democratic governance[66].

It is crucial to remember, in any discussion of constitutional jurisdiction, that interpretation should not stray beyond logic or exceed the reasonable limits of the text, even when influenced by cultural contexts.

For Konrad Hesse[67], unwritten law should not be in contradiction with the written Constitution, as the "[...] limit of constitutional interpretation". More than that, this "[...] limit is a presupposition of the rationalizing, stabilizing and limiting function of the power of the Constitution". It is worth mentioning that where "[...] the interpreter goes over the Constitution, he no longer interprets, but he modifies or breaks the Constitution"[68].

Such measures, on their own, cannot guarantee that judicial decisions in cases of constitutional review will always be grounded in rational reasoning, especially when dealing with highly ambiguous or unclear areas. However, the greater the possibility of external oversight—across any branch of government—the less likely it is that one branch will overstep its boundaries and usurp the role of another.

Finally, it must be emphasized that any interpretation of the constitutional text must always adhere to the principles of reasonableness and proportionality. Whether through a purely grammatical reading or by invoking the "Spirit of the Constitution," there is no justification for violating the constitutional framework.

For example, it would be unreasonable to interpret the term "national character" of political parties as requiring the vertical integration of party coalitions, a conclusion that deviates entirely from the original intent of the text. Similarly, the interpretation of Article 52, X, of the Constitution as merely publicizing decisions, thereby usurping the prerogative of the Federal Senate, cannot be reasonably supported by the text. Yet, many rulings emerge from constitutional silence, at times allowing and at other times prohibiting.

Thus, it becomes clear that more important than the broad scope of the constitutional

66 Martins (2011), p. xxi.

67 Hesse (1998), p. 69.

68 Hesse (1998), p. 69.

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text—common in most states—are the guiding principles that direct the Courts. The strict adherence to the text, the necessity for logical justification, and interpretative reasonableness can serve as excellent safeguards. However, these alone will not be effective if the Court oversteps its role, assuming responsibilities beyond its mandate of solely defending the Constitution.

5. Activist Decisions: The role of the Brazilian Supreme Court in addressing social demands unmet by the Legislative Branch

The Direct Action of Unconstitutionality by Omission (ADO) No. 26 is an example of the Brazilian Supreme Federal Court's[69] (STF) role in cases involving fundamental rights, confirming the court's growing influence in areas where there is legislative omission. This action was filed by the Popular Socialist Party (PPS), aiming for the STF to recognize the National Congress's omission in legislating the protection of LGBTQIA+ individuals against acts of discrimination and violence, equating such conduct with those covered by Law 7.716/1989[70], which addresses racism crimes.

The ADO is a legal instrument that allows the Brazilian Supreme Federal Court (STF) to identify and correct unconstitutional omissions by public authorities in implementing the necessary rules to ensure constitutional rights. The ADO is used when there is a legislative gap that compromises the fulfillment of fundamental precepts, such as the protection of fundamental rights enshrined in the Constitution. When ruling on an ADO, the STF acknowledges the omission and, in some cases, mandates that Congress or another competent body take action to ensure the full exercise of constitutional rights, aiming to ensure the effectiveness of constitutional norms and prevent rights violations caused by state inaction.

The petition argued that the Legislature's inertia violated the constitutional precepts of equality, human dignity, and prohibition of discrimination, rights guaranteed by the 1988 Constitution.

The PPS's request in ADO 26 was based on the notion that, by not criminalizing homophobia and transphobia, Brazil allowed a significant portion of the population to remain vulnerable to prejudice-motivated crimes. The legal basis of the action emphasized that, under the

69 The Supreme Federal Court (STF) is Brazil's highest court, similar to the Supreme Court in other countries, and serves as the guardian of the Federal Constitution. Its primary role is to ensure that laws and public acts comply with constitutional principles, exercising judicial review over legislative and administrative matters. Additionally, the STF rules on cases of significant relevance, often involving fundamental rights and issues that directly impact Brazil's democratic system. The court also plays a crucial role in protecting human rights and arbitrating conflicts between branches of government and between the federal government and states.

70 Lae Nº 7.716, defining crimes resulting from prejudice based on race or color.

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Federal Constitution, the State is responsible for protecting all citizens from discrimination.

Furthermore, the action highlighted Brazil's obligation under international human rights treaties, such as the American Convention on Human Rights, which requires member states to adopt effective measures against discrimination.

The proceedings of ADO 26 in the STF included several statements from civil society entities, representing LGBTQIA+ groups, human rights movements, and even religious sectors that opposed equating homophobia with the crime of racism.

The action drew broad public attention and sparked a national debate on legal security and the protection of minorities, highlighting the controversy between the need to protect human rights and the limits of the Judiciary's role in relation to the Legislature.

During the trial, which began in 2019, the action's rapporteur, Minister Celso de Mello[71], argued that the absence of specific legislation against homophobia and transphobia constituted an unconstitutional omission, as the Constitution establishes the State's duty to protect the fundamental rights of all citizens, regardless of sexual orientation or gender identity. Celso de Mello emphasized that the STF, as the guardian of the Constitution, had the duty to fill this legislative gap to ensure the effective protection of fundamental rights, in line with the principle of human dignity.

The STF's decision in ADO 26 resulted in an expansive interpretation of Law 7.716/1989, extending its scope to include the criminalization of acts of homophobia and transphobia as a form of racism. This measure was considered an important step in ensuring the safety of LGBTQIA+ individuals in a context of high social vulnerability, particularly in a country where violence against these communities is notoriously high.

However, the decision was not unanimous. Some justices expressed concern about the activist nature of the decision, arguing that the court was overstepping its role by legislating on an issue that should be resolved by the National Congress.

The reason why the ADO 26 decision is seen as an example of judicial activism lies in the STF's interpretation of its constitutional function. By framing homophobia and transphobia as crimes of racism, the STF filled a space that, theoretically, should be regulated by the Le-

71 The judgment delivered states that "Nothing is more harmful, dangerous, and illegitimate than drafting a Constitution without the will to fully enforce it, or enacting it with the intent to apply it only selectively, according to the convenience of those in power or majority groups, to the detriment of the greater interests of citizens or, often, in blatant disregard for the rights of minorities, particularly those in vulnerable situations".

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gislature, given the need for in-depth debates and the creation of specific norms for such a complex and sensitive issue.

This type of interpretation demonstrates the court's ability to respond to legislative omissions but also raises debates about the limits of judicial power and the risk of interference with legislative competence. The activist nature of the decision is reinforced by the very nature of the ADO, which is based on Congress's omission in legislating on a socially relevant and constitutionally guaranteed issue.

The use of the ADO as a legal instrument reinforces the STF's role as the ultimate interpreter of the Constitution, but at the same time, it raises questions about the balance of powers in Brazil, where the Judiciary, by taking such a decisive position, may disincentivize the Legislature from acting in controversial areas. The judgment of ADO 26 thus reveals the tension between the need for immediate protection of fundamental rights and respect for the democratic process of lawmaking.

The decision issued in ADO 26 also established an important precedent for other cases of legislative omission on human rights issues, offering a judicial response to pressing social demands. The STF, by adopting an active stance, seeks to ensure the realization of the constitutional principles of equality and dignity, even in areas where Congress chooses to remain silent.

This precedent, however, places the court in a delicate position, as it sets expectations for future interventions on legislative issues, which could impact public perception of the Judiciary's neutrality and impartiality.

In summary, the ADO 26 decision is a clear manifestation of judicial activism, in which the STF took on a decisive role in protecting fundamental rights in the face of legislative omission.

The judgment of Extraordinary Appeal (RE) nº. 635659 by the Brazilian Supreme Federal Court (STF), which dealt with the decriminalization of marijuana possession for personal use, is yet another example of an activist decision. This case began with the conviction of a citizen caught with a small amount of marijuana, being accused of drug possession for personal use.

The Extraordinary Appeal is a type of judicial appeal that allows constitutional issues—doubts or controversies regarding the interpretation and application of the Federal Constitu-

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tion—to be brought before the STF. It is applicable when a lower court decision, such as those by the Courts of Justice (TJs) or Regional Federal Courts (TRFs), allegedly contradicts the Constitution or declares a law or normative act unconstitutional. Unlike other appeals, the Extraordinary Appeal does not seek to re-evaluate facts or evidence of the case but to discuss the correct interpretation of the Constitution in the specific case.

Thus, the STF exercises the function of standardizing constitutional interpretation in the country, ensuring the uniform application of constitutional principles in all Brazilian jurisdictions.

The defense argued that the criminalization of possession violated fundamental rights guaranteed by the Constitution, such as the right to privacy and private life as well as the principle of proportionality, since the punishment did not distinguish between users and traffickers.

The case was referred to the STF with the argument that criminalizing possession for personal use constituted an affront to the individual's fundamental rights and did not achieve the public health protection objectives underlying anti-drug legislation.

According to the defense, Article 28 of the Drug Law (Law 11.343/2006), by criminalizing possession, exceeded the role of protecting society and invaded the right to self-determination and privacy, resulting in unjust penalties for those who consume the substance without commercial intent.

During the trial, there was an in-depth discussion on the scope of the right to privacy concerning the personal use of illicit substances and the Legislature's competence to review Brazil's drug policies. The absence of a clear definition of what constitutes personal use and the application of similar penalties for users and traffickers were points raised to justify the need for a reinterpretation of Article 28.

The case's rapporteur, Minister Gilmar Mendes, argued that criminalizing drug possession for personal use violated the constitutional principle of human dignity and the right to individual freedom, especially in cases where there was no evidence that consumption affected third parties.

The STF's decision, ruling that possession of small amounts of drugs for personal use does not constitute a crime, was marked by an expanded interpretation of fundamental rights. Although the case involved only marijuana, the ministers discussed the potential impact of decriminalization on society and public health policy.

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The decision, which has not yet been completed with all votes, sparked debates on the STF's role as the ultimate interpreter of the Constitution and the extent to which this interpretation could alter highly relevant social public policies.

This judgment is widely considered an example of judicial activism, as the STF, by reinterpreting drug legislation, acted in an area traditionally reserved for the Legislature. By deciding on decriminalization, the STF assumed a "negative legislator" stance, invalidating a legal provision without the National Congress having pronounced on the review of drug policy.

This aspect gives the decision an activist character, as the court took a position on a controversial and high-impact social issue, where it would be up to the Legislature to formulate policies and adapt legislation according to social changes.

The STF's action in decriminalizing marijuana possession also generated discussions on the impact of judicial decisions on public security and health policies. Some ministers pointed out that the judicial decision could be interpreted as a sign of permissiveness toward drug use, which should be evaluated by the Legislature.

Others, however, emphasized that the Judiciary has a duty to protect individual rights, especially in cases where the Legislature is silent or takes a conservative stance, inconsistent with social reality and international trends of decriminalizing substances for personal use.

The decriminalization of marijuana possession is an emblematic example of this approach, in which the STF seeks to ensure the protection of rights even in the absence of Legislative action. However, this type of judicial activism can have implications for interbranch relations and societal expectations regarding the scope and limits of constitutional interpretation.

This case illustrates the complexity of judicial activism on social issues and raises the question of the limits of the STF's interpretative power. The court, in exercising its review function, faces the challenge of balancing respect for the Legislature's attributions with the guarantee of fundamental rights. In the decriminalization of marijuana possession, the STF extended the boundaries of its role, assuming a normative position that echoes the role of the ultimate interpreter of the Constitution.

These decisions demonstrate an activist stance by the Supreme Federal Court, which, by

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reinterpreting and expanding the scope of laws on socially significant issues, such as the criminalization of homophobia and the decriminalization of drug possession, goes beyond the role traditionally assigned to the Judiciary and assumes functions that, in a system of separation of powers, would belong to the Legislature.

By positioning itself as a "negative legislator" and filling gaps left by the National Congress's omission, the STF takes actions aimed at ensuring the protection of fundamental rights but also raises debates about the limits of constitutional jurisdiction and the risk of imbalance in the relationship between the branches of government.

6. Conclusion

The role of safeguarding the constitutional project has historically been entrusted to the courts, assigning them the responsibility of interpreting laws in accordance with the Constitution. This responsibility manifests differently across various jurisdictions, whether through the diffuse model pioneered by the U.S. Supreme Court, the concentrated approach of Kelsen in Europe, or the hybrid model seen in Brazilian law, which incorporates elements of both systems.

Schmitt's preference for entrusting this role to the courts grants them the authority to assess the effectiveness of constitutional claims, a task that extends beyond the mere logical analysis of the relationship between infraconstitutional laws and the Constitution.

However, this expansive role, coupled with the comprehensive rights enshrined in modern constitutions, alongside the inertia or lack of political will of other branches of government, has led to the judiciary receiving special attention—resulting in potential risks.

Today, Constitutional Courts are charged with the dual mission of resolving disputes over constitutional interpretation while sometimes transforming mere promises into enforceable realities. Yet, this was not the original intent of judicial review, particularly in its early form as established in 1803.

Nonetheless, courts that emerged or evolved in post-war democratic states have gradually assumed this broader role, making constitutional jurisdiction an undeniable reality with the essential function of interpreting and enforcing the Constitution, thereby shielding it from political turbulence and moments of legal instability.

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While constitutional jurisdiction is indispensable for the maintenance of a democratic state, it cannot be ignored that judicial interpretation of the Constitution, particularly when it borders on activism, poses inherent risks. On one hand, proponents of substantialist theory advocate for an expanded judicial role, allowing courts to extend their powers into political spheres under the guise of enforcing rights. On the other hand, proceduralist theory offers a necessary counterbalance, emphasizing that courts should focus on facilitating legitimate democratic processes without directly engaging in political decision-making.

Given the delicate balance between interpretation and law creation, it is critical to establish parameters that guide the work of constitutional jurisdiction. To avoid judicial overreach, courts must adhere to certain key principles.

First, constitutional interpretation must remain tethered to the text itself; deviations from the written provisions should be strictly limited. Second, all interpretations must be logically sound and supported by clear and rational reasoning to prevent arbitrary decision-making. Lastly, constitutional hermeneutics must always align with the principles of reasonableness and proportionality, ensuring that judicial decisions do not stray from the constitutional framework.

These safeguards, while not foolproof, offer a crucial framework for judges to avoid encroaching upon the legislative domain. They are designed to limit the potential for judicial activism by ensuring that the judiciary does not preemptively pursue desired outcomes or usurp the functions of other branches of government. By respecting these boundaries, courts can fulfill their role in a democratic system without compromising the integrity of the Constitution.

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