

JUDICIAL REVIEW IN TROUBLED TIMES: STABILIZING DEMOCRACY IN A SECOND-BEST WORLD*

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Debates over the role of judicial review in a constitutional democracy gravitate to one of two poles. Either the debates are framed in terms of the power of courts countering the outputs of a well-ordered legislative process, or they are framed in terms of minority rights that are ever vulnerable to the tyranny of the majority.

This Article parts company with the customary debate in two ways. First, the inquiry focuses on the structures of democratic governance rather than the relation between a governing majority and the rights of disfavored individuals or minorities. Second, and contrary to the conditions assumed by critics of judicial review such as Jeremy Waldron and Richard Bellamy, this Article aims to look directly to the “contaminated” domain of our lived experience in the moment rather than an idealized vision of well-ordered parliamentary sovereignty. Especially in a time of populist challenges to the institutionalization of democratic politics, the role of constitutional courts as potential brakes on the politics of immediacy takes on greater and greater significance.

Relying on examples from jurisdictions around the world, this Article sets out three types of interventions ranging in terms of how problematic they are for democratic governance. First is the use of constitutional review to prevent entrenched officeholders from undermining their electoral accountability, as seen in places as far removed as Taiwan and North Carolina. The second is the role of court interventions to bolster what is termed the “soft power” of democracy in which institutional norms compel a politics of negotiation and compromise. Finally, there is the temptation for courts to substitute judicial authority for failing state competence of democracies in general, and of the legislative branches in particular.

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In each case, this Article examines judicial review to determine to what extent the judiciary can serve as an institutional buffer in protecting democracy against systemic failure, sometimes on matters that may pertain to fundamental liberties but more often on questions of the exercise of governmental authority. The question here is whether, in times of challenge to democratic functioning, the judiciary may play a stabilizing role in warding off temporary political expedients that threaten governmental integrity. The term “stabilization” invokes the role of a central banker charged with maintaining fiscal integrity in the face of inevitable partisan demands for unsustainable short-term returns. In turn, the inquiry is whether judicial interventions in defense of the structural integrity of democratic rule can be thought of in similar terms of conservatorship by a semi-independent entity and, in turn, how this institutional role of the judiciary might be utilized in times of systemic stress.

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INTRODUCTION

Too much American constitutional law engages a ritualized set of exchanges over judicial review. Even when stripped of the normative valence as a defense or critique of *Brown*, or *Roe*, or *Lochner*, or *Dred Scott*, the arguments loop back onto themselves. At bottom is always the concern over the legitimacy of judicial arrogation of the power to set aside the desired objectives of the democratically accountable political branches. The countermajoritarian dilemma is the shorthand for the peculiar ability of the weakest branch of government to claim a privileged, if not monopolistic, power to invoke constitutional authority as the supreme law of the land. This Article argues that judicial review may play a critical role in stabilizing democratic governance for reasons not having to do with rights preservation or with the usurpation of political authority from the elected branches. All democracies carry the seeds of their own fragility, and this Article aims to examine how judicial review can provide stability when these seeds take root. Rather than assume away threats to democratic order, this Article will ground itself in the real, imperfect world of threatened democracy.

More than a half century after Alexander Bickel published his field-defining monograph, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*,¹ the debates in American constitutional law continue unabated. Oddly, the American “obsession,” as framed by Barry Friedman,² persists even as the rest of the democratic world has assumed the centrality of constitutional courts in framing the post-World War II democratic order. All postwar democracies feature an apex court with the power to review the constitutionality of legislation, a marked departure from the status quo prior to World War II, in which the United States stood largely isolated in the scope of its judicial power of constitutional invalidation of legislation.³ Indeed, in the “third wave”⁴ of democratic creation after the fall of the Soviet Union, the centrality and power of these courts has only increased.⁵ As set out in my work, *Fragile*

1. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962) (“The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there.”).

2. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 155 (2002).

3. DIETER GRIMM, *CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE* 199 (2016).

4. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 3–5 (1991).

5. Although it is hard to measure in the full light of actual practice, one estimate is that over eighty percent of countries now have a high court with the judicial review authority to strike down offending legislation. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 *J.L. ECON. & ORG.* 587, 587 (2013).

Democracies,⁶ there is not much logic in creating a tribunal with jurisdiction targeted at the constitutionality of governmental conduct if the aim is not to invite judicial review of the political branches.⁷ One does not give a carpenter a hammer without anticipating that he will soon start finding nails.

And yet, the customary debate persists. The current malaise of democratic governance is a good time to reengage the questions over the role of judicial review, understood here as the institutional capacity of an apex court to limit the boundaries of political choice. The analytic impulse that follows is exactly the opposite of the organizing principle for much of the debate about judicial oversight. My colleague Jeremy Waldron forcefully defines the core theoretical debate as one searching for “some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society.”⁸ Such an approach assumes “a democratic culture and electoral and legislative institutions in reasonably good working order”⁹ as a precondition to the question of “what reason can there be for wanting to set up a nonelective process to review and sometimes override the work that the legislature has done?”¹⁰ For another leading critic of judicial intervention, Richard Bellamy, the ideal condition could be threatened by declines in turnout and party membership, an electorate that is “too vast and diverse,” and a scale of government “too large for citizens to be able effectively to relate to each other.”¹¹ For both Waldron and Bellamy, so long as the democratic preconditions are met, only legislatures provide “an equitable process for deciding between individuals’ often competing claims.”¹² As Bellamy elaborates, “the basic components of such an arrangement consist in citizens having an equal vote in common elections where political parties compete for the people’s vote and electoral and legislative decisions are made by majority rule.”¹³

For Bellamy, the debate over judicial constitutionalism begins axiomatically with the proposition that “[c]entral to legal constitutionalism is the idea of constitutional rights.”¹⁴ This is a common assumption shared across the various positions on judicial review. On the other side of the ledger, arguments for judicial intervention to overcome the deficiencies of democratic

6. See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 189–213 (2015).

7. *Id.*

8. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1352 (2006) [hereinafter Waldron, *Core of the Case*].

9. *Id.* at 1362.

10. *Id.*

11. RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* 260–61 (2007).

12. *Id.* at 212; see Waldron, *Core of the Case*, *supra* note 8, at 1346.

13. BELLAMY, *supra* note 11, at 219.

14. *Id.* at 15.

processes usually begin (and end) with the key concern that a too-powerful majority will see no electoral incentive to safeguard the interests of a disfavored minority. On this view, judicial review invoking a higher-order legal authority is a necessary corrective for the concern over discrete and insular minorities facing the disregard of a tyrannous majority. Even here, the discussion takes on a stylized character at high levels of abstraction. As Theunis Roux notes, “[T]he wide array of pathologies in the functioning of representative institutions, including the poor quality of deliberation in such institutions, makes it impossible to generalise about the relative merits of judicial versus legislative attention to rights.”¹⁵

This Article parts company with the customary debate in two key ways. First, this Article addresses the structures of democratic governance rather than the relation between a governing majority and the rights of disfavored individuals or minorities. Judicial review is examined to determine to what extent the judiciary can serve as an institutional buffer in protecting democracy against systemic failure, sometimes on matters that may pertain to fundamental liberties, but more often on questions of the exercise of governmental authority. The question here is whether in times of challenge to democratic functioning the judiciary may play a stabilizing role in warding off temporary political expedients that threaten governmental integrity.

Judicial review is one of many mechanisms that remove from direct and immediate democratic accountability institutions that may be predictability compromised in the press of political expediency. The term “stabilization” invokes the role of a central banker charged with maintaining fiscal integrity in the face of inevitable partisan demands for unsustainable short-term returns. In turn, the inquiry is whether judicial interventions in defense of the structural integrity of democratic rule can be thought in similar terms of conservatorship by a semi-independent entity.

The second point of departure follows, and here the aim is to look directly to the “contaminated” domain of our lived experience in the moment. To quote Roux again, “The question whether judicial review would be morally justified if various assumptions hold is in any case not the question that these societies actually confront.”¹⁶ The critical inquiry is not an idealized world of healthy parliamentary exchange but the current disabilities of democratic governance in nearly all states ruled by popular sovereignty. Were we to live among the angels, as Madison once noted, institutional constraints would be unnecessary.¹⁷ In the second-best domain of real-world conflict and uncertainty, the discussion

15. Theunis Roux, *In Defence of Empirical Entanglement: The Methodological Flaw in Waldron’s Case Against Judicial Review*, in *THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM* 203, 203 (Ron Levy et al. eds., 2018) [hereinafter Roux, *In Defence of Empirical Entanglement*].

16. *Id.* at 209.

17. *THE FEDERALIST* NO. 51, at 252 (James Madison) (Terrence Ball ed., 2003).

should move beyond Platonic ideals.¹⁸ Rather than assuming the operation of a healthy democracy running on all of its institutional gears, I begin with the real-world observation that all is not well in the house of democratic governance. In accepting neither the health of democracy nor the centrality-of-rights concerns as the analytic point of departure, it is my aim to take the debate over judicial review off of its customary theoretical mooring and ground it in the messy reality of lived experience.

Each point of departure asks not about the idealized vision of how individual rights are best protected in a democratic culture but rather what the institutional role of the judiciary might be in times of systemic stress. This alters the analytic framework substantially. Virtually the entire debate over judicial review is framed in the language of rights discourse that dominated constitutional thought in the second half of the twentieth century. The rights focus is not only jurisprudential, most notably in the work of Ronald Dworkin,¹⁹ but is also found in the practical application of constitutional adjudication in the American context. Whether the object of debate is *Brown*²⁰ or *Roe*²¹ or *Heller*,²² the claim is always that certain rights are so centrally guaranteed to the citizenry that the judiciary not only *may*, but indeed *must*, be the Herculean guarantor of the deepest constitutional values of the society. As a general matter, the rights claims reject Waldron's invitation to compare the practical and legitimacy gains from allowing the democratic institutions of the society to take up the definitional dimensions of citizenship. Certain matters are simply outside the democratic bargain once embroidered as human rights or constitutional entitlements.

The argument about a structural role for judicial engagement is not new. It was anticipated in John Hart Ely's classic recounting of the *Carolene Products* footnote to focus less on the characterization of discrete and insular minorities and more on the conditions disabling the capacity for democratic self-repair.²³ For Ely, the critical justification for judicial intervention was the preservation

18. See Mark Tushnet, *How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49, 49 (2010) (comparing core cases for and against judicial review and concluding that the authors' "different dispositions" lead them to "characterize their quite similar positions in [a] dramatic 'against-for' manner").

19. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 4 (1977) (discussing the persistent focus on jurisprudence); RONALD DWORKIN, *LAW'S EMPIRE* 1–3 (1986) (discussing judicial power and interpretation).

20. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

21. *Roe v. Wade*, 410 U.S. 113 (1973), *holding modified by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

22. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

23. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980).

of democratic competition and electoral accountability.²⁴ In turn, the focus on the preservation of the structural integrity of democracy was the key move in recapturing a slice of American constitutional law under the rubric of the law of democracy.²⁵ And, as Rosalind Dixon noted, that same approach underlies the extension of a non-rights-based look at the role of constitutional courts in fragile democracies—what she termed the international turn in the law of democracy canon.²⁶

Less evident is the other half of the attack on judicial review. Here the question is what happens if democracy is not in full working order? Does it make a difference for the critics of judicial review if the question is not posed in the first-best world of perfectly working institutions, but rather in the second-best world in which democratic institutions are failing? The world of the second best is always treacherous. But even economists willing to entrust just about all human engagements to self-realizing market exchanges reserve a special place for market failure. Despite the many debates over when and under what circumstances markets do indeed fail, even the most ardent of free marketeers recognize the role for a regulatory intervention when markets are dominated by noninternalizable externalities, by underproduction of public goods, or by anticompetitive collusive behavior.²⁷ Is there a corresponding concept of democratic failure, conditions that command an institutional response to the inability of democratic institutions to play their assigned role?

Shifting the debate over judicial review into the domain of the second best does not yield easy answers about how far judicial intervention may go in the name of curing institutional process failure. The most sophisticated challenge to democratic integrity comes in the powerful and disturbing application of public choice theory by Justice Luis Roberto Barroso of the Supreme Federal Court of Brazil (“STF”).²⁸ For Justice Barroso, institutional failure is not an

24. *Id.*

25. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 8–9 (5th ed. 2016).

26. See Rosalind Dixon, *‘Politics as Markets’ Goes Global*, JOTWELL (Feb. 12, 2016), <https://intl.jotwell.com/politics-as-markets-goes-global/> [<https://perma.cc/Z5ZH-66JS>] (reviewing SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015)); see also ISSACHAROFF, *supra* note 6, at 189–213.

27. See ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 48 (2018) (“Western liberals concluded that capitalism, whatever its limitations, was the superior method of economic organization. The best approach to monopoly was antitrust law, . . . regulation, and limited state ownership in the most important industries.”).

28. Luís Roberto Barroso, *Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts*, in *DEMOCRATIZING CONSTITUTIONAL LAW* 71, 79–80 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016) [hereinafter Barroso, *Reason Without Vote*]; see Luís Roberto Barroso, *Counter-majoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 67 AM. J. COMP. L. 109, 128 (2019) [hereinafter Barroso, *Counter-majoritarian*] (“[I]t should

episodic feature of legislative democracy but an ever-present attribute of the ability of concentrated sectional claims to defeat the dissipated public interest in the battle for public goods.²⁹ Brazil may represent an extreme example³⁰ with more than a third of the national legislature under indictment for corruption;³¹ with the last three presidents successively in prison,³² impeached,³³ and having left office with a five percent approval rating in the face of massive corruption scandals;³⁴ and with a current president pushing the boundaries of the spectrum of acceptable democratic leaders.³⁵ But Barroso does not raise an episodic question about Brazil in a moment of political crisis. Rather, he offers a well-grounded concern about special interest capture of the regulatory capacity of democratic states.³⁶ If such capture is endemic to the political branches, posits Barroso, then perhaps the judiciary is the sole branch immune from political distortions.³⁷ From this follows a stirring defense of the social rights activism of some of the more engaged apex courts around the world, notably Brazil and Colombia.³⁸

My aim here is to resist both of these polar roles for the judiciary as exemplified by Waldron and Bellamy on one end and Barroso on the other. I want neither passivity in the hope that idealized visions of parliamentary sovereignty will emerge nor overarching intervention into the allocation of

not be surprising that the Supreme Court, though not as a general rule, functions as an interpreter of social sentiment.”)

29. Barroso, *Countermajoritarian*, *supra* note 28, at 128–29.

30. Jonathan Watts, *Operation Car Wash: Is This the Biggest Corruption Scandal in History?*, *GUARDIAN* (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history> [<https://perma.cc/TTH9-DX97>].

31. See Ricardo Brito & Lisandra Paraguassu, *Brazil Judge Orders Corruption Probe into a Third of Temer’s Cabinet*, *REUTERS* (Apr. 11, 2017), <https://www.reuters.com/article/us-brazil-politics-probes-idUSKBN17D2KB?il=0> [<https://perma.cc/TW2K-SXQ8>].

32. Manuela Andreoni, Ernesto Londoño & Shasta Darlington, *Ex-President ‘Lula’ of Brazil Surrenders to Serve 12-Year Jail Term*, *N.Y. TIMES* (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/world/americas/brazil-lula-surrenders-luiz-inacio-lula-da-silva.html> [<https://perma.cc/UD7C-9MF8> (dark archive)].

33. Catherine E. Shoichet & Euan McKirdy, *Brazil’s Senate Ousts Dilma Rousseff in Impeachment Vote*, *CNN* (Sept. 1, 2016), <https://www.cnn.com/2016/08/31/americas/brazil-rousseff-impeachment-vote/index.html> [<https://perma.cc/6UR5-DZ2X>].

34. Lisandra Paraguassú & Anthony Boadle, *Brazil President’s Popularity Mired at Lows in Election Year: Poll*, *REUTERS* (Apr. 5, 2018), <https://www.reuters.com/article/us-brazil-politics-poll/brazil-presidents-popularity-mired-at-lows-in-election-year-poll-idUSKCN1HC1RL> [<https://perma.cc/3567-8CAM>] (noting that then-President Michel Temer’s approval rating had dropped to five percent).

35. See generally Claire Felner & Rocio Cara Labrador, *Brazil’s Corruption Fallout*, *COUNCIL ON FOREIGN REL.* (Nov. 7, 2018), <https://www.cfr.org/background/brazils-corruption-fallout> [<https://perma.cc/3FHL-M6CD> (dark archive)] (detailing corruption in Brazil’s top levels of government).

36. Barroso, *Countermajoritarian*, *supra* note 28, at 128–29.

37. *Id.* at 129–30.

38. *Id.* at 130–33.

government services and resources in the name of state incapacity. Hopefully, there is a middle ground in which democratic debility necessitates heightened judicial scrutiny without substituting judicial command for democratic self-governance. In particular, the rise of populist demands, fueled by a noninstitutional sense of a plebiscitary mandate, makes the modern role of the judiciary an all the more pressing issue.

This Article presents three different circumstances in which democracies may be under serious challenge: when attempts are made to end or frustrate electoral accountability of the governors, when the norms of democratic governance are undermined, and when there is manifest disregard for the interests of predictable sectors of the population. When executive overreach, populist extremism, or loss of legislative competence pushes courts into the breach, the need for judicial intermediation presents itself most directly. What follows is an attempt to sort through the messy reality of judicial review as a response to democratic incapacity in the unfortunately very real world that surrounds us.

I. ASSUMING A WELL-FUNCTIONING DEMOCRACY, OR NOT

In addressing the role of judicial review in the second-best world of political reality, it is useful to highlight the points of departure between the idealized versions of democratic governance and what we actually have. The title of this Article speaks of “troubled times,” and some attention needs to be directed at how the troubles play out in terms of the demands made upon the judiciary.

A. *Idealized Democracies*

There is great value in examining idealized social engagements to elucidate the nature of the lived experience. Most famously, Ronald Coase explored the behavior of firms in a hypothesized world free of transactions costs, not so as to claim that such a world did or should exist, but in order to examine how firms behave in response to the reality of transactional hurdles in every aspect of their existence.³⁹ In Waldron’s case, the equivalent transaction-cost-less democratic order is characterized thusly:

This society has a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis. I assume that this legislature is a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy. The legislators deliberate and vote on public issues, and the procedures for lawmaking are elaborate

39. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937); R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 15–19 (1960).

and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting. I assume that these processes connect both formally (through public hearings and consultation procedures) and informally with wider debates in the society.⁴⁰

These preconditions are certainly recognizable from contemporary democracies, at least aspirationally. The list understates the critical role assumed by intermediary institutions, most notably political parties. Indeed, as famously formulated by E.E. Schattschneider, “political parties created democracy and that modern democracy is unthinkable save in terms of the parties.”⁴¹ For Waldron, parties are more the mechanism for legislators to rise above parochial demands,⁴² as famously formulated by Edmund Burke in his address to the electors of Bristol.⁴³

On the other hand, the demand for bicameralism as a necessary condition is a bit odd, as it would exclude from the debate Israel and New Zealand and allow for the inclusion of Great Britain only by virtue of the House of Lords, an institution certainly lacking in democratic pedigree.⁴⁴ If democratic legitimacy emerges from the open process of selection of the governors by the governed, the exacting specificity of bicameralism appears out of place.

On closer inspection, however, the inclusion of bicameralism and the diminished role of political parties is not so much idiosyncratic or mistaken as unexplained.⁴⁵ Waldron’s exclusive focus on judicial review results in the understatement of any theory as to what these other institutional preconditions are supposed to accomplish. Let me now essay to fill in the picture of proper democratic governance against which judicial intervention is juxtaposed.

There are two organizing principles to Waldron’s list of democratic preconditions. One may take issue with the bill of particulars, and certainly there are long historic debates about “thin” versions of democracy turning on elections with a broad franchise versus “thick” versions that carry an expandable list of social rights, minimum entitlements, and other elements that enrich civic

40. Waldron, *Core of the Case*, *supra* note 8, at 1361.

41. E.E. SCHATTSCHEIDER, PARTY GOVERNMENT 1 (9th prtg. 1959).

42. Waldron, *Core of the Case*, *supra* note 8, at 1361 (“I assume too that there are political parties, and that legislators’ party affiliations are key to their taking a view that ranges more broadly than the interests and opinions of their immediate constituents.”). By contrast, Richard Bellamy offers a more classic account of parties as mediating competing interests and helping stabilize agenda setting in the legislative arena. BELLAMY, *supra* note 11, at 236–37 (citing Michael D. McDonald, Silvia M. Mendes & Ian Budge, *What Are Elections For? Conferring the Median Mandate*, 34 BRIT. J. POL. SCI. 1, 1–26 (2004)).

43. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 89, 94–98 (London, John C. Nimmo ed., 1887).

44. JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 72–73 (2016) [hereinafter WALDRON, POLITICAL POLITICAL THEORY].

45. For a more theoretical grounding for bicameralism, see *id.* at 72–92.

life.⁴⁶ Whether on Waldron's account or under a thicker version of democratic society, we can distinguish between the process of electoral choice of governors and the mechanisms that steer the governors toward a respect for the dignity of all citizens.

As with most accounts of democracy, Waldron begins with the central role of elections and the franchise.⁴⁷ The participation of the citizenry in self-governance through the electoral process sets the foundation for democracy. Elections allow the citizens to assess retrospectively the success of the most recent governors. Universal suffrage and periodic elections are elements that contribute to a Schumpeterian obligation of the governors to be accountable to the citizenry⁴⁸ as well as the capacity of the citizenry to respond retroactively by "throwing the rascals out."⁴⁹ Indeed, for political scientists such as Adam Przeworski and his collaborators, the fact of having at least twice removed incumbent politicians by electoral means is the operational definition of democracy.⁵⁰ The voting aspect offers citizens the renewal of consent, in Bernard Manin's formulation,⁵¹ such that the continued exercise of state authority may assume political legitimacy. To this might be added a series of rights guarantees that are essential to democratic choice, including freedoms of speech and press, the capacity to organize political parties, and the ability to assemble in furtherance of political expression. This first set of principles is well trod in political theory and is premised on the central role of citizen voting that underlies any theory of democracy. These are the structural components of democratic governance, including the familiar separation of powers among branches of government that have different electoral constituencies together with formal rights guarantees established through constitutional design.

Less clearly identified is the second set of preconditions. Requirements of bicameralism, ongoing debate, committee structures, and the like do not go to the process values of accountability. These are elements of a concern about democratic *governance* rather than democratic *election*. With the exception of bicameralism, these tend not to be constitutionally entrenched but emerge

46. See DAVID F. J. CAMPBELL, *THE BASIC CONCEPT FOR THE DEMOCRACY RANKING OF THE QUALITY OF DEMOCRACY 20* (2008) (reviewing various definitions of democracy ranging from "thin" to "thick").

47. WALDRON, *POLITICAL POLITICAL THEORY*, *supra* note 44, at 125–26.

48. See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (Routledge 2010) (1943) ("[T]he role of the people is to produce a government, or else an intermediate body which in turn will produce a national executive or government . . . [T]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.")

49. G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 47 (2000).

50. See ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 18–30 (2000).

51. BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 176 (1997).

instead from trial and error and the resulting lived institutional experience of particular democratic governments. Each of the listed attributes, and others such as filibuster rules and supermajority requirements for certain legislative enactments, are efforts to compel a broader consensus for governance. Elections serve primarily to create a momentary majority (or plurality) that will assume office. Rules concerning how governmental power will be exercised define the limits of office and the requirements of political consensus. In turn, these governance rules evince a substantive concern with moderation and stability in the discharge of governmental functions.

Democracies allow a broad swath of private citizen behavior and decisionmaking. Legitimate governance offers citizens the ability to carry on ordering their private affairs under a knowable set of societal commitments to a rule of law. Ultimately, law seeks to permit the citizenry to form justifiable expectations about rights, security, and freedom from arbitrary state action. Unlike plebiscitary governance, which may permit radical swings in programmatic commitments, institutionalized democratic governance provides what James Madison hailed as the virtues of “filtration” of popular sentiment through institutional intermediation.⁵² Committee structures, bicameralism, staggered election cycles, federalism, and separation of powers are instruments that delay the implementation of momentary popular preferences until they command sufficient support, measured in terms of both the intensity of the majority commitment and its endurance over time. In the perhaps apocryphal exchange between George Washington and Thomas Jefferson, Washington likened the need for a second legislative chamber to Jefferson’s custom of pouring hot coffee from cup to saucer: after passage by the popularly accountable House, explained Washington, “we pour our legislation into the Senatorial saucer to cool it.”⁵³

From this perspective, two aims are served by submitting democratic governance to constitutional constraints. Constitutionalism serves to secure both the process values of periodic accountability and the substantive aim of checking the ability of a majority to get its political way too readily.⁵⁴ But constitutional law does only part of the work. The formal structures of

52. NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* 112–15 (2017).

53. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 194 (1928).

54. See, e.g., Andrew Geddis, *Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change*, 14 INT’L J. CONST. L. 99, 99–118 (2016) (examining New Zealand’s government and arguing that New Zealand has “an ongoing popular constitutional preference for a supreme legislature and active government primarily restrained through accountability to the general public”); see also Jack H. Nagel, *Expanding the Spectrum of Democracies: Reflections on Proportional Representation in New Zealand*, in *DEMOCRACY AND INSTITUTIONS* 113, 113–14 (Markus M. L. Crepaz, Thomas A. Koelble & David Wilsford eds., 2000) (discussing New Zealand’s electoral reform of proportional representation).

governance, such as the composition of the legislative branch and the formal powers of the executive, are customarily specified in the formal writing of a constitution. Were a government to suspend the operation of parliament, or override judicial review altogether,⁵⁵ there would be little question that any claim to democratic legitimacy would be foregone for the executive that pursues such a course, with or without tanks in the street. This is the narrow view of constitutional democracy as providing for a series of structural guarantees that are often the subject of judicial oversight.⁵⁶

But other important features of democratic stability are less evident, ranging from the internal procedures of the parliament to such measures as the filibuster or the “blue slip” in the American Senate, all mechanisms that should compel negotiation and compromise between the majority and the minority. These latter mechanisms go not to the core principle of electoral accountability but to the discharge of responsible governance. These norms of restraint form the “spirit” of democratic governance, to borrow from Montesquieu,⁵⁷ without which political stability could not exist. Thus, from Waldron, we have concern that New Zealand’s practice of allowing a unicameral legislature strays from the deliberative ideal by allowing proposed legislation to be “enacted in a single sitting, and that means we lose the point of having successive layers of debate and voting, which is supposed to be a way of slowing down the enactment of a Bill, a kind of compulsory waiting period.”⁵⁸

The existence of the above two sets of preconditions for stable democratic governance does not speak for or against judicial review. These are instead mechanisms that temper the democratic necessity of majoritarian rule by diminishing the risk of the tyranny of that same majority. Among this set of accommodations may be found the guarantees of quality of life for all citizens that thicken some accounts of democratic legitimacy. The mechanisms that compel democracies to care for all their citizens, including those unable to prevail in the electoral arena, may be thought of as the “soft power” of a constitutional democracy. For classic thinkers like Montesquieu, “[T]he hard architecture of political institutions might be enough to constrain overreaching power—that constitutional design was not unlike an engineering problem”⁵⁹ In practice, however, successful democracies embroider the hard

55. See John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 216, 232 (2004).

56. See, e.g., *INS v. Chadha*, 462 U.S. 919, 945–46 (1983) (discussing Article I of the United States Constitution and the importance of separation of powers).

57. See generally BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

58. Jeremy Waldron, *Compared to What? Judicial Activism and New Zealand’s Parliament*, 2005 N.Z. L.J. 441, 442 [hereinafter Waldron, *Compared to What?*].

59. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 212 (2018) (characterizing Baron de Montesquieu’s 1748 treatise, *The Spirit of the Laws*).

architecture with a series of norms and institutionalized practices that slow down the risk of partisan exuberance and allow for stable governance over time and over shifting election results.

B. *Real Democracies*

The procedures and conditions that emerge from how democracies actually work are the “guardrails” of modern democratic governance, in Levitsky and Ziblatt’s useful formulation,⁶⁰ that provide important constraints on majoritarian excess far beyond the formal structures of constitutionally mandated institutions. Indeed, the erosion of such soft power in the face of plebiscite-like demands for the immediate satisfaction of majoritarian demands may be the greatest contemporary threat to democracy. With the weakness of the legislative branches and the rise of the executive, these “guardrails” may prove vulnerable to the populist wave, which in critical ways overwhelms the customary limitations on the exercise of constitutional power. These guardrails are somewhat evident in the selection process that defines democratic culture. But there are further guardrails that check the exercise of democratic authority by those elected in such a way as to restrain extremism. When these customary limits and conditions are threatened, as they often are in the messy and second-best realm of lived experience, the question of what to do next cannot be answered by assuming the threats do not exist.

As I have addressed elsewhere,⁶¹ the cooling function of legislative debate and accommodation is in disrepair, and institutional checks on temptations for momentary excess must come from elsewhere. Renata Uitz explains that executive power grows when legislatures fail to exercise this cooling function and resolve difficult questions:

The powers of the executive branch to execute the laws . . . are neither self-standing, nor self-explanatory. Rather they are part of a complex web of legislative and executive powers, mended by the judiciary and extended by the political branches based on practical needs, fears, and personal ambitions. Complexity leads to complication and complications are left unresolved under the banner of being (too) complex. This becomes the convenient source of unstoppable executive overreach.⁶²

60. *Id.* at 97–117.

61. See Samuel Issacharoff, *Democracy’s Deficits*, 85 U. CHI. L. REV. 485, 499 (2018) [hereinafter Issacharoff, *Democracy’s Deficits*].

62. ANDRÁS SAJÓ & RENATA UITZ, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* 284–85 (2017); see also Renata Uitz, *Courts and the Expansion of Executive Power: Making the Constitution Matter*, in *THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH* 85, 89 (David Bilchitz & David Landau eds., 2018).

Modern democracies are almost invariably commanded from above by executive authority. In contemporary politics, the risk of undermining norms of governance comes not only from populist insurgents around the world but also from the breakdown of legislatively focused politics. Morris Fiorina compellingly establishes that, in the context of U.S. politics—“given the American constitutional system with its separation of powers, checks and balances, and federalism—a party would have to win and retain an overwhelming majority to implement its platform given all the veto points that can be utilized by the opposition.”⁶³ From this, Fiorina concludes that “[f]ailure to win and hold such . . . majorities produces the stalemate and gridlock that characterize contemporary politics.”⁶⁴

Perhaps. But looking away from the legislative arena, where indeed stalemate and gridlock reign, the actual exercise of political power looks more complicated. Fiorina grounds his analysis in the failure of the legislative branch to play its suited role. The historic premise of the constitutional democracies of the nineteenth and twentieth centuries is the primacy of the legislative branch, denominated by the Article I power in the U.S. setting. Legislative weakness invites capture of government authority by the executive, a tendency for policy to be initiated through regulation or decree rather than legislation. These executive-dominated governments look to elections as a mandate rather than as the normal process of parliamentary ups and downs.⁶⁵ And these executives see the legislature as an obstacle to moving ahead with executive prerogatives. A legislature that does not deliver risks being overwhelmed by the executive branch. It does not matter that legislative inaction may result from the fracturing of the political parties capable of negotiating for the public good, the sheer dysfunction of the legislature, a political disagreement with the agenda of the executive, or the inability to cohere on a policy initiative in the face of internal political disagreement. An executive riding a populist wave would not distinguish among the sources of legislative inaction and would instead see each sign of legislative reprobation as an unwarranted threat to the executive’s electoral mandate.

Without the primacy of legislative authority, the legitimacy and support of democratic governance erodes. The ensuing period of “democratic decline” allows a populist leader to launch “a concerted and sustained attack on institutions whose job it is to check his actions or on rules that hold him to account.”⁶⁶ As Kim Lane Scheppele explains, such a populist leader “does so in

63. MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 85 (2017).

64. *Id.*

65. See Robert Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 360 (1990).

66. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 (2018) [hereinafter Scheppele, *Autocratic Legalism*].

the name of his democratic mandate. Loosening the bonds of constitutional constraint on executive power through legal reform is the first sign of the autocratic legalist.”⁶⁷

Separating the functions of democratic election from democratic governance highlights the risk posed by legislative decline. Running a successful democracy is not simply a matter of getting elected but of delivering the goods, of getting things done well. Governments must frequently trade off the immediate satisfaction of demands for the long-term good, whether in infrastructure investments, in wartime privation, or in not indulging in inflationary monetary expansion. The processes of electoral accountability speak primarily to government formation and re-formation. But successful governance is a longer project and state capabilities develop over time. The epistemic challenge to wise democratic stewardship is not a matter of electoral accountability alone but of institutionalized state competence that must at times resist or cool the temporary ardor of the electorate.⁶⁸

Institutional failure invites erosion of democratic norms through efforts to circumvent the process accountability aspects of democratic election or through efforts to unwind the institutional constraints that accompany successful democratic governance. This leads to the core of the argument for judicial scrutiny as a check in periods of democratic decline. The case for judicial intervention is more apparent in the case of efforts to defeat the structural protections of democratic accountability. Whether the judiciary can restore the guardrails of democratic governance is a harder question. And, finally, there is the question whether, once the boundary is crossed for the judicial mandate to include questions of governance, there is a stopping point short of judicial claims to oversee the policy outcomes that ensue. Once the assumption of properly functioning legislative supremacy is relaxed, the leading arguments against judicial review stumble badly when measured against the unfortunately imperfect real world.

II. BASIC STRUCTURES AT PERIL

In the manner that foxes should not be posted at the henhouse door, so it is that deference to the legislative process cannot serve as the answer to systematic assaults on the process of electoral accountability.⁶⁹ There may be great dignity, at least ideally, in the deliberation offered in the legislative

67. *Id.*

68. FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* 472 (2011) (noting that state competence and the liberal rule of law has often been a necessary predecessor for democracy itself).

69. Roux puts it far too politely when he writes: “There is also considerable scope for disagreement about . . . whether legislatures have the capacity for self-correction.” Roux, *In Defence of Empirical Entanglement*, *supra* note 15, at 208.

setting. But there is no dignity in an argument among a band of thieves about how to divide the spoils of rapacious plunder.

There is a lurking empirical claim in the debate about judicial review. Critics are most comfortable positing the dignity of the legislative process abstracted from the messiness of contemporary politics. Yet they nonetheless are quick to point to legislative successes in matters such as Britain or Ireland legislating a right to abortion as proof of the superiority of the parliamentary route.⁷⁰ And it may be that under certain circumstances, for those seeking such social reforms, that “the British constitution provide[s] one of the best opportunities for this to be done, particularly after the introduction of universal suffrage and the reform of the House of Lords in 1911 and 1949 [T]here were no institutional restraints on a legally sovereign legislature and a politically sovereign electorate.”⁷¹ But where democracy yields one-party domination along with ease of constitutional amendment, the historic legacy of parliamentary sovereignty does not appear so rosy. For every Britain, there is a Hungary or Poland or South Africa or India, as this Article develops below.

Nonetheless, it is hard to take issue with the general proposition that the legislature is the preferred democratic route to govern in a democratically legitimate system. It is so evident as to appear tautological. But cherry-picking examples from political history fails to answer two questions that must be addressed once the debate is moved from the premises of first principles to the nasty world of human reality. First, how representative are these cases of legislative self-repair amid the broad swath of experience under the imperfect democracies that populate the world? And, second and more critically, what happens when it is the political branches of government that threaten democratic legitimacy?

A. *Taiwan*

Let me offer a clear example of democracy-enhancing judicial intervention from Taiwan. For much of its post-1949 existence, Taiwan was an unresponsive, dominant-party state controlled and coerced by the Kuomintang (“KMT”).⁷² The democratization reforms of the 1980s allowed for some weak forms of electoral contestation but always under the control of the KMT, which

70. See, e.g., Waldron, *Core of the Case*, *supra* note 8, at 1384–85; Jeremy Waldron, *Legislating With Integrity*, 72 *FORDHAM L. REV.* 373, 389 (2004) [hereinafter Waldron, *Legislating*].

71. K. D. Ewing, *The Unbalanced Constitution*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 103, 104 (Tom Campbell, K. D. Ewing & Adam Tomkins eds., 2001).

72. See Tzu-Yi Lin, Ming-Sung Kuo & Hui-Wen Chen, *Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape*, 48 *H.K. L.J.* 995, 1002–09 (2018) (discussing Taiwanese government history from 1948 until 1987).

remained as dominant as before.⁷³ All this began to change as the KMT's grip on Taiwanese politics began to slip in the face of the first serious political challenges in the late 1990s. As established political power waned, the dominant legislative parties in 1999 tried to cement their hold on power by passing a constitutional amendment allowing them to, in effect, bypass electoral accountability.⁷⁴ Among the lock-in provisions put into effect were two that stand out as an affront to any system of electoral representation. First, all elections for the National Assembly, the constitutional chamber of the bicameral legislature, beginning in 2000 were to be put off for two years—a process by which the legislature voted itself a respite from electoral accountability.⁷⁵ Second, the seats in the National Assembly were to be guaranteed to the parties with representation in the lower chamber (the Legislative Yuan), without any direct election—a form of party entrenchment again removed from electoral accountability.⁷⁶ And, as if to confirm the collusive nature of the power grab, the legislators were permitted to vote for these changes anonymously—thereby undermining the accountability that ensues from parliamentary public debate and voting.⁷⁷

Having removed a large core of political power from democratic contestation, there was no realistic prospect of a legislative solution. The legislature that had just voted to keep the voters at bay was unlikely to restore its own electoral accountability. What then of the prospect for judicial review? As is often the case in dominant-party states, the Taiwan Constitutional Court had remained generally passive throughout the period of exclusive KMT rule.⁷⁸ And even as electoral competition began to stir in the 1990s, the court steered clear of any direct engagement with political power, except at the invitation of

73. A concise account of this development may be found in TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 111–19 (2003) [hereinafter GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES].

74. See Lin et al., *supra* note 72, at 1009–12 (discussing Taiwanese government history from 1987 until present).

75. ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN [ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF CHINA] art. X (1999), translated in *Constitution of the Republic of China (Taiwan)*, OFF. PRESIDENT: REPUBLIC CHINA (TAIWAN), <https://english.president.gov.tw/page/93> [<https://perma.cc/YPV7-H84E>].

76. *Id.*; see PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA 99 (2017).

77. See Yen-Tu Su, Political Antitrust: Rethinking the Constitutional Law of Competitive Democracy 189–90 (May 2010) (unpublished Ph.D. dissertation, Harvard Law School) (on file with author).

78. See Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deference in Defense of Democracy*, 2016 WIS. L. REV. 683, 705 (2016) (highlighting the increased importance of “strategic judicial delay” in the dominant party democracy context); cf. Sujit Choudhry, *He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 1, 3 (2009) [hereinafter Choudhry, *He Had a Mandate*] (noting the difficult questions confronting the South African Constitutional Court in the face of the African National Congress's consolidation of power).

the ruling party and then primarily for managing internal conflict.⁷⁹ All this changed abruptly in early 2000 when, for the first time, a non-KMT candidate won the presidency and ushered in an era of full political competition. As happens in many national settings, contested politics allowed the Judicial Yuan more latitude in resisting dominant-party efforts to lock itself in power.⁸⁰ The Constitutional Court wasted no time seizing upon the fact of genuine political competition to assert its role as the guardian of democratic institutions.⁸¹ Within days of the presidential election, the Constitutional Court issued its decisive ruling in Interpretation No. 499, striking down the legislative efforts at self-entrenchment despite the acts taking the form of a formal constitutional amendment.⁸² Interpretation No. 499 is the first and only time Taiwan's Constitutional Court has invalidated a constitutional amendment.⁸³

Regarding the process, the Constitutional Court noted that the constitution's "amendment greatly affects the stability of constitutional order and the well-being of all people as a whole and, therefore, must be done by the authorized [governmental] body in accordance with constitutional due

79. See YAP, *supra* note 76, at 95–96. The use of courts as internal mediating institutions for autocratic regimes is surprisingly common and underexamined. Perhaps the most striking example is the creation of a constitutional court in Pinochet's Chile to arbitrate among the contending powers of the military regime and thereby avoid the threat of repeated coups upon coups, as in Argentina under the various military regimes from 1976–1983. In an extraordinary turn of historic fate, the Constitutional Court then became a legitimating force that gave the precarious opposition the prospect of organizing against Pinochet's efforts to legitimate his rule through a popular referendum which the court oversaw, and which Pinochet lost, thereby ending military rule. For a riveting account of the Constitutional Court's origins under Pinochet, see generally ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION* (2004).

80. See Dixon & Issacharoff, *supra* note 78, at 695 (noting how weakness of political parties or other actors can "create space for other institutional actors (including courts) to act").

81. The question of how far courts may go in challenging entrenched political authority is invariably a matter of context and subtlety. See *id.* at 688 (arguing that "localized, context-specific factors" determine a court's success, particularly at second-order deferral strategies).

82. See Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. LAW 606, 607–08 (2015) [hereinafter Dixon & Landau, *Transnational Constitutionalism*] (summarizing the unconstitutional constitutional amendment doctrine as the idea that "some constitutional amendments are substantively unconstitutional because they undermine core principles in the existing constitutional order"); see also Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations Towards the Guardian of Constitutionalism and Rule of Law*, in *ASIAN COURTS IN CONTEXT* 143, 170 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015) (analyzing the Constitutional Court's basis for review of constitutional amendments).

83. Compare Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 597, 603 (2016) (arguing that the court has been "sidelined in the arena of constitutional politics" in the twenty-first century), with Lin et al., *supra* note 72, at 1014 (arguing that the court has taken on a "role as the defender of constitutional principles in the face of social dissensus" in the twenty-first century).

process.”⁸⁴ The court concluded that the amendment’s passage was not conducted in a transparent and open manner and that its passage entailed several “clear” and “gross” procedural flaws:

The provisions of the Amendment to the Constitution, as passed by the National Assembly in the pre-dawn hours of September 4, 1999, were voted upon in the Second and Third Readings by anonymous ballots, which violated the procedure for constitutional amendments. Moreover, the voting process had major flaws and was clearly erroneous because the very same provisions had already been voted down during the Second Reading but were brought up again in the Third Reading in a direct violation of the parliamentary rules.⁸⁵

Critically, the opinion did not stop with certain procedural improprieties in the rushed effort to immunize a failing political order from electoral accountability. The court also reviewed the amendment’s substantive conformity with the pre-existing Constitution and held that

[a]lthough the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution’s very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper.⁸⁶

The court found in the lack of electoral oversight the critical constitutional failing, ruling as impermissible “any amendment designed to alter existing constitutional provisions concerning the fundamental nature of governing norms and order” that would compromise “the integrity and fabric of the Constitution itself.”⁸⁷ At bottom, the court held, “delegates must be directly elected by the people to exercise the powers and duties of the National Assembly,” and absent such election, “the amended provisions on the installation of National Assembly delegates violate the constitutional order of democracy.”⁸⁸

The efforts of incumbent powers to use legislation to thwart political challenge is hardly new or confined to Taiwan. Numerous international parallels can be drawn showing the propensity for those in power to insulate themselves

84. Judicial Yuan [J.Y.] Interpretation No. 499, JIESHI (Const. Ct. Mar. 24, 2000) (Taiwan), https://web.archive.org/web/20171025024050/http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499 [<https://perma.cc/AD3J-R8AK>].

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; see also Kuo, *supra* note 83, at 600 (arguing that Interpretation No. 499 is “the foremost example . . . [of the] constitutional politics” of the Taiwanese judiciary).

from electoral accountability. The American experience with gerrymandering is one manifestation but is hardly the most pernicious. Alexander Kirshner uses the 1951 South African law banning voting by “colored voters” to introduce the problem of capture of democratic processes for antidemocratic aims.⁸⁹ A South African court bravely resisted the National Party and held the law unconstitutional, only to have its efforts overwhelmed by the apartheid reforms of the constitution.⁹⁰

In the face of shutting down part of the electoral process as in Taiwan, or excluding internal opponents from the political process altogether, it is hard to argue for the “dignity” of the legislative process, to borrow Waldron’s term.⁹¹ At a minimum, a thin defense of democracy is the avoidance of civil war because the losers of today can emerge victorious in a subsequent electoral round.⁹²

In Taiwan, no such deference to parliament may attach in the case of an incumbent legislative majority that has used its power to suspend elections, turned the constitutional chamber into a permanent fiefdom, and thereby eliminated the electoral accountability that must form the core of any claim to democratic legitimacy. As even Bellamy must concede, under such circumstances, all bets are off: “If matters did indeed get so bad that the democratic system could no longer claim to be either credibly representative of political opinion or responsible and accountable for central matters of public policy, then it would cease to possess the constitutional credentials described here.”⁹³ At its most basic, once elections are suspended or eliminated, it is impossible to claim that there remain “incentives for incumbents to address a wide range of disparate concerns in order to build a broad coalition of supporters.”⁹⁴

B. *India*

The aim in this Article is not to catalogue the many parallel judicial interventions around the world. But India does deserve special mention because of the impact its Supreme Court has had on emerging democracies around the world. The Indian “basic structures” doctrine was an early resistance to the

89. ALEXANDER S. KIRSHNER, *A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATING POLITICAL EXTREMISM* 12 (2014).

90. *Id.*

91. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 5 (1999) [hereinafter WALDRON, *DIGNITY OF LEGISLATION*].

92. *See generally* ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 95 (1989) (“A more reasonable justification for democracy, then, is that, to a substantially greater degree than any alternative to it, a democratic government provides an orderly and peaceful process by means of which a majority of citizens can induce the government to do what they most want it to do and to avoid doing what they most want it not to do.”).

93. BELLAMY, *supra* note 11, at 261.

94. *Id.* at 230.

reaches of Prime Minister Indira Gandhi's emergency measures.⁹⁵ In articulating the internationally influential doctrine, the Indian Supreme Court placed certain core constitutional protections, including the right of judicial review, beyond the reach of not only ordinary legislation but also of the process of constitutional amendment itself.⁹⁶ The nation's Supreme Court concluded that its review of proposed amendments for conformity with its constitution's basic structures is an implied limit on the legislature's amendment power.⁹⁷ In using this new power to resist the state of emergency and one-party rule, the basic structures doctrine "introduced the world to the idea of unconstitutional constitutional amendment, a domain of values so central to democratic governance that alteration was beyond even the power of the constitutional amendment process."⁹⁸

When the government attempted to place constitutional amendments beyond judicial review,⁹⁹ the Indian Supreme Court then held the legislature could not grant itself unlimited power to amend the constitution and that the Supreme Court was competent to review amendments to determine whether they were so radical as to destroy the constitution's basic structures and thus amount to a change greater than a mere "amendment."¹⁰⁰

The basic structures doctrine has been employed not only in response to attempts to limit the Indian Supreme Court's power but also in response to amendments aiming to entrench executive power and evade electoral accountability.¹⁰¹ For example, after the High Court of Allahabad found Indira Gandhi, the recently elected prime minister, guilty of corrupt election practices and barred her from holding office or running for reelection for a period of six years,¹⁰² then-President Fakhrudeen Ali Ahmad declared a state of emergency,

95. SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 225 (2009).

96. See *Golaknath v. State of Punjab*, (1967) 2 SCR 762, 814–15 (India). For a discussion of the limitations on amendments trenching on structural protections in the Indian Constitution, see Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP. L. REV. 55, 93–94 (2009). For the doctrinal emergence of the basic structures doctrine, see Madhav Khosla, *Constitutional Amendment*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 232, 232–50 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

97. *Golaknath*, 2 SCR at 814–15; see also KRISHNASWAMY, *supra* note 95, at 24–26 (2009) (noting the importance of implied limitations for constitutional amendments).

98. ISSACHAROFF, *supra* note 6, at 163; see also Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 660 (2013) (arguing that "the global trend is moving towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power").

99. INDIA CONST. art. 368, amended by The Constitution (Twenty-Fourth Amendment) Act, 1971.

100. *Bharati v. State of Kerala*, (1973) 4 SCC 225, 365 (India).

101. See *Gandhi v. Narain*, (1975) 2 SCR 354 (India).

102. *Id.* at 349.

and the government passed an amendment that would have given Parliament power to regulate elections, including the basis for judicial challenges of elections, and would render previous legal proceedings adjudicated under the old laws void.¹⁰³ The amendment was challenged in the Supreme Court of India.¹⁰⁴ The court held that the amendment and emergency measures were impermissible because they violated core principles like democracy and free and fair elections, which are integral to the constitution's overall design.¹⁰⁵ Since its early development in India, the basic structures doctrine, and other substantially similar judicial doctrines, have been used by courts in India and around the world to protect against both attacks on the powers of constitutional courts and attacks on democratic processes more broadly.

C. *Emerging Democracies*

Preserving the core basic structures of democratic accountability provided the organizing principle for a dramatic series of decisions in recent years in which apex courts have struck down even procedurally proper constitutional amendments. The Colombian Supreme Court successfully rejected the excessive concentration of executive power when President Uribe tried to amend the constitution to allow himself a third term.¹⁰⁶ Eastern European courts slowed the process of political exclusion of governmental enemies through lustration laws and language requirements for representation in parliament.¹⁰⁷ The list goes on, and the scholarship on judicial intervention in such fragile or compromised democracies has become substantial in recent years.¹⁰⁸ At its most far-reaching, constitutional courts have developed a

103. INDIA CONST. art. 329, amended by the Constitution (Thirty-Ninth Amendment) Act, 1975.

104. *Gandhi*, 2 SCR at 349–50.

105. See *id.* at 350–51. For an analysis of the basic structural features of the Indian Constitution, see generally KRISHNASWAMY, *supra* note 95, at 137–42. For a discussion of the necessary basic structure principles featured in the Indian Constitution articles known as the “golden triangle,” see generally Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49 J. INDIAN L. INST. 365, 372–73 (2007).

106. For additional information regarding a Colombian constitutional amendment for election terms, see Dixon & Issacharoff, *supra* note 78, at 716–19.

107. For a discussion of lustration laws and their application in various Eastern European countries, see generally ROMAN DAVID, *LUSTRATION AND TRANSITIONAL JUSTICE: PERSONNEL SYSTEMS IN THE CZECH REPUBLIC, HUNGARY, AND POLAND* 65–92 (2011).

108. See, e.g., ISSACHAROFF, *supra* note 6, at 65–66, 147–49, 181–82 (examining Turkey, Colombia, and South Africa, among others); Choudhry, *‘He Had a Mandate,’ supra* note 78, at 2–4 (South Africa); Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 18, 18–44 (Mark Tushnet & Madhav Khosla eds., 2015) [hereinafter Choudhry, *How to Do Constitutional Law*] (India); Melissa Crouch, *Dictators, Democrats, and Constitutional Dialogue: Myanmar’s Constitutional Tribunal*, 16 INT’L J. CONST. L. 421, 432 (2018) (Myanmar); Rosalind Dixon & Tom Ginsburg, *Comparative Constitutional Law in Latin America: An Introduction*, in COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 3 (Rosalind Dixon & Edward Elgar eds., 2017) (Latin America); Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 458–59, 501 (2018) (India, South America, and

doctrinal framework for rejecting “unconstitutional constitutional amendments” that, even if presented in a procedurally proper manner, so challenge the integrity of further democratic accountability as to be rejected on that basis.¹⁰⁹

The Indian Supreme Court’s doctrine of preserving the basic structures of democratic accountability then provides the framework for the assertion of judicial challenges to one-party rule in countries like Malaysia, which again, as in Taiwan, corresponded to the fracturing of the ruling party’s lock-hold on power.¹¹⁰ In Malaysia, the Federal Court (the constitutional high court) even ventured into the fraught area of religious authority, declaring that judicial review and constitutional interpretation are “pivotal constituents of the civil courts’ judicial power” and that “[a]s part of the basic structure of the constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendments, Act of Parliament or state legislation.”¹¹¹ As with the initial formulation of the basic structures doctrine in India, and as repeated in many invocations around the world, the Malaysian Federal Court proclaimed its basic structure to invalidate a constitutional amendment that would have stripped the judiciary of the power to review and invalidate certain categories of legislation.¹¹²

Categorical critics of judicial review tend not to address the problem of the “third wave”¹¹³ of democracy formation in which the background in autocracy or ethnic conflict yields deeply imperfect democratic institutions. Bellamy, for example, simply posits away all the work of modern democracies in forging a democratic polity.¹¹⁴ In his view, political failure “tend[s] to arise out of resistance by certain territorially based cultural, religious, ethnic and socio-economic minorities to rule by a national majority.”¹¹⁵ In these situations, “the absence of a common political identity with their fellow citizens within the cultural majority may undercut a minority’s ability to form alliances with them

Zimbabwe, among others); Po Jen Yap, *Courts and Elections in Asia*, in JUDICIAL REVIEW OF ELECTIONS IN ASIA 1, 5–6 (Po Jen Yap ed., 2016) [hereinafter Yap, *Courts and Elections*] (East Asia).

109. Dixon & Landau, *Transnational Constitutionalism*, *supra* note 82, at 615–618 (detailing an example from Colombia).

110. See, e.g., *Rasiah v. Badan Peguam Malaysia & Anor*, (2010) 3 CURRENT L.J. 507, 517 (F.C.) (Malay.) (“Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional.”).

111. Yvonne Tew, *Courts and Constitutional Adjudication in Contemporary Malaysia and Singapore* 43 (Aug. 20, 2019) (unpublished manuscript) (on file with author) (internal quotation marks omitted) (quoting *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.*, (2018) 1 MALAYAN L.J. 545, 587 (F.C.)).

112. See *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.*, (2018) 1 MALAYAN L.J. 545, 587 (F.C.).

113. HUNTINGTON, *supra* note 4, at 13–16.

114. See BELLAMY, *supra* note 11, at 233–34 (explaining that political failure arises from ethnic conflict, not from lack of judicial review).

115. *Id.*

on particular policy areas.”¹¹⁶ This domain is then excised from the argument on judicial review.¹¹⁷

In the actual world of beleaguered democratic institutions, one cannot simply posit away the difficult question of judicial intervention to preserve democratic institutions and the prospect for electoral accountability. Not surprisingly, resurgent autocratic rulers frequently find comfort in attacking any accountability to judicial review.¹¹⁸ Holding political power becomes the repudiation to judicially imposed constraints on legislative prerogatives.¹¹⁹ As urged by Polish de facto head of state Jaroslaw Kaczynski, “In a democracy, the sovereign is the people, their representative in Parliament and, in the Polish case, the elected president If we are to have a democratic state of law, no state authority, including the Constitutional Tribunal, can disregard legislation.”¹²⁰ Kaczynski rules from behind a commanding parliamentary majority, dispensing with the pretense of even holding any formal position other than being a Member of Parliament.¹²¹ From that perch, he has

116. *Id.* at 234.

117. *Id.* at 233–34.

118. See, e.g., Marc Santora, *Amid Growing Uproar, Poland to Remove 27 Supreme Court Justices*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-judiciary.html> [<https://perma.cc/MQ5S-ESQW> (dark archive)] [hereinafter Santora, *Amid Growing Uproar*] (detailing how Poland’s governing party harassed, threatened, and removed opposing members of the Supreme Court). In fairness, it is also possible that an autocrat may capture the judiciary to impose commanding rule, as occurred in Venezuela. President Nicolás Maduro used the Venezuelan Supreme Court to, in effect, shut down Congress after the opposition surprisingly prevailed in elections. See Nicholas Casey & Patricia Torres, *Venezuela Muzzles Legislature, Moving Closer to One-Man Rule*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/world/americas/venezuelas-supreme-court-takes-power-from-legislature.html> [<https://perma.cc/7DRP-S7VJ> (dark archive)] (describing the court’s unprecedented decision to suspend the National Assembly); Hannah Strange, *Venezuela Supreme Court Blocks Opposition’s Parliamentary Super-Majority in Judicial Coup*, TELEGRAPH (Dec. 31, 2015), <https://www.telegraph.co.uk/news/worldnews/southamerica/venezuela/12076970/Venezuela-Supreme-Court-blocks-oppositions-parliamentary-super-majority-in-judicial-coup.html> [<https://perma.cc/7X5M-AN5K> (dark archive)] (relating the court’s decision not to seat three opposition legislators on the basis of supposed voting irregularities, thus denying the opposition a supermajority). As a general matter, the courts are more difficult to capture because of the time lag of judicial appointments. This is particularly so in parliamentary systems in which the head of government typically is also head of the commanding legislative majority. Cf. Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1, 66 (2003) (noting that “the key separation in the parliamentary system . . . is between the democratic institutions of government and the judiciary”); Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT’L L.J. 673, 678 (2016) (noting that the Malaysian judiciary’s position in its 1988 standoff vis-à-vis the executive was seriously weakened by the fact that it was a parliamentary system in which the “executive and legislature maintain[ed] a strong control over government power”).

119. See, e.g., Casey & Torres, *supra* note 118 (describing how when the legislature attempted to restrain Maduro, he used his supporters on the Venezuelan Supreme Court to overrule them).

120. Santora, *Amid Growing Uproar*, *supra* note 118.

121. See Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* 10 n.45 (Sydney Law Sch., Legal Studies Research Paper No. 18/01, 2018),

successfully dismantled the Polish Constitutional Court, purged much of the Supreme Court, and forced the constitution increasingly to bend to one-party rule.¹²²

The role of courts in resisting democratic backsliding in weak democratic states is the subject of my monograph on *Fragile Democracies*,¹²³ an argument that I do not wish to rehearse here. Instead, the aim here is to push the boundaries of the arguments over judicial review beyond the context of unconsolidated democracies as such. The pressures of institutional weakness or design defects in established democracies brings the elements of fragility to the fore even in cases that would meet the narrow boundaries of proper democracies identified by Waldron and Bellamy. The experience of strong constitutional courts in emergent democracies helps clarify a form of judicial intervention that addresses not the output of the legislative process, nor the rights of individual citizens as such, but the integrity of the democratic process that conditions lawmaking. But the extreme frailty of nascent democracies may reveal a generalizable tension in democratic self-government. In short, the claim is not that the world is divided between fragile democracies and a handful of stable ones, mostly emerging from the remnants of the British Empire. Instead, the argument is that all democracies may become fragile under excessive pressure on the structural preconditions for democratic governance, at least at times.

D. *The Democratic Heartland*

While extreme, the examples from Taiwan or Eastern Europe or India have a resonance in even the established democratic countries. There are temptations for incumbent authorities to either bypass the formal accountability structures that limit their immediate power (George Washington's "cooling" function)¹²⁴ or to thwart the electoral mechanisms that, having brought them to office, might well lead to their removal. Richard Pildes and I have referred to the problem of "lockups" on power by incumbents as a major justification for judicial intervention and also as a guiding principle for distinguishing democracy-reinforcement from mere policy imposition by the judiciary.¹²⁵

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 [https://perma.cc/3L3T-9YZB] [hereinafter Sadurski, *How Democracy Dies*].

122. See Sujit Choudhry, *Will Democracy Die in Darkness? Calling Autocracy By Its Name*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 571, 574–77 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2008) [hereinafter Choudhry, *Will Democracy Die in Darkness?*]; Sadurski, *How Democracy Dies*, *supra* note 121, at 18.

123. See ISSACHAROFF, *supra* note 6, at 10.

124. See *supra* note 53 and accompanying text.

125. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Political Process*, 50 STAN. L. REV. 643, 648–49 (1998).

When the American Supreme Court ventured into the “political thicket” in the Reapportionment Cases of the 1960s,¹²⁶ it was the failure of electoral accountability that provided the key doctrinal justification,¹²⁷ as it later proved to be in Taiwan.¹²⁸ The core fact of the political question cases of the 1960s was that the American political establishment refused to reapportion political power from 1910 on.¹²⁹ As the population grew, urbanized, and welcomed new generations of immigrants, the act of reapportionment would shift political power from rural America to the numerical strongholds of an urbanizing, integrating nation. Even Congress, despite an express constitutional duty to reapportion after every decennial Census, refused to do so after the 1920 Census,¹³⁰ which confirmed the rise of the urban, industrial North.¹³¹ Absolute power loves power, absolutely.

As the twentieth century progressed, the refusal to reapportion meant that some counties had representation sixty times as great, indeed even one hundred times as great, as other counties on a per person basis.¹³² Even though one person, one vote was not yet enshrined as constitutional doctrine, there was no question that the intuitive principle of equal shares among voters was in grave disrepair. Ultimately what foundered the political question doctrine was the sheer futility of seeking political redress for a political power grab. In the seminal case of *Baker v. Carr*,¹³³ Justice Tom Clark perfectly captured the absurdity of a legislative solution:

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. . . . I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket.

126. See *Reynolds v. Sims*, 377 U.S. 533, 537 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 635 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 658 (1964); *Davis v. Mann*, 377 U.S. 678, 680 (1964); *Roman v. Sincock*, 377 U.S. 695, 697 (1964); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 715 (1964).

127. See, e.g., *Reynolds*, 377 U.S. at 562 (“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

128. See *supra* Section II.A.

129. *ISSACHAROFF ET AL.*, *supra* note 25, at 165 (noting that representatives from rural areas whose population had not increased were unwilling to reapportion their states, knowing that this would lead them to lose power).

130. Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1940 (2018).

131. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1665 (1993).

132. *Id.* at 1652 (noting the disparity of 41-to-1 in *Reynolds v. Sims*); see also PAUL T. DAVID & RALPH EISENBERG, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE* 3 (1961) (noting a disparity of 987-to-1 in Vermont’s lower house).

133. 369 U.S. 186 (1962).

Tennessee has an ‘informed, civically militant electorate’ and ‘an aroused popular conscience,’ but it does not sear ‘the conscience of the people’s representatives.’ This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. . . . We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.¹³⁴

Most often, the cases that command attention are judicial interventions when the legislature has acted perniciously, as with the Taiwanese power grab, or the South African exclusion of “colored voters,” or the declaration of emergency powers in India.¹³⁵ More complicated than a power grab through legislative action is legislative refusal to act and a corresponding lack of political accountability before the electorate. One of the obstacles to entering the political thicket to confront the refusal to reapportion was the generalized legal difficulty with acts of omission versus acts of commission. Yet legislative passivity in the face of consolidating power may also be the occasion for critical judicial intervention.

Brexit offers an instructive example. Each of the major parties was and still is deeply divided on the question of European integration, immigration, EU regulatory authority, and a number of subsidiary issues at the heart of British political divides.¹³⁶ The result was an ill-considered referendum. In effect, this was a desperate gambit by a weak prime minister to compensate for lack of parliamentary leadership to take charge of an explosive political issue. The avoidance strategy was to stage a direct appeal to the population. Prime Minister David Cameron, like many failing politicians, misjudged the times and was repudiated by the voters. Cameron quickly departed the scene, and a chastened and ultimately unstable Tory government formed under Prime

134. *Id.* at 258–59 (Clark, J., concurring). Focusing on the structures of governance also allows a critique of courts that fail to address structural deformities of the political process. Much as Justice Clark usefully distinguished areas of governance that are beyond democratic repair, the recent decision of the U.S. Supreme Court on partisan gerrymandering shows that this distinction is not internalized in American constitutional law. Rather than look to the issue of democratic integrity, all members of the Court, under a variety of theories, would recognize only an individual right to vote in an individual district and not any systemic harm from the non-responsiveness of the political process. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

135. *See supra* Sections II.A.–B.

136. *See* Sara B. Hobolt, *The Brexit Vote: A Divided Nation, a Divided Continent*, 23 J. EUR. PUB. POL’Y 1259, 1260 (2016) (“British Leave voters were motivated by anti-immigration and anti-establishment feelings. They also reveal stark demographic divides, as the less well-educated and the less well-off voted in large majorities to leave the EU, while the young graduates in the urban centres voted to stay. This divide between those who feel left behind by the forces of globalization and mass immigration and those who welcome such developments is also a driving force behind the increasing support for Eurosceptic parties on the radical right and left across Europe . . .”).

Minister Theresa May, who in turn was replaced by Boris Johnson in an as-yet-unresolved crisis of constitutional proportions.¹³⁷

Unable or unwilling to resist the wave of populist anger, the new government announced its intention to implement the Brexit vote as the voice of the people. The result was an attempt to disentangle Britain from the EU by executive fiat. This provoked a major legal challenge in the Supreme Court of the United Kingdom, now formally disengaged from the House of Lords. The *Miller* case prompted a remarkable discussion on the nature of British democratic governance and the importance of institutional order. The inquiry was thus: [The] Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.¹³⁸

That a weak government had appealed directly over the head of Parliament to enraged voters did not alter the institutional commitments to the democratic supremacy of Parliament. Nor could the Prime Minister invoke plebiscitary approval as a substitute for proper institutional process:

The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.¹³⁹

Undoubtedly, there would ultimately have been political retribution for the entire Brexit imbroglio, including on Prime Minister May. Perhaps in the absence of judicial intervention, the parliamentary leadership would have paid the price for any ensuing dislocations and its failure to discharge the leadership responsibilities under Britain's parliamentary constitution. But in the immediate political moment, the Supreme Court of the United Kingdom forced a political accounting. The court's intervention did not predetermine either the ultimate decision on Brexit or substitute for the political accountability of Parliament. Instead, in a fashion that borders on the soft power of democracy, the limited intervention aimed to reinforce the constitutional constraints necessary for democratic governance.

137. *See id.* at 1259.

138. *R v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [83], [2018] 1 AC 61 (appeal taken from N. Ir., Eng., and Wales), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>. [<https://perma.cc/53V8-WPV3>].

139. *Id.* at [82].

III. THE SOFT POWER OF DEMOCRACY

Beyond the formal commands of electoral accountability stand the norms of democratic governance that exercise a soft power over successive generations of governors. Mostly these norms are boundaries of constraint as citizens and governors come to internalize the critical elements of democracy: the acceptance of the legitimacy of an opposition, the prospect that results will vary from election to election, and the institutional limitations that provide for continuity in the lived experiences of the citizenry. Just as no successful society can rely on the express sanctions of law alone, no democracy can survive unless certain norms of continuity and restraint in governance are accepted by the political class. The idea of “regulated rivalry” between legitimate adversaries dampens the risk of upheavals and violence in favor of “the legitimacy of ongoing, managed, institutionalized conflict.”¹⁴⁰

A. *Soft Power Under Threat*

The institutional pathways of democratic governance serve to slow demands for immediate satisfaction of the momentary majority. Such delayed gratification frustrates populist insurgents for whom institutional constraints are seen as an impediment. To the tempering effect of institutionalized political parties come the independent, charismatic candidates increasingly untethered to any governmental experience. To the labored processes of administrative procedure come the demands for draining the swamp.¹⁴¹ To the separation of prosecutorial power from direct political commands comes the chant of “lock her up.”¹⁴² And, to the difficulty of working the legislative byways comes the recourse to executive decrees.¹⁴³ In large measure, these are the frustrations of political immediacy that bedevil every new administration in every democracy. The ship of state is cumbersome and alters course hesitatingly.

140. NANCY ROSENBLUM, *ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 121 (2008) (invoking Edmund Burke’s framing of parties as regulated rivals).

141. *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Dec. 22, 2016, 8:41 AM), <https://twitter.com/realDonaldTrump/status/811975049431416832> [<https://perma.cc/DPT4-PZT3?type=image>] (“Someone incorrectly stated that the phrase “DRAIN THE SWAMP” was no longer being used by me. Actually, we will always be trying to DTS.”); Donald Trump (@realDonaldTrump), TWITTER (May 17, 2019, 4:00 AM), <https://twitter.com/realDonaldTrump/status/1129340814080040961> [<https://perma.cc/T5DP-6CAC?type=image>] (“DRAIN THE SWAMP!”).

142. *See* Peter W. Stevenson, *A Brief History of the ‘Lock Her Up!’ Chant by Trump Supporters Against Clinton*, WASH. POST (Nov. 22, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?noredirect=on> [<https://perma.cc/Y2J4-5R97> (dark archive)].

143. The populist frustration with the norms of democratic governance is examined more fully in Samuel Issacharoff, *Populism Versus Democratic Governance*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?*, *supra* note 122, at 445, 445–58 [hereinafter Issacharoff, *Populism versus Democratic Governance*].

1. United States

More is at stake at present than the normal difficulties of governing. There is no escaping the efforts made to foreclose any possibility that the political opposition might reverse the electoral trend. In North Carolina, for example, the governorship has shifted pretty steadily between Republicans and Democrats since the partisan realignment of the late 1960s.¹⁴⁴ But in the most recent such shift in 2017, Republicans used their legislative majority to attempt to neuter the office of the governor altogether, thereby depriving the elected Democrat of traditional powers of appointment and various normal trappings of executive office.¹⁴⁵ As with all classic lockups, the aim is to consolidate past electoral gains and eliminate the capacity for political opponents to realize power by changing the rules of the game.¹⁴⁶ Thus, in December 2016, less than two weeks before the swearing in of Democratic Governor-elect Roy Cooper, the Republican-controlled North Carolina General Assembly passed a significant package of restrictions on the powers of the governor, reducing the number of state employees that the governor could appoint from 1500 to 425, stripping the gubernatorial power to appoint a majority to the influential State Board of Elections, requiring that appointments to the governor's cabinet be subject to approval by the Republican-controlled state Senate, and significantly stripping the jurisdiction of the Democratic-controlled state supreme court.¹⁴⁷ This process was put to a halt by the state supreme court,¹⁴⁸ which ruled that the legislation obstructed the governor's ability to ensure the laws were faithfully executed.¹⁴⁹ Not easily deterred, the General Assembly then presented multiple amendments to the state constitution, aiming to frustrate any exercise of customary gubernatorial powers by a Democrat.¹⁵⁰

144. *Former North Carolina Governors*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/north-carolina/> [<https://perma.cc/EEJ2-HPSY>].

145. See generally Trip Gabriel, *North Carolina G.O.P. Moves to Curb Power of New Democratic Governor*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/us/politics/north-carolina-governor-roy-cooper-republicans.html> [<https://perma.cc/BT8L-Y5L3> (dark archive)] (detailing the North Carolina Republican Party's attempts to strip power from the Governor).

146. For an overview of the persistent manipulations of election rules to consolidate Republican gains, see generally Michael Kent Curtis, *North Carolina's Sick Democracy: Racial Gerrymanders, Political Gerrymanders, and Voting Rules as Tools for Partisan Entrenchment* (Sept. 11, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247292 [<https://perma.cc/GM8P-6XMN>].

147. Richard Fausset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/us/politics/north-carolina-governor-roy-cooper-north-carolina.html> [<https://perma.cc/D7XZ-MAML> (dark archive)].

148. *Cooper v. Berger*, 370 N.C. 392, 422, 809 S.E.2d 98, 116 (2018).

149. *Id.*

150. See Dave Hendrickson, *Here's a Look at North Carolina's Proposed Constitutional Amendments*, WRAL (Aug. 10, 2018), <https://www.wral.com/here-s-a-look-at-north-carolina-s-proposed-constitutional-amendments/17715772/> [<https://perma.cc/G28V-E5WD>] (detailing the proposed amendments).

At the national level, one of the founders of the Federalist Society advocated seizing the advantage of a Republican President and Congress to increase by a factor of 2.5 the number of federal appellate judges, ram through appointments, and seal the judiciary as a Republican keepsake for a generation or more.¹⁵¹ And at the executive level, the norms against presidential engagement with criminal investigations have been lost to repeated demands by President Trump for the prosecution of everyone from Hillary Clinton to current and former government officials who have aroused presidential ire.¹⁵²

In the United States and abroad, politics have shifted from the mediating institutional framework of parties to individual-based campaigns with a decidedly plebiscitary air. One rather extreme variant is found in Italy, in which an antigovernance group without a policy platform is allied with a right-wing party rooted in anti-immigrant sentiment.¹⁵³ To this may be added the radical overhaul of post-1989 institutions in Hungary and Poland and the repeated efforts in each to dismantle the judiciary as a source of resistance.¹⁵⁴

151. See Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill 15–18* (Nw. Univ. Pritzker Sch. of Law Pub. Law & Legal Theory Series, No. 17-24, 2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/ZJ5J-WHSV>] (calling for a significant increase in federal circuit judges).

152. Peter Baker, *'Lock Her Up' Becomes More Than a Slogan*, N.Y. TIMES (Nov. 14, 2017), <https://www.nytimes.com/2017/11/14/us/politics/trump-pressure-clinton-investigation.html> [<https://perma.cc/CZ4D-A5AH> (dark archive)]; John T. Bennett, *Trump Urges Sessions to Investigate His Political Foes*, ROLL CALL (Aug. 24, 2018), <https://www.rollcall.com/news/politics/trump-urges-sessions-to-investigate-his-political-foes> [<https://perma.cc/4UHK-KBEZ>]; Donald Trump (@realDonaldTrump), TWITTER (Nov. 3, 2017, 3:57 AM), <https://twitter.com/realDonaldTrump/status/926403023861141504> [<https://perma.cc/CVL6-N6QN>] (“Everybody is asking why the Justice Department (and FBI) isn’t looking into all of the dishonesty going on with Crooked Hillary & the Dems.. [sic]”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2018, 5:04 AM), <https://twitter.com/realdonaldtrump/status/1060155917059219461> [<https://perma.cc/M8CZ-CLUZ>] (“If the Democrats think they are going to waste Taxpayer Money investigating us at the House level, then we will likewise be forced to consider investigating them for all of the leaks of Classified Information, and much else, at the Senate level. Two can play that game!”).

153. See Alexander Stille, *Not So Funny*, N.Y. REV. BOOKS (May 10, 2018), <http://alexanderstille.net/wp-content/uploads/2018/05/Not-So-Funny-by-Alexander-Stille-The-New-York-Review-of-Books-1.pdf> [<https://perma.cc/V7GZ-SG4Z>].

154. See Patrick Kingsley, *After Viktor Orban's Victory, Hungary's Judges Start to Tumble*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/world/europe/hungary-viktor-orban-judges.html> [<https://perma.cc/K3ST-FNR8> (dark archive)]; Marc Santora, *Poland Purges Supreme Court, and Protesters Take to Streets*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html> [<https://perma.cc/5JJM-P3JN> (dark archive)] [hereinafter Santora, *Poland Purges Supreme Court*]. For a more extensive account of the recent illiberal changes to the Hungarian Constitutional Court, see Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111, 111–24 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

2. Poland and Hungary

The experiences in Poland and Hungary certainly cast doubt on the ultimate judicial capacity to intercede successfully on behalf of the soft power of democracy. Each case presents a threat to democracy from within recognizable processes and institutions of democratic governance, as opposed to the sudden appearance of tanks on the streets. In this sense, it is important to distinguish the risks of illiberal democracies¹⁵⁵ of the twenty-first century from the military diktat states of the past century. The presumptive legitimacy of elections, even under compromised conditions, deters the more overt challenges to civilian rule.¹⁵⁶ At the same time, the hard challenges, particularly in the face of anti-institutional populist sentiment, do not so often concern the formal use of dramatic constitutional changes, as in Taiwan.¹⁵⁷ Rather, more common is a process of democratic backsliding that occurs when a democratically elected government uses lawful tools to manipulate rules and institutions in order to retain power. Instead of high voltage constitutional amendments, the tools of “ordinary constitutional law, administrative law, and statutory interpretation” may be the key levers to further “these abuses of public power.”¹⁵⁸

Consider the experience in Poland since the Law and Justice Party (PiS) won a legislative majority in the 2015 parliamentary elections. The national judiciary proved a substantial impediment to the consolidation of power by the controlling legislative coalition¹⁵⁹—a playbook that readily extends from North Carolina to Venezuela and beyond. Through a series of steps, including refusing to fund the publication of Constitutional Tribunal decisions and then flooding the court with new loyalist appointees, PiS loyalists numbered nine out of the fifteen members of the tribunal, including its president and vice president.¹⁶⁰ The subversion of legal authority was accomplished by avoiding a single, comprehensive constitutional amendment and working relatively slowly and

155. See generally Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.–Dec. 1997, at 22, 22 (coining the term “illiberal democracy” and describing the problem of “[d]emocratically elected regimes . . . [which] are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms”).

156. See Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 15 (2016).

157. See *supra* Section II.A.

158. Sujit Choudhry, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon and David Landau*, 15 INT’L J. CONST. L. 826, 829–30 (2017) [hereinafter Choudhry, *Reply to Dixon & Landau*].

159. Choudhry, *Will Democracy Die in Darkness?*, *supra* note 122, at 572–73.

160. PIOTR BURAS & GERALD KNAUS, BATORY FOUND., WHERE THE LAW ENDS: THE COLLAPSE OF THE RULE OF LAW IN POLAND—AND WHAT TO DO 6 (2018), http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/ESI-ideaForum_Batory%20-%20Poland%20and%20the%20end%20of%20the%20Rule%20of%20Law.pdf [<https://perma.cc/5U5Y-FHD6>].

through highly technical and procedural maneuvers.¹⁶¹ Wojciech Sadurski argues that this set of moves “produces a cumulative effect” in which the “whole is greater than the sum of its parts.”¹⁶² Each step was calculated to “ensure that next phases would sail through without any scrutiny.”¹⁶³ Far from satisfied, in early July 2018, the PiS forced the retirement of twenty-seven of the seventy-two Supreme Court justices, including the top judge, through a law that requires judges to retire at age sixty-five unless they gain a personal reprieve from President Andrzej Duda, who has sole discretion over this retirement provision.¹⁶⁴

One need only look to Hungary to see the anticipated path in Poland. In 2010, with fifty-three percent of the popular vote, Prime Minister Viktor Orbán’s government seized sixty-eight percent of the seats in Parliament.¹⁶⁵ This two-thirds supermajority allowed the unicameral parliament to fundamentally rewrite the 1989–1990 Constitution and to pass large blocks of legislation challenging the independence of the judiciary, the media, the prosecutor’s office, the tax authority, and the election commission, as well as extending the reach of governmental power into civil society institutions.¹⁶⁶ Key here as well was the neutering of the judiciary through forced retirements, harassment, and outright threats.¹⁶⁷ All these incremental moves had the combined effect of neutering the customary forms of opposition from within the political process. The result was an increasingly isolated and weakened judiciary trying to constrain the concentration of power in an increasingly despotic executive.

B. *Judicial Intervention*

The path to judicial invalidation of specific laws abrogating the structures of democracy is well established, if difficult to execute successfully. Judicial

161. Choudhry, *Will Democracy Die in Darkness?*, *supra* note 122, at 576. For a comprehensive account of the systematic assault on constitutional limits in Poland, see generally WOJCIECH SADURSKI, *POLAND’S CONSTITUTIONAL BREAKDOWN* (2019).

162. SADURSKI, *supra* note 161, at 58.

163. *Id.* (quoting Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers: On the Judicial Purge and the Capture in the Heart of Europe*, VERFASSUNGSBLOG (July 19, 2017), <https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/> [<https://perma.cc/5WMK-H3GW>]).

164. Santora, *Poland Purges Supreme Court*, *supra* note 154; see also Wojciech Sadurski, *Polish Chief Justice of the Supreme Court Under Pressure: What Now?*, VERFASSUNGSBLOG (July 5, 2018), <https://verfassungsblog.de/polish-chief-justice-of-the-supreme-court-under-pressure-what-now/> [<https://perma.cc/7AGN-PEEN>].

165. Scheppele, *Autocratic Legalism*, *supra* note 66, at 549.

166. *Id.* at 549–50.

167. See Kingsley, *supra* note 154 (quoting Peter Szepshazi, a sitting Hungarian judge, speculating that they “may have been approached by people . . . who may have conveyed the message that it would be best if they stopped”); see also Scheppele, *Autocratic Legalism*, *supra* note 66, at 549–50.

interdiction of violations of democratic norms is less apparent than the more established power to strike down offending legislation. Nonetheless, there are some examples of judicial intervention that are aimed not so much at forcing a direct confrontation with offending legislation than at restoring decisionmaking back into normal political channels in such ways as to reinforce soft power.¹⁶⁸ This approach of restoring normal politics helps capture the role of the U.S. Supreme Court in forcing executive claims of national security exigency onto a template of demanding congressional action to support and assume responsibility for emergency measures. As previously addressed in work with Richard Pildes, I have argued that this has been the key to judicial sign-off in cases of war powers, along the lines of Justice Jackson's typology in the *Steel Seizure Cases*.¹⁶⁹ Similarly, the Brexit decision in *Miller v. Secretary of State* can be cast as compelling the proper forms of democratic deliberation in parliament rather than the expedient of executive action.¹⁷⁰ The Israeli Supreme Court's recent decision in *Ramat Gan Academic Center of Law and Business v. Knesset* can be seen in a similar light.¹⁷¹ The Israeli's Constitution requires that the legislature reviews and approves an annual budget recommended by the executive, and, when the executive branch attempted to change this to a biannual review thus limiting the legislature's oversight, the court intervened and demanded a return to the normal procedure.¹⁷²

There are mechanisms of what Rosalind Dixon terms first-order deferral that allow a declaration of unconstitutionality or incompatibility with controlling higher authority to place back in the hands of the legislature the ability to reengage the issue after an adverse judicial determination.¹⁷³ Examples

168. See *supra* Sections III.A.1.–2.

169. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 32–35 (2004) (examining how courts use the institutional framework in Justice Jackson's *Youngstown* concurrence to adjudicate cases on alleged national security abuses). In *Youngstown*, Justice Jackson argued the scope of the President's powers depended on its "disjunction or conjunction with those of Congress." *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). Jackson advanced a tripartite framework, proposing that the powers of the President are strongest when he acts with congressional authorization, at their "lowest ebb" when he acts without congressional authorization, and in a "zone of twilight" when Congress is silent. *Id.* at 637.

170. See *R v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [82], [2018] 1 AC 61 (appeal taken from N. Ir., Eng., and Wales), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> [<https://perma.cc/B54B-RCA5>] ("We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.").

171. See Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, 4 VERFASSUNG UND RECHT IN ÜBERSEE 415, 425–28 (2018) (Ger.) (discussing HCJ 8260/16 *Ramat Gan Academic Center of Law and Business v. Knesset* (2017) (Isr.)).

172. *Id.*

173. See Dixon & Issacharoff, *supra* note 78, at 687; see also Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 43 (2016) ("After a judicial finding of

include the Canadian “notwithstanding” provision¹⁷⁴ and the European community’s similar mechanisms for a legislative acknowledgement of an adverse judicial ruling. In the European context, national legislatures may recommit to the importance of the policy objective through “derogation.”¹⁷⁵ While each in practice aims to restore a constitutional balance (though the Canadian power is almost never invoked),¹⁷⁶ neither is directed specifically to the less mandatory values of tempered democratic deliberation.

Pushing this judicial role a bit further are cases in which courts seek to reinforce proper institutional byways and thereby reorient democratic engagement, either by design or by result. Two examples from Canada and South Africa illustrate the point.

1. Quebec Secession

Only twenty years ago, the fate of Canada as a nation seemed at issue. Quebec nationalism was at its high point and the separatist Parti Québécois was the largest political force in the province.¹⁷⁷ The Canadian Supreme Court confronted a question as fundamental as it was unprecedented: “[W]e are asked to rule on the legality of unilateral secession ‘[u]nder the Constitution of Canada.’”¹⁷⁸ As with most democracies, the Canadian Constitution was silent on the exact contours of Canadian democracy: “The representative and democratic nature of our political institutions was simply assumed.”¹⁷⁹ There were no mediating principles in Canadian constitutional law or in general democratic principles that could resolve the apparent conflict should a majority of the Québécois opt for independence while a majority of the broader Canadian constituency (including the Québécois) vote to preserve the territorial integrity of Canada. Rather, Canadian politics had long subsumed a form of Québécois separate representation through the reigning Liberal Party requirement that the leadership of the party alternate between French and English speakers and the party’s practice of setting informal quotas for cabinet seats between the two

unconstitutionality, a delay in the declaration of invalidity permits the legislature to remedy the violation in the first instance.”).

174. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, § 33, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see* Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 *TEX. INT’L L.J.* 537, 543 (2005) (describing the Notwithstanding Clause of the Canadian Charter).

175. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 *U.N.T.S.* 221 (providing a right of derogation “[i]n time of war or other public emergency threatening the life of the nation,” to be strictly construed and subject to several exceptions).

176. Roach, *supra* note 174, at 543.

177. *See* ALVIN FINKEL, *OUR LIVES: CANADA AFTER 1945*, at 347–55 (1997).

178. Reference re Secession of Quebec, [1998] 2 *S.C.R.* 217, 263 (Can.).

179. *Id.* at 253.

groups.¹⁸⁰ The question was one of identity, rather than national oppression or compelled subjugation—the customary fare of rights claims.¹⁸¹

The court eschewed first-order constitutional resolution (i.e., is there or is there not a right of secession) in favor of reinforcing the capacity for democratic political debate. The court’s intervention granted separatist claims the right to initiate a dialog on dissolution of the country. In what is known as the “clear majority/clear question” requirement, the court mandated that a majority of the Québécois would have the right to initiate a process of political renegotiation whose outcome could be secession, although those terms remained unspecified:

[A] referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession.¹⁸²

While unusual as a constitutional matter,¹⁸³ the effect was to create mechanisms of both popular consultation and legislative deliberation to defuse and diffuse the mounting nationalist tensions, something that at the time had reached the level of terrorist attacks in the name of Quebec independence.¹⁸⁴

The threshold requirement of a clear outcome on a clear question, as the holding was termed,¹⁸⁵ was never put to the test. The last referendum in Quebec occurred in 1995 and failed by less than 1.2%.¹⁸⁶ But the capacity for democratic discourse leading to parliamentary negotiations allowed for some needed reforms and marked the end of the nationalist tensions in Quebec.¹⁸⁷ By 2014, the nationalist Parti Québécois became a minority even in the provincial

180. Brendan O’Leary, *Debating Consociational Politics: Normative and Explanatory Arguments*, in FROM POWER SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 3, 16 (Sid Noel ed., 2005).

181. *See id.*

182. *Secession of Quebec*, 2 S.C.R. at 265.

183. *See* Sujit Choudhry, *Popular Revolution or Popular Constitutionalism? Reflections on the Constitutional Politics of Quebec Secession*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 480, 487 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Choudhry, *Popular Revolution*].

184. *See* FINKEL, *supra* note 177, at 194–95 (discussing the “October crisis”).

185. *Secession of Quebec*, 2 S.C.R. at 293 (“[A] clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.”); *see also* Clarity Act, S.C. 2000, c 26 (Can.).

186. MARIO CARDINAL, *BREAKING POINT: QUEBEC, CANADA, THE 1995 REFERENDUM* 404 (2005).

187. *See* Choudhry, *Popular Revolution*, *supra* note 183, at 488–91.

Quebec legislature,¹⁸⁸ and Canada today has both a French-origin prime minister and a francophone chief justice of its Supreme Court.¹⁸⁹

Canada provides a useful and highly influential example of courts respecting and reinforcing the boundaries of democratic politics. The court sagely defused the sense of Quebec being aggrieved and used its constitutional authority in the service of democracy. At no point, however, in the disputes over Quebec was Canada at risk of descending into civil war or massive bloodshed. This was the primacy of politics in a decidedly mature and decent democratic society, which court intervention reinforced rather than supplanted.

2. Anticorruption in South Africa

South Africa's Constitution fails to provide sufficient checks on unilateral power, a defect that became apparent once leadership passed from the enlightened hands of Nelson Mandela to the kleptocratic ambitions of Jacob Zuma. In Westminster style, South Africa allows the same individual to serve as head of the ruling party, head of government, head of state, and head of the legislative faction.¹⁹⁰ Once power passed to President Zuma, even the weak institutional constraints on the executive provoked resistance. Repeatedly, Zuma found himself in conflict with the independent public anticorruption prosecutorial authority,¹⁹¹ the National Director of Public Prosecutions (NDPP), which the constitution unfortunately allowed the President to appoint pursuant to statutory qualifications.¹⁹² The statute said, among other things, that the National Director must "be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity."¹⁹³ Shortly after assuming office in 2009, President Zuma appointed a crony as NDPP, precipitating a constitutional confrontation over whether the creation of an independent corruption oversight agency would serve as a check on misuse of presidential office.¹⁹⁴

188. *Official Results by Political Party for All Electoral Divisions*, ÉLECTIONS QUÉBEC (Apr. 7, 2014), <https://www.electionsquebec.qc.ca/english/provincial/election-results/general-elections.php?e=74&s=2#s> [<https://perma.cc/S8PC-GQUM>].

189. *The Right Honourable Justin P. J. Trudeau*, JUSTIN TRUDEAU, PRIME MINISTER CAN., <https://pm.gc.ca/en/cabinet/right-honourable-justin-p-j-trudeau> [<https://perma.cc/AL77-JTZA>]; *The Right Honourable Richard Wagner, P.C., Chief Justice of Canada*, SUP. CT. CAN. (Feb. 23, 2018), <https://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=richard-wagner> [<https://perma.cc/QD4X-6PAE>].

190. S. AFR. CONST., 1996, §§ 83, 84, 86.

191. *See Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA) at 284 para. 2 (S. Afr.) (noting that the "litigation between the NDPP and Mr.[.] Zuma has a long and troubled history").

192. S. AFR. CONST., 1996, § 179(1)(a), (3)(a); *see also* National Prosecuting Authority Act 32 of 1998 §§ 9–10 (S. Afr.).

193. National Prosecuting Authority Act 32 of 1998 § 9(1)(b).

194. *See Democratic All. v. President of the Republic of S. Afr.* 2013 (1) SA 248 (CC) at 254 para. 1 (S. Afr.).

Zuma's first appointment was rejected by a Constitutional Court opinion in 2012 notable for its assertion of muscular judicial authority in policing the structural integrity of the constitution:

It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are . . . fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.¹⁹⁵

In the meantime, the incumbent Public Protector continued investigating Zuma's expanding fortune and, in particular, his efforts to transform his private lands into a monument at public expense.¹⁹⁶ In her 2014 report, the Protector concluded that Zuma had been unduly enriched by the government coffers in the form of improvements such as a "cattle kraal, chicken run, swimming pool, visitors' centre and the amphitheatre."¹⁹⁷ The President thus had violated the provisions of the Executive Members' Ethics Act and the Executive Ethics Code.¹⁹⁸ Not to be deterred, Zuma and the National Assembly commissioned an "independent" report by the Minister of Police that (not surprisingly) exculpated the President.¹⁹⁹

As evidence of the extent of corruption mounted, and as the Parliament remained unable to resist the entrenched executive and the commands of the ANC, the Constitutional Court issued a series of rulings whose cumulative effect was to prod parliamentary action.²⁰⁰ These decisions were noteworthy not for predetermining the outcome of claims against Zuma but for enabling the legislative branch to exercise its countervailing authority.²⁰¹ The decisions required secret voting on no confidence motions and various protections of minority rights within the parliament.²⁰² When the issue turned once again to

195. *Id.* at 267 para. 26.

196. *See Econ. Freedom Fighters v. Speaker of the Nat'l Assembly & Others* 2016 (3) SA 580 (CC) at 587 paras. 5–6 (S. Afr.).

197. *Id.* at 611 para. 76.

198. *Id.* at 587–88 para. 7.

199. *See id.* at 612–13 paras. 79–81.

200. *See, e.g., United Democratic Movement v. Speaker of the Nat'l Assembly & Others* 2017 (5) SA 300 (CC) at 326–27 para. 97 (S. Afr.) (requiring secret ballots on no confidence motions); *Democratic Alliance v. Speaker of the Nat'l Assembly & Others* 2016 (3) SA 487 (CC) at 506 para. 45 (S. Afr.) (criticizing the removal of minority members for engaging in parliamentary debate); *Mazibuko v. Sisulu & Others* NNO 2013 (6) SA 249 (CC) at 263 para. 45 (S. Afr.) (stating that the right to initiate a motion of no confidence should be accorded to every member of the assembly); *Oriani-Ambrosini v. Sisulu* 2012 (6) SA 588 (CC) at 604 para. 51 (S. Afr.) (protecting the rights of legislative participation and speech by minority parties).

201. *See cases cited supra* note 200.

202. *See cases cited supra* note 200.

the independence of the prosecution authority over corruption, the Constitutional Court again interceded, this time ordering the President and National Assembly to comply with the Public Protector's findings and repay the amounts wrongfully taken from the public fisc.²⁰³

The saga continued as Zuma did not repay all of the amounts owed, attempted to appoint various cronies as NDPP, and finally sought to remove a 2013 appointee who had begun yet another investigation.²⁰⁴ Zuma assumed the power to discharge any appointee and managed to obtain a pressured resignation in exchange for a payout well in excess of the salary of the latest NDPP appointees.²⁰⁵ Another lawsuit followed, this time before the High Court, Gauteng Division,²⁰⁶ which wasted no time rejecting Zuma's claim of unilateral presidential authority: "In a rights-based order it is fundamental that a conflicted person cannot act; to act despite a conflict is self-evidently to pervert the rights being exercised as well as the rights of those affected."²⁰⁷ Because the President admitted that he intended to use the processes available to him to resist prosecution, he was obviously conflicted.²⁰⁸

Of more immediate interest is the decree that followed. The court reversed all the efforts of President Zuma to control anticorruption efforts and ordered that "as long as the incumbent President is in office, the Deputy President is responsible for decisions relating to the appointment, suspension or removal of the National Director of Public Prosecutions."²⁰⁹ Further, the court declared the unconstitutionality of the National Prosecuting Authority Act and offered a rewritten Act that would cure the constitutional defect of allowing presidential authority over an investigation of the President.²¹⁰ But the court suspended the statutory revision for eighteen months and referred the entire matter to Parliament to cure the constitutional defect on its own.²¹¹

203. *Econ. Freedom Fighters*, 2016 (3) SA at 620–21.

204. Franny Rabkin, *Zuma Had Been 'Intent' on Seeing Nxasana Leave the NPA*, *Zonda Commission Hears*, MAIL & GUARDIAN (Aug. 19, 2019), <https://mg.co.za/article/2019-08-19-zuma-had-been-intent-on-seeing-nxasana-leave-the-npa-zondo-commission-hears> [https://perma.cc/YDP2-5M3N]; Mfuneko Toyana & James Macharia, *South Africa's Zuma Repays Some State Money in Home Improvement Scandal*, REUTERS (Sept. 12, 2016), <https://www.reuters.com/article/us-safrica-zuma/south-africas-zuma-repays-some-state-money-in-home-improvement-scandal-idUSKCN1I16V> [https://perma.cc/DL3B-FZ4B].

205. Barry Bateman, *Nxasana Was Paid Over R17M After Resigning*, EYE WITNESS NEWS (June 3, 2015), <https://ewn.co.za/2015/06/03/Nxasana-paid-a-little-over-R17m-after-resigning> [https://perma.cc/5MFC-NGHE].

206. *Corruption Watch (RF) NPC & Another v. President of the Republic of S. Afr. & Others; Council for the Advancement of the South African Constitution v. President of the Republic of S. Afr. & Others* 2018 (1) All SA 471 (GP).

207. *Id.* at 32 para. 112.

208. *Id.* at 32 para. 115.

209. *Id.* at 38 para. 128.

210. *Id.* at 38–39 para. 129.

211. *Id.*

As with the Canadian court's novel solution, this story also turns out well. Once back in the hands of Parliament, the ongoing corruption scandals compelled a confrontation with President Zuma and led, ultimately, to his ouster at the hands of an awakened legislative branch and the ascension of President Cyril Ramaphosa.²¹²



To summarize and to be clear: The world is filled with failed or failing judicial attempts to thwart the descent of weak democracies into autocratic and semi-autocratic rule. Hungary, Poland, and Russia are but some of the examples of courts that have stood tall and suffered accordingly.²¹³ And the world has also witnessed captured judicial institutions serving to silence political opposition to entrenched power, with Venezuela serving as the leading example.²¹⁴ Tom Daly well captures, with great skepticism, the curious demand that the least democratic of the branches of government secure an incompletely realized democracy, in effect “to transmute the base materials of a new democracy—an incomplete political settlement, a nascent commitment to democratic rule, and imperfect constitutional and international texts—into the gold of a functioning democracy.”²¹⁵

What is being offered is not by any means a certain antidote to the erosion of democratic norms of governance, nor even a universal constraint. In some high-functioning parliamentary inheritors of the Westminster tradition, courts have crafted an intermediary role with stronger defenses of rights claims but greater deference to the political branches to craft remedies.²¹⁶ But in country after country, particularly in times of political instability, the observed reality is the insertion of the judiciary into the allocation of power among the political branches. In turn, “[t]he central role played by the courts can perversely raise

212. See E.C.S., *Why Jacob Zuma Resigned*, ECONOMIST (Feb. 19, 2018), <https://www.economist.com/the-economist-explains/2018/02/19/why-jacob-zuma-resigned> [<https://perma.cc/EV8C-T4A2> (dark archive)].

213. See Javier Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002*, 10 DEMOCRATIZATION 70, 88 (2003) (arguing that the Chilean judiciary's robust use of judicial review backfired by reducing judicial independence); Dixon & Issacharoff, *supra* note 78, at 689 (noting that Russian and Peruvian court interventions only led to the “shuttering of the courts as institutions and the increasing consolidation of autocratic power”); Scheppele, *Autocratic Legalism*, *supra* note 66, at 551–53 (explaining attacks from the executive on the judiciary in Hungary and Poland). For a fuller account of the paradox of increased judicial review in Chile after the 2005 constitutional reform, and the backlash that ensued, see generally Sergio Verdugo, *How Constitutional Courts Fail to Their Makers?* (Oct. 2018) (unpublished J.S.D. dissertation, New York University) (on file with author).

214. See Casey & Torres, *supra* note 118.

215. TOM GERALD DALY, *THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY BUILDERS*, at xxii (2017).

216. See STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 1–2 (2013) (examining constitutional developments in Australia, Britain, Canada, and New Zealand).

the stakes in political battles over who controls the courts.²¹⁷ There are sufficient counterexamples to undermine any claim to guaranteed outcomes, and no guarantee of success is being offered here. Instead, as nicely captured by Tom Ginsburg, the resulting paradox is that the “judicialization of politics has led to the politicization of the judiciary.”²¹⁸ The question remains whether the expanded role of constitutional courts across the democratic world can usefully be invoked to protect subconstitutional democratic processes on a sustained basis.

This returns to the opening theme of the capacity of the judiciary as an institution playing the role of a steward of democratic integrity, a role akin to that of a central banker assuming regulatory oversight over a democracy’s fiscal integrity. Such oversight at a remove from immediate electoral demands raises the concern of the ensuing democratic deficit.²¹⁹ But the ability of an institutional buffer against democratic currents raises the prospect that perhaps the judiciary is not the ideal candidate for the job. In the United States, decisional constraints can be created not only through the federal government but also through tightly orchestrated review through an entity like the Base Closing Commission.²²⁰ In other countries, the function of overseeing even politics has been channeled outside constitutional courts. Thus, the Mexican transition to democracy relied heavily on the Federal Election Commission and on the specialized Supreme Electoral Court,²²¹ and in post-Francoist Spain, the role was even assumed by the remaining claimant to the royal house, King Juan Carlos.²²² And in the wake of the near-complete electoral meltdown in the presidential election of 1876, the United States Congress through the Electoral Count Act sought to keep electoral oversight in the hands of a specially designated body, rather than the Supreme Court.²²³

Even without claiming exclusivity for courts as institutional bulwarks of democratic processes, there are nonetheless reasons that courts might be a superior institution for this role. Courts are established sites for the resolution of contested claims and have mechanisms relying on open public argument, structured inquiries, and reasoned judgments that do not simply dictate results

217. TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 174 (2018).

218. Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 363 (2018).

219. For a deeply probing and troubling account of legitimacy concerns over the role of the central banker, by a central banker himself, see PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE*, at x–xii (2018).

220. See Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 336–37 (1991).

221. ISSACHAROFF, *supra* note 6, at 206–07.

222. See Walther L. Bernecker, *Monarchy and Democracy: The Political Role of King Juan Carlos in the Spanish Transición*, 33 J. CONTEMP. HIST. 65, 72 (1998).

223. See Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 652 (2001).

but attempt to persuade. There are rule of law metrics for assessing decisional results as well as comparisons to prior decisions by the same tribunal.²²⁴ Finally, in most democratic countries, the appointment process for judges to apex courts has some political accountability that keeps the judiciary within the broad bands of the country's political currents, something that a king in Spain or the military in Turkey cannot claim.²²⁵ At the same time, the longer tenure of judges, whether by term or for life in the U.S. federal system, allows the judiciary a longer time horizon that allows an institutional distance from the press of immediacy of intense political moments.²²⁶

In countries recently emerged from authoritarianism or civil war, principled judicial exposition may help ease the ensuing constitutional order from expedient arrangements that ease the transition to a fuller democratic order. Courts in such circumstances both resist the pressure toward absolutist invocations of universal human rights norms and also test the ongoing capacity of restrictions on civil liberties to continue, with examples stretching from Bosnia-Herzegovina to Colombia.²²⁷

IV. JUDGES IN THE BREACH

The erosion of the legislative branch as the fulcrum of democratic governance is the most worrisome aspect of the modern day challenge to democratic rule. This “decline of parliamentary sovereignty”²²⁸ breeds a lack of policy initiative and a corresponding loss of capability of democratically accountable institutions. Political power does not lightly tolerate a void, and into the policy space assigned to legislatures have stepped the executive and the agencies of the administrative state. As the competence of the legislative state diminishes and the decretal and administrative powers of the executive grow, the checking function of courts become more and more central. In turn, as judicial intervention becomes quotidian, so too do the capabilities of the courts and the comfort with a centralizing role.

224. My thanks to Jeremy Waldron for his help in formulating this account of specific judicial competence.

225. For a discussion of the long-standing role of the military in Turkey as the appointed guardian of bounded politics under the Kemalist constitution, see OZAN VAROL, *THE DEMOCRATIC COUP D'ÉTAT* 3 (2017).

226. Many thanks to Pablo de Greiff for stressing the point to me that a broader view permits even high stakes political issues to be fitted into a longer-term institutional perspective.

227. For an excellent account of the “peace jurisprudence” of constitutional courts as stewards of fragile post-conflict period, see Jenna Sapiiano, *Courting Peace: Judicial Review and Peace Jurisprudence*, 6 *GLOBAL CONSTITUTIONALISM* 131, 143 (2017) (drawing, inter alia, on Bosnian and Colombian jurisprudence among the examples of an emerging constitutional “understanding of the political settlement that must be preserved for the constitution to continue to exist in any meaningful form”).

228. GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES*, *supra* note 73, at 1.

A. *Loss of State Competence and the Risk of Judicialization of Politics*

In some countries, the low level of state competence leads to tremendous pressure for courts to assume increased managerial responsibilities as a stopgap institution of last resort. In India, for example, the procedural vehicle of Article 32 of the Constitution allowing direct filing of injunctive claims in the Supreme Court of India²²⁹ has led to famous interventions ordering the New Delhi Zoo authorities to remove the overgrown monkey population from the leafy center of the city²³⁰ or to order the removal of industry from the environs of Agra to protect the Taj Mahal from environmental degradation.²³¹ In effect, the Supreme Court of India has become the forum for redress of admittedly desperate social ills as fundamental as the breakdown of sanitary facilities.²³²

As courts stretch their reach into domains once considered the workings of the political process, there seems a strong logic to not just measuring the democratic inputs of the society but the outputs as well. Under the sweeping rubric of social rights litigation, apex courts increasingly see in open-textured constitutional commands an invitation to direct the deployment of societal resources, a task ideally relegated to the policy-setting role of the legislature. Legislative failure invites action. For example, the United Nations Committee on Economic, Social and Cultural Rights has declared a right of “everyone to sufficient, safe, acceptable, physically accessible and affordable water for

229. INDIA CONST. art. 32(1) (“The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.”).

230. See J. Venkatesan, *Supreme Court Shifts Monkey Business to Delhi High Court*, HINDU (Feb. 15, 2007), <https://www.thehindu.com/todays-paper/Supreme-Court-shifts-monkey-business-to-Delhi-High-Court/article14720898.ece> [<https://perma.cc/7YN4-U5U4> (dark archive)].

231. Over the past two decades, the Indian Supreme Court has issued repeated orders on environmental threats to the Taj Mahal, ranging from the relocation of industry and crematoriums, to the banning of non-electric vehicles near the Taj, to addressing insect infestations and discoloration. All of this is done under direct mandate of the High Court. See, e.g., Eli Meixler, *The Taj Mahal Is Changing Color. That Has India’s Highest Court Concerned*, TIME (May 2, 2018), <http://time.com/5262395/taj-mahal-india-change-color-supreme-court/> [<https://perma.cc/QN8P-6ZZ2> (dark archive)] (describing the Indian Supreme Court’s direction to state officials that they hire experts to restore the Taj Mahal); Dean Nelson & Jalees Andrabi, *Taj Mahal Falling Victim to Chronic Pollution*, TELEGRAPH (Dec. 3, 2010), <https://www.telegraph.co.uk/news/worldnews/asia/india/8179446/Taj-Mahal-falling-victim-to-chronic-pollution.html> [<https://perma.cc/A45M-NSPM>] (noting a 1998 Supreme Court order to protect the Taj Mahal from pollution); Samanwaya Rautray, *Supreme Court Tells Agra Municipal to Shift Crematorium to Protect Taj Mahal*, ECON. TIMES (Nov. 17, 2015), <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-tells-agra-municipal-to-shift-crematorium-to-protect-taj-mahal/articleshow/49805132.cms> [<https://perma.cc/U5RN-H7MY>] (describing a letter by Supreme Court Justice Joseph requesting that a crematorium in Agra be moved to protect the Taj Mahal).

232. In *Wadehra v. Union of India*, the Court read the non-judicially enforceable provisions of Article 21 (right to life) and Articles 48A and 51(A) (environmental protections) to have been breached by the state’s failure to provide social services. (1996) 2 SCC 594, 606–07 (India). Among the specific ordered relief was the installation of incinerators in all hospitals with more than fifty beds, the construction of additional garbage collection centers, and the appointment of specialized municipal magistrates to promulgate new rules on waste disposal. *Id.* at 608–10.

personal and domestic uses.”²³³ In Colombia, the Constitutional Court has accepted this mandate as a constitutional obligation to oversee the requirements and processes for the termination of municipal services. Beginning in at least 2007, when the Constitutional Court ordered the reconnection of water service for a seriously ill woman unable to pay her utility bills,²³⁴ the court has superintended the creation of “appropriate pricing policies such as free or low-cost water.”²³⁵ In highly detailed injunctive orders under its *tutela* power of constitutional oversight,²³⁶ the court has struck down individual suspension of water services for minors, for the indigent, or where the court deemed a breach of a fundamental right.²³⁷ In effect, the court became the prime regulator of a public function as old as the Roman aqueducts.

Brazil is perhaps the best example of the new judicialization of politics,²³⁸ combining discredited political institutions with ample rights guarantees unqualified by the types of ability to realize constraints found in other expansive modern constitutions, such as with the “progressive realization” provision of the South African Constitution.²³⁹ Nowhere is this seen more clearly than with

233. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15 on the Right to Water, ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan. 3, 2003).

234. See Corte Constitucional [C.C.] [Constitutional Court], abril 17, 2007, Sentencia T-270/07 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2007/T-270-07.htm> [<https://perma.cc/7X43-K7LB>]; see also Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2009, Sentencia T-546/09 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2009/T-546-09.htm> [<https://perma.cc/6AQJ-BRTB>] (“Pues bien, cuando el agua potable se destina al consumo humano adquiere carácter de derecho fundamental y es susceptible de protección mediante tutela, dado que sin ella se ponen en serio riesgo los derechos a la vida, la salud y la dignidad de las persona.”) (“Thus, drinking water, when destined for human consumption, acquires the character of a fundamental right and is subject to *tutela* protection, given that, without water, the rights to life, health, and dignity of the person are placed at risk.”) (translation by author).

235. C.C., abril 17, 2007, Sentencia T-270/07, § II.4 (quoting Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15 on the Right to Water, ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan. 3, 2003)).

236. César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1669–70 (2011) (discussing role of *tutela* power in social rights litigation).

237. See C.C., agosto 6, 2009, Sentencia T-546/09 § 5.1 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2009/T-546-09.htm> [<https://perma.cc/P954-J5HJ>].

238. See, e.g., Estefânia M. de Quieroz Barboza & Katya Kozicki, *Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court*, 13 DIRITTO & QUESTIONI PUBBLICHE 407, 411, 411 n.8 (2013) (It.) (“Another aspect of the judicialization of politics is the enhancement of the Judicial System’s responsibilities to decide on public policies matters, especially on those regarding rights guaranteed by the constitution, implying the redefinition of the boundaries of other public powers.”).

239. Compare CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.), translated at *Brazil 1988 (rev. 2017)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Brazil_2017?lang=en [<https://perma.cc/EA9L-U9VC>] (“Education, health, nutrition, labor, housing, transport, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.”), with S. AFR. CONST., 1996 art. 26(2) (“The state must take reasonable legislative and other measures, within its available resources, to

regard to health care claims for medication that is unaffordable to an individual claimant.²⁴⁰ The stunning success rate of such litigated claims²⁴¹ results in a significant portion of the national health care system's budget that "is used to pay for judicially mandated medication and treatment."²⁴² In these cases, Brazilian courts read the guarantees of Article 196 very expansively: "[A]n individual litigant must simply prove that a health need, as described in a doctor's prescription, was not met, and the benefit will then need to be granted by the state regardless of costs."²⁴³ In effect, resource allocation has shifted from the legislature or executive branch administrators to the judiciary, which in turn may short-circuit the customary political debates about resource allocation in favor of a "syllogistic" mandate that if a right is identified, an entitlement to state-provided benefits must ensue.²⁴⁴ Conrado Hübner Mendes argues that this shift from legislative to judicial resource allocation and rights protection is not so much a practical necessity but the result of "the underlying quality of constitutional scrutiny: it frames, in a conflictive partnership with the legislator, the boundaries of the political domain."²⁴⁵

Certainly, there are many examples of courts around the world venturing into clear areas of social policy, parallel to the Brazilian Supreme Federal Court ordering state-financed access to expensive medicines, or the Colombian Constitutional Court directing a minimum provision of water to all citizens, or the Indian Supreme Court assuming responsibility for how sanitation services shall be provided. Courts have moved quite far from the expositors of negative constraints on governmental conduct to mandating positive returns to disadvantaged or disfavored groups, in the spirit of Isaiah Berlin's famous typology.²⁴⁶ In some countries, courts even hold hearings on issues of social rights, assuming the power to become what Daly terms "positive legislators."²⁴⁷

Nor is this confined to economically vulnerable democracies. Commenting on the centralization of opioid litigation in a single federal U.S. court, the

achieve the progressive realisation of this right."). In South Africa, the distinction between the granting of the right in article 26(1) and the qualification of its implementation in article 26(2) led to the South African Constitutional Court's adoption of a reasonableness standard for determining whether the government has fulfilled its constitutional duties in administering these rights.

240. See Mariana M. Prado, *The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help?*, 41 J.L. MED. & ETHICS 124, 125 (2013).

241. *Id.* at 124 (documenting success rates higher than ninety percent).

242. *Id.* at 126.

243. *Id.* at 125.

244. Daniel M. Brinks & William Forbath, Commentary, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions*, 89 TEX. L. REV. 1943, 1954 (2011).

245. CONRADO HÜBNER MENDES, CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY 99 (2013).

246. ISAAH BERLIN, TWO CONCEPTS OF LIBERTY 51–52 (1958).

247. DALY, *supra* note 215, at 90.

presiding judge, Dan Polster, lamented that the “federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it’s here.”²⁴⁸

Courts as competent gap-fillers for democratic governmental incapacity presents a different set of issues than the normal accounts of judicial review. This is not a case of fashioning judicial review to serve as a countermajoritarian brake to protect discrete and insular parts of the society who cannot avail themselves “of those political processes ordinarily to be relied upon to protect minorities.”²⁴⁹ Nor is this a matter of relying on courts to bring to life an “enlightened” vision of a society’s better angels, extending equal rights to same-sex couples, for example.²⁵⁰ Rather, this is the substitution of judicial authority for the ordinary, if complicated, role of other institutions of democratic governance. Courts serving as the last available source of state competence is not the customary justification for judicial review. But courts in the delicate domain of allocating scarce public resources among competing social claims, particularly once the courthouse doors swing open, raises deep concern for the institutional competence of the courts. The very nature of litigation focuses attention on the matters that happen to be before the courts, while the silent majority of social concerns may find no exposition in a special case focused on a specific kind of medical care or addressing a specific need for remediation. Among other concerns, litigation-directed social policy may privilege those causes or classes with the readiest access to legal resources and may actually constitute a regressive reallocation of public resources.²⁵¹

The loss of state competence in democratic societies²⁵² pushes courts into areas of state responsibility once properly reserved for the political branches. The line between rights declaration and assumption of responsibility for governmental functions has always been permeable. The equitable powers of American judges issuing structural injunctions over the functioning of prisons or schools certainly tested the boundaries between adjudication and

248. Transcript of Proceedings at 4, *In re Nat’l Prescription Opiate Litig.*, No. 02804 (N.D. Ohio filed Jan. 12, 2018).

249. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

250. Barroso, *Countermajoritarian*, *supra* note 28, at 109, 110, 138.

251. Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1646 (2011) (“[L]itigation is likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities . . .”). As pithily expressed by Stephen Holmes and Cass Sunstein, “[t]aking rights seriously means taking scarcity seriously.” STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 94 (1999).

252. This theme is examined more fully in Issacharoff, *Democracy’s Deficits*, *supra* note 61, at 485 (noting that one of the reasons for the “current democratic malaise” is “the decline in state competence”).

administration.²⁵³ But when the loss of competence is coupled with the erosion of legitimacy of democratic politics, the temptation for judicial action appears inescapable. The discrediting of the entire political class in Brazil, to take a recent dramatic example, invites despair over the institutional capabilities of democratic government to fulfill its most basic social mandate.²⁵⁴

Doctrines such as equity in the common law tradition, or *amparo* and *tutela* in civil law jurisdictions, recognize the need for a power of the exceptions held in the judiciary, particularly when confronting governmental misconduct or incapacity. To this exceptional account of broad judicial intervention may now be added the sophisticated claim of Justice Barroso that the need for judicial intervention may not be exceptional but structural. The risk is that transgressing the presumptive centrality of the legislative branch may invite excessive judicialization of politics. Even so, on this account, the presumptive legitimacy of democratic politics may be compromised through the public choice set of “problems attributed to (i) failure of the electoral and party system, (ii) party minorities that function as ‘veto players,’ obstructing the prevailing will of the parliamentary majority, and (iii) the eventual trapping by special interests.”²⁵⁵

The consequence for Barroso is a “democratic deficit of political representation,” in turn serving as an invitation for judges to assert a vision of the public good “not subject to the short-term volatilities of electoral politics.”²⁵⁶ For advocates of this vision of constitutional judging, including not only Barroso but the German theorist Robert Alexy, constitutional judging becomes a form of popular representation above and beyond electoral politics.²⁵⁷ Alexy stretches this claim to root democratic legitimacy not in electoral results but in “argumentative representation” such that “[a]n adequate concept of democracy

253. See, e.g., *Brown v. Plata*, 563 U.S. 493, 545 (2011) (upholding court-ordered reduction in prison population); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 (1979) (upholding court-ordered desegregation plan); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1389 (S.D. Tex. 1980), *modified*, 679 F.2d 1115 (5th Cir. 1982) (finding that prison conditions violated the Constitution and appointing special masters and monitors to supervise the implementation of and compliance with court-mandated changes).

254. One indication is the approval rating of President Temer on the eve of the most recent elections. As of April 2018, Temer’s approval rating had slipped to five percent, with seventy-two percent of the population rating him “bad” or “terrible.” Lisandra Paraguassú & Anthony Boadle, *supra* note 34. In turn, a right-wing populist won the presidential election, demonizing the opposition and heralding the order of the period of military rule. Anthony Faiola & Marina Lopes, *Bolsonaro Wins Brazilian Presidency*, WASH. POST (Oct. 28, 2018), https://www.washingtonpost.com/world/the_americas/brazilians-go-the-polls-with-far-right-jair-bolsonaro-as-front-runner/2018/10/28/880dd53c-d6dd-11e8-8384-bcc5492fef49_story.html?utm_term=.a879854c80b4 [<https://perma.cc/KMG7-N9SR> (dark archive)].

255. Barroso, *Countermajoritarian*, *supra* note 28, at 129.

256. *Id.*

257. See Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT’L J. CONST. L. 572, 578 (2005).

must . . . comprise not only decision but also argument.²⁵⁸ Because judicial decisions may be tested by reasoned public review, the correctness of such decisions may afford democratic legitimacy separate from, and indeed often superior to, that of the political branches.²⁵⁹ The publicity of this form of argumentation then allows for an “indirect electoral link” to popular acceptance, to use Mattias Kumm’s formulation.²⁶⁰

B. *Managing the Risk*

At risk when the link to electoral politics becomes too attenuated is that the judiciary will become simply a substitute for democratic politics. Once armed with constitutional authority, emboldened by its reservoir of competence, and then ennobled by the public choice insight about the risk of capture of the political branches, there is the risk that the domain of politics is limited to confirmation of first-order constitutional proclamations of rights. All the more so if claims of “*ex post facto* popular approval” of judicial interpretations by public acquiescence provide for no real measure of such endorsement of judicial authority.²⁶¹ Here I find myself in agreement with Bellamy that, under such a broad claim of judicial power, the judiciary itself will become the battleground for partisan strife, most visibly at times of contested judicial appointments, and that battles over the judiciary will displace normal forms of partisan contest through politics: “Effort will go into capturing the judiciary rather than constructing a legislative majority by reaching a mutually acceptable compromise with one’s political opponents. As a result, both sides become ever more polarised.”²⁶² But the risk potentially reaches beyond the question of who sits as the judicial expositor of broad constitutional rights.

While there are many examples of increasingly pitched battles over who are the judges, from the United States to Argentina, there are few examples of judges so commanding public policy as to diminish democratic politics in some

258. *Id.* at 579.

259. See Mattias Kumm, *Alexy’s Theory of Constitutional Rights and the Problem of Judicial Review*, in *INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY* 201, 205–06 (Matthias Klatt ed., 2012). For a distinct claim that the express role of the Colombian Constitutional Court encompasses democratic legitimacy because of popular approval of that country’s constitution, see David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 *HARV. INT’L L.J.* 319, 344 (2010) (“The Colombian Constitutional Court’s striking institutional popularity relative to other political institutions suggests that it has more democratic legitimacy than most judicial bodies. The public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the 1991 constitution.”).

260. See Kumm, *supra* note 259, at 207.

261. Ana Micaela Alterio, *Una Justificación Mayoritaria del Control Judicial de Constitucionalidad: La Representación Argumentativa en la Democracia Deliberativa*, in 1 *ENTRE LA LIBERTAD Y LA IGUALDAD: ENSAYOS CRÍTICOS SOBRE LA OBRA DE RODOLFO VÁZQUEZ* 37, 49 (Jorge Cerdio, Pablo De Larrañaga & Pedro Salazar eds., 2017) (Mex.) (translation by author).

262. BELLAMY, *supra* note 11, at 44.

provable context. But an analogy may be drawn to the hollowed ambit of domestic politics in the European context in ways that may serve as a caution. Writing at the beginning of the populist upsurge that would bring to prominence Wilders in the Netherlands, Le Pen in France, Podemos in Spain, Five Star in Italy, and a host of more menacing figures in Eastern Europe, Peter Mair cautioned that the centralization of increasing authority in European authorities had voided domestic national politics of responsibility for governance. The increased distance between electoral contestation and governing authority made politics a choice grounds for increasingly demagogic posturing with little accountability for subsequent governance. With broad anticipation of how traditional European political parties have withered before polar politics, Mair wrote:

As popular involvement fades, . . . and as indifference grows, we can expect that even those citizens who do continue to participate will prove more volatile, more uncertain and more random in their expressions of preference. If politics no longer counts for so much, then not only should the willingness to vote begin to falter; so also should the sense of commitment among those who continue to take part. Choices are likely to prove more fickle, and to be more susceptible to the play of short-term factors. . . . Hand in hand with indifference goes inconsistency.²⁶³

And if the result of political posturing is that Spain is without a government for months on end,²⁶⁴ or Belgium even longer,²⁶⁵ not much matters because ultimate responsibility lies at the non-electoral level of European Union administration. When governance fails, Brussels may still rule Belgium, but it is not the elected representatives of the Belgian citizenry who are making the decisions. By analogy, the risk is that the judicialization of public policy may similarly contribute to voiding out customary politics and even turn national politics into a referendum on the judiciary. Certainly hostility to the European Court of Human Rights has been an oft-raised theme among the populist right in Europe, and the social rights rulings of the Colombian Constitutional Court serve as the backdrop for political contestation seemingly far removed from the actual rulings of the court.²⁶⁶

263. PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* 29 (2013).

264. See Tim Worstall, *Spain Has No Government for 10 Months: Economy Grows, Unemployment Falls to 18.9%*, FORBES (Oct. 27, 2016), <https://www.forbes.com/sites/timworstall/2016/10/27/spain-has-no-government-for-10-months-economy-grows-unemployment-falls-to-18-9/#81f6954b62c8> [perma.cc/BY9P-UDB3].

265. Bruno Waterfield, *Belgium to Have New Government After World Record 541 Days*, TELEGRAPH (Dec. 6, 2011), <https://www.telegraph.co.uk/news/worldnews/europe/belgium/8936857/Belgium-to-have-new-government-after-world-record-541-days.html> [[https://perma.cc/49E4-4]M2].

266. See Sibylla Brodzinski, *Colombia Referendum: Voters Reject Peace Deal with FARC Guerillas*, GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/world/2016/oct/02/colombia-referendum->

Here too there is an intermediary position akin to the process-reinforcement of the Canadian and South African courts in the context of governing structures. Courts faced with grave questions of subsistence and other first-order policy questions do at times simply assume the role of a quasi-legislature and create, in effect, a new administrative body under judicial mandate.²⁶⁷ But courts can also interpret existing laws and decrees to force the government to meet the burden of its existing obligations, or courts can compel the government to take up an issue of contested social rights under threat of judicial intervention.²⁶⁸ Thus, Po Jen Yap usefully distinguishes between judicial interventions that substitute for the failure of the political process to address a social need, those that force greater implementation of pre-existing social programs, and those that compel the government to take up the contested issue and assume political responsibility for its resolution.²⁶⁹ Confined judicial intervention may even be more rights-enabling than substitution for the political process altogether.²⁷⁰

1. Brazil

An example from Brazil shows the difficulty of courts trying to weigh the costs and benefits of competing claims for limited societal resources. In 2016, the STF ordered the impoverished state of Rio Grande do Norte to provide an individual claimant free access to the drug Sildenafil, notwithstanding the \$5000 USD price tag for each box of medication.²⁷¹ Viewed as a question of individual entitlement, such decisions betray an absence of “normative criteria”²⁷² for assessing competing claims to scarce resources. There are also serious concerns not just of distribution of public resources but of allocation, as

rejects-peace-deal-with-farc [<https://perma.cc/FL23-4HFD>] (describing intense political contestation in Colombia).

267. See, e.g., *infra* Section IV.B.3 (discussing India’s Supreme Court use of a constitutional provision to take on administrative authorities).

268. This has been a frequent form of Supreme Court intervention in India. See Shylashri Shankar & Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 146, 174 (Varun Gauri & Daniel M. Brinks eds., 2008).

269. See Po Jen Yap, *Remedial Discretion and Dilemmas in Asia*, 70 U. TORONTO L.J. (forthcoming 2020).

270. Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999) (“[R]aising the ‘price’ of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations.”).

271. STF, RE No. 566471 RN, Relator: Marco Aurélio, 28.09.2016, Diário da Justiça Eletrônico [D.J.e.], 09.30.2016, 209 (Braz.) (translation by author).

272. Vanice R. Lirio de Valle, *Enforcing Socio-Economic Rights Through Immediate Efficacy: A Case Study of Rio de Janeiro’s Right to Housing*, 25 TUL. J. INT’L & COMP. L. 1, 27, 30 (2016) (remarking that the development of mass litigation “leads to a non-differentiation tendency in ruling” and that “[d]etails about the factual framework tend to be lost, and judges would usually develop a certain decisional matrix that would be mechanically applied”).

wealthier individuals more capable of maneuvering in the legal system may siphon off state resources by demanding free state-provided medication.²⁷³

In dissent, Justice Barroso offered two alternative paths. First, he noted that there should be mechanisms to check the public health decisions made by state officials in terms of the efficacy of alternative medications, the availability of lower cost substitutes, and a range of other considerations that might channel the judicial rights inquiry into the more traditional pathways of cost-benefit regulatory oversight.²⁷⁴ More central to this inquiry, however, is the second approach offered by Justice Barroso. Rather than rushing to implement a remedy under the broad mantle of rights jurisprudence, Barroso urges courts to draw in state regulators, including experts from the public health system, to focus government attention on the health issues before the courts.²⁷⁵ By contrast to the first-order rights claims, such a procedural vehicle would compel public authorities to engage in public policy dialogue.²⁷⁶ The approach follows a focus on court intervention to “open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.”²⁷⁷

What distinguishes this process-reinforcing approach from simple rights proclamation is the engagement of the political branches to discharge their duties of democratic governance. The aim is to compel political engagement with pressing social issues, particularly on behalf of the most vulnerable members of the society but without predetermining the outcome of that engagement. In effect, this is the same posture for judicial intervention as the process-driven reinforcement of democratic soft power already seen in the examples from Canada and South Africa in the domain of democratic governance.

273. See generally Brinks & Forbath, *supra* note 244, at 1952 (reviewing recent scholarship that suggests that health care litigation may be exacerbating, rather than alleviating, economic inequality).

274. See STF, RE No. 566471 RN, at paras. 3–4 (Barroso, J., dissenting) (translation by author).

275. See *id.* at para. 4 (translation by author).

276. Barroso’s role as judge dovetails here with his constitutional scholarship on the role of courts as part of a larger dialogic constitutional apparatus. See Barroso, *Reason Without Vote*, *supra* note 28, at 88 (“What can be drawn from that final note is that the current model cannot be characterized as judicial supremacy. The Brazilian Federal Supreme Court . . . does not own the Constitution. . . . A loss of dialogue with society, the potential inability to justify its decisions or to be understood, would undercut compliance with and legitimacy by the Court.”).

277. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004).

2. South Africa

The South African Constitution, through sections 26 and 27,²⁷⁸ guarantees a right to housing and to health care, food, and social security.²⁷⁹ These rights are justiciable²⁸⁰ and may be invoked by individual litigants, as in Brazil. Both of these provisions are qualified, however, by considerations of reasonableness and adequacy of resources: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”²⁸¹

In *Government of South Africa v. Grootboom*,²⁸² the Constitutional Court distinguished the rights guarantees from the necessary deference to political authorities for the actual policies taken to implement the constitutional protections.²⁸³ At issue was a land seizure by squatters who rightly claimed government unresponsiveness to their need for housing relief.²⁸⁴ Unlike the blanket Brazilian order to provide a needed medication, the court asked about the reasonableness of the government’s overall decisions²⁸⁵ and acknowledged “that a wide range of possible measures could be adopted by the state to meet its obligations.”²⁸⁶ This reasonableness inquiry of necessity must be “extremely context-sensitive,”²⁸⁷ allowing the court to condemn the government for its complete inaction “in that it failed to provide for any form of relief to those desperately in need of access to housing” and requiring policy development “to devise, fund, implement and supervise measures to provide relief to those in desperate need.”²⁸⁸

278. S. AFR. CONST., 1996 §§ 26(1), 27(1).

279. *Id.*; see also Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. (2002) 753, 755–56, 756 n.19 (noting the influence of the International Covenant on Economic, Social and Cultural Rights on the South African Constitution’s elaboration of socioeconomic rights).

280. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 25 (S. Afr.). (“The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.” (citations omitted)).

281. S. AFR. CONST., 1996 §§ 26(2), 27(2). Note that section 28, on the rights guaranteed to children, does not contain an equivalent limiting subsection. See *id.* § 28.

282. *Gov’t of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC).

283. See *id.* at para. 32.

284. *Id.* at paras. 6–9.

285. *Id.* at para. 33; see also *id.* at para. 41 (“In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable.”).

286. *Id.* at para. 41.

287. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST. L. 106, 136 (2009).

288. *Grootboom* (11) BCLR at paras. 95–96. Whether this order actually helped the respondents is debatable. See generally Kameshni Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights*, 6 LAW DEMOCRACY & DEV. 255, 276 (2002) (arguing that, in the wake of *Grootboom*, the lives of the shanty-town residents had not appreciably improved).

The Court rejected an alternative claim for judicial declaration of a “minimum core” of housing entitlements as beyond judicial competence:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. . . . All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.²⁸⁹

While critics would no doubt have preferred the categorical elaboration of rights,²⁹⁰ as in Brazil, the South African approach forces onto the legislative agenda a more transparent engagement with resource claims by those at risk of political disregard. In such cases, “the greatest reasons for restraint” have been the product of the novelty of the rights claims “not in relation to the idea that citizens have socio-economic entitlements against the state, but in relation to issues of implementation.”²⁹¹

3. India

Alternatively, apex courts may attempt to ground rights in broader constitutional guarantees while using underenforced legislation as the remedial framework. As a practical matter, there is every reason to believe that “litigating on the basis of the government’s own standards is a very powerful tactic, and any attempt by government to repeal or roll back its own standards will be both conspicuous and ripe for challenge as a retrogressive step.”²⁹² For example, the

289. *Grootboom* (11) BCLR at para. 32 (rejecting the minimum core approach, in part, because the Court does not have access to enough facts to take into account all the variable factors affecting housing shortages in South Africa).

290. See, e.g., David Bilchitz, *Towards a Reasonableness Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 10 (2003) (claiming that “[a]t present, reasonableness seems to stand in for whatever the Court regards as desirable features of state policy” and asserting that “the Court has to develop and stipulate a specific meaning for this broad, amorphous concept”); Ania Kwadrans, *Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person Under the Canadian Charter of Rights and Freedoms?*, 25 J.L. & SOC. POL’Y 78, 89–90, 90 (2016) (discussing the model of South African jurisprudence and its aftermath as emblematic of the danger of “refusing to ascribe substantive content” to socioeconomic rights); Pillay, *supra* note 288, at 276 (arguing that, in the wake of *Grootboom*, the lives of the shanty-town residents had not appreciably improved).

291. JAMES FOWKES, *BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA* 240 (2016).

292. *Id.* at 267.

Indian Supreme Court addressed threatened mass starvation in Rajasthan under the judicially unenforceable constitutional guarantees of Article 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law”) and Article 47 (“The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”).²⁹³ Rather than circumvent the absence of a constitutional enforcement mechanism, the court accepted the constitutional mandate as a declaration of fundamental social policy. That constitutional interpretation then allowed the court to look to legislative enactments in light of the constitutional commitment. In the specifics of the decision, the court drew its specific remedial authority from the statutory Famine Code in Rajasthan²⁹⁴ and issued dozens of interim administrative orders that were to be implemented through the overall statutory framework. Ultimately, court supervision terminated in 2017, following more comprehensive legislative action: “In view of the passage of the National Food Security Act, 2013, nothing further survives in this petition. It is accordingly disposed of.”²⁹⁵

The contrast is between engaging a one-off claim for resources as a straight matter of individual entitlement and compelling the political branches to take responsibility for social welfare. This is well-captured in the South African Constitutional Court’s general “emphasis on assessing social policies and programs to ensure that they take adequate account of the needs and circumstances of the most disadvantaged, its readiness to prod government to

293. In *People’s Union for Civil Liberties v. Union of India (PUCL)*, the Court addressed famine conditions in Rajasthan under the authority of Article 21 and Article 47. Writ Petition (Civil) No. 196 of 2001 (India), <http://www.righttofoodindia.org/case/petition.html> [<https://perma.cc/G7N8-H9YE>] (initial petition); see also Yamini Jaishankar & Jean Dreze, *Supreme Court Orders on the Right to Food: A Tool for Action*, RIGHT TO FOOD CAMPAIGN 3 (Oct. 2005), <http://www.corteidh.or.cr/tablas/27433.pdf> [<https://perma.cc/LJ87-UECM>] (explaining how Article 47 relates to the right to food in India). Although the specific command of Article 47 is not a judicially enforceable guarantee, the court nonetheless issued dozens of decrees running from 2001 until 2017. These decrees covered grain allocation, obligations of ration shops to remain open and provide food for families below the poverty line, free food provisions for disabled and other destitute citizens, and school lunch programs. See *People’s Union for Civil Liberties v. Union of India & Ors*, *In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 196 of 2001*, INT’L NETWORK FOR ECON., SOC. & CULTURAL RTS., <https://www.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original> [<https://perma.cc/VL4U-HSLM>].

294. See, e.g., OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 846 (2d ed. 2014) (“Our attention has been drawn to the Famine Code That Famine Code, we are informed, is the one formulated by State of Rajasthan and similar Codes have been formulated by other States [W]e direct the implementation of the Famine Code for the period May, June and July, 2003” (quoting *PUCL*, Writ Petition (Civil) No. 196 of 2001 (May 2, 2003) (interim order)).

295. See *PUCL*, Writ Petition (Civil) No. 196 of 2001 (Feb. 2, 2017) (interim decision), <https://www.sci.gov.in/jonew/ropor/rop/all/901064.pdf> [<https://perma.cc/DJ24-LZX5>].

implement such changes, and its chariness toward individual claims for direct relief.”²⁹⁶

CONCLUSION

Few contests in life are fully self-regulating. Even markets premised on freedom of contract need overseers to prevent untoward manipulations. I confess to little patience for first-order claims of the primacy of legislative politics that cannot be tested against the lived experience of democratic governments today. The period since the end of the Soviet empire has yielded more democracies than at any time in human history and has allowed more humans to have a say in the election of their governors than ever before. At the same time, these democracies suffer the loss of the governing drive of the legislative branches, the collapse of their historic political parties, and increased populist demands to unwind their institutions. In some older democracies, these are venerated institutions of governance; in other younger counterparts, they arise in countries still trying to shake off the legacies of not quite forgotten old autocratic regimes. To speak glowingly of a halcyon English parliamentary past in the cossetted days of the British empire has little to offer debates around the world or even in Britain today.

The premise of *Fragile Democracies* was that constitutional courts could ill afford to be passive night watchmen over democracies in formation. For the suddenly emerged efforts at popular sovereignty cobbled from the collapse of autocratic states, the institutions were too vulnerable to permit courts to check only partisan excesses. Instead, the core workings of democratic institutions had to be nurtured so that the habits of democratic governance could take hold. Courts had to learn “to intervene to constitutionally valuable ends.”²⁹⁷

Dividing the world between the newly-installed fragile democracies and the stable regimes in the United States and Europe may have been error. It may be that all democracies carry the seeds of their own fragility, with the older states being distinguished by having greater protective institutional guardrails.²⁹⁸ The era of rising populist anger and the dysfunction of modern democracies is hopefully transitory. For as long as these moments last, however, there is greater pressure for judicial engagement with the institutional foundations of democratic governance. Whether the threat is to institutions or norms, or whether it is as a result of other branches’ inability or unwillingness to act in the best interest of democracy, the judiciary may emerge as the last best hope for the preservation of the basic structures of democracy. This may

296. Brinks & Forbath, *supra* note 244, at 1952.

297. FOWKES, *supra* note 291, at 349.

298. I thank Ira Katznelson for this helpful formulation of democratic fragility as a condition at a given point in time rather than a characteristic of one state versus another.

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not be the first, best world of perfectly functioning legislative politics. On the other hand, humans were forced from Eden a long time ago and have adapted to decidedly second-best arrangements.

