

## The Ghost of John Hart Ely

Ryan D. Doerfler\*  
Samuel Moyn\*\*

*The ghost of John Hart Ely haunts the American liberal constitutional imagination. Despite the failure long ago of any progressive constitutional vision in an increasingly conservative Supreme Court, Ely's conjectures about the superiority of judges relative to legislatures in the protection of minorities and the policing of the democratic process remain second nature. Indeed, they have been credible enough among liberals to underwrite an anxious or even hostile attitude toward judicial reform. In order to exorcise Ely's ghost and lay it to rest, this Article challenges his twin conjectures. First, the Article argues that there is little historical and no theoretical basis for the belief that courts will outperform legislatures in overcoming deeply entrenched historic discrimination against deserving minorities—even as courts act to entrench the power of undeserving ones, like the powerful and wealthy, today. Second, the Article contends that Ely's almost complete failure to anticipate the inaction of the judiciary in policing the democratic process—except when judges assist their own ideological allies—is devastating for his theory, which depended precisely upon an empirical prediction. Ely's conjecture about the comparative superiority of judges in policing the democratic process has proved untrue because he ignored ideological affiliation (focusing exclusively on personal self-interest) in supposing that, with their independence and life tenure, judges are less likely to act in self-dealing fashion than politicians. And the deepest reason for the ideological affiliation of judges, who often exacerbate what many take to be the worst pathologies of democratic exclusion, is that identifying what arrangements count as more rather than less democratic is itself a matter of intense ideological division. If Ely's two conjectures fail, nothing remains to support the conclusion that judges deserve excess countermajoritarian power, leaving democracy's shortcomings to be remedied within democratic politics—which is, in turn, the most desirable future of liberal constitutionalism.*

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\* Professor of Law, The University of Chicago Law School.

\*\* Henry R. Luce Professor of Jurisprudence, Yale Law School; Professor of History, Yale University. Thanks to Maggie Blackhawk, Nikolas Bowie, David Pozen, Christopher Sprigman, and Nicholas Stephanopolous for helpful comments and suggestions, and to Alex Hall for outstanding research assistance.



empirical conjectures he makes that mainstream liberals share. Ely's attempt to recast constitutional law as procedural is regarded by most observers as a failure. A consensus rapidly emerged that many of the "procedural" determinations Ely was depicting rested upon unspoken substantive premises about which minorities deserve protection and what counts as impermissible interference with electoral processes.<sup>6</sup> But since that debate was settled, scholars have not seen that the actual basis for his continuing influence—the fact that Ely's twin empirical conjectures resonate ideologically with liberal political expectations that judges can and should have interventionist power to manage and shape democratic life—is nearly as faulty. The ghost of John Hart Ely haunts contemporary constitutional theory, not in the guise of "process theory," but in two empirical suppositions that continue to lead the field away from democracy. Indeed, to many observers of America's constitutional order, these two conjectures are sufficiently intuitive as to allow them to construct something like Ely's theory of judicial intervention without having ever read Ely themselves, or even heard of him. The classroom of constitutional law has been suffused by Ely's assumptions for decades even when his name is unmentioned, in part because teachers bring those assumptions but also because students have already reached them out of the liberal civic culture with which Ely's theory resonated for so long.

As Henry Paul Monaghan noted on Ely's death in 2003, *Democracy and Distrust* is really "two books"—his critique of the credibility of judges discovering suprapolitical values via any interpretive approach, and his residual theory of the remaining role for their interventions.<sup>7</sup> But there is a strong possibility that the two books contradict each other. Seeking to replace the reasons for judicial intervention Ely offered after the collapse of his own substance/process distinction, scholars have chosen to save the wrong one. The focus of this Article, following them, is on the part of the theory in which Ely

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6. See, e.g., Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73 (1988); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981).

7. Henry Paul Monaghan, *John Ely: The Harvard Years*, 117 HARV. L. REV. 1748, 1750 (2004). Monaghan called the chapter on fundamental values, which first appeared as Ely's *Harvard Law Review* foreword, "the finest piece [Ely] ever wrote," *id.*, but the entire first half of *Democracy and Distrust* often goes missing from scholarly memory. See John Hart Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

found a residual credibility for a judiciary empowered to trump majoritarian processes. It proposes dropping that part of theory in the spirit of Ely's own impassioned brief against judicial intervention—not because he was wrong to be concerned about persistent minorities and representative process, but because there is no reason to empower judges in their defense.<sup>8</sup>

*Democracy and Distrust* starts with the observation that democracy is possible only under certain conditions. If a society prohibits women from voting, for example, legislative decisions within that society are fairly characterized as “undemocratic,” or at least as *less* democratic than they would be otherwise.<sup>9</sup> From this premise, Ely argues that judges should limit themselves to ensuring that the conditions of democracy obtain (e.g., that the franchise is not restricted to men), leaving it to the people to decide other issues through the use of democratic procedures. But why should judges even do that? Why not let the people (try to) decide for themselves which conditions are more democratic or less?<sup>10</sup> The answer, and *Democracy and Distrust's* core claim, is one of comparative institutional advantage. “Obviously,” Ely reasons, “our elected representatives are the *last* persons we should trust” in determining whether the conditions of democracy yet exist.<sup>11</sup> Far better, he continues, to rely upon life-tenured judges given their comparative disinterest in electoral outcomes.<sup>12</sup>

Because Ely is telling a story of comparative advantage, whether assessments of democracy are themselves substantive as opposed to procedural seems irrelevant. If courts are *better* than legislatures at identifying the substance of democracy, one might ask, what does it matter? What this Article submits, in turn, is that Ely continues to influence mainstream liberal scholars because the empirical conjecture—or, as it turns out, conjectures—he offers about comparative advantage continue to resonate with them. But there is almost no basis for the guess. In fact, political experience, and most

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8. For an exemplary attempt to justify greater judicial intervention than Ely countenanced, while both ignoring his own critique of appeals to substantive values and relying on his conjectures about the likely behavior of judges, see Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021) (defending judicial intervention to protect “dignity” and prevent status injury).

9. As this Article discusses throughout, because Ely's argument is one of comparative institutional advantage, the relevant question is whether some allocation of decisionmaking authority among institutions is *more* democratic than some other, as opposed to whether that allocation results in a society that is “democratic” all things considered.

10. The example of a society with the franchise restricted to men deciding “collectively” whether to extend it to women illustrates the obvious complications with such a “popular” approach.

11. ELY, *supra* note 1, at 103 (emphasis added).

12. *Id.*

glaringly the history since Ely's theory was available to be applied by judges, suggests the opposite: judges are less well-positioned to protect the minorities who deserve help and less apt to police self-dealing politicians setting out to entrench their electoral power.

This Article is, accordingly, devoted to identifying and critiquing the conjectures that appear to support the Elysian conception of judicial review. As it explains, Ely's historical narratives, for many in recent decades, border on common sense. The aim of the Article is thus to denaturalize these narratives, showing them to be, at best, uncertain. Once these narratives are revealed as uncertain, it proves better to place confidence in legislatures rather than courts. Abandoning the conjectures is to exorcise Ely's ghost and allow recommitment to more democratic approaches to democracy's pathologies as the most desirable future of constitutionalism.

This Article proceeds in four parts. Part I opens by dispensing with Ely's distinction between "process" and "substance," on the grounds that it is a distraction from his true argument. Any reckoning with Ely should fall instead on the two distinct conjectures he offers for why courts are better than elected officials at protecting democracy. The first, which goes to courts' supposedly critical role in protecting the rights of "discrete and insular" minorities, says that insulation from majoritarian pressures makes judges more reliable than elected officials in attending to minoritarian interests. Most charitably, this narrative reduces to the claim that government officials on their own are more attentive to the interests of minorities than are ordinary citizens, which is to say, less politely, that ordinary citizens are more bigoted than government officials. Ely's second conjecture, by contrast, concerns courts' alleged superiority in administering the "law of democracy." In that story, courts are more trustworthy than elected officials in setting the rules of electoral contestation because elected officials have an obvious interest in choosing rules that are to their advantage. Judges, meanwhile, are comparatively disinterested in electoral outcomes because of life tenure and so can be relied upon to select electoral rules more fairly.

In Part II, this Article asks whether it is appropriate to weigh the sort of "instrumental[ ]"<sup>13</sup> or "outcome-related"<sup>14</sup> arguments Ely offers for why judges rather than elected officials should be tasked with

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13. JEREMY WALDRON, *LAW AND DISAGREEMENT* 252 (1999) (describing "rights-instrumentalism" as the position in which "one chooses whatever decision-procedures are most likely to answer the question 'What rights do we have?' correctly").

14. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1373 (2006) ("Outcome-related reasons . . . are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome (i.e., a good, just, or right decision).").

maintaining democracy, considering Jeremy Waldron's influential criticism that such arguments are inherently question-begging against those who understand democracy relevantly differently.<sup>15</sup> Responding to Waldron, this Part suggests that, in circumstances of bitter, fundamental disagreement about the nature of democracy of the sort that characterizes our political situation today, the assumption of mutual respect that undergirds Waldron's criticism is not satisfied. For that reason, it is unavoidable that today's debates about judicial review will focus on outcomes, even if, as Waldron rightly warns, claims about outcomes cannot be shared across relevant partisan or ideological divides.

In Part III, this Article takes up the first of Ely's narratives in support of the comparative advantage of judges—again, the alleged comparative bigotry of ordinary citizens. As this Part explains, Ely's narrative is most charitably understood as grounded in specific historical evidence. In turn, this Part asks how well Ely's history holds up in the United States in particular. Noting various key omissions—most significantly, the Supreme Court's repeated invalidation of rights-protective enactments by Congress—it concludes that Ely's claim that courts are historically more attentive to the interests of minorities is uncertain at best. (It is dubious at worst.) In addition, this Part observes that, seemingly for institutional reasons, courts both domestically and internationally are less disposed than other governmental bodies, particularly legislatures, to recognize and enforce positive as opposed to negative rights. As such, under conditions of uncertainty as to whether courts or legislatures are more attentive to the interests of minorities, this Part argues, legislative rather than judicial empowerment should predominate insofar as legislative empowerment can conduce to real or substantive equality for vulnerable populations, whereas judicial empowerment conduces to mere formal equality for those same groups.

Finally, Part IV turns to Ely's second narrative, that judges are less interested in electoral outcomes and so can be more trusted to set electoral rules fairly. Insofar as it rests on an empirical conjecture, Ely's guess about judges and the democratic process has been systematically refuted by American history, as judges have stood by passively as gerrymandering and other electoral self-dealing have proceeded. Ironically, it is as if Ely's argument for a necessary judicial role in this area coincided with a disappearance of any empirical grounds for crediting it. Frustration by liberal Elysians with the Supreme Court's recent handling of election law should be surprising to them insofar as

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15. See WALDRON, *supra* note 13, at 252–54, 294–95.

Ely *predicts* that courts will handle such matters comparatively well. Asking what accounts for the Court's recent failure to act as a check on entrenchment efforts by elected officials, the explanation it suggests is that, insofar as administering democracy is an unavoidably ideological endeavor, it should come as no surprise that ideologically allied judges and elected officials cooperate. This Part concludes by arguing that, in addition to being an unreliable check on entrenchment, courts plausibly make entrenchment easier by impairing the efforts of popular insurgents to unsettle self-serving arrangements adopted by political elites. For that reason, once again, legislative empowerment is systematically preferable to judicial empowerment insofar as legislative empowerment leaves more open the possibility of a popular check on the sort of entrenchment with which Ely's followers are concerned.

*Democracy and Distrust* and its core argument(s) remain influential both within that legal academic tradition and in mainstream liberal political rhetoric more broadly. In both the leadup to and the aftermath of the 2020 election, federal judges were characterized as "the last wall" against a stolen election.<sup>16</sup> More generally, liberal scholars continue to insist that the judiciary has a special role in protecting democracy. "A constitution for the modern world," Jamal Greene asserts, "asks judges neither to ignore nor to supplant politics, but rather to structure it, to push it, and to police it."<sup>17</sup> Similarly, "every democracy needs . . . strong courts," reasons Kim Lane Scheppele, largely because "majoritarian political processes are pretty tough on . . . minority rights" and do a poor job of "protecting the framework of democratic decision-making."<sup>18</sup> The desire for a response to these undoubtedly real problems has, unfortunately, led mainstream liberals to idealize the judiciary as a solution to them, when in fact it leaves them unaffected, or worsens them. It has therefore distracted from the

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16. Rosalind S. Helderman & Elise Viebeck, *The Last Wall: How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html) [https://perma.cc/9G6E-DPQ6]; see also Peter Baker & Kathleen Gray, *In Key States, Republicans Were Critical in Resisting Trump's Election Narrative*, N.Y. TIMES, <https://www.nytimes.com/2020/11/28/us/politics/trump-republicans-election-results.html> (last updated Feb. 1, 2021) [https://perma.cc/F26Q-86J7]; William A. Galston, Opinion, *Institutions Saved the 2020 Election: Trump May Refuse to Concede, but the Judiciary and the States Did Their Duty*, WALL ST. J. (Dec. 15, 2020, 12:34 PM), <https://www.wsj.com/articles/institutions-saved-the-2020-election-11608053669> [https://perma.cc/C448-QAWE].

17. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at xxxv (2021).

18. The White House, *Presidential Commission on the Supreme Court of the United States – 6/30/21 Meeting*, YOUTUBE (June 30, 2021), <https://www.youtube.com/watch?v=WBvKrXJnO8E&t=6649s> [https://perma.cc/A2LQ-42LS].

proper focus on political solutions to democratic ills and the reality that remediation is only available through the democratic process itself.

### I. ELY'S TWIN CONJECTURES

The central thesis of *Democracy and Distrust* is that judges are better positioned than elected officials to ensure that democracy functions well. In making this case, however, Ely identifies two relatively different types of democratic “malfunction,” and in turn offers two separate stories as to why judges are comparatively advantaged.<sup>19</sup>

Ely's own framing of the book around a defense of proceduralist—rather than substantive—intervention was rapidly discarded. As scholars observed, that framing was especially implausible in relation to Ely's insistence that courts should afford protection to politically disadvantaged minorities.<sup>20</sup> According to Ely, a well-functioning democracy precludes adverse treatment of minorities based upon “simple hostility,” which is why, for example, judicial nonenforcement of legislation reflecting racial animus is democracy enhancing rather than democracy subverting.<sup>21</sup> Needing to distinguish, however, between disparate treatment of minorities that is contrary to democracy (e.g., penalizing religious minorities) and that which is its permissible output (e.g., penalizing sexual harassers), Ely was left to appeal to notions like “prejudice” or “discreditable” reasons for classification.<sup>22</sup> Such appeals betray that substantive assessments unavoidably underlie such distinctions; as Bruce Ackerman put it, “One person's ‘prejudice’ is, notoriously, another's ‘principle.’”<sup>23</sup> Ronald Dworkin, similarly, responded to Ely to the effect that his pretense of avoiding substantive value choices distracted from the need for an openly moralistic account of judicial supremacy Dworkin famously (or notoriously) favored.<sup>24</sup> Owing to criticisms like these, liberal constitutionalists today concede that Ely's “enterprise is shot full of value choices,”<sup>25</sup> and that determining “whether the political decision-

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19. ELY, *supra* note 1, at 103.

20. See, e.g., Klarman, *supra* note 3, at 784 (conceding Ely's “task” of portraying minority protection as procedural as opposed to substantive is “impossible”).

21. ELY, *supra* note 1, at 103.

22. *Id.* at 152–53.

23. Ackerman, *supra* note 6, at 737.

24. RONALD DWORKIN, A MATTER OF PRINCIPLE 57–69 (1985).

25. Post & Siegel, *supra* note 4, at 401 (quoting Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140 (1981)).



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making process has functioned properly . . . is substantive through and through.”<sup>26</sup>

But Ely’s two empirical conjectures about the comparative superiority of judges in addressing two democratic malfunctions have not received comparable attention, even though they are the true reasons for the continuing influence of his argument for judicial intervention.

#### A. *The Protection of Minorities*

The first type of malfunction Ely identifies is, as mentioned above, if majorities fail to consider adequately the interests of certain minorities. “No matter how open the process,” as Ely put it, “those with the most votes are in a position to vote themselves advantages at expense of the others.”<sup>27</sup> Conceding that majority rule entails that political minorities will be “treated less favorably” some of the time, Ely nonetheless maintained that minorities are entitled to “equal concern and respect,”<sup>28</sup> which Ely understood to preclude adverse treatment based upon animus or “prejudiced refusal to recognize commonalities of interest.”<sup>29</sup>

Through the idea of “representation reinforc[ement],”<sup>30</sup> Ely particularly attempted to make sense of efforts by the Warren Court to advance racial equality through its much-hailed decisions concerning school segregation, minority voting rights, and the like. In so doing, Ely’s hope was to contrast such decisions with those in which the Court was “vindicat[ing] particular substantive values it had determined were important or fundamental.”<sup>31</sup> In this latter category, Ely included most obviously notorious decisions from the Court’s *Lochner* era that struck down various worker protections in the name of economic liberty,<sup>32</sup> but

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26. Daniel R. Ortiz, *Pursuing A Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 723 (1991); see also, e.g., Klarman, *supra* note 3, at 758 (“It is true, as Ely’s critics note, that identifying groups eligible to participate in the political community requires a substantive judgment of the sort that political process theory seeks to remove from judicial purview.”).

27. ELY, *supra* note 1, at 135.

28. *Id.* at 82 (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)).

29. *Id.* at 103.

30. *Id.* at 101–02 (characterizing the role of judges as “policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent”).

31. *Id.* at 74.

32. E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lochner v. New York*, 198 U.S. 45 (1905).

also, more jarring for mainstream liberals, the Court's recognition of a right to abortion in *Roe v. Wade*.<sup>33</sup>

Assuming Ely was right that the mistreatment of political minorities constitutes a failure of *democracy* (as opposed to a failure of justice or political morality), the question remains whether judicial intervention is the appropriate way to remedy or prevent such failures. Should we rely, for example, on courts rather than legislatures to ensure respectful treatment in the United States of Muslims or Mexican immigrants? For Ely, the answer was, again, "obvious[ ]."<sup>34</sup> Whereas elected officials are prone to act as "accessories to majority tyranny," judges are comparatively insulated from politics and so "position[ed to] objectively . . . assess" claims of minority mistreatment.<sup>35</sup>

There are two ways to understand Ely's reasoning here. The first, less charitable, is that Ely regards political majorities as the only potential source of "tyranny" within our institutional arrangement. In this (confused) picture, political majorities sometimes demand that elected representatives infringe upon the rights of minorities.<sup>36</sup> Such demands succeed on occasion, whether because the officials in question share the prejudices of their constituents or because they fear removal from office if they do not acquiesce. In those instances, we are assured, the judiciary remains as a backstop, positioned to negate majoritarian excess. Judges will perform this role imperfectly, of course, sometimes or even often burdened by the same bigoted attitudes as political majorities or lacking confidence in the judiciary's institutional capacity to resist. As legal scholar Girardeau Spann once observed, "Life tenure and salary protection, which are designed to insulate the judiciary from external political pressures, are not designed to guard against the majoritarianism inherent in a judge's own assimilation of dominant social values."<sup>37</sup> Still, owing to their comparative insulation from electoral politics,<sup>38</sup> judges will sometimes stand up to tyrannical

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33. 410 U.S. 113 (1973). Notably, many contemporary (and perhaps unreflective) Elysians treat women and, for example, racial and ethnic minorities as relevantly similar, with courts portrayed as a necessary protector of the rights of each given their similarly vulnerable status, politically speaking. For this reason, we extend our analysis of the comparative treatment of vulnerable groups by courts and elected officials to women as well as political minorities strictly speaking, even if that approach is not, strictly speaking, Elysian.

34. ELY, *supra* note 1, at 103.

35. *Id.*

36. Here we use "rights" language loosely to cover unreasonable treatment of minorities generally.

37. GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1993).

38. Ely limits his discussion to federal judges and so assumes that judges enjoy Article III protections of life tenure and guaranteed salary. *See* U.S. CONST. art. III. The widespread use of elections to select state judges plainly complicates Ely's analysis at the state level. *See* David E.

majorities when elected officials would not, preserving or restoring democracy at least in those instances.

The problem with this picture, of course, is that it ignores that judges can do harm on their own. As Waldron has observed, there is nothing especially interesting about tyranny committed *by a majority* as opposed to tyranny generally.<sup>39</sup> And, indeed, insofar as they remain empowered to negate majoritarian action, judges might just as easily be a source of tyranny against minorities, undoing grants of protections to those minorities by political majorities. When the Supreme Court declared invalid the Civil Rights Act of 1875, for instance, it was not merely that the justices failed to stand up on behalf of minorities against oppressive majorities.<sup>40</sup> Far worse, the Court was an active source of oppression, negating the protections afforded to racial minorities *by* national majorities acting through their elected representatives.

Understanding that courts are a potential source of tyranny as opposed to merely imperfect guardians against it also undercuts the idea that one might reinterpret Ely as offering a purely prescriptive account of how judges ought to behave. Because the power to undo the harms of elected officials is inseparable from the power to prevent them from helping, the choice of which institution to assign final authority is unavoidable.<sup>41</sup> For Ely, then, it is not enough to say that judges should act as a bulwark against tyranny. Instead, he or someone sympathetic to his picture of judging must argue that courts are a better bulwark than are elected officials, a claim that unavoidably rests on empirical premises.

The second, more charitable, way to understand Ely, then, is as saying that judges are systematically less likely than elected officials to disregard minority interests despite shared opportunity to do so. But why would this be? Again, Ely's basic contention is that judges are less disposed to tyranny because they are "comparative outsiders" in our political system.<sup>42</sup> Afforded life tenure and salary protection, judges are more insulated from majoritarian pressure than elected officials and so

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Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010) (exploring the connection between "popular constitutionalism" and the election of state judges).

39. See Waldron, *supra* note 14, at 1396 ("Is tyranny by a popular majority (e.g., a majority of elected representatives, each supported by a majority of his constituents) a particularly egregious form of tyranny? I do not see how it could be.")

40. See *The Civil Rights Cases*, 109 U.S. 3, 14–16 (1883).

41. Even in a system in which elected officials have final authority as to what democracy requires, one could still imagine a "dialogic" relationship between elected officials and courts, with courts offering, for example, nonbinding opinions on the constitutionality of legislation. Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 205–06 (2008).

42. ELY, *supra* note 1, at 103.

can assess claims involving minority rights with comparative independence. For that comparative independence to conduce to less tyranny rather than more, though, it would have to be the case that political majorities were systematically less attentive to minority interests than governmental officials on their own. Put more bluntly, only if the masses are comparatively *bigoted* do we do better to rely upon officials insulated from popular demands.<sup>43</sup>

Before confronting the argument below, it is worth noting how historically contingent the seeming plausibility of Ely's empirical assumptions were.<sup>44</sup> His own doubts about expansive judicial interventions had been orthodox in midcentury, and he was attempting to discover how to back up the interventionist Supreme Court under Chief Justice Earl Warren—to whom he memorably dedicated *Democracy and Distrust*<sup>45</sup>—while registering the judicial overreach in *Roe v. Wade* (as he saw it)<sup>46</sup> and reflecting on the emerging backlash at and limitations of judge-supervised integration of public schools. But the reception coincided with the counterrevolution of right-wing ascendancy that drove the liberal project of relying on the judiciary to maintain past gains. Traumatized by Ronald Reagan's landslide election in 1980 and the repudiation of liberalism that it seemed to represent, many mainstream legal liberals of that generation internalized that their views on issues like race and abortion were unpopular with the broader electorate.<sup>47</sup> The success of "Willie Horton" style advertisements<sup>48</sup> led many elected Democratic officials to advocate an aggressively carceral and embarrassingly racialized

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43. See Waldron, *supra* note 14, at 1405 (observing that this form of argument "depends on a particular assumption about the distribution of support for the minority's rights," namely that "sympathy is assumed to be strongest among political elites" as compared to "among ordinary people").

44. For the path of legal liberals through this era, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–94 (1996).

45. ELY, *supra* note 1, at v ("You don't need many heroes if you choose carefully.").

46. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 922, 924–25 (1973).

47. See Ryan Grim, *Haunted by the Reagan Era*, *WASH. POST* (July 5, 2019), <https://www.washingtonpost.com/news/posteverything/wp/2019/07/05/feature/haunted-by-the-reagan-era/> [<https://perma.cc/6EH7-TJBD>] (describing the generation of liberals "shaped by their traumatic political coming-of-age during the breakup of the New Deal coalition and the rise of Ronald Reagan—and the backlash that swept Democrats so thoroughly from power nearly 40 years ago").

48. See Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, *N.Y. TIMES* (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [<https://perma.cc/5YNG-K7CP>] (explaining how Willie Horton political advertising became a "precursor to campaigns to come and a decisive force that influenced criminal justice policy for decades").

overhaul of state and federal criminal law.<sup>49</sup> Simultaneously, the myth of the “welfare queen”<sup>50</sup> caused elected Democrats to abandon their support of the welfare state, pursuing instead euphemistically labelled “reform.”<sup>51</sup> And, witnessing apparent popular backlash to the recognition and expansion of abortion rights,<sup>52</sup> elected Democrats found themselves supporting policies like the Hyde Amendment, which barred and continues to bar the use of federal funds for most abortions.<sup>53</sup> Having come of age in this political climate, it is thus no surprise that, for many mainstream liberals, elites insulated from popular pressure seem potentially more receptive to, for example, demands for racial equality, than those who must stand for election.

### *B. The Channels of Political Change*

In addition to protecting vulnerable minorities, Ely maintained that judges should disregard legislation if necessary to keep open the “channels of [political] change.”<sup>54</sup> Political incumbents, Ely reasoned, predictably regulate the democratic process in ways that ensure their continuing advantage—keeping the “ins” in and the “outs” out, as he put it.<sup>55</sup> For that reason, judges, comparatively disinterested in electoral outcomes, must be relied upon to prevent political branch actors from rendering our “democratic” process a farce.

Appealing to such considerations, Ely hoped to make sense of the Warren Court’s interventions in election law, including the

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49. See, e.g., Lauren Brooke-Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [<https://perma.cc/6NKP-MGT6>]; Marie Gottschalk, *The Democrats’ Shameful Legacy on Crime*, NEW REPUBLIC (Sept. 11, 2019), <https://newrepublic.com/article/154631/democrats-shameful-legacy-crime> [<https://perma.cc/7HNS-AHXP>]; Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> [<https://perma.cc/8YEZ-3QT5>].

50. Bryce Covert, *The Myth of the Welfare Queen*, NEW REPUBLIC (July 2, 2019), <https://newrepublic.com/article/154404/myth-welfare-queen> [<https://perma.cc/DM46-ZP2X>].

51. Kathryn J. Edin & H. Luke Shaefer, *20 Years Since Welfare Reform*, ATLANTIC (Aug. 22, 2016), <https://www.theatlantic.com/business/archive/2016/08/20-years-welfare-reform/496730/> [<https://perma.cc/QBN2-BEU5>]; see also MARISA CHAPPELL, *THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA 199–230* (2010).

52. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2032–33 (2011) (observing that “enactment of laws liberalizing access to abortion provoked energetic opposition by the Catholic Church” in the 1960s).

53. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 74–75* (2015).

54. ELY, *supra* note 1, at 103.

55. *Id.*

“revolution”<sup>56</sup> effected by its Reapportionment Cases.<sup>57</sup> Disparaging Justice Felix Frankfurter’s famous remark that reapportionment was a “political thicket” that the courts should avoid,<sup>58</sup> Ely observed, quoting Louis Jaffe, that the Court’s intervention in this area had “‘not impaired’ [but] ‘indeed . . . ha[d] enhanced the prestige of the Court.’” Further, Ely found that Justice Frankfurter’s criticism, “whether or not it ever had colorable validity,” was now “yesterday’s news.”<sup>59</sup> Similarly, Ely insisted that “[c]ourts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so,”<sup>60</sup> praising decisions like *Cohen v. California*.<sup>61</sup>

Within the “law of democracy” more narrowly defined,<sup>62</sup> the motivational story Ely tells is straightforward. Elected officials have an obvious interest in shaping the electoral landscape in ways that make reelection more likely. This story seems confirmed by familiar practices like partisan gerrymandering, in which the incumbent political party redraws electoral boundaries to insulate itself from meaningful challenge. Judges, the story continues, lack a direct stake in electoral outcomes and so are at least *more* disposed to facilitate democratic contestation. Judges will, as always, perform in this role imperfectly. And yet, better to rely upon them than the predictably self-dealing alternative.

## II. CONSTITUTIONALISM AND DISAGREEMENT

Ely, then, offers two separate narratives why judges are more reliable than elected officials at determining what democracy requires. Neither narrative depends, importantly, upon such assessments being procedural as opposed to substantive in character. Each is, instead, a story about why relying upon judges produces *better outcomes*, and so long as outcomes are better, the distinction between substance and process seems neither here nor there.

Building on this observation, this Article submits that *Democracy and Distrust*’s continuing influence among legal liberals is

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56. See Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1331 (2005).

57. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

58. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

59. ELY, *supra* note 1, at 121 (quoting Louis Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967)).

60. *Id.* at 106.

61. 403 U.S. 15 (1971).

62. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY* 1–14 (5th ed. 2016).

meaningfully attributable to their continuing to find those narratives persuasive. To sap the appeal of Ely's position, then, one needs to target those narratives directly, showing them to be false, incomplete, or at the very least uncertain. The remaining sections of the Article take up that work.

It is, however, worth interrogating briefly whether it makes sense to focus on outcomes at all. Jeremy Waldron, for example, observes that the reason we find ourselves asking whether courts or elected officials should settle disputes about what democracy requires is that what democracy requires *is in dispute*.<sup>63</sup> It seems, in other words, that to make a claim about the comparative correctness or attractiveness of judicial or legislative decisions in this area is inevitably to beg the question against those whose ideology relevantly differs. Suppose, for instance, that courts were less likely than legislatures to embrace voter identification requirements. Would this fact favor the empowerment of legislatures or courts? Mainstream liberals would presumably say courts, but many conservatives would predictably disagree. And citing back to those conservatives the correctness or attractiveness of decisions rejecting voter identification would obviously do no work. Similarly, suppose courts are less tolerant than legislatures of restrictions on political activity by corporations. Here presumably liberals would say this fact favors legislative empowerment, with many conservatives drawing the opposite inference. Here again, appeal to the rightness of such legislative decisions would only lead to frustration.

Waldron suggests for this reason that we should select among institutions based (ironically, here) upon comparative *procedural* advantage. More specifically, Waldron argues that, assuming a social commitment to settling disputes democratically, disputes about what democracy requires should themselves be settled by whichever institution employs more democratic procedures.<sup>64</sup> Compared this way, Waldron continues, legislatures are "evidently superior" insofar as "[l]egislators are regularly," albeit imperfectly, held "accountable to their constituents" whereas judges have only an "indirect and limited basis of democratic legitimacy" owing to the role of elected officials in judicial appointments.<sup>65</sup> Whatever the failings of our electoral system, in other words, the legislative process is *more* democratic than the judicial alternative. Because the judiciary is deliberately insulated from

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63. WALDRON, *supra* note 13, at 294–95; Waldron, *supra* note 14, at 1373.

64. Most democratic, that is, in relation to the citizenry (as opposed to, for example, the participants within the institution).

65. Waldron, *supra* note 14, at 1391.

majoritarian pressure, its processes for making decisions are incontestably less democratic, even if the substance of those decisions is (contestably) not.

Critical to Waldron's argument is that legislatures have an *evident* or *incontestable* procedural advantage. Everyone agrees, Waldron assumes, that needing to stand for election enhances democratic legitimacy. Accordingly, both liberals and conservatives can appeal to legislative elections (and the absence of judicial ones) as a reason to prefer legislatures to courts without begging the question against the other. Put more abstractly, Waldron's strategy is to limit debate about institutional choice to common ideological ground. Because outcome-related arguments are predictably contested, Waldron reasons, it makes no sense to defend assigning questions about democracy to courts (or legislatures) on the ground that outcomes would be better. Instead, we should appeal to process-related arguments, which are sufficiently shared as to provide a basis for rational consensus.<sup>66</sup>

Waldron's strategy seems persuasive insofar as one is attempting to bridge ideological divides. The narrative that political elites are less bigoted than the masses, for instance, depends for its plausibility on mainstream liberals regarding certain outcomes as "bigoted," and given that many conservatives disagree with those assessments, there is no way for liberals to deploy that narrative in a way that would be persuasive to those conservatives. Assuming, then, a goal of reaching bipartisan consensus, liberals would do well to set aside that and similar narratives, focusing, as Waldron suggests, on process instead.

The problem, though, is that even if such narratives are unpersuasive to certain conservatives, they continue to be persuasive to liberals. And because those narratives point in one direction (in favor of courts) and process-related arguments another (in favor of legislatures), liberals continue to be reluctant to embrace the

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66. Elsewhere, Waldron considers and rejects the possibility that *shared* outcome-related reasons might tell in favor of courts. See Waldron, *supra* note 14, at 1376–86; WALDRON, *supra* note 13, at 289–91. Dworkin, for instance, suggests that channeling disputes about rights into the judicial process improves the quality of public debate on those issues. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 344–45 (1996). Since improving the quality of public debate would be uncontroversially beneficial, Waldron assumes, Dworkin's argument does not beg any questions. At the same time, Waldron continues, Dworkin's claim is not obviously true given that, Waldron observes, the quality of public debate over issues like abortion is not appreciably different in countries lacking judicial review. WALDRON, *supra* note 13, at 289–91. Through such exchanges, Waldron makes plausible that shared criteria for evaluating judicial and legislative decisions "are at best inconclusive." Waldron, *supra* note 14, at 1375. At the same time, such exchanges fail to address the outcome-related reasons that are *not* shared but that are far weightier for legal liberals.



institutional choice that process-related arguments recommend. Put differently, Waldron's objection to outcome-related arguments is that such arguments are unavoidably question-begging. As with any such objection, though, one must ask, question-begging *to whom*? Waldron is right that narratives like those Ely offers beg the question against those whose ideology relevantly differs.<sup>67</sup> Within relevantly ideologically homogenous groups, however, such narratives can be persuasive. And if they are, the motivational force of those arguments does not simply vanish upon being reminded they are unpersuasive to those with whom one disagrees; on the contrary, that force may even increase. In this case, liberals appear persuaded that, in terms of outcomes, courts protect democracy better. As such, even if the stories that persuade liberals of courts' advantage cannot be shared with some conservatives, that institutional choice will remain attractive to them.

The limits of Waldron's approach are especially apparent during periods of intense political contestation. Waldron's argument is predicated on a commitment to mutual respect for one's political opponents and, in turn, to regarding one's disagreements with those opponents as reasonable. In moments of extreme political discord, however, such conditions simply fail to obtain. When legal liberals insist, for example, that their conservative counterparts fail to "believe in free and fair elections,"<sup>68</sup> the demand that liberals limit themselves in arguing about democracy to common ideological ground will seem not only unmotivated but potentially dangerous. Starting from such bitter, fundamental disagreement, resort to contested ideological ground is thus seemingly unavoidable.<sup>69</sup>

### III. WHY THE FIRST CONJECTURE FAILS

Ely offers his conjectures as if they are obvious—and it is striking that they are widely taken to be so. They turn out to be

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67. Though, as we discuss below, the relevant ideological differences do not always correspond to traditional liberal/conservative divides. See *infra* Part III.

68. Nicholas Stephanopoulos (@ProfNickStephan), TWITTER (Feb. 5, 2021, 9:20 AM), <https://twitter.com/ProfNickStephan/status/1357710705118638080> [<https://perma.cc/JW7Q-DWNW>].

69. Waldron's discussion of the need for respect and humility within a democracy and reasoning about democracy anticipates to some degree later philosophical developments concerning the "epistemology of disagreement," and, in particular, the idea that reduced confidence in one's beliefs is an appropriate response to disagreement with one's epistemological "peer." See, e.g., David Christensen, *Disagreement as Evidence: The Epistemology of Controversy*, 4 PHIL. COMPASS 756 (2009) (summarizing the debate). As philosopher Adam Elga argues, however, it is far from obvious that reduced confidence is an appropriate response to disagreement with someone with whom one disagrees at a deep or fundamental level. See Adam Elga, *Reflection and Disagreement*, 41 NOÛS 478, 493–97 (2007).

anything but that when we ask what reason there is for thinking them true as a predictive matter of how judges behave relative to other institutions.

The first is that judges are more reliably attentive to the interests of political minorities than are elected officials. The reason, according to Ely, is that elected officials are comparatively beholden to political majorities, with the implication being that political majorities are less respectful of minority interests than are officials considering such matters on their own.<sup>70</sup> Put less politely, Ely's thesis, widely shared, is that government officials are less bigoted than ordinary citizens and so, when considering claims of minority rights violation, such officials should be insulated from majoritarian pressures.

From the perspective of critical race theory, Girardeau Spann has done the best work to show that white majoritarian judicial review—associated with a benighted past and treated as aberrational after being superseded—defines the practice structurally.<sup>71</sup> The socialization of the judiciary combined with the inadequacy of formal and substantive safeguards on majoritarian domination make it almost unthinkable for judiciaries to avoid perpetuation of structural racism, let alone to end it.<sup>72</sup> Spann by no means underrated racially majoritarian outcomes in political processes. But there was no alternative to them when it comes to the protection of minorities.<sup>73</sup> And, he added, insofar as angling for control of judicial review could be regarded as a covert political strategy, it was predictably inferior to others in its results.<sup>74</sup> In this Part, we supplement and update Spann's arguments. While those arguments were neglected when initially framed, they have only been vindicated further in the past quarter century since he wrote.

As an initial matter, one way to understand Ely's argument is as an invocation of the principle of *nemo iudex in causa sua*, or the idea that one should not be the judge in one's own case.<sup>75</sup> On this reading, Ely's claim, endorsed by some, is that to permit elected officials to adjudicate minority rights claims would be, in effect, to let political majorities judge for themselves whether their actions (by proxy)

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70. ELY, *supra* note 1, at 103.

71. SPANN, *supra* note 37, at 9–70.

72. *See id.* at 19–26 (emphasizing the middle-class status of minority judges once appointed).

73. *See id.* at 85 (“[T]he appropriate minority response to . . . judicial majoritarianism should be a political response.”).

74. *See id.* at 159–60.

75. *See* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 *YALE L.J.* 384, 386 (2012) (“The maxim *nemo iudex in sua causa*—no man should be judge in his own case—is widely thought to capture a bedrock principle of natural justice and constitutionalism.” (footnote omitted)).

infringe upon the rights of minorities.<sup>76</sup> Because political majorities would obviously be biased in such cases, the argument continues, it is better to assign rights adjudication to an “independent and impartial institution” like a court.<sup>77</sup>

Though intuitive to some, invoking *nemo iudex* to explain entrusting courts with rights adjudication is misguided. The assumption underlying that principle, of course, is that one is more interested in one’s own case than is some other judge. With claims concerning the rights of minorities, however, judges, like ordinary citizens, are either members of the majority or a relevant minority and so no less interested in the outcome of such claims.<sup>78</sup> Indeed, this is perhaps the main reason so much attention is paid to the judiciary’s demographic composition.

While the *nemo iudex* reading of Ely’s argument is confused, a different way to understand the argument is as having to do not with majorities and minorities as such but with patterns of *historical* discrimination. So construed, Ely’s argument depends for its force on readers attending to actual, historical mistreatment of specific minorities by political majorities acting through their elected representatives. Ely draws readers’ attention to such histories largely through discussion of case law. Analyzing various civil rights cases, drawn substantially though not exclusively from the Warren Court era, Ely alerts his readers to those cases’ historical subject matter, namely ongoing legacies of discrimination in the United States.<sup>79</sup> While Ely’s focus is, for obvious reasons, discrimination against Black Americans and other racial and ethnic minorities, he also calls attention to mistreatment of certain religious and political groups.<sup>80</sup> Ely also makes note of persistent discrimination against gays and lesbians, analogizing their political circumstances to those of minorities to which the Court had already afforded protections.<sup>81</sup>

For Ely’s mainstream liberal readers, such reminders of the history of discrimination in the United States were and are hardly necessary. Liberal interest in constitutional law has long been motivated by an association of that topic with the civil rights era and the use of courts (and especially the powers of the constitutional

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76. See, e.g., DWORKIN, *supra* note 24, at 330–32.

77. WALDRON, *supra* note 13, at 297–98 (critically describing the argument).

78. See *id.*

79. See ELY, *supra* note 1, at 73–75 (explaining that “we need look no further than to the Warren Court” to find a model of “process-oriented” judicial review).

80. See *id.* at 140 (political discrimination); *id.* at 141 (religious discrimination).

81. See *id.* at 162–64.

judiciary) during that period to alleviate racial injustice in particular.<sup>82</sup> Today, readers come to Ely amidst a different racial uprising, led by the Black Lives Matter Movement, which places emphasis on racial oppression through the carceral and policing state.<sup>83</sup> Recent electoral politics and subsequent state action, meanwhile, reflect continuing xenophobic attitudes toward Latin American immigrants as well as animus towards Muslims, including but not limited to Muslim Americans, persistent since 9/11.<sup>84</sup> Similarly, contemporary liberals bring a much more encompassing understanding of the mistreatment suffered by persons on the basis of sexual orientation or gender identity, including discrimination against transgender and nonbinary persons, manifested at various levels in both state and federal law.<sup>85</sup> And this is

82. As Randall Kennedy has recently written:

Many people who came of age between, say, 1940 and 1970 have become accustomed to seeing the Supreme Court as a force for good when it comes to race. . . . Some progressives have even come to view the court as an inherently enlightened branch of government, or at least more enlightened than the executive and legislative branches. This celebratory view is mistaken.

Randall Kennedy, *More Foe than Friend: The Supreme Court and the Pursuit of Racial Equality*, NATION (Aug. 9, 2021), <https://www.thenation.com/article/society/justice-deferred-racial-equality-supreme-court/> [<https://perma.cc/A7WS-MBQ4>]; see also KALMAN, *supra* note 44, at 10 (“Political liberalism affected the way law professors wrote about the Supreme Court from the 1930s until the 1970s.”).

83. See, e.g., #DefundThePolice, BLACK LIVES MATTER (May 30, 2020), <https://blacklivesmatter.com/defundthepolice/> [<https://perma.cc/AVS6-4FUD>]; KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION (2016).

84. See, e.g., Alexander Burns, *Choice Words from Donald Trump, Presidential Candidate*, N.Y. TIMES (June 16, 2015, 2:01 PM), <https://www.nytimes.com/politics/first-draft/2015/06/16/choice-words-from-donald-trump-presidential-candidate/> [<https://perma.cc/PHW7-JSAS>] (quoting then-candidate Trump calling immigrants from Mexico “rapists”); Jack Herrera, *Biden Brings Back Family Separation—This Time in Mexico*, POLITICO MAG. (Mar. 30, 2021, 1:33 PM), <https://www.politico.com/news/magazine/2021/03/20/border-family-separation-mexico-biden-477309> [<https://perma.cc/S3NC-D63W>] (detailing the recent history of immigration enforcement, including the Trump Administration’s “family separation” policy); Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/> [<https://perma.cc/42TM-LF2E>] (noting that in the first eight months of Trump’s presidency, ICE increased arrests by forty-two percent); Jenna Johnson & Abigail Hauslohner, *I Think Islam Hates Us: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [<https://perma.cc/6SGR-X3J2>]; Adam Liptak & Michael D. Shear, *Trump’s Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html> [<https://perma.cc/T3WK-5LCL>].

85. See, e.g., Jonathan Matisse, *Tennessee Gov. Bill Lee Signs Transgender ‘Bathroom Bill’ into Law*, HuffPost (May 18, 2021, 3:24 PM), [https://www.huffpost.com/entry/tennessee-transgender-bathroom-bill\\_n\\_60a4050ae4b0909248096f58](https://www.huffpost.com/entry/tennessee-transgender-bathroom-bill_n_60a4050ae4b0909248096f58) [<https://perma.cc/CY5L-J7J2>]; Chris Cameron, *Trump Presses Limits on Transgender Rights over Supreme Court Ruling*, N.Y. TIMES (July 24, 2020),

to say nothing of discrimination against women, including most obviously attacks on reproductive freedom, something Ely understood as outside his framework,<sup>86</sup> but which most liberals regard as importantly as discrimination against other targeted groups.<sup>87</sup>

Taken together, this combination of historical reminders and contemporary experience makes plausible to many that political majorities in the United States cannot be trusted to respect the rights of at least *these* minorities. But what about courts? Does history or experience give reason to think that judges do better? Here, Ely, like many before and since, calls to mind various moments when the Supreme Court was indeed protective of relevant groups. Recalling heroic moments from the Court's history—with heavy emphasis on Warren Court classics like *Brown* and *Gomillion v. Lightfoot*<sup>88</sup>—Ely offers examples of the Court acting in the rights-protective role he recommends and, more importantly, *conjectures* and *predicts* judges will actually perform. Here again, for mainstream liberal audiences, Ely's reminders are mostly superfluous as the Warren Court's legacy is what grounds that group's confidence, or at least faith, in the judiciary.<sup>89</sup> Add to this more recent examples of protections for LGBTQ persons afforded by the otherwise reactionary Roberts Court, and belief in the importance of judges in protecting minorities from the political branches of government grows further still.<sup>90</sup> Ely acknowledges, of course, that the Court's record in these areas is flawed, criticizing, for example, the Rehnquist Court's rights-restrictive tendencies.<sup>91</sup> The moments of rights protection that do occur—even as the Supreme Court moved further right—are enough to warrant the assumption that courts are on balance better. Liberals follow suit in adopting this view even today.

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<https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html>  
[<https://perma.cc/JMU4-BU8N>].

86. See ELY, *supra* note 1, at 228–29, n.91 (calling *Roe* a “[j]udicial attempt[ ] to cement fundamental values” akin to *Dred Scott* and *Lochner*).

87. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116 (1997) (noting “bodies of law that for centuries had defined African-Americans and white women as subordinate members of the polity”).

88. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

89. See, e.g., GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* (2019); see also, e.g., Cass R. Sunstein, *Constitutional Personae*, 2013 SUP. CT. REV. 433, 437 (“The Warren Court was the Court’s iconic heroic era, helping to define a conception of the federal judiciary for a generation and more.”); Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12 (2012) (praising the “genius of the Warren Court”).

90. See e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

91. See ELY, *supra* note 1, at 148–49.

If Ely's argument is best understood as historical in nature, the question is, then, how does his history hold up? This is really two separate questions: First, is his depiction of the Warren Court correct, and second, is it generalizable across time so that it authorizes Ely's conjecture in different historical circumstances?

Ely's suggestion that the history of the United States is one of persistent discrimination against political minorities is beyond question. Indeed, as recent scholarship has highlighted, the histories of discrimination widely taught in this country are, if anything, woefully incomplete.<sup>92</sup> Nonetheless, Ely's portrayal of the judiciary's role in that history of discrimination is itself conveniently partial. In addition, the implicit comparison Ely makes between judges and more politically accountable branches of government, and legislatures in particular, is misleading.

First, the comparison at issue for Ely is between judges and elected officials. For that comparison to be informative, though, one must hold all other relevant factors fixed, including, among other things, jurisdiction. Suppose, for instance, that certain *state* elected officials prove reliably less attentive to minority interests than do *federal* judges. In that scenario, one might be learning less about the difference between elected officials and judges than between state and federal officials. And, indeed, many of the historical examples favorable to Ely fit precisely this schema. The vast majority of the civil rights cases from the Warren Court era that involve judicial intervention see the Court declaring unconstitutional various state laws.<sup>93</sup> So too with more recent favorable examples like *Obergefell v. Hodges*.<sup>94</sup> To be sure, the mere fact that it is federal judges negating the actions of state elected officials does not make these cases irrelevant for purposes of institutional comparison. If, for example, *federal* judicial interventions were prompted by the unwillingness or inability of *federal* elected officials to act, such cases could still teach us something about the comparative tendency of judges and elected officials to countenance bigotry.<sup>95</sup> As it turns out, though, in many of the cases just mentioned,

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92. See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

93. E.g., *Brown*, 347 U.S. at 486–96; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Loving v. Virginia*, 388 U.S. 1 (1967).

94. 576 U.S. at 644. *But see* *United States v. Windsor*, 577 U.S. 744 (2013) (striking down the Defense of Marriage Act (“DOMA”), a federal statute).

95. Gerald Rosenberg's pathbreaking scholarship documenting how ineffectual courts have been in realizing progressive social change precipitated a reconstructed optimism around the premise that, in specific historical circumstances, judiciaries can act when other avenues of political change are blocked—though most historians agree that legislative action is still essential,

federal judicial decisions were anticipated or supplemented by federal action, especially federal legislation. And in many of those cases, it is at least plausible that it was federal legislation that had the greater impact in counteracting discrimination—with *Brown* the most widely discussed example.<sup>96</sup>

Second, while Ely candidly discusses the Court's imperfect record combatting majoritarian bigotry, he and mainstream liberals for whom his first conjecture is intuitive pay far less attention to instances in which the Court was a source of bigotry itself. Most glaringly, *Brown*—the pinnacle of the Court's rights protection—in large part reversed the damage *Plessy v. Ferguson*<sup>97</sup> had done by its permissive attitude towards the separation of races in public schools. More broadly, the Court played an instrumental role in the end of Reconstruction, especially in the *Civil Rights Cases*, undermining federal majoritarian efforts toward racial equality in the form of guarantees of equal treatment in public accommodations and public transportation.<sup>98</sup> And in the civil rights arena, the damage that the Court does to minorities can require more politically accountable branches to undo. Only the passage of the Civil Rights Act of 1964, for example, finally undid part of the damage of the *Civil Rights Cases* by extending statutory protection to racial minorities that the Court never again allowed the Fourteenth Amendment itself to afford.<sup>99</sup> Other parts of the Court's lasting damage, like the state action doctrine, remain.<sup>100</sup> As Nikolas

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as in the trajectory of the United States between the 1954 *Brown* decision and the 1964 Civil Rights Act and the beginning of the de facto desegregation of public schools. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For another resource, and an immense literature, see Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012)). Our premise in this paper is not that courts can *never* have comparative advantage in protecting minorities over political branches, but neither U.S. history nor any theoretical consideration authorizes generalizing from those rare instances—which in 1950s America involved an unrealigned Democratic party and Cold War environment.

96. See ROSENBERG, *supra* note 95.

97. 163 U.S. 537 (1896).

98. The *Civil Rights Cases*, 109 U.S. 3 (1883).

99. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

100. In *United States v. Cruikshank*, 92 U.S. 542 (1876) and the *Civil Rights Cases*, 109 U.S. at 25–26, the Court limited the reach of the Fourteenth Amendment to “state action,” i.e., violations traceable to government action, not covering historic patterns of state inaction, let alone private discriminatory conduct. It was in view of this disturbing precedent that, when Congress passed the Civil Rights Act of 1964, a great debate ensued about whether to challenge the *Civil Rights Cases* in order to prohibit major forms of private discrimination. But Congress opted in the end to rely on its Commerce Clause powers. See, e.g., Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095 (2005). Famously, the Supreme Court passed on the Commerce Clause rationale in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Bowie documents,<sup>101</sup> this pattern of judicial harm extends from the antebellum period with decisions like *Dred Scott* to the early twentieth century with cases like *Hammer v. Dagenhart*<sup>102</sup> to late twentieth-century examples like *Adarand Constructors, Inc. v. Peña*.<sup>103</sup> And as liberals today know all too well, this trend continues into the twenty-first century with cases like *Shelby County v. Holder*<sup>104</sup> in which the Roberts Court has shown consistent hostility to statutory protections for the voting rights of racial and ethnic minorities.<sup>105</sup> While weighing cases like these against contemporary opposites—for example, *United States v. Windsor*,<sup>106</sup> in which the Court was concededly protective of the rights of LGBTQ persons even against discriminatory federal legislation—the point here is just that these unfortunate cases have to be weighed. The Court, in other words, can be a source of harm as well as help even for the political minorities that Ely highlights.

Third, discussions of rights, including Ely's, typically center on how well courts or elected officials attend to the interests of political minorities and other vulnerable groups most mainstream liberals regard as *deserving* of constitutional protection.<sup>107</sup> Hence, for Ely, the discussion builds from the idea of “discrete and insular” political minorities articulated in *United States v. Carolene Products Co.*,<sup>108</sup> and then goes on to consider the treatment of racial and ethnic minorities, religious minorities, and the like.<sup>109</sup> As previously mentioned, whether it is beneficial to assign protection of *these* minorities' interests to courts or elected officials is itself a difficult question. What complicates the matter even further, though, is that by so limiting the discussion, we miss that authorizing courts to protect the interests of these minorities and other groups opens the possibility of judicial protection for

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101. *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives: Hearing Before the Presidential Commission on the Supreme Court of the United States* (2021) (written statement of Nikolas Bowie, Assistant Professor of Law, Harvard Law School).

102. 247 U.S. 251 (1918).

103. 515 U.S. 200 (1995).

104. 570 U.S. 529 (2013).

105. See Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 178–87 (2020).

106. 570 U.S. 744 (2013).

107. See ELY, *supra* note 1, at 74.

108. 304 U.S. 144, 152 n.4 (1938).

109. See Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 172 (2004) (claiming that Ely's centering of *Carolene Products* “create[d] the modern view of footnote four”); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995) (arguing that Ely's interpretation of footnote four is unduly narrow).



*undeserving* minorities as well. As Evelyn Atkinson recounts,<sup>110</sup> for example, the extension of Fourteenth Amendment protection to Chinese immigrants in *Yick Wo v. Hopkins*<sup>111</sup> was intimately bound up with the granting of Equal Protection rights to corporations in *Santa Clara County v. Southern Pacific Railroad Co.*<sup>112</sup> The Court would rely upon both sets of precedents during its *Lochner* era, invalidating swaths of legislative protections for workers on Fifth and Fourteenth Amendment grounds.<sup>113</sup> More recently, in a series of First Amendment decisions, the Court has construed commercial and political speech doctrine to insulate corporations and affluent individuals from disclosure requirements,<sup>114</sup> political spending constraints,<sup>115</sup> and restrictions on the sale of consumer information.<sup>116</sup> Add to this the use of free speech doctrine to undermine unionization,<sup>117</sup> and the “weaponiz[ation]” of the First Amendment becomes clearer still.<sup>118</sup> Whether the Court’s history of affording protections to wealthy, powerful minorities outweighs whatever aid it has secured to political minorities deserving of protection is, again, complicated and not something we can hope to settle here. For present purposes, the claim is simply that by empowering courts to protect politically disadvantaged minorities and other vulnerable groups, courts are simultaneously empowered to determine *which* minorities and groups are deserving of protection. And, as even the brief sketch above shows, courts have, as a historical matter, very often and very consequentially gotten it wrong—at least from the perspective of liberals. Ely’s conjecture flies in the face not merely of the underprotection of racial and other minorities, but that the empowerment of the court more regularly leads to the protection of minorities who do not deserve it.

Taking stock, the intuitive appeal of Ely’s first conjecture depended upon both conflating state and federal officials and omitting affirmative harms done by courts to minorities and other vulnerable groups. With these clarifications, it becomes far from obvious that officials insulated from majoritarian pressures are less bigoted than those who are not. By itself, that should be enough to make mainstream

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110. Evelyn Atkinson, *Frankenstein’s Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. (forthcoming 2022).

111. 118 U.S. 356 (1886).

112. 118 U.S. 394 (1886).

113. See Atkinson, *supra* note 110.

114. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. \_\_\_, 141 S. Ct. 2373 (2021).

115. *Citizens United v. FEC*, 558 U.S. 310 (2010).

116. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

117. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (2018).

118. *Id.* at 2501 (Kagan, J., dissenting).

liberals open to institutional experimentation since the *obviousness* of Ely's conjecture was what made judicial empowerment seem like the "safe" course of action. Adding to the ledger the aid courts have provided for wealthy minorities, legislative empowerment should seem to liberals at least somewhat safer. Either way, the key claim is that attention to the full history of judicial (and legislative) activity makes liberal confidence in the judiciary completely untenable. As admirable as the Warren Court may have been, it gives liberals no reason to place faith in the judiciary as an institution.

Assuming, though, that liberals come away from this historical account not yet convinced of the superiority of legislatures but merely *uncertain*, the question becomes how, under conditions of uncertainty, to decide between judicial and legislative empowerment. Here, it becomes critical to attend not only to the relative tendency of judges and elected officials to afford protections to minorities and other vulnerable groups but also to the type of protections each of those actors has been disposed to afford. Most significantly, federal courts in particular have, for various reasons, been mostly unwilling or unable to recognize and enforce *positive* rights for minorities and other vulnerable groups, opting systematically for *negative* rights instead.<sup>119</sup> Most visibly, "[f]or nearly 150 years, the Supreme Court has held that the Fourteenth Amendment does not secure 'positive' rights to governmental aid,"<sup>120</sup> rejecting constitutional arguments for, among other things, state-financed abortion,<sup>121</sup> special scrutiny for policies disadvantaging disabled persons,<sup>122</sup> and increased funding for schools in low-income districts.<sup>123</sup> During that same period, legislatures have provided, through ordinary legislation, contraception at no cost to patients,<sup>124</sup> guaranteed access to places of public accommodation for

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119. For accounts of positive rights in state constitutions and global constitutions which are more regularly textually available but underenforced, see, for example, EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013); and, in a massive literature, Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J.L. & ECON. 713 (2017).

120. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 111 GEO. L.J. 1, 2 (2021).

121. *Maher v. Roe*, 432 U.S. 464, 478 (1977).

122. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

123. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

124. 42 U.S.C. § 300gg-13(a)(4) (requiring coverage, without cost, to include "preventative care . . . provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA")); 77 Fed. Reg. 8725 (Feb. 15, 2012) (adopting HRSA's guidelines and "requir[ing] coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods . . .'" (second and third alterations in original)).

disabled persons,<sup>125</sup> and direct payments to low- and middle-income parents, among many other positive guarantees.<sup>126</sup>

As we use those terms, “positive” rights are guarantees by the state to bring about some material outcome, whereas “negative” rights are promises by the state not to bar the pursuit of that outcome through “private” transactions. So construed, a “positive” right to abortion would, for example, require that the state make abortions available at minimal or no cost to the patient, while a “negative” right would require only that the state not prohibit the procedure, leaving financing and accessibility to contracting individuals. As different scholars have noted, even the implementation of negative rights involves affirmative measures by the state—a federal right to abortion, understood negatively, requires the availability of judicial proceedings to challenge state and local ordinances that conflict with that right.<sup>127</sup> At the same time, for any given right, we think it remains helpful to ask whether *that* right is understood as positive or negative.<sup>128</sup> And when it comes to the rights that typically concern us, like those to abortion, racial equality, or freedom of speech, courts have been reluctant to interpret those rights positively, in notable contrast to legislatures.

What accounts for courts’ comparative apprehension to recognize and enforce positive rights? Domestically, the U.S. Constitution is widely regarded as, in the words of Judge Richard Posner, a “charter of negative rather than positive liberties.”<sup>129</sup> This pervasive understanding, especially among judges, is grounded partly in a contestable history according to which the principal concern of the Framers was government overreach as opposed to state inaction.<sup>130</sup> So too, the narrative continues, the drafters of the Reconstruction Amendments “sought to protect Americans from oppression by state

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125. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12103, 12181-12184.

126. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). For the canonical accounting of the positive guarantees Congress has provided, see WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

127. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999); see also HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (2d ed. 1980).

128. Or, maybe better, the right to a *specific material outcome*. While true, for example, that one could redescribe a “negative” right to abortion as a “positive” right to, say, judicial process in the event a state or locality attempted to prohibit that procedure, it would remain true that such a right would not guarantee the material conditions needed to make abortion truly available to an individual.

129. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989).

130. See, e.g., Bernick, *supra* note 120, at 47 (describing and challenging that history); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991) (same); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 526 (1991) (same).

government, not to secure them basic governmental services.”<sup>131</sup> Apart from such historical claims, domestic courts offer institutional reasons to be wary of judicial recognition and enforcement of positive rights. In *San Antonio Independent School District v. Rodriguez*, for example, the Supreme Court held that the Equal Protection Clause does not prohibit significant disparities in per-pupil expenditures within public schools, reasoning in part that judicial “interference[] with [a] State’s fiscal policy” is presumptively inappropriate because judges “lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”<sup>132</sup> Similarly, in *Maher v. Roe*, the Court held that the Fourteenth Amendment did not require state funding of “nontherapeutic” abortions, explaining that the “decision whether to expend state funds” on such procedures was “fraught with judgments of policy and value over which opinions are sharply divided,” and that for “policy choices as sensitive as those . . . the appropriate forum for their resolution in a democracy is the legislature.”<sup>133</sup>

Taking stock again, if mainstream liberals came away from the historical discussion unsure whether to empower elected officials or courts, a commitment to real freedom of choice points toward elected officials. Because courts are more hesitant than elected officials to recognize positive rights, theirs is a world in which abortion remains

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131. *Jackson*, 715 F.2d at 1203; see also *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’” (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (alteration in original))).

132. 411 U.S. 1, 40–41 (1973).

133. 432 U.S. 464, 479 (1977). Such institutional concerns appear to explain courts’ reluctance to enforce positive rights internationally as well. In contrast to the U.S. Constitution, the constitutions of many other countries contain language widely understood to afford citizens positive rights to things like housing or education. And although foreign courts have, broadly speaking, deemed such provisions “justiciable,” those same courts have “tend[ed] to deny systematic remedies that would affect larger groups,” preferring “individualized” remedies—recognizing for a specific plaintiff a right to a particular medical procedure, for example. David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 192 (2012). In addition, when courts have opted for more systematic remedies, the remedy provided has tended to be a judicial pronouncement that the state fulfill some guarantee within some reasonable period. Such pronouncements have, however, gone largely ignored, as illustrated by the once celebrated but now disappointing *Grootboom* decision in South Africa. *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC). Like their domestic analogues, foreign courts’ decisions to limit themselves to negative or individualized remedies appear to reflect a concern with institutional capacity. Translating abstract positive guarantees like a right to housing into concrete government policy requires the sort of “polycentric” reasoning for which courts are generally thought ill equipped. Landau, *supra*, at 194–95; see also Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 403 (1978). And because legislatures jealously guard their budgetary authority, the specter of noncompliance or retaliation seemingly deters courts from mandating the sort of spending a meaningful right to housing would entail.

practically unavailable for poor women and many women of color, despite fewer legal prohibitions of the procedure. Similarly, explicit racial segregation of residential areas and schools has been supplanted by effective segregation through geographic migration and zoning policies. Put slightly differently, given the relative hesitancy of courts to recognize positive rights, empowering courts over legislatures has the effect of prioritizing the minimization of express legal barriers to individual choices over the guarantee that *everyone* is in a real sense able to make these choices. The reason is that courts' ability to recognize and enforce negative rights is one and the same as the power to set aside positive rights afforded by legislatures. Practically speaking, this means that for every *Griswold v. Connecticut*,<sup>134</sup> there is a *Burwell v. Hobby Lobby Stores, Inc.*;<sup>135</sup> for every *Brown*, the *Civil Rights Cases*, and so on. The result is a world with fewer immediate legal barriers to contract, but also one with fewer persons having real opportunity to choose.

In sum, the intuitive appeal of Ely's narrative that courts are more protective of "discrete and insular" minorities (however those are identified<sup>136</sup>) and other vulnerable groups depends on attending to the help that empowered courts provide but not to the concomitant harms. This is, of course, not to say that courts never provide help. Particularly in moments when public sentiment takes a reactionary turn, a judiciary appointed during a prior moment will likely act as a modest bulwark against the manifestation of those reactionary sentiments in government policy. The question, though, is whether minorities and other vulnerable groups on the whole fare better under a regime of judicial supremacy. And as this Part suggests, there is no reason to believe that courts are systematically more attentive to the interests of vulnerable populations generally speaking. Worse still, courts' unwillingness or inability to recognize and enforce positive as opposed to negative rights puts a depressingly low ceiling on the sort of freedom judicial empowerment might achieve.

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134. 381 U.S. 479 (1965) (striking a moribund state law prohibiting the use of contraception).

135. 573 U.S. 682 (2014) (invalidating an affirmative guarantee of contraception for employees of religious employers).

136. See Ackerman, *supra* note 6, at 744 (arguing that defining "discrete and insular" minorities is a moving target); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 316–17 (1989) (advocating for a deconstructivist approach to defining "discrete and insular" minorities); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1080–82 (1974) (focusing on "powerlessness" as a metric for identifying "discrete and insular" minorities); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1297–1300 (1982) (contending that a generalized approach cannot adequately grapple with inherently "contingent instances of prejudice").

## IV. WHY THE SECOND CONJECTURE FAILS

Ely's second conjecture is that judges are less likely than elected officials to close off the "channels of political change."<sup>137</sup> The rationale is, again, that elected officials will predictably rewrite the rules of democracy in ways that prevent or impair meaningful electoral contestation. Judges, meanwhile, are at least *less* interested in electoral outcomes and so *more* disposed to facilitate democratic turnover. But it is precisely in this area that Ely's conjecture has most decisively failed to be borne out—yet many continue to embrace it anyway as if this failure had no implications for the theory.<sup>138</sup> In fact, both the passivity of judges in allowing electoral self-dealing and their own interventionism to abet it leave Ely's theoretical framework for the role of constitutional judges in a democracy in ruins.

The "law of democracy" independently illustrates the larger impossibility of distinguishing between process and substance that Ely made famous in U.S. constitutional theory. Innocuous as it may sound, assuring the propriety of the democratic process is inevitably ideological and political. But despite its independent importance, this fact also devastates Ely's conjecture that judges might compare favorably to other actors in "clearing the channels of political change." Indeed, it explains why judges regularly abet, rather than inhibit, attempts to transform the electoral landscape in what liberals take to be undemocratic directions.

In his widely discussed Foreword to the *Harvard Law Review's* annual Supreme Court issue, Klarman, for instance, describes the "degradation of American democracy," condemning what he describes as a coordinated effort by the Republican Party to undermine voting rights in the United States.<sup>139</sup> Klarman catalogs methods of voter suppression implemented by Republican elected officials at the state level, including voter identification laws, voter roll purges, and "domicile" requirements for student voters, along with other methods of partisan entrenchment such as gerrymandering of state and federal legislative districts and legal challenges to adverse election results.<sup>140</sup>

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137. ELY, *supra* note 1, at 103.

138. Even Richard Bellamy, author of the most accomplished general argument against judicial empowerment (on which we build here), writes at the end of his treatment of Ely, "[I]t might be argued that judges have fewer incentives to distort the process or accumulate power in self-serving ways than politicians. Perhaps." RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 119–20 (2007). We intervene in the argument at this point, pushing harder against Ely's comparative advantage hypothesis than earlier accounts.

139. Klarman, *supra* note 105.

140. *Id.* at 46–67.

At the same time, Klarman criticizes the federal judiciary for its complicity in this partisan project. Klarman recounts sins of both omission and commission, from failures to intervene in the cases of gerrymandering or voter identification to the invalidation of federal legislative measures used to combat state-level suppression.<sup>141</sup> Whereas “[s]ome of the Supreme Court’s finest historical moments have involved safeguarding democracy,” Klarman laments, “today’s Republican Justices seem insensitive, or even hostile” to the idea that courts should prevent “incumbent legislators and political parties” from “entrench[ing] themselves in power.”<sup>142</sup> Klarman’s frustration with the Court in this area is representative. Nicholas Stephanopolous, for example, complains that the contemporary Court has “not just refus[ed] to fix democratic malfunctions judicially, but also thwart[ed] nonjudicial actors from dealing with them.”<sup>143</sup> In so doing, Stephanopoulos continues, the Court has shown outright “hostil[ity]” to the Elysian vision, aiding a minoritarian Republican Party in entrenching itself, seemingly in an effort to advance the Court’s own ideological ends.<sup>144</sup>

Pervasive as these attitudes are among mainstream liberals, negative assessments of the Court’s handling of election law should be surprising to them because Ely’s conjecture is that courts are specially positioned to protect democracy against elected official entrenchment. That “conception of the Court’s constitutional role” is, after all, grounded in a prediction about the respective motivations and dispositions of judges and elected officials.<sup>145</sup> As long as judicial intervention to keep the channels of democracy clear is permitted—as it plainly is, given the Court’s willingness to invalidate relevant state and federal legislation—Ely’s framework predicts that courts should “check and balance” elected officials, not be complicit in their entrenchment. Yet the reverse has proven true. Ely’s script failed to be followed not because the actors failed to play their roles assigned by him but because they played the roles in a different script. Ely’s position is, ultimately, a normative one: that judges *should* have the final word on what “democracy” formally requires. But it is based on an *empirical* conjecture about judicial and elected official behavior. Absent additional explanation, therefore, judges actively aiding entrenchment efforts should weigh against that position.

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141. *Id.* at 178–224.

142. *Id.* at 178.

143. Stephanopoulos, *supra* note 3, at 115.

144. *Id.* at 113, 181.

145. Klarman, *supra* note 105, at 178–79.

We proceed in three steps. First, we clarify precisely what Ely meant when he predicted that judges would serve better than more politically responsive actors to prevent alleged distortions of democratic representation, including the most basic one of self-dealing. Second, we suggest that it is precisely as a conjecture about judicial behavior that Ely's theory fails; it did so because he mistakenly assumed that institutional self-interest is the main or only interest actors might have to entrench representational power.<sup>146</sup> Third, reviewing the case law on partisan gerrymandering, campaign finance, and the politics of the party nomination process, we show that since what counts as a fair and undistorted electoral process is *itself* a central ideological or political question, we should not be surprised that judges have been unable to transcend factional interest. Rather than acting as external arbiters of democracy, judges turn out to be positioned in the thick of disagreement about its desirable form.

#### A. *Clarifying the Argument*

Understood substantively, enabling democratic contestation would justify a sweeping approach to judicial review. Beyond formal restrictions on participation, economic realities make it much more difficult for various classes of citizens to take part in the political process. Lack of state-financed childcare, for example, places a special burden on lower- and middle-income parents. Similarly, unpredictable work schedules and other forms of employment instability make it more challenging for members of the working class to participate in politics in whatever form. Beyond economics in a narrow sense, various types of state violence against racial and ethnic minorities discourage participation directly while also alienating those communities in relation to the state, thereby sapping motivation to participate in the democratic process.<sup>147</sup> Needless to say, remedying these substantive impediments to equal political participation would require radical restructuring of our economic and social order. And while many on the political left would welcome such restructuring, the judiciary taking up that project is at odds with the idea that courts should limit themselves to protecting democracy, leaving the rest to ordinary politics.

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146. Here we are adapting Girardeau Spann's contention that judges are socialized actors even when institutionally protected, which was developed to explain judicial majoritarianism (and judicial failure to protect minorities) to account for the judicial failure to intervene for the sake of democratic choice. See SPANN, *supra* note 37, at 20–23.

147. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2143 (2017).



Construed more narrowly, then, keeping open the “channels of political change” comes closer to removing formal impediments to participation or pretextual requirements intended to disadvantage some group of citizens or persons. Under this rubric, we can make sense of courts declaring invalid historical impediments like poll taxes<sup>148</sup> or literacy tests<sup>149</sup> or more contemporary hurdles such as voter identification requirements<sup>150</sup> or, in principle, the conditioning of felon re-enfranchisement on the payment of fines or fees associated with incarceration.<sup>151</sup> Judicial protection against the burdening of political speech by disfavored groups also fits comfortably within this narrower understanding.<sup>152</sup> So too judicial intervention in cases of malapportionment since, there again, we see formally unequal treatment of similarly situated voters.<sup>153</sup>

Whatever its precise boundaries, the rationale that courts are better positioned to ensure meaningful democratic contestation has election law as its core application. Indeed, for many, that courts have a special role in articulating and enforcing the “law of democracy” is the distinctly Elysian view. For these reasons, this Part turns to election law, both to give that rationale its fairest hearing and to engage as many of its partisans as possible.

### B. *The Empirical Record*

With these clarifications in place, the question becomes what accounts for Ely’s failure to predict the sort of complicity in the entrenchment of elected officials that Klarman describes. Ely’s first claim of comparative advantage had to do with alleged differences between judges and elected officials in terms of willingness to resist popular pressure. Here, by contrast, Ely is invoking the relative disposition of institutional actors to accumulate power, making it similar to, though not quite the same as, a traditional Madisonian separation-of-powers story. In a Madisonian story, “[a]mbition [is] made to counteract ambition,” which is to say, the self-interest of one

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148. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

149. *Contra Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

150. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008).

151. *Cf. Jones v. Governor of Fla.*, 975 F.3d 1016, 1049 (11th Cir. 2020).

152. *See, e.g., Bridges v. California*, 314 U.S. 252, 262, 275–78 (1941); *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (explaining that the viewpoint neutrality doctrine in the First Amendment area has the purpose of ensuring “that minority views are treated with the same respect as are majority views” so that “[a]ccess to a public forum . . . does not depend upon majoritarian consent”).

153. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964).

institution is used to offset that of another.<sup>154</sup> With slight variation, Ely's suggestion is that the self-interest of elected officials can be counterbalanced by judicial *lack* of interest, preventing excessive accumulation of power through the positioning of an unbiased coequal branch.

As with traditional separation-of-powers stories, though, the difficulty with Ely's narrative is that it abstracts from ideological interest. As Daryl Levinson and Richard Pildes have explained, Madison's story anticipates that institutional actors will be motivated primarily by institutional concerns.<sup>155</sup> Members of Congress, for example, can be expected to "vigilantly monitor and check presidential decisionmaking" because those members are driven to increase *congressional* decisionmaking authority.<sup>156</sup> Owing to such motivations, "the branches," Levinson and Pildes describe, "purportedly are locked in a perpetual struggle to aggrandize their own power and encroach upon their rivals."<sup>157</sup> These "mutually antagonistic" institutional actors, in other words, compete with one another to accumulate power, ensuring that neither attains an "excessive" or "tyrannical" amount.<sup>158</sup>

As Levinson and Pildes observe, however, Madison's predictions of antagonism between the branches proved false. At least during periods of unified government, ideologically aligned legislators applied only minimal scrutiny to the executive branch.<sup>159</sup> And even during moments of divided government, Congress afforded the President tremendous discretion on issues of bipartisan consensus—most notably militarism.<sup>160</sup> The reason, Levinson and Pildes explain, is that both legislators and executive officials were motivated less to exercise power as such than to have it exercised in particular ways.<sup>161</sup> Driven, that is, by *ideological* interest, likeminded officials proved willing and even eager to work across branch lines in order to achieve policy ends.

With Ely's story, the problem is similar. As he tells it, elected officials select the rules of democracy motivated by self-preservation.

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154. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

155. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338 (2006).

156. *Id.* at 2351.

157. *Id.* at 2314.

158. *Id.* at 2328.

159. See *id.* at 2320–22, 2326–27.

160. See, e.g., Catie Edmondson, *House Passes \$738 Billion Military Bill with Space Force and Parental Leave*, N.Y. TIMES, <https://www.nytimes.com/2019/12/11/us/politics/house-ndaa-space-force-leave.html> (last updated Jan. 1, 2021) [<https://perma.cc/HNQ3-7BWG>] (noting that the "vote reflected . . . bipartisan support for . . . one of the nation's most expensive military policy bills to date").

161. Levinson & Pildes, *supra* note 155, at 2318 (observing that politicians are rewarded for "effectuating political or ideological goals").

Needing to retain office to preserve their authority, such officials predictably shape the conditions of electoral contestation to their advantage and to the disadvantage of their opponents. Judges, by contrast, with their offices and (to some extent) authority constitutionally guaranteed, have no direct stake in electoral outcomes and so can determine the conditions of contestation more fairly. As with Madison, then, the relevant motivation for each set of institutional actors is supposedly the motivation to accumulate power, present here for one set of actors and absent for the other.

Again, though, this prediction based upon institutional interest proved false. Ideologically sympathetic courts instead declined to intervene in cases in which elected officials erected barriers to political participation by their opponents. Those same courts also invalidated on constitutional grounds both state and federal legislation enacted or supported by ideological opponents intended to enhance participation by their supporters. And even on issues of ideological consensus among officials, courts facilitated efforts at entrenchment by current officials against popular insurgents, most notably in the context of party primaries. Repeatedly, in other words, ideological alignment predicted complicity, suggesting that judges, like elected officials, care less about accumulating power than its being exercised toward particular ends.

### *C. The Inseparability of Democracy and Ideology*

Importantly, such ideological behavior on the part of judges was and is mostly unavoidable. The reason is that figuring out what helps or hurts democracy is itself the central issue of ideological contention in contemporary societies.

In contrast with elected officials, to say that judges are motivated by ideological interest in rendering decisions can sound like criticism. Indeed, one way to hear Klarman's indictment of the contemporary Supreme Court is as an accusation that Republican Justices have succumbed to partisan or ideological motivation, and, in so doing, have departed from the judicial role. More generally, judicial morality as internally understood rests famously on the separation of politics and law, with ideologically driven decisions falling on the wrong side of that divide.<sup>162</sup> Importantly, though, the argument here is not that judges fail to administer the "law" of democracy. Rather, as we illustrate with representative examples below, judges could not help but answer questions about democracy ideologically for the straightforward reason

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<sup>162</sup>. See generally STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021).

that the questions being presented to courts are unavoidably ideological. Following Waldron and others, concepts like “democracy” and “equality” are both remarkably abstract and deeply contested.<sup>163</sup> Add to this the relative lack of more specific constitutional text in this area, and it is unsurprising that debates about what democracy requires as a matter of “law” correspond roughly to familiar dialectics within moral and political thought. Put simply, asking ideological questions necessitates receiving ideological answers, and so, so long as judges are the ones answering, judicial ideology is what we must get.

Start with the controversy over partisan gerrymandering. While the practice of partisan gerrymandering in the United States dates back at least to the early nineteenth century, its political salience increased markedly following the 2010 election. Taking control of state legislatures in various swing states, Republican state officials positioned themselves to redraw numerous federal congressional districts to their party’s advantage following the completion of that year’s census.<sup>164</sup> In part by taking advantage of technological advancements in redistricting software, Republican officials were able to “pack” and “crack” Democratic voters with remarkable efficacy.<sup>165</sup> Coupled with a relatively even partisan split among voters in the United States and increasing partisan polarization, partisan gerrymandering thus became a major topic of political debate, especially among Democrats, with, for example, Democratic presidential candidates campaigning explicitly on the issue<sup>166</sup> and Democratic members of Congress centering possible remedies by means of signature legislative proposals.<sup>167</sup>

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163. Waldron, *supra* note 14, at 1366–69.

164. See ‘Gerrymandering On Steroids’: How Republicans Stacked the Nation’s Statehouses, WBUR (July 19, 2016), <https://www.wbur.org/hereandnow/2016/07/19/gerrymandering-republicans-redmap> [<https://perma.cc/3NDU-TWLL>] (describing project “REDMAP”); see also Ally Mutnick & Sabrina Rodriguez, ‘A Decade of Power’: Statehouse Wins Position GOP to Dominate Redistricting, POLITICO (Nov. 4, 2020, 9:09 PM), <https://www.politico.com/news/2020/11/04/statehouse-elections-2020-434108> [<https://perma.cc/P7NS-MCUG>] (noting similar successes in 2020).

165. See David A. Lieb, *AP Analysis Shows How Gerrymandering Benefited GOP in 2016*, ASSOCIATED PRESS (June 25, 2017), <https://apnews.com/article/e3c5cc51faba4b7fb67d8a3f996bdaca> [<https://perma.cc/T4ZA-XK79>] (estimating that Republicans won as many as twenty-two additional House seats in 2016 as a result of redistricting efforts).

166. Joe Biden (@JoeBiden), TWITTER (Sept. 4, 2019, 4:40 PM), <https://twitter.com/joebiden/status/1169349413145387009?lang=en> [<https://perma.cc/YGJ4-WNCE>] (“For too long, partisan gerrymandering has allowed politicians to rig the political process and draw districts in their favor.”).

167. See Michael Li, *Why the For the People Act Is Critical for Fair Voting Maps*, BRENNAN CTR. FOR JUST. (Mar. 11, 2011), <https://www.brennancenter.org/our-work/analysis-opinion/why-people-act-critical-fair-voting-maps> [<https://perma.cc/BYC4-ZF2C>].

The Supreme Court has yet to declare an act of partisan gerrymandering constitutionally invalid. In *Davis v. Bandemer*,<sup>168</sup> the Court held for the first time that challenges to partisan gerrymandering were judicially cognizable under the Equal Protection Clause, though a plurality concluded ultimately that the redistricting plan before the Court was within permissible bounds.<sup>169</sup> Eighteen years later, in *Vieth v. Jubelirer*,<sup>170</sup> a conservative plurality led by Justice Antonin Scalia declared the justiciability holding in *Bandemer* a failure, reasoning that “no judicially discernable and manageable standards for adjudicating political gerrymandering claims ha[d] emerged” in the years since that decision.<sup>171</sup> The four liberal Justices, in three separate dissents, would have rejected the Republican-drawn map at issue in *Vieth*, though each dissent offered its own test with which it would have reached that result.<sup>172</sup> Justice Anthony Kennedy, meanwhile, held out hope that, at some point in the future, a judicially manageable standard for adjudicating gerrymandering claims would emerge.<sup>173</sup> Fifteen years after that, the conservatives, in *Rucho v. Common Cause*,<sup>174</sup> at last assembled a majority in support of the proposition that partisan gerrymandering claims present a nonjusticiable “political question.”<sup>175</sup> In dissent, the liberals, this time headed by Justice Elena Kagan, again would have invalidated the Republican-favoring map on the grounds that its partisan tilt deprived citizens of the “fundamental . . . constitutional rights . . . to participate equally in the political process” and “to choose their political representatives.”<sup>176</sup>

Rather than text or history, demands for judicial intervention in cases of political gerrymandering appear motivated by the intuition that there is something undemocratic about a mismatch between the share of the vote a political party receives and the share of seats it is allocated as a result. Justice Kagan, for example, remarked in her *Rucho* dissent that “gerrymandering is incompatible with democratic principles,” “maximiz[ing] the power of some voters and minimiz[ing] the power of others,” thereby “entrench[ing]” the incumbent party “no matter what the voters would prefer.”<sup>177</sup> Given this intuition, one might

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168. 478 U.S. 109 (1986).

169. *Id.* at 143.

170. 541 U.S. 267 (2004).

171. *Id.* at 281.

172. *Id.* at 317–42 (Stevens, J., dissenting); *id.* at 343–55 (Souter & Ginsburg, JJ., dissenting); *id.* at 355–68 (Breyer, J., dissenting).

173. *Id.* at 317 (Kennedy, J., concurring).

174. 588 U.S. \_\_\_, 139 S. Ct. 2484 (2019).

175. *Id.* at 2506.

176. *Id.* at 2509 (Kagan, J., dissenting) (emphasizing a free assembly interest).

177. *Id.* at 2509–12 (internal quotation marks omitted).

infer that democratic principles compel a system of proportional representation, which is to say, a system in which the seats within a jurisdiction are allocated to political parties in proportion to the share of the vote each party receives. Practically speaking, this could mean, in the United States, the use of multimember congressional districts, as contrasted with now-standard single-member districts.<sup>178</sup> As Justice Stephen Breyer observed in *Vieth*, however, “winner-take-all” systems also have plausible virtues, including, for example, better geographic representation and more accountability owing to the “diminish[ed] . . . need for coalition governments” and, correspondingly, the greater “eas[e] for voters to identify which party is responsible for government decisionmaking.”<sup>179</sup> Beyond that, Breyer emphasized, winner-take-all systems promote greater governmental “stability,” again seemingly because such systems disfavor minor political parties.<sup>180</sup> Add to this the plausible value of ensuring representation of politically salient minorities,<sup>181</sup> and it quickly becomes apparent that deciding whether or to what extent to allow partisan mismatch requires the sort of contestable balancing of values that we ordinarily recognize as political.

At this point, one might respond that even if partisan mismatch is a permissible *consequence* of pursuing other values like geographic or minority representation, surely democratic values preclude drawing district lines with partisan advantage as a *goal*. An immediate problem, though, is that the “neutral” criteria for redistricting radically underdetermine where district lines should be drawn. And because the partisan impact of the various permissible options is reasonably knowable—and increasingly so, given technological advances—the partisan impact of any choice is likely foreseen and so is, in that sense, intended. To this, one might object, channeling Thomas Aquinas, that there is a critical difference between merely foreseeing an outcome and having that outcome as one’s aim.<sup>182</sup> In so objecting, though, one would

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178. See Lee Drutman, *This Voting Reform Solves 2 of America’s Biggest Political Problems*, VOX, <https://www.vox.com/the-big-idea/2017/4/26/15425492/proportional-voting-polarization-urban-rural-third-parties> (last updated July 26, 2017, 3:21 AM) [<https://perma.cc/RET9-GKLZ>]. Other suggestions include using criteria to evaluate single-member districting plans that ensure rough equivalence with multimember districts in terms of outcomes. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

179. *Vieth v. Jubelirer*, 541 U.S. 267, 357 (2004) (Breyer, J., dissenting).

180. *Id.* at 360.

181. As well as the complicated question of *which* politically salient minorities, if any, warrant protected representation. See *supra* text accompanying note 146.

182. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, q. 64, art.7 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948) (articulating the doctrine of double effect).

be invoking a deeply contested moral philosophical principle, suggesting again that any solution to the gerrymandering puzzle is more politics than law. Similarly difficult, if one accepts, à la Breyer, that governmental stability is a plausible value to be promoted through redistricting, it becomes hard to see how partisan advantage can be characterized as an impermissible aim. After all, to say that an approach to districting promotes governmental stability is just to say that it insulates the current government from removal. And insofar as the purpose of partisan gerrymandering is, again, to entrench the incumbent party, why not think of such efforts as intended to prevent governmental flux?

As a last resort, one could argue that even if any redistricting *ideal* must rest upon contestable moral and political assumptions, courts should at least intervene in “extreme” cases.<sup>183</sup> Justice Kagan, for instance, urged in *Rucho* that instead of articulating a comprehensive rule for what constitutes excessive partisan advantage, courts could simply start with instances of gerrymandering which all agree go “too far,” developing more general principles over time.<sup>184</sup> In so reasoning, Kagan observed that her conservative counterparts had conceded that “excessive partisanship” in redistricting was “incompatible with democratic principles.”<sup>185</sup> So let courts intervene in those concededly excessive cases, she insisted, leaving more contestable ones to future courts or, perhaps, to politics. The problem, of course, is that there are few if any instances of universally conceded excess, at least among actual as opposed to hypothetical cases. For this reason, the remarks of Kagan’s conservative colleagues amounted to an empty concession that “excessive” partisan advantage is problematic, with no shared understanding of what constitutes excess. To Kagan’s credit, reasoning from egregious violations rather than from an ideal can be helpful under certain conditions. For individuals or relatively ideologically homogeneous groups, sustained attention to obvious wrongs can help one or all to work towards a more comprehensive outlook or to simply step over practically insignificant ideological divides.<sup>186</sup> Again, though, under conditions of significant ideological disagreement, appeals to “extreme” or “excessive” violations fail because that disagreement simply manifests itself in disagreement about what counts as extreme or excessive. Worse still, owing to the

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183. *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).

184. *Id.* at 2517.

185. *Id.* at 2512.

186. See, e.g., AMARTYA SEN, *THE IDEA OF JUSTICE* (2009) (pursuing this approach in relation to liberal conceptions of justice).

lack of meaningful ideological overlap, invocations of terms like extreme or excessive function mostly to hide or obscure disagreement rather than to shed light on the problem.

None of the above is to suggest that partisan gerrymandering in whatever form is desirable. Nor is it to cast doubt on the wisdom of, for example, the use of independent redistricting commissions should the United States retain single-member congressional districts.<sup>187</sup> As Pildes emphasizes, though, even independent redistricting commissions must be instructed what substantive criteria to apply.<sup>188</sup> And the selection of those criteria, by whichever actor, inevitably involves substantive, contestable judgments. In other words, deciding what constitutes a “fair” electoral map is an unavoidably ideological endeavor.<sup>189</sup>

The story with campaign finance is more complicated but ultimately similar. Modern campaign finance cases begin with *Buckley v. Valeo*.<sup>190</sup> Upholding statutory limitations on contributions by individuals or groups to candidates, the *Buckley* Court explained that “the prevention of corruption and the appearance of corruption” owing to the “real or imagined coercive influence” of large contributions on candidates was enough to justify any “interference” with contributors’ associational freedoms.<sup>191</sup> At the same time, the Court in *Buckley* went on to declare corresponding expenditure limits unconstitutional constraints on political speech. Assuring that the “absence of prearrangement and coordination” between an individual or group making an expenditure and the candidate on whose behalf that expenditure was made was enough to “alleviate[] the danger that expenditures will be given as a quid pro quo,” the Court deemed the state’s anticorruption interest inadequate.<sup>192</sup> More strikingly, the Court rejected outright the notion that the “government may restrict the speech of some elements of our society in order to enhance the relative voice of others,” calling such a “concept . . . wholly foreign to the First Amendment,” an amendment, the Court continued, “designed to secure the widest possible dissemination of information . . . and to assure unfettered interchange of ideas.”<sup>193</sup> The Court invalidated limitations

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187. See Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, ELECTION L. BLOG (Jan. 9, 2019, 7:30 PM), <https://electionlawblog.org/?p=103123> [<https://perma.cc/W7DE-B9QL>].

188. Richard H. Pildes, *Redistricting Reform and the 2018 Elections*, HARV. L. REV.: BLOG (Oct. 26, 2018), <https://blog.harvardlawreview.org/redistricting-reform-and-the-2018-elections/> [<https://perma.cc/8MEG-KE33>].

189. *Id.*

190. 424 U.S. 1 (1976).

191. *Id.* at 25.

192. *Id.* at 47.

193. *Id.* at 48–49 (internal quotation marks omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (further citations omitted)).



on personal expenditures by candidates for analogous reasons, noting, in particular, the absence of quid pro quo opportunity when a candidate finances him or herself.<sup>194</sup> In partial dissent, Justice Thurgood Marshall would have at least upheld limits on candidate expenditures, reasoning that the state very much has an “interest in promoting the reality and appearance of equal access to the political arena,” and that a “wealthy candidate’s immediate access to a . . . personal fortune” may place less-wealthy opponents at an impossible disadvantage and, more generally, “discourage potential candidates without significant personal wealth” from even deciding to run.<sup>195</sup>

With the “equalizing” rationale unavailable, disputes among the Justices shifted to the state’s interest in regulating “corruption.” In *Austin v. Michigan Chamber of Commerce*,<sup>196</sup> for example, Justice Marshall assembled a majority to uphold state legislation prohibiting corporations from making donations or independent expenditures in connection with state candidate elections.<sup>197</sup> According to Justice Marshall, regardless of whether an interest in preventing quid pro quo corruption might justify such a restriction, this law targeted a different type of corruption, namely “the corrosive and distorting effects of immense aggregations of wealth” enabled by the corporate form.<sup>198</sup> Despite efforts to distinguish this more expansive “corruption” interest from the “equalization” interest rejected in *Buckley*, Marshall’s reasoning is, as Elizabeth Garrett described, more plausibly understood as “an argument supporting regulation to better ensure equality of participation in campaigns for all Americans, no matter what their economic resources.”<sup>199</sup> In dissent, Justice Kennedy noted as much,<sup>200</sup> insisting that the only interest in regulating “corruption” following *Buckley* was an interest in preventing actual or apparent quid pro quo.<sup>201</sup> Twenty years later, Justice Kennedy’s view would prevail in *Citizens United v. FEC*.<sup>202</sup> Over a dissent from Justice John Paul Stevens insisting that “the Constitution does, in fact, permit numerous restrictions on the speech of some in order to prevent a few from

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194. *Id.* at 52–54.

195. *Id.* at 287–88 (Marshall, J., concurring in part and dissenting in part).

196. 494 U.S. 652 (1990).

197. *Id.* at 668–69.

198. *Id.* at 660.

199. Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 *HOW. L.J.* 655, 678 (2009).

200. *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting) (observing that the corporate expenditures at issue were no “more likely to dominate the political arena” than spending by the wealthy individuals protected in *Buckley*).

201. *Id.* at 703.

202. 558 U.S. 310 (2010).

drowning out the many,”<sup>203</sup> Justice Kennedy asserted that *Austin*’s “antidistortion” rationale was inconsistent with the expansive “civic discourse” the First Amendment was meant to ensure.<sup>204</sup>

As reflected by *Austin*, post-*Buckley* debates also moved from the political influence of wealthy individuals to the power of corporations. Justices specifically sympathetic to the regulation of corporate spending offered different justifications, some more persuasive than others. Dissenting in *First National Bank of Boston v. Bellotti*,<sup>205</sup> then-Justice William Rehnquist, for example, reasoned that the state had greater latitude in regulating corporate political spending because corporate profits were attributable to special legal protections the state has afforded<sup>206</sup>—ignoring that the fortunes of wealthy individuals are nearly always traceable to those same state-provided legal protections. (Rehnquist would reverse his position on corporate spending in the decades to come.<sup>207</sup>) Somewhat different, Justice Marshall in *Austin* maintained that corporate spending was special because there is no connection between the funds available to a corporation and the popularity of political views that corporation might use those funds to promote<sup>208</sup>—again, disregarding that the same is true of those with immense personal wealth.<sup>209</sup> More plausibly, supporters of regulation pointed towards the “immense aggregations of wealth” available to corporations for political spending and the corresponding threat that such entities might utterly “dominat[e]” political discourse.<sup>210</sup>

As with the state’s interest in preventing “corruption,” a narrower understanding of the state’s authority to regulate corporate spending prevailed over time. Again, stated most clearly by Justice Kennedy in *Citizens United*, the alternate position was that corporate political expenditures should not be treated any differently than expenditures by wealthy individuals. The reason, Justice Kennedy explained, is that “[p]olitical speech is indispensable to decisionmaking

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203. *Id.* at 441 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

204. *Id.* at 349. For an extended discussion of the underdeterminacy of abstract concepts like “truth,” “autonomy,” and “democracy” in the context of *Citizens United*, see Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1981–84 (2018).

205. 435 U.S. 765 (1978).

206. *Id.* at 822–28 (Rehnquist, J., dissenting).

207. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United*, 558 U.S. at 310.

208. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 659 (1990) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)).

209. *Citizens United*, 558 U.S. at 351.

210. *Id.* at 440, 469 (Stevens, J., concurring in part and dissenting in part) (quoting *McConnell*, 540 U.S. at 240) (further citations omitted) (internal quotation marks omitted).

in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”<sup>211</sup> Put differently, according to Kennedy and others, the ultimate interest in all these cases is that of the would-be listener, which is to say, citizens. And because citizens benefit from more political speech rather than less, speech restrictions cause significant harm regardless of the identity of the person or entity whose speech is restricted.

As with partisan gerrymandering cases, none of the cases above involve meaningful engagement with constitutional text. Some of the more recent cases do contain (very) modest historical analysis, though even there, very often, the concepts being analyzed, such as “corruption,” are ones given legal significance by late twentieth-century judicial decisions.<sup>212</sup> More fundamentally, then, what one sees playing out in these various exchanges are disputes between what are popularly called “libertarian” and “egalitarian” conceptions of the freedom of speech.<sup>213</sup> For libertarians like Justice Kennedy, the role of the state, broadly speaking, is to permit as much private political spending as the market will bear, trusting citizens to sort for themselves good political information from bad. For egalitarians like Justice Marshall or Justice Stevens, by contrast, the state has an interest in promoting equal participation in the political process among citizens or, at the very least, in preventing moneyed individuals or entities from dominating that process completely.<sup>214</sup> Whatever one’s sympathies, that more fundamental disagreement is plainly ideological in nature. As such, it should, again, come as no surprise if judges resolve cases manifesting that disagreement siding with ideological allies.

In these and similar cases, we see courts resolving what are essentially ideological disputes under the guise of administering the “law” of democracy. To say that these decisions are ideological is, again, not intended as criticism. Insofar as judges are asked to settle questions like whether or how corporate political activities should be limited or the extent to which “stability” is a legitimate consideration in setting the rules of electoral contestation, ideological answers are the only type

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211. *Id.* at 349 (quoting *Bellotti*, 435 U.S. at 777) (internal quotation marks omitted).

212. See e.g., *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (recognizing an interest in “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions”); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 496–97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

213. Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1341–42 (1994).

214. Especially in view of the emphasis on *corporate* political participation (as well as the influence of billionaires), it is reasonable to ask whether the liberal ideal has migrated from *political equality* to *not too much political inequality*.

that they could give. Be that as it may, insofar as ideological interest is what is principally at stake in these types of conflicts, judges are no less interested and so no more “objective” in resolving them than elected officials.

Attending to ideological interest, then, helps explain why judges should be no better at administering democracy than elected officials. It might also provide reason to think they are worse. Many of the ideological disagreements described above map on to familiar partisan disputes. The choice between libertarian and egalitarian understandings of speech, for instance, is a standard point of disagreement between conservatives and liberals, with conservative and liberal politicians competing on the issue explicitly. With such disputes, practical outcomes are determined by elections and judicial appointments respectively, and so one should expect rough ideological parity between the two sets of actors over time—with familiar if troubling caveats.<sup>215</sup> Similarly, other disagreements correspond to persisting divisions between officials either within parties or across party lines.<sup>216</sup> Here, again, whether judges or elected officials will handle such issues “better” will depend on electoral outcomes and judicial appointments, suggesting rough parity between the two groups over time.

Consider, though, other issues on which officials are in broad consensus, but on which the populace is either divided or—more worrying—united around a contrary view. In *Kurzon v. Democratic National Committee*,<sup>217</sup> for example, a supporter of Bernie Sanders’s 2016 presidential campaign challenged the Democratic Party’s use of “superdelegates” in its presidential nomination process.<sup>218</sup> In contrast with “pledged” delegates, who were required to vote for a particular candidate at the party’s nominating convention based on the result of their state’s primary or caucus, superdelegates were “unpledged” and so could vote for the candidate of their choice.<sup>219</sup> Superdelegates consisted of current elected officials within the party, both state and

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215. Most notably, judicial ideology lags systematically behind popular ideology because of the relative infrequency of judicial appointments. See BREYER, *supra* note 162, at 57–58.

216. Democrats, for example, have been engaged in a heated debate over the appropriateness of Super PACs. See Shane Goldmacher, *Elizabeth Warren, Long a Super PAC Critic, Gets Help from One*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/politics/elizabeth-warren-super-pac.html> [<https://perma.cc/6JFH-4VGS>] (“At the last Democratic debate, in New Hampshire, Ms. Warren had used the fact that neither she nor Senator Amy Klobuchar of Minnesota had a super PAC as a cudgel to hit the rest of their opponents.”).

217. 197 F. Supp. 3d 638 (S.D.N.Y. 2016).

218. *Id.* at 641.

219. *Id.*

federal, and a small number of “distinguished party leaders.”<sup>220</sup> The Sanders supporter argued the use of superdelegates “dilute[d] the power of [his] vote . . . to select the next President . . . because it create[d] a possibly insurmountable hurdle for a grassroots candidate” like Sanders.<sup>221</sup> On this basis, the supporter alleged an Equal Protection violation and an infringement of his associational rights.

The Democratic Party introduced superdelegates to the presidential nomination process after devastating electoral defeats to Richard Nixon and Ronald Reagan in 1972 and 1980 respectively.<sup>222</sup> Attributing those losses to the party’s increased use of presidential primaries, party leaders formed a commission to reform the nomination process. The overarching goal of the commission was to restore greater control over presidential nominations to party officials. Led by then-North Carolina Governor James Hunt, members of the commission emphasized the superior “political acumen” of elected officials in selecting presidential candidates, as well as the broad electoral base to which those officials were collectively responsive.<sup>223</sup> Though recognizing that “uncommitted” delegates anointing a nominee who enjoyed less popular support during the primaries than her opponent could call the “legitimacy” of that nomination into question,<sup>224</sup> members of the commission reasoned that the primary system was unacceptably vulnerable to “outsider” candidates.<sup>225</sup>

Returning to *Kurzon*, a federal district court quickly dismissed the Sanders supporter’s Equal Protection challenge. Relying mostly on alleged inadequacies with the supporter’s complaint, Judge Paul Oetken, an Obama appointee, expressed skepticism towards the idea that the principle of “one person, one vote” applied in the context of

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220. Drew DeSilver, *Who Are the Democratic Superdelegates?*, PEW RSCH. CTR. (May 5, 2016), <https://www.pewresearch.org/fact-tank/2016/05/05/who-are-the-democratic-superdelegates/> [<https://perma.cc/R7RJ-JGDH>].

221. *Kurzon*, 197 F. Supp. 3d at 641 (second alteration in original) (internal quotation marks omitted).

222. See Branko Marcetic, *The Secret History of Superdelegates*, IN THESE TIMES (May 16, 2016), [https://inthesetimes.com/features/superdelegates\\_berniesanders\\_hillary\\_clinton.html](https://inthesetimes.com/features/superdelegates_berniesanders_hillary_clinton.html) [<https://perma.cc/4YN6-PX8P>].

223. *Hunting the Hunt Commission*, IN THESE TIMES (May 16, 2016), [https://inthesetimes.com/features/hunt\\_commission\\_what\\_are\\_superdelegates.html](https://inthesetimes.com/features/hunt_commission_what_are_superdelegates.html) [<https://perma.cc/8XGX-9CQJ>] (quoting the DNC COMMISSION ON PRESIDENTIAL NOMINATIONS 136–37 (Nov. 7, 1981) (testimony of Dick Schneller)).

224. *Id.*

225. *Id.* Such sentiments were echoed in 2016 when, for example, Democratic National Committee Chair Debbie Wasserman Schultz remarked, “Unpledged delegates exist really to make sure that party leaders and elected officials don’t have to be in a position where they are running against grassroots activists.” Independent Voter, *DNC Chair Says Superdelegates Exist to Protect Party Leaders*, YOUTUBE (Feb. 12, 2016), <https://www.youtube.com/watch?v=w5llIKM9Yc> [<https://perma.cc/9XEF-D7WD>].

party nominating conventions.<sup>226</sup> On the supporter's First Amendment claim, Judge Oetken reasoned that, although eliminating superdelegates would make the Democratic Party's selection of nominees "marginally more democratic," the voter had not been "fully excluded" from the nominating process, nor had his preferred candidate been "excluded from participation or consideration."<sup>227</sup> Given this relative opportunity, Judge Oetken concluded that the Democratic Party's "countervailing" associational rights would be infringed if the supporter's requested injunction were granted.<sup>228</sup>

Reaching this conclusion, Judge Oetken relied heavily on the Supreme Court's 2008 decision in *New York State Board of Elections v. Torres*.<sup>229</sup> In that case, a candidate for the New York state supreme court raised an associational challenge to the process by which state parties selected supreme court nominees. Under New York state law, political parties must select supreme court nominees at a convention of delegates chosen by party members in a primary election.<sup>230</sup> Like superdelegates, delegates at the judicial convention are "uncommitted" to any particular nominee.<sup>231</sup> The candidate, a lower court judge who had purportedly fallen out of favor with party leaders for failure to engage in patronage hiring, argued that because their slate of delegates predictably carries the primary, party leaders exercise effective control over the nomination process.<sup>232</sup> Worse still, because New York judicial districts are dominated by a single party, party leaders control access to the offices themselves.<sup>233</sup> Taken together, the candidate alleged, these features of the electoral system deprived her of a "fair shot" both at the party's nomination and at a seat on the court.<sup>234</sup>

Writing for a unanimous Supreme Court, Justice Scalia dismissed the candidate's claim with similar haste. Observing that the Court had, in previous cases, struck a delicate balance between political parties' associational interests and the state's interest in regulating the nomination process, here, Justice Scalia scolded, both the Democratic and Republican state parties had intervened on behalf of the state law.<sup>235</sup> As such, the candidate was left to rely on her "own claimed

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226. *Kurzon*, 197 F. Supp. 3d at 643.

227. *Id.* at 642–43.

228. *Id.* at 643.

229. 552 U.S. 196 (2008).

230. *Id.* at 200.

231. *Id.*

232. *Id.* at 201.

233. *Id.* at 207.

234. *Id.* at 205.

235. *Id.* at 202–03.

associational right not only to join, but to have a certain degree of influence in the party.”<sup>236</sup> More specifically, the candidate was insisting that the Constitution requires that the New York state electoral system ensure her a “fair chance of prevailing in [her] part[y’s] candidate-selection process.”<sup>237</sup> That “contention,” Justice Scalia concluded, “finds no support in our precedents,” and for “good reason” since “[w]hat constitutes a ‘fair shot’ ” is unavoidably a political question.<sup>238</sup>

Attending to ideological interest, both *Kurzon* and *Torres* play out as one would predict. In each case, elected and party officials were in broad ideological consensus concerning the desirability of official influence over the nominating process at issue, or, at the very least, the discretion to exert such influence. Under those conditions, relevant ideological difference among judges is unlikely—given the control elected officials have over judicial appointments, it would be odd for them to appoint ideological outliers in significant numbers.<sup>239</sup> Taken together, one would, following Levinson and Pildes, thus expect judges to cooperate with elected and party officials in their efforts to disadvantage insurgent candidates, advancing their likely shared ideological goal.

In *Kurzon*, Democratic Party officials had defended the use of superdelegates, emphasizing mostly that the existence of superdelegates “should not have been a surprise to either” candidate.<sup>240</sup> Republicans, meanwhile, had ceased using “unpledged” delegates only recently, and had done so, ironically, hoping to limit the ability of insurgent candidates to prolong the presidential nomination process.<sup>241</sup> All of this took place against the absence of any state or federal legislation or regulation purporting to regulate this aspect of the presidential nomination process, indicating broad ideological consensus among elected and party officials from both major parties. On the judicial side, Judge Oetken was nominated and confirmed (with significant Republican support) by many of the same Democratic

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236. *Id.* at 203 (emphasis omitted).

237. *Id.* at 203–04.

238. *Id.* at 204–05.

239. A possible exception are scenarios in which consensus among elected officials has only recently emerged, such that judicial ideology is reflective of earlier elected official dissensus.

240. Ben Jacobs, *Who Are the Democratic Superdelegates and Where Did They Come From?*, GUARDIAN (Apr. 19, 2016, 11:11 AM), <https://www.theguardian.com/us-news/2016/apr/19/democratic-party-superdelegates-history-rules-changes> [https://perma.cc/6J2K-2C44] (quoting former Detroit mayor and Democratic superdelegate Dennis Archer).

241. Gwynn Guilford, *How the Republican Elite Tried to Fix the Presidency and Instead Got Donald Trump*, QUARTZ, <https://qz.com/685831/the-republican-crackdown-on-2012s-ron-paul-insurgency-boosted-donald-trumps-delegate-math-and-changed-how-the-party-connects-with-its-supporters/> (last updated Mar. 29, 2019) [https://perma.cc/5HDY-G7NS].

officials whose presidential nomination process he was now being asked to displace.<sup>242</sup> That he had no more sympathy for insurgent candidates than those officials thus came as no surprise.

In *Torres*, the story was similar. There, as Justice Scalia observed, both Republican and Democratic state parties had intervened on behalf of the state law mandating nomination by convention. State legislators, for their part, had allowed that law to stand for decades, displacing an earlier direct primary.<sup>243</sup> While inferring national consensus from seeming consensus among state elected and party officials is more complicated, that inference is bolstered by the apparent normative consensus among the Justices. Indeed, in addition to the decision being unanimous, only two Justices, John Paul Stevens and David Souter, signed a concurring opinion expressing reservations with the New York system on policy, as opposed to constitutional, grounds.<sup>244</sup>

The appearance of cooperation between judges and elected and party officials under conditions of ideological consensus is bolstered by the Supreme Court's handling of primary cases in which elected and party officials openly disagree. In *Tashjian v. Republican Party of Connecticut*,<sup>245</sup> for example, the Court declared invalid a 1955 Connecticut statute mandating "closed" primaries, requiring voters in any party primary to be registered members.<sup>246</sup> In 1984, the Connecticut Republican Party adopted a rule allowing "independent" voters to participate in Republican primaries for federal and some state offices. Seeking an injunction against the conflicting statute, Connecticut Republicans argued that the statute unduly burdened their associational rights.<sup>247</sup> Siding with party officials, the Court reasoned in part that "[t]he Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association."<sup>248</sup> Likewise, in *California Democratic Party v. Jones*,<sup>249</sup> the Court held unconstitutional a California state law under which each voter's primary ballot listed every candidate regardless of party affiliation.<sup>250</sup> Various state parties challenged the law on associational grounds, and,

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242. *J. Paul Oetken*, BALLOTEDIA, [https://ballotpedia.org/J\\_Paul\\_Oetken](https://ballotpedia.org/J_Paul_Oetken) (last visited Mar. 22, 2022) [<https://perma.cc/PJ6F-A5LP>].

243. *Torres*, 552 U.S. at 199–200.

244. *Id.* at 209 (Stevens & Souter, JJ., concurring).

245. 479 U.S. 208 (1986).

246. *Id.* at 210–22.

247. *Id.* at 213.

248. *Id.* at 214.

249. 530 U.S. 567 (2000).

250. *Id.* at 569, 586.



by a vote of 5-4, the Supreme Court agreed, explaining that the blanket primary law “force[d] political parties to associate with . . . those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.”<sup>251</sup>

In *Clingman v. Beaver*,<sup>252</sup> by contrast, the Court rejected an associational challenge by the Libertarian Party of Oklahoma and various registered members of the state Republican and Democratic Parties to an Oklahoma state law limiting participation in party primaries to party members unless a party opens its primary to registered independents as well.<sup>253</sup> While the challengers argued that Oklahoma’s “semiclosed” primary system unreasonably burdened participation in the Libertarian Party’s primary by excluding registered members of the two major parties, the Court reasoned that any associational burden resulting from the law was “minor” insofar as disassociation from either major party “is not difficult,” and that “[t]o attract members of other parties, the [Libertarian Party] need only persuade voters to make the minimal effort necessary to switch parties.”<sup>254</sup> Similarly, in *Washington State Grange v. Washington State Republican Party*,<sup>255</sup> the Court rejected a challenge to Washington’s “modified blanket primary,” in which any candidate on the ballot could affiliate with the party of her choosing regardless of whether the party approved of her candidacy.<sup>256</sup> Washington State Republicans argued that the Washington state law “severely” burdened its associational rights by “forcing it to associate with candidates it does not endorse.”<sup>257</sup> By a vote of 7-2, the Court rejected that argument, explaining that the party’s concern was based on “sheer speculation” that voters would misinterpret the candidates’ party-preference designations as indicating endorsement by the party.<sup>258</sup>

Election law scholars debate whether cases like *Clingman* and *Washington State Grange* can be reconciled with those like *Tashjian* and *Jones* as a matter of doctrine. For our purposes, the takeaway is that in cases involving party primaries in which elected and party officials disagree, judicial behavior is harder to predict. And understandably so insofar as disagreement between elected and party

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251. *Id.* at 577.

252. 544 U.S. 581 (2005).

253. *Id.* at 584–85.

254. *Id.* at 590–91, 593.

255. 552 U.S. 442 (2008).

256. *Id.* at 444.

257. *Id.* at 448.

258. *Id.* at 454.

officials is strong evidence of the absence of elite consensus on the relevant ideological question.

The difference in predictability between primary cases in which ideological consensus among officials is present or absent is driven home by the fact that the only instances of the Court declaring invalid a state law regulating primaries despite agreement between elected and party officials are what are commonly referred to as the *White Primary Cases*.<sup>259</sup> In those cases, decided between 1927 and 1944, the Court held unconstitutional under the Fourteenth and Fifteenth Amendments various iterations of a Texas state law barring Black and Hispanic voters from participation in statewide primaries. Beginning in the late nineteenth century, numerous states in the former Confederacy, dominated by the Democratic Party, imposed such restrictions through state legislation or party rule.<sup>260</sup> Because the Democratic nominee nearly always prevailed in the general election, laws prohibiting minority voter participation in party primaries effectively precluded those voters from meaningful electoral participation in those states.<sup>261</sup> In 1927, the Court first declared Texas's primary law invalid under the Fourteenth Amendment<sup>262</sup> and, following a revision to the law, did so again in 1932.<sup>263</sup> Finally, in 1944, the Court declared a different version of the law unconstitutional, this time under the Fifteenth Amendment.<sup>264</sup> Following that decision, most Southern states ended their selectively inclusive primaries.<sup>265</sup>

While the *White Primary Cases* involved elected and party officials in agreement, in view of the broader political context, those cases plainly do not constitute ones in which judges intervened despite official consensus at a national level. As Klarman describes, around the same time as those cases, Congress was engaged in a heated debate concerning the exclusion of Black voters, considering, for example, a general repeal of the poll tax in federal elections.<sup>266</sup> Given this broader context, it is thus less surprising that judicial appointees from that historical moment would be willing to rule contrary to the interests of a regional faction of political elites. And, again, given that the *White*

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259. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); see also Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

260. See Klarman, *supra* note 259, at 57–69.

261. See *e.g.*, *id.* at 62.

262. *Herndon*, 273 U.S. at 541.

263. *Condon*, 286 U.S. at 89.

264. *Smith*, 321 U.S. at 664–66.

265. See Klarman, *supra* note 259, at 69–71, 85.

266. *Id.* at 65–66. As Klarman explains, Congress's inability to act was attributable to Southern Democrats' "stranglehold" over the Senate at the time. *Id.* at 66.

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*Primary Cases* are the only cases in which the Court intervened despite elected and party official agreement, those cases are, quite literally, the exceptions that prove the rule.

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Given the lack of success of challenges to primary systems by popular insurgents in a judicial setting, subsequent developments with the use of superdelegates in the Democratic presidential nomination process provide an informative contrast. While legal challenges to the use of superdelegates by Sanders supporters predictably went nowhere, Sanders's surprisingly strong showing in the 2016 nomination campaign left him with meaningful political leverage in relation to the Democratic Party. Hoping to unify party members and Democratic-leaning voters generally around the party's 2016 presidential nominee, Hillary Clinton, Sanders surrogates negotiated changes to the party rules governing the nomination process such that, in future years, superdelegates would play no role unless a candidate failed to acquire a majority of pledged delegates from state primaries and caucuses.<sup>267</sup> More still, despite rumblings that party officials might backtrack on that commitment in 2020 given Sanders's strong early showing in that year's presidential primary, those officials ultimately relented, and the norm of more limited involvement of superdelegates hardened.<sup>268</sup>

Though merely suggestive, the comparative success of this *political* challenge to the use of superdelegates in the Democratic presidential nomination process lends support to the idea that elected officials and, in this case, their party surrogates might be *better* suited than judges to settle questions of what democracy requires. The reason is that, as one would expect, elected officials and their surrogates are more vulnerable to pressure from popular insurgents given their comparative interest in electoral outcomes. Given this vulnerability, assigning questions of democracy to elected officials and other political actors provides greater opportunity for insurgents to unsettle official consensus that is at odds with popular views. Stated abstractly, of course, this observation is merely an instance of the more general truth that assigning decisions to elected officials rather than judges makes it

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267. Astead W. Herndon, *Democrats Overhaul Controversial Superdelegate System*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/us/politics/superdelegates-democrats-dnc.html> [<https://perma.cc/KK5Q-CDVN>].

268. Lisa Lerer, *The Superdelegates Are Nervous*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/us/politics/on-politics-sanders-superdelegates.html> [<https://perma.cc/F8RB-WTXN>].

easier for the political masses to get their way.<sup>269</sup> And while that general observation lends a sense of *procedural* democratic legitimacy to doing things that way, it leaves open whether, as a matter of *outcomes*, the political masses more often correctly identify what democracy requires. In this case, though, the history surrounding the rules of political participation seems to suggest that the masses are comparatively reliable. That history, after all, is one of an uneven but steady march towards more expansive and, as relevant here, more direct democratic participation, wresting more and more power away from a set of comparatively homogeneous political elites.<sup>270</sup> And for liberals, that story is, seemingly, a positive one, with few lobbying for a return to “smoke-filled rooms”<sup>271</sup> or “yearn[ing]” for a return to the “old collegial concept of the Electoral College.”<sup>272</sup>

### CONCLUSION

Ely’s genius was to combine one of the strongest possible cases against judicial intervention—as if it went wrong only when it came to substantive values—with a set of contradictory assumptions about the credibility of judges to police democracy—as if it were plausible when it came to “process.” No wonder, then, that in the aftermath of the immediate deconstruction of Ely’s own distinction between process and substance, scholars have spent a generation fortifying some other line between cases of licit and illicit judicial intervention.

The trouble is that, from the beginning, Ely’s caustic and plausible skepticism about judicial intervention in the general case threatens any attempt to defend a line beyond which judges are credible agents of constitutional fiat for specific reasons. In particular, the empirical guesses Ely offers—and which the lion’s share of mainstream

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269. One could tell a similar story about both the blanket primary rejected in *Jones* and the modified blanket primary upheld in *Washington State Grange*. In both cases, the less restrictive primary system at issue was adopted by citizen referendum. State and national parties brought constitutional challenges in each instance while state elected officials defended the system, seemingly owing to popular pressure.

270. See, e.g., U.S. CONST. amends. XV, XVII, XIX.

271. Merrill Fabry, *Now You Know: Where Was the Original ‘Smoke-Filled Room’?*, TIME (May 17, 2016, 11:30 AM), <https://time.com/4324031/smoke-filled-room-history/> [<https://perma.cc/HQQ5-DTZF>].

272. IN THESE TIMES, *supra* note 223 (quoting the DNC COMMISSION ON PRESIDENTIAL NOMINATIONS 50 (Aug. 20, 1981) (testimony of Don Fraser)). *But see* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 815 (2014) (arguing that “our culture uniquely emphasizes—I would say, romanticizes—the role and purported power of individuals and direct ‘participation’ in the dynamics and processes of ‘self-government,’” and that “[a]s part of this romanticized picture of democracy, we uniquely distrust organized intermediate institutions standing between the citizen and government, such as political parties”).

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liberal scholars retain—about the credibility of judicial agency to intervene conflict with his own case for deference to openly political decisionmaking. If those guesses were right, it would be hard to conclude that judges were not better situated to do a great deal more than he allowed. But they are wrong—which means less power for judges intervening in majoritarian action, not more.

Of course, from the ruins of Ely's empirical premises—that judges can be counted on neither to protect oppressed minorities nor to regulate political representation—could spring a hope that now and then they might play their appointed role anyway. And more openly political decisionmaking will regularly disappoint, or even go dreadfully wrong. But without any basis, hope is empty. Ely was correct to root an expectation about what should happen in a set of beliefs about what will; the trouble is that those beliefs were wrong. If so, all that remains is a wish for a different future that does nothing to provide one by itself. Exorcising the ghost of John Hart Ely is essential. While not without risk of defeat, doing so at least has a chance of realizing the elusive democracy that Ely trusted that, someday, judicial power would help bring about.

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