ESSAY

Constitutional Courts in Defective Democracies

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Constitutional courts exercising the power to invalidate the outputs of elected bodies can strengthen the liberal democratic character of the polities they serve in three main ways: by reinforcing representation; protecting human rights, particularly those of members of socially disadvantaged groups; and promoting the political system's stability over time. These functions may be especially important in defective democracies. This Essay expounds the utility of constitutional review through the example of the United States, which has a democracy that is defective in various respects, especially its essentially unamendable allocation of disproportionate political power to residents of states with small populations and the ongoing impacts of racial inequality. Nevertheless, constitutional review is no panacea. In the face of extraordinary threats unleashed by a former President and his authoritarian movement, jurists in the United States must display courage to preserve the nation's democratic order.

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I. INTRODUCTION

Whereas judges on constitutional courts around the world freely rely and build on one another's work, many justices of the Supreme Court of the United States pointedly refuse to do so. For example, resisting Justice Breyer's invocation of European subsidiarity in a 1997 case, Justice Scalia wrote for a majority of the Court that "comparative analysis" is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[1] He thus grounded U.S. constitutional isolationism in originalism: If the meaning of the Constitution is fixed at the time of its adoption, then subsequent developments in the rest of the world have no bearing on its interpretation.

Justice Scalia's argument fails even on its own terms because we can agree on the original meaning of constitutional language but still not know how to apply it to contemporary conditions. For example, suppose we agree that the original meaning of the Tenth Amendment requires protecting state and local autonomy. How do we know whether some measure does so? One can look to experience in other countries for data. Has state-level enforcement of national law—the issue in the 1997 case—led to greater or less local autonomy? Do hate-speech prohibitions end up chilling political debate? Insofar as constitutional interpretation allows policy to fill gaps when original meaning runs out, as many originalist theorists acknowledge it frequently does,[2] comparative constitutional law should inform the application and not just the writing of a constitution.

Yet if Justice Scalia was wrong to think that comparative constitutionalism serves *only* as a useful vehicle for constitutional design rather than also for constitutional application, he was right to observe the value of comparativism in matters of design. One might look to others' experience in deciding any number of decisions about constitutional design. Should the system include a separately elected president or is a prime minister as head of government preferable? What rights should receive protection? Should a constitutional court or its equivalent be empowered to enforce the constitution against political actors?

That last question—whether judicial review is justifiable in a democracy—has been a central concern of constitutional scholars in the United States. As the practice of judicial review has spread to other countries, it has become a global concern, and not just for well-functioning democracies but for defective ones as well. This Essay asks whether and if so, how, judicial review can be justified in defective democracies, using the

1. Printz v. U.S., 521 U.S. 898, 921 n.11 (1997).

2. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 387 (2013); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. PUB. POL'Y 65, 67–70 (2011).

experience of the United States partly as a template but partly as a cautionary tale.

Part II addresses the central objection to judicial review, the so-called countermajoritarian difficulty. It argues that because defective democracies are, by definition, imperfectly majoritarian, judicial review is easier to justify in a defective democracy than in a well-functioning one. Yet there might be important differences in how one implements judicial review in different sorts of political systems. Accordingly, Part III sets forth a rough typology of well-functioning democracies, defective democracies, and non-democracies. Part IV justifies constitutional review in well-functioning democracies by noting how any real-world democracy can only be well-functioning but never perfect. In that sense, all democracies are at least somewhat defective. Part V applies the important work by U.S. constitutional scholar John Hart Ely[3] to two kinds of democratic deficiencies—failures of representativeness and violations of human rights, especially the rights of members of socially disadvantaged groups. Part VI identifies the limits of the Ely-based approach with respect to the risk of authoritarianism, concluding by drawing lessons from the recent experience of the United States in the aftermath of the 2020 presidential election and the exemplary jurisprudence of the Constitutional Court of Colombia.

II. OVERCOMING THE COUNTERMAJORITARIAN DIFFICULTY

What justifies judicial review? That is a question both for constitution drafters deciding whether to include some judicial review mechanism and for judges assigned the responsibility of exercising judicial review and thus deciding how much deference to give to the legislators and executive officials whose actions they must evaluate.

With respect to the latter issue—confronting judges—one seemingly straightforward answer could be *text*. Judges might think themselves justified in exercising judicial review simply because they detect a violation of the constitutional text. But how can they be confident that they have detected rather than imagined a constitutional violation?

In rare cases, judges on constitutional courts can point to unambiguous constitutional language as the warrant for invalidating legislation. For example, in *Marbury v. Madison*, Chief Justice John Marshall included within his argument justifying judicial review a thought experiment. He imagined a law allowing for a treason conviction based on the testimony of one witness or an out-of-court confession, in clear contradiction of the provision of the U.S. Constitution requiring "the [t]estimony of two [w]itnesses" or a

3. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

"[c]onfession in open court."[4] Surely a conviction obtained based on the testimony of one witness or an out-of-court confession, Marshall reasoned, would violate the Constitution and thus impose on the courts a duty to say so.[5]

Yet such examples are almost invariably hypothetical, as in *Marbury* itself. In the real world, constitutional courts typically invalidate legislation based on their selection of one rather than another plausible reading of the constitutional text. That is especially true in rights cases involving constitutional language protecting vital but abstractly stated principles such as "liberty," "equality," and "dignity."[6] These cases implicate what, in the U.S. context, Alexander Bickel famously called the "countermajoritarian difficulty"—the substitution of a contestable interpretive judgment by mostly unaccountable jurists for a different judgment by politically accountable actors.[7]

The very notion of a countermajoritarian difficulty appears to presuppose a reasonably well-functioning democracy.[8] If it did not—if legislation or executive action invalidated by a constitutional court did not reflect the will of a majority of the relevant people (either of the nation as a whole or of a sub-unit such as a state or local government)—then the substitution of the judges' views for those of other officials would not be countermajoritarian. It would still be counter-legislative or counter-executive, but we could well imagine that a constitutional court in such circumstances would come closer to reflecting the democratic will of the people than the bodies whose judgments it displaced. Accordingly, justifying

4. U.S. CONST. art. III, § 3, cl.1.

5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

6. For example, in protecting the right to abortion, the U.S. Supreme Court explained that while a literal reading of the Due Process Clause would indicate that it only governs procedures a state may use to deprive people of liberty, the Clause has also been understood to contain a substantive component. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1993). The Court has also located a fundamental right to (same- and opposite-sex) marriage in the broad language of the Fourteenth Amendment. *See* Obergefell v. Hodges, 576 U.S. 644, 647 (2015). The Canadian Supreme Court has held that discrimination on the basis of citizenship constitutes discrimination on a ground analogous to constitutionally enumerated grounds. Lavoie v. Canada, [2002] S.C.R. 769. Similarly, the Supreme Court of India interpreted the constitutional right to equality to extend to transgender individuals. Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India). In striking down a ban on commercial assisted suicide, the German Federal Constitutional Court explained that the right to end one's life is rooted in human dignity. *Germany: Constitutional Court Strikes Down Provision Criminalizing Commercial Assisted Suicide*, LIBRARY OF CONG. (Apr. 29, 2020), https://www.loc.gov/item/global-legal-monitor/2020-04-29/germany-constitutional-court-strikes-down-provision-criminalizing-commercial-assisted-suicide/. The Constitutional Court of South Africa has reasoned that "the death penalty could not be deemed a justifiable limitation on the rights to dignity and life." Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 252 (1998).

7. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962).

8. For conciseness, hereafter I use the term "well-functioning democracy" to mean "reasonably well-functioning democracy," recognizing that no democracy functions perfectly, so that "well-functioning" is a relative term.

a robust role for constitutional courts in defective democracies is actually easier than justifying such a role in well-functioning democracies.

All democracies are at least somewhat defective.[9] Hence, the countermajoritarian difficulty is less of a difficulty than commonly assumed. However, different democracies are defective to different degrees. Judicial review of legislative and executive action is more or less problematic on grounds of countermajoritarianism depending inversely on how defective a democracy is. The more defective a democracy, the less we need worry about a countermajoritarian difficulty. Conversely, democracies that are only modestly defective (and even the most well-functioning democracies are at least modestly defective)[10] present at least *some* countermajoritarian difficulties, even if they do not present quite the full problem that Bickel thought judicial review in the United States presents.

There are also other reasons besides the countermajoritarian difficulty for courts to exercise restraint when striking down laws or executive action. A non-judicial actor or body that has no greater democratic authority than a court may nonetheless have other advantages. For example, an administrative agency staffed largely by unelected technocrats will often have subject-matter-relevant expertise that judges lack. So too, legislators chosen even through a less-than-fully-representative process may have tools at their disposal, such as the ability to hold factfinding hearings, that give them epistemic advantages over courts. And even when judges have expertise that is comparable to or exceeds that of the officials whose acts they review, there may be reasons of prudence for judges to decline to use the full scope of their authority. To give but one of many potential examples, a judge on a constitutional court who, in her pre-judicial career, was a high-ranking army officer might well know more about the relevant subject matter in a constitutional case involving military policy than legislators whose act she must review; nonetheless, considerations of separation of powers would counsel some degree of deference to the judgment of the elected officials on grounds of presumed, if not actual, institutional competence. Thus, downplaying the countermajoritarian difficulty as a basis for worrying about the scope of judicial review by constitutional courts does not signify approval of unbridled judicial activism.

III. GOVERNMENT TYPES

The conclusion that some form of judicial review can be justified in any real-world democracy notwithstanding the countermajoritarian difficulty

9. The most recent Democracy Index does not contain any democracies with a "perfect score." *See Democracy Index 2020: In Sickness and in Health?*, THE ECONOMIST: INTELLIGENCE UNIT 8 (2020).

10. James Stavridis, *Democracy Isn't Perfect, but It Will Prevail*, TIME (July 12, 2018), https://time.com/5336615/democracy-will-prevail/.

leaves open the question of what distinctive role constitutional courts play in defective democracies. To answer that question, we first need to define our terms. Various definitions of a defective democracy could be offered. For example, in an insightful essay drawing on the distinctive history of constitutionalism in Latin America, Professor Roberto Gargarella defines a defective democracy as "an institutional system that concentrates power (particularly, but not only, in the hands of the executive), expressing and reproducing, in that way, *political inequalities*" that reflect social inequalities.[11] For the purposes of this Essay, however, it will be useful to offer a somewhat more capacious and vaguer definition.

We can begin by describing what a defective democracy is not. A defective democracy is not a *non-democracy*. Although an authoritarian state may have a sham constitution[12] and might even have at least somewhat contested elections for some offices, to qualify as a democracy—even a defective one—the political system as a whole must be substantially responsive to elections. North Korea is an obvious non-democracy, but under this definition so too are Iran and China, even though each holds some contested elections for offices in which some real power is lodged.[13] Because no election can wrest ultimate power from unelected rulers in Iran or China,[14] however, they are best categorized as non-democracies rather than defective democracies.

The line between defective democracies and non-democracies is not necessarily clear and ultimately stipulative. The president of the Democratic Republic of Congo took office in January 2019 despite losing to the opposition candidate in what Human Rights Watch describes as "long-delayed and disputed national elections, marred by widespread irregularities, voter suppression, violence, and interference from armed groups" in which over "a million Congolese were unable to vote" due to an Ebola outbreak.[15]

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11. Roberto Gargarella, *Dialogic Constitutionalism in Defective Democracies*, *in* CONSTITUTIONALISM: OLD DILEMMAS, NEW INSIGHTS 71, 71 (Alejandro Linares-Cantillo, ed. 2021).

12. *See* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 880–81 (2013).

13. *See generally* Thomas Erdbrink, *Iran Moderate Wins Presidency by a Large Margin*, N.Y. TIMES (June 15, 2013), https://www.nytimes.com/2013/06/16/world/middleeast/iran-election.html; Pierre F. Landry et al., *Elections in Rural China: Competition Without Parties*, 43 COMP. POL. STUD. 1 (2010); Daniel A. Bell, *Chinese Democracy Isn't Inevitable*, THE ATLANTIC (May 29, 2015), https://www.theatlantic.com/international/archive/2015/05/chinese-democracy-isnt-inevitable/394325/.

14. Max Fisher, *How Iran Became an Undemocratic Democracy*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/world/middleeast/iran-presidential-election-democracy.html; Bell, *supra* note 13 ("[t]he government doesn't even make a pretense of holding national elections and punishes those who openly call for multiparty rule"); Sara Cheng & Alun John, *Hong Kong's First 'Patriots-Only' Election Kicks Off*, REUTERS (Sept. 19, 2021), https://www.reuters.com/world/asia-pacific/hong-kongs-first-patriots-only-election-kicks-off-2021-09-18/ ("[p]ro democracy candidates are nearly absent from Hong Kong's first election since Beijing overhauled the city's electoral system to ensure that 'only patriots' rule China's freest city").

15. *World Report 2020: Democratic Republic of Congo*, HUMAN RIGHTS WATCH (2020), https://www.hrw.org/world-report/2020/country-chapters/democratic-republic-congo#.

Despite including "Democratic" in its name, the country is currently best classified as non-democratic, but perhaps it could be said to be merely a *very* defective democracy.

Meanwhile, countries can transition from one category to another. Many central and eastern European countries that escaped Soviet domination after 1989 became democracies, but some—including European Union members Hungary and Poland—are now defective democracies in danger of devolving further into non-democracies.[16] Exactly when that further transition might occur can be debated.

What about comparisons at the other end of the spectrum? How do we distinguish a defective democracy from a well-functioning democracy? Because no democracy functions perfectly,[17] "well-functioning" requires some degree of judgment. Like the line between defective democracies and non-democracies, so the line between well-functioning and defective democracies is fuzzy and essentially stipulative. Accordingly, consider three criteria by which to measure the health of a democracy: (1) representativeness; (2) respect for human rights, especially those of members of socially disadvantaged groups; and (3) stability over time.

It will be difficult to identify *any* country that fully satisfies all three criteria. The top three most democratic countries by one index—Norway, Iceland, and Sweden[18]—had fairly homogeneous populations until relatively recently and thus little occasion for violating the rights of members of disadvantaged groups. It is therefore difficult to score them with respect to their treatment of minorities. The next two countries on the list—New Zealand and Canada—each has a history of mistreatment of indigenous peoples, and Francophone Canadians might object to treating their country as a model democracy. In any event, the list makers employed their own criteria.[19]

Having identified three kinds of regimes, the rest of the discussion will focus on the role of constitutional courts in well-functioning democracies and defective democracies. To be sure, constitutional courts can play a role in non-democracies; they may even exhibit some degree of judicial independence.[20] However, the interaction of constitutional courts with non-

16. Patrick Kingsley, *As West Fears the Rise of Autocrats, Hungary Shows What's Possible*, N.Y. TIMES (Feb. 10, 2018), https://www.nytimes.com/2018/02/10/world/europe/hungary-orban-democracy-far-right.html; Steven Erlanger, *Poland and Hungary Use Coronavirus to Punish Opposition*, N.Y. TIMES (updated July 20, 2021), https://www.nytimes.com/2020/04/22/world/europe/poland-hungary-coronavirus.html.

17. *See Democracy Index*, *supra* note 9, at 8.

18. *Id.*

19. *Id.* at 3 ("[t]he Democracy Index is based on five categories: *electoral process and pluralism, the functioning of government, political participation, political culture,* and *civil liberties*").

20. *See* Anil Kalhan, *"Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 VAND. J. TRANSNAT'L L. 1, 43–46 (2013).

democratic governments mostly raises issues distinct from those raised by constitutional courts in even defective democratic systems.

IV. THE PURPOSES OF CONSTITUTIONAL REVIEW IN WELL FUNCTIONING DEMOCRACIES

With the foregoing admittedly rough criteria for distinguishing among government types in hand, I am now ready to ask a question that will eventually frame my discussion of constitutional courts in defective democracies: What role should constitutional courts play in well-functioning democracies? One might think the right answer should be *none*. After all, if the democracy functions well, then it will do well along all three measures of democratic health. Legislative and executive officials will represent the people effectively (whether executive officials are chosen directly, as in presidential systems; indirectly, as in parliamentary systems; or through some hybrid mechanism); some combination of cultural and structural factors (such as population heterogeneity and veto gates that slow precipitous lawmaking) prevents the violation of basic human rights; and similar factors (such as strong traditions of civilian control over the military and respect for the rule of law) ensure stability.

And yet, even in establishing a constitution for a well-functioning democracy, constitution writers commonly include some role for constitutional courts. As James Madison wrote in Federalist No. 51, in addition to "[a] dependence on the people" as the primary means of ensuring that government functions as it ought to, "experience has taught mankind the necessity of auxiliary precautions."[21] Madison had in mind various structural features of the original U.S. Constitution that divided power and were in that sense countermajoritarian; the subsequent course of history in the United States and elsewhere has added judicial review under a written constitution to the catalogue of such auxiliary countermajoritarian precautions.

Some structural features of constitutions, such as federalism and separation of powers, define the means by which the democratic will is exercised and may therefore be conceptualized as partly internal to the democracy itself. Such features play an important role in defining whether the democracy functions well, even as they also serve to divide, and thereby check, abuses of power.

By contrast, constitutional review by a court is an almost exclusively external check on the political system. External checks may be essential even in a well-functioning democracy because all democracies have a tendency towards overvaluing the interests of the most powerful actors. Consider

21. THE FEDERALIST No. 51 (James Madison).

Articles 15 and 16 of the Constitution of India, which forbid discrimination based on caste and sex, while also authorizing what in the United States would be called affirmative action on those (and other) grounds.[22] Even—perhaps especially—people who regard themselves as egalitarians may be oblivious to various ways in which current practices that might seem innocuous to them in fact perpetuate historical and ongoing social disadvantages based on what the society has come to regard as invidious grounds.

The inclusion in a national constitution of provisions that forbid (or authorize remedies for) practices that perpetuate such invidious patterns might suggest that the democratic process can be trusted to resist them on a day-to-day basis. After all, the democratic process produced those provisions in the first place. Given the sorts of practices typically required for constitutional entrenchment, it will likely be true that a supermajority of citizens repudiated invidious perpetuation of a caste system. In light of the supermajoritarian support that was garnered for placing an anti-caste principle in the constitution, one would think it highly unlikely that attitudes would devolve to the point where the government draws or exploit caste-based distinctions.

Yet the history of India, the United States, and a great many countries proves otherwise.[23] Constitutional provisions expressing egalitarian principles are often aspirational. They aim to disentrench existing hierarchies rather than simply prevent such hierarchies from coming into being.[24] It is thus sensible for a perhaps temporarily egalitarian supermajority to conclude that it cannot always trust the ordinary give and take of politics, which inevitably favors the politically powerful, to look out for the powerless. Judicial review of such day-to-day decisions enables a well-functioning democracy to correct the political blind spots that come with economic, social, and political privilege.

The foregoing account of constitutional review's utility suggests that perhaps it is not exclusively or even primarily an external check on abuses of government power. Perhaps constitutional review, like separation of powers or federalism, can be best conceptualized as part of the democratic system itself—the part that ensures compliance with human rights, the second criterion for concluding that a country has a well-functioning

22. THE CONSTITUTION OF INDIA, Dec. 9, 2020, arts. 15, 16.

23. The different national histories may reflect a universal tendency of humans toward tribalism. *See* ALEXANDER LEE, FROM HIERARCHY TO ETHNICITY: THE POLITICS OF CASTE IN TWENTIETH-CENTURY INDIA 8-9 (2020) ("the hierarchical elements of caste systems, far from being unique to India, are merely an extreme manifestation of trends found in most developing countries"); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (6th ed. 2021) (describing how express racism has evolved into structural racism but hardly disappeared in the contemporary United States).

24. *See* Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009).

democracy. Under this alternative understanding, constitutional review can be justified in a well-functioning democracy by recognizing that times change. All polities, including well-functioning democracies, can go through paroxysms of malfunction in periods of stress. Indeed, this fear provides a classic justification for judicial review, often accompanied by allusions to Ulysses asking his sailors to bind him to the mast lest he heed the sirens' call.[25]

In his excellent book *Perilous Times*, constitutional scholar Geoffrey Stone describes how the U.S. political system repeatedly lost its nerve under pressure and succumbed to the temptation to suppress dissent.[26] Stone observes that most such episodes did not have permanent impacts; after the danger passed, so did the most repressive urges. However, that pattern is hardly inevitable. In other countries, indeed, even in the United States and other seemingly long-term stable democracies, there is always a risk that the legal system itself could sustain irreversible damage. Constitutional review acts as a hedge against that risk, even if it is not foolproof.

Stone's own study and others like it[27] show that for all the angst about the countermajoritarian character of constitutional review, the greater danger runs in the opposite direction—that the same forces that upend the broader society's commitment to civil rights and civil liberties during times of war and other national emergency will also erode that commitment among the judges on the constitutional court. That fear has been realized in the United States. With the exception of a few notable dissents by Justices Louis Brandeis and Oliver Wendell Holmes, Jr., our Supreme Court largely acquiesced in the censorship of the first Red Scare at the end of World War I and did the same during the McCarthyite period of the Cold War.[28] In between, the Court acquiesced in the shameful and racist treatment of Japanese Americans during World War II.[29]

Yet just as a vaccine or medicine with substantially less than one hundred percent efficacy can be beneficial, so too we might conclude that constitutional review, while imperfect, provides a net benefit. Better to enter perilous times with imperfect protection than with none at all.

As noted above, regimes change over time, becoming more or less democratic. In retrospect one may be able to say that a period of human rights violations or otherwise problematic rule was a temporary paroxysm, but while it occurs, one cannot say with certainty that it is not a transition from well-functioning democracy to defective democracy or even non-democracy. Thus, constitutional review to mitigate the worst effects of a

25. *See* HOMER, THE ODYSSEY, BOOK XII (Robert Fagles trans. 1996).
26. *See* GEOFFREY R. STONE, PERILOUS TIMES (2004).
27. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 367–86 (2009).
28. *See, e.g.*, Abrams v. U.S., 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).
29. *See* Korematsu v. U.S., 323 U.S. 214, 219–20 (1944).

paroxysm might be thought to serve yet another purpose—preservation of democracy itself.

That possibility in turn might affect the substance of constitutional jurisprudence even in calm periods. Because of the pressure that crises put on judges no less than other officials, constitutional review to mitigate harm in times of crisis may be ineffective. Accordingly, Vincent Blasi has argued that even in normal times, courts should take what he calls the "pathological perspective": they should adjudicate constitutional cases in accordance with rules and principles that will provide the maximal protection against the erosion of constitutional governance in a crisis.[30] Professor Blasi's specialty is freedom of speech, and so he offered his pathological perspective as a means of protecting free speech in perilous times, but the principle can apply across the full range of potential constitutional issues.

In sum, in a well-functioning democracy, constitutional review serves at least three purposes: first, it is a key mechanism by which the democracy protects human rights of socially disadvantaged and relatively politically powerless groups, correcting for the blind spots that even an enlightened population inevitably has with respect to the plight of members of such groups; second, it acts as an imperfect buffer against disregard of human rights in times of crisis; and third by anticipating and mitigating such paroxysms, it can help to preserve the democracy itself.

V. REPRESENTATION REINFORCEMENT AND MINORITY RIGHTS IN A DEFECTIVE DEMOCRACY

In discussing the role that constitutional courts properly play in defective democracies, Professor Ely's work, published as a book in 1980 and developed in the prior decade,[31] can serve as an instructive point of departure.

As a young man, Ely served as a law clerk to Chief Justice Earl Warren, who became Ely's hero.[32] Later, as a professor of constitutional law, Ely was highly critical of the Supreme Court's 1973 decision in *Roe v. Wade*[33] recognizing a constitutional right to abortion.[34] However, he also disagreed with conservative critiques of *Roe* that lumped it together with liberal Warren

30. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

31. *See* ELY, *supra* note 3.

32. The dedication to *Democracy and Distrust* reads: "For Earl Warren. You don't need many heroes if you choose carefully." ELY, *supra* note 3, at v. In addition to Chief Justice Warren, a famous and hugely influential footnote in a 1938 Supreme Court case also clearly inspired Ely. *See infra* note 36 and accompanying text.

33. 410 U.S. 113 (1973).

34. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

Court rulings and decried them all as unwarranted countermajoritarian judicial activism. Ely shared the conservatives' view that it was not the courts' proper role to discover or enforce society's fundamental values,[35] but he nonetheless defended the work of the Warren Court on the very different ground that some rulings that are countermajoritarian in the short run ultimately serve democratic values.

Built on the jurisprudence of the Warren Court, which in turn built on a famously prophetic footnote in a 1938 case,[36] Ely's project can be described as having two main prongs that roughly correspond to the first two criteria identified above as characteristic of a well-functioning democracy. First, Ely approved of Supreme Court rulings that facilitate representativeness. The leading example is the line of cases implementing the principle of one-person-one-vote.[37]

Some U.S. states had legislatures apportioned based either on very outdated census data or based on geographical units with widely divergent population bases. Ely applauded the leading Warren Court decisions that invalidated these malapportioned districts. Admittedly, it is possible for the democratic process itself to correct such defects; the Parliament in England eventually overcame its "rotten boroughs" without judicial intervention[38]; however, that process can take decades, while in the meantime, officials elected to represent a minority of the population have no incentive to change the basis for representation. Ely approvingly called the Warren Court's decisions in the apportionment and related cases "representation reinforcing" judicial review.

Second, Ely also approved of the broad swath of Warren Court decisions, exemplified by but hardly limited to *Brown v. Board of Education*,[39] that sought to dismantle the system of racial apartheid and white supremacy. He strongly favored rulings that directly facilitated representation of African American voters. Thus, state laws that disenfranchised minority voters were doubly suspect: first because they undercut the overall representativeness of the political system, and second because they made it harder for minority citizens to use the political process to secure their other rights and their fair share of the goods that government distributes.

Ely's theory of judicial review also targeted racially biased outputs of the political system, even on the assumption that minority voters had their fair share of representation. Ely's account was an update to James Madison's

35. *See* ELY, *supra* note 3, at 43–72.

36. *See* U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

37. Gray v. Sanders, 372 U.S. 368, 381 (1963).

38. *See The Great Reform Act*, POWER, POLITICS & PROTEST: THE GROWTH OF POLITICAL RIGHTS IN BRITAIN IN THE 19TH CENTURY, https://www.nationalarchives.gov.uk/education/politics/g6/.

39. 347 U.S. 483 (1954).

political science in Federalist 10.[40] Madison anticipated modern public choice theory in seeing politics as a domain of interest-group bargaining. Madison's central insight was that in a large diverse country, various interest groups will join together in constantly shifting coalitions based on contingent and temporary overlapping interests.[41] He thus turned on its head the conventional wisdom that democracy was impossible in a large polity. On the contrary, Madison said, in an "extended Republic" there will be more—and more diverse—interest groups than in a small polity, with the result that no single faction can dominate politics. A group that might lose on one issue will win on another.[42]

Although Madison failed to anticipate how ideologically coherent political parties would undercut the Federalist 10 dynamic, his insights remain important, but only when updated by Ely's further critique: If a group defined by identifiable characteristics such as race is the object of prejudice and thus systematically shut out of interest-group bargaining, the political system will be effectively unavailable to that group. When its outputs disadvantage "discrete and insular minorities,"[43] those outputs cannot be trusted. Thus, Ely justified what U.S. case law has called "strict scrutiny" of racially discriminatory laws.[44]

Ely's theory hardly went unchallenged. He faced "mirroring critiques" from the left and the right.[45] Ely's critics argued that his account relied on an impossible distinction between judicial review that aims at ensuring procedural regularity and judicial review that instantiates particular values. Thus, the left-leaning critics contended that judicial review should properly embrace a broader set of substantive as well as procedural rights, whereas the right-leaning critics thought that the Warren Court jurisprudence was unjustifiable free-wheeling judicial activism.

Nonetheless, Ely's theory holds up very well against the foregoing criticisms because of a point that Ely himself did not emphasize or even seem to recognize: the United States when Ely published *Democracy and Distrust* in 1980 and today was and remains a defective democracy.[46] Including a constitutional court even in a well-functioning democracy to

40. *See* THE FEDERALIST No. 10 (James Madison).

41. *See id.*

42. *See id.*

43. ELY, *supra* note 3, at 75-76 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

44. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964).

45. Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1238 (2005).

46. *Democracy Index*, *supra* note 7, at 44 ("the US's overall performance is held back by a number of weaknesses, including extremely low levels of trust in institutions and political parties; deep dysfunction in the *functioning of government*; increasing threats to freedom of expression; and a degree of social polarization that makes consensus on any issue almost impossible to achieve"). The report also notes that the nation's score has declined by 0.30 since 2006, a deterioration only slightly less than the average recorded in Western Europe. *Id.*

protect against blind spots and to hedge against abuses during paroxysms, as discussed earlier, fits reasonably well with Ely's theory. Ely's account, however, is an especially good fit for a democracy that is defective in just the way the U.S. government is defective: it gives disproportionate political power to a racially identifiable elite.[47]

U.S. political parties have fluctuated in their platforms and their constituents over time, but for roughly the last half century, the Democratic Party coalition has included a disproportionate share of racial minority voters and has been overall more popular than the Republican Party; and yet, Republicans have more frequently been able to secure control over government. In five of the last six Presidential elections, the Democratic candidate won the popular vote, but due to a system that disproportionately favors whiter and more rural voters, the Republican presidential candidate won half of those elections.[48] The upper house of the national legislature in the United States currently balances on a knife's edge, with equal numbers of Democrats and Republicans, but an internal rule requires a super-majority of 60 of 100 Senators to enact legislation.[49] The chamber's even division disguises a further defect: Democratic Senators hold eight more of the seats from the more populous states, while the Republicans hold eight more of the seats from the less populous states, resulting in a boost of Republican representation by more than 40 million people.[50] The deviations from majoritarian rule just described do not account for the further advantage Republicans derive from gerrymandering for the lower house of Congress and most state legislatures.[51]

One might object to characterizing these disparities as undemocratic on the ground that they simply reflect the federal nature of the U.S. system. Surely a federal system of government cannot be labeled defective simply in

47. Jesse H. Rhodes et al., *Research Shows Just How Much More Power White Voters Wield in Local Elections*, WASHINGTON POST (Sept. 3, 2020), https://www.washingtonpost.com/politics/2020/09/03/research-shows-just-how-much-more-power-white-voters-wield-local-politics/; *Kim* Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/; HANNAH KLAIN ET AL., BRENNAN CTR. FOR JUST., WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES 3 (2020), https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf (noting that "[b]lack and Latino voters face longer wait times on Election Day than white voters").

48. *See United States Presidential Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/RESULTS/index.html.

49. *See* Standing Rules of the Senate, Rule XXII, Precedence of Motions.

50. Ian Millhiser, *America's Anti-Democratic Senate, in One Number*, VOX (Jan. 6, 2021), https://www.vox.com/2021/1/6/22215728/senate-anti-democratic-one-number-raphael-Warnock-jon-ossoff-georgia-runoffs.

51. To be sure, states with Democratic legislatures also gerrymander, but they derive a much smaller aggregate advantage. *See* LAURA ROYDEN & MICHAEL LI, BRENNAN CENTER FOR JUSTICE, EXTREME MAPS 1–2 (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

virtue of the fact that representation in the national system is not directly proportional to population. That, after all, is a characteristic protection for the autonomy of the relevant sub-units.

If the concern about the U.S. government were merely that it permits national numerical minorities to block national action or even occasionally to control the national government, the foregoing would be a good objection. Federalism in Canada, although hardly perfect, appropriately provides Quebec and the maritime provinces with influence in the national government beyond what they would enjoy in a unitary system in order to ensure the rights of the Francophone minority. So too, the complex structures of Belgian federalism—designed as they are to reflect and protect the distinct linguistic and cultural traditions of people in different regions—produce electoral and policy outcomes that one would not necessarily see in the absence of those structures. There is nothing inherently problematic or undemocratic about federalism. Accordingly, the conclusion that the United States today is a defective democracy does not rest on the federal nature of the political system. Rather, it rests on a historically contingent and time-limited claim about how contemporary party politics interacts with an extremely difficult-to-amend constitution and a system of federalism designed for circumstances that no longer exist. The ratios alone are problematic: California has a population of nearly 40 million; Wyoming has under 600,000[52]; each enjoys unamendable equal sovereignty in the upper house of our national legislature.

Meanwhile, and more problematically, federalism in the contemporary United States does not serve to protect the interests of any currently or traditionally socially disadvantaged groups. People who vote for the Republican Party are on average whiter, older, wealthier, and more likely to be male than those who vote for the Democratic Party[53]; yet the particular federal structure of our political system provides a boost to the Party that represents the preferences of the former—socially advantaged groups.

That is not to say that everyone who votes Republican is, to use the current argot, "privileged." On the contrary, the modern Tea Party-turned-Trumpist movement in the United States and its right-wing populist cousins

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52. *See National Population Totals: 2010-2020*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-totals-national.html.

53. *See* John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/; *Wide Gender Gap, Growing Educational Divide in Voters' Party Identification*, PEW RSCH. CTR. (Mar. 20, 2018), https://www.pewresearch.org/politics/2018/03/20/wide-gender-gap-growing-educational-divide-in-voters-party-identification/; Frank Newport et al., *Republicans' Well-being Higher Than Democrats', Independents'*, PEW RSCH. CTR. (May 4, 2012), https://news.gallup.com/poll/154499/republicans-wellbeing-higher-democrats-independents.aspx.

in other countries appeal to and mobilize white voters who feel a distinct loss of status due to global trends and put them in coalition with more traditionally conservative constituencies. The point is not to decry this political strategy—or rather, not simply to decry it. Unlike in places like the United Kingdom, where supporters of Brexit won fair and square by persuading the public with lies,[54] in the United States a similar coalition repeatedly loses the popular vote but gets an electoral bump that enables it to win control over or a blocking power in the national government. No interest in shielding disadvantaged racial, ethnic, linguistic, or other social groups from the excesses of majoritarianism justifies this bump, much less does any such interest justify the increasing power of the privileged minority to insulate itself against free and fair elections. The system is quite simply defective.

VI. CONCLUSION: EVALUATING REPRESENTATION REINFORCEMENT IN DEFECTIVE DEMOCRACIES

To say that Ely's theory of judicial review fits well with defective democracies is not to say that such review is effective. Even during the heyday of the Warren Court—when the Supreme Court was genuinely interested in using constitutional review to correct the defects of American democracy—judicial efforts achieved only limited results. Although the one-person-one-vote decisions reduced raw numerical disparities, and *Brown v. Board of Education* played an important symbolic and perhaps catalytic role, it took the political will of Congress and President Lyndon Johnson to translate the Warren Court's ideals into legislation that made a difference on the ground.[55] Moreover, even if we count the Warren Court era as a success, progress has often given way to backsliding.

For example, Congress enacted the Voting Rights Act in 1965 and periodically re-enacted it thereafter.[56] Then, in 2013, in an opinion by Chief Justice John Roberts that can most charitably be described as naïve, the Supreme Court invalidated Section 4(b) of that Act as no longer justified because, according to the Court, increases in African American voting while the Act was being enforced meant that "things ha[d] changed dramatically."[57] Meanwhile, after some initial desegregation once the Justice Department was empowered to sue by Title III of the Civil Rights Act of 1964, public schools in the United States—and not only in the South—

54. Editorial, *Brexit Proponents' False Promises Crumble*, N.Y. TIMES, (June 28, 2016), https://www.nytimes.com/2016/06/28/opinion/brexit-proponents-false-promises-crumble.html.

55. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 42–72 (2d ed. 2008).

56. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

57. Shelby Cnty. v. Holder, 570 U.S. 529, 547 (2013).

became segregated again.[58] However, modern case law treats contemporary segregation as the result of private conduct—"white flight" to the suburbs—and thus beyond the reach of an Equal Protection Clause that only applies to state action.[59]

Indeed, in the two contexts in which we might expect a constitutional court to remedy the defects of a defective democracy with Ely-inspired interventions, the U.S. Supreme Court in the post-Warren Court period has more nearly seemed to aim at the opposite result. Instead of reinforcing representation, its 2013 decision invalidating the Voting Rights Act, its resolution of the 2000 Presidential election, and its rulings that campaign finance regulations violate free speech all seem to make the political system less, rather than more, representative of the People.[60] Meanwhile, most of the Court's major decisions involving racial minorities over the last several decades have struck down policies that aimed to remedy past and ongoing discrimination on the ground that they unfairly discriminated against white applicants to universities, for jobs, or for contracts.[61]

Although the track record of the U.S. Supreme Court thus leaves much to be desired, it is nonetheless possible to imagine a constitutional court using Ely's normative justification for judicial review as a guide to mitigate the defects of a defective democracy with respect to representation, civil rights, and civil liberties. Indeed, that is more or less an accurate characterization of the Warren Court, which is hardly surprising, given two facts: first, Ely's theory sought to justify the Warren Court jurisprudence; and second, the United States during the Warren Court era—from 1953 to 1969—was a defective democracy that, thanks at least in part to the Court's interventions, became somewhat less defective.

We thus have at least a theoretical fit between Ely-style judicial review and a remedy for defects along two of the three dimensions for measuring

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58. *See* Emma García, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECONOMIC POLICY INSTITUTE (Feb. 12, 2020), https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/.

59. *See* Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 369-70 (2015) (criticizing the Supreme Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974) for its rejection of an inter-district remedy to segregation in Detroit).

60. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder ("states previously covered by the preclearance requirement have engaged in recent, significant efforts to disenfranchise voters"); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 10 (2020) (arguing that the outcome of *Bush v. Gore*, 531 U.S. 98 (2000), resulted in the appointment of conservative justices who enabled recent antidemocratic rulings); DANIEL I. WEINER, BRENNAN CTR. FOR JUST., *CITIZENS UNITED* FIVE YEARS LATER 4 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Citizens_United_%205 _%20 Years_%20Later.pdf (noting that in the first five years after *Citizens United v. FEC*, 558 U.S. 310 (2010), super PACs, interest groups, labor unions, corporations, and other outside groups spent almost $2 billion aimed at federal elections).

61. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

a democracy's health identified above. Constitutional review can serve to remedy defects in representativeness and in respect for human rights, with a special focus on the rights of members of socially disadvantaged groups.

In one very important sense, Ely-style judicial review also aids in stabilizing democracy, the third dimension for measuring the health of a democracy. A defective democracy teetering on the edge of slipping into non-democracy along the dimensions of representativeness or respect for human rights can be held back from the precipice by robust judicial decisions that reinforce representativeness and protect human rights. To give an all-too-salient example of the latter, insofar as courts have a role to play in reining in excessive state force against civilians—whether in Bogota or Minneapolis—they protect not just the civil rights and civil liberties of the protesters, but they also potentially protect the democratic character of the regime itself. Excessive force sparks further protest, which leads to still more brutality, until either revolution or strongman rule may result. Courts enforcing constitutional rights and keeping the government within the bounds of law can break the cycle of escalation.

Courts may ultimately be powerless to defend against some direct assaults on democracy. By the time the tanks surround the parliament, presidential palace, or constitutional court, jurists will not be able to stop the coup. Whether found in express constitutional language or judicial opinions construing that language, what Madison called "parchment barriers" cannot stop bullets.

Still, there may be opportunities *before* shots are fired for judges to play a role in stabilizing democracy. By standing up not only for human rights but also for the rule of law—especially when doing so runs contrary to judges' presumed political druthers—constitutional courts may stiffen the backbone of other government officials, including some with real power, like military officers sworn to uphold the constitution even in the face of a contrary order from the civilian commander-in-chief or would-be coup leader.

Despite the Roberts Court's naïveté about voting rights and broader complicity in the degradation of American democracy,[62] the federal judiciary of the United States deserves praise for its overall commitment to the rule of law. The Roberts Court and lower court judges—many appointed by Donald Trump—uniformly refused to aid the latter in his 2020 post-election litigation challenging a free and fair election based on groundless allegations.[63]

62. *See* Klarman, *supra* note 60, at 178-231 (describing the anti-democratic character of much contemporary Supreme Court case law).

63. *See, e.g.*, Order in Pending Case, Texas v. Pennsylvania, No. 22O155, 592 U.S. (Dec. 11, 2020).

Other courts have shown even greater courage—none more so than the Constitutional Court of Colombia. During its three decades of existence, that court has used the tutela, a broadly available writ for challenging illegality, to develop human rights as a building block of democracy.[64] The court has done so courageously, in spite of the very real threat to the safety of court personnel and others. The deadly 1985 Palace of Justice siege has undoubtedly been on the minds of the judges throughout this period.[65]

Instances of judicial courage in Colombia, the United States, and elsewhere may not be universal, but neither are they aberrational. Such episodes lead to the conclusion that the list of judicial means for protecting democracy described above is incomplete. In protecting the stability of democracy—and thus either preventing a defective democracy from becoming a non-democracy or helping it to become a well-functioning democracy—Ely's mechanisms of representation reinforcement and protection for the rights of members of disadvantaged groups should be supplemented by two more judicial virtues: respect for the formal character of the rule of law and courage.

In much of my scholarly work, I am a critic of formalism and have argued at length that jurists who claim to find determinate answers to contested legal questions in the text or original understanding of broad constitutional language are at best fooling themselves. However, I acknowledge that formal legal materials do a great deal of work in the sorts of cases that do not typically reach apex courts or constitutional courts. When such cases do reach these courts, it is important for jurists to be able to point to the formal legal materials to reject outlandish claims—especially when, as was true in the United States in late 2020, those outlandish claims are made on behalf of the incumbent president in an effort to overturn a free and fair election.[66] The ability to point to the law and say there is no room for argument can be crucial to a court's credibility.

Although such formalism in extreme cases was not distinctive to Ely's views, it is compatible with those views. For example, in defending the Warren Court's application of the U.S. Constitution's Bill of Rights against the states as foreshadowed by the famous footnote to which I referred earlier, Ely wrote that "positive law has its claims, even when it doesn't fit some grander theory."[67] Indeed, in a crisis it might turn out that the very

64. Chris Thornhill & Carina Rodrigues de Araújo Calabria, *Global Constitutionalism and Democracy: The Case of Colombia*, 2 JUS COGENS 155, 171–77 (2020).

65. *See 1985 Palace of Justice Siege*, COLOMBIA REPORTS (Dec. 15, 2016), https://colombiareports.com/palace-justice/.

66. *See, e.g.*, Sarah Elbeshbishi, *A Dozen Republican Senators Plan to Object to Certification of Biden's Election Win Over Trump*, USA TODAY (Jan. 2, 2021), https://www.usatoday.com/story/news/politics/elections/2021/01/02/republican-senators-join-josh-hawley-electionobjection/4113152001/.

67. *See* ELY, *supra* note 3, at 76.

fact that positive law is just that rather than the application of some grander theory will enable a court to point to the positive law to stand up to pressure.

In the end, however, experience teaches that jurists need more than a good theory and more than positive law to defend the constitutional order against the enemies of democracy and human rights—they also need courage, which is a distinctly, if not a uniquely, judicial virtue.

In the U.S. canon, one finds no better an exemplar of this idea than the separate opinion of Justice Brandeis in *Whitney v. California*.[68] Although Brandeis, joined by Holmes, concurred on procedural grounds in affirming the criminal syndicalism conviction of the petitioner in that case, his opinion came to stand for a dissenting and speech-protective view that eventually became dominant. Significantly, the poetic opinion of Brandeis repeatedly returns to the theme of courage and the danger of succumbing to fear:

> Those who won our independence . . . believed . . . *courage* to be the secret of liberty. They . . . knew that order cannot be secured merely through *fear* of punishment for its infraction; . . . that *fear* breeds repression . . . . *Fear* of serious injury cannot alone justify suppression of free speech and assembly. Men *feared* witches and burnt women. It is the function of speech to free men from the bondage of irrational *fears*. . . . Those who won our independence by revolution were *not cowards*. . . .To *courageous*, self-reliant men, with confidence in the power of free and *fearless* reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[69]

Although writing specifically about free speech, for Brandeis, speech was always and ultimately about democracy. Perhaps Brandeis exaggerated in attributing his views to the founders of the American republic, but he told a timeless truth about what it takes for democracy to survive and the role that constitutional courts staffed by courageous judges can play in increasing the odds of survival. Constitutional courts may not be sufficient to save a democracy from catastrophe, but staffed by courageous judges, they can sometimes make a difference.

68. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring) (emphasis added).
69. *Id.* at 375-77.

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