

UCLA

UCLA Public Law & Legal Theory Series

Title

Comparative Political Process Theory

Permalink

<https://escholarship.org/uc/item/6f6230cx>

Journal

UCLA School of Law Public Law & Legal Theory Series

Author

Gardbaum, Stephen

Publication Date

2020-05-10

COMPARATIVE POLITICAL PROCESS THEORY

BY

STEPHEN GARDBAUM

STEPHEN YEAZELL ENDOWED CHAIR IN LAW

In 18 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1429 (2020)

Final published article can be found here: <https://doi.org/10.1093/icon/moaa084>

Comparative political process theory

Stephen Gardbaum*

*What, if anything, do recent constitutional court decisions requiring a legislature to create a customized presidential impeachment procedure, invalidating a government's prorogation of parliament, rejecting the disbanding of an independent anticorruption unit, and striking down legislation for inadequate deliberation have in common? They are all examples of courts protecting the political processes of representative democracy against threats or failures. Yet none of these various types of failure appear in the work that is synonymous with a political process theory of judicial review: John Hart Ely's *Democracy and Distrust*. This article argues that when we look beyond the United States and at the comparative context generally, a political process theory has a great deal of relevance and application to constitutional law and courts around the world, both descriptively and normatively. Especially now when the structures and processes of representative democracy are under assault in so many places. However, for comparative purposes, Ely's account takes too narrow a view of what types of political process failures exist and are of concern, and what types of judicial review or other protective mechanisms they may call for. It is also an interpretive theory of one system, but what is needed in the comparative context is a broader, normative theory of the role of courts and other actors in protecting democratic politics. Accordingly, suitably expanded and adapted, a comparative political process theory can make a valuable contribution to the field of comparative constitutional law. This article seeks to explore and further develop such a theory.*

1. Introduction

This year is the fortieth anniversary of the publication of John Hart Ely's *Democracy and Distrust*.¹ The book famously interpreted the US Constitution as being overwhelmingly concerned with process and structure rather than substantive values,² and, building

* Stephen Yeazell Endowed Chair in Law, UCLA School of Law, USA. Email: gardbaum@law.ucla.edu. Earlier versions of this article were presented at the 2019 University of New South Wales Comparative Constitutional Law Roundtable and the Drake University Law School faculty workshop. Thanks to commentators Rosalind Dixon and Aileen Kavanagh and participants at both events for helpful comments and questions.

¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

² *Id.* at 92.

on *Carolene Products* Footnote 4,³ developed a theory of judicial review appropriate for such a constitution. As an alternative to the then-prevailing rival approaches of interpretivism and the identification and protection of fundamental values, Ely presented a “participation-oriented, representation-reinforcing”⁴ approach to judicial review that policed for, and focused on, malfunctions in the democratic political process. In particular, he argued that judicial review was legitimate and necessary in two situations where the political process cannot be trusted: (i) where incumbent officials are clogging the channels of political change by suppressing voices and/or votes; and (ii) where the majority is systematically disadvantaging a minority out of hostility or prejudice.⁵

Ely’s book is self-consciously parochial. It deals exclusively with the US Constitution and presents a theory of judicial review that is specifically tailored to its contents, quirks, and case law, as he interpreted them, especially that of the Warren Court as “foreshadowed” in *Carolene Products*. But when we look beyond the United States and at the comparative context more generally, a political process theory of judicial review has a great deal of relevance and application to constitutional law and courts around the world, both descriptively and normatively. The theory’s central insight—that protection of a system of representative democracy against erosion or degradation by elected representatives cannot be left exclusively in their hands—remains a powerful one. Especially at this particular moment when many of the most troubling constitutional and political developments primarily involve failures of the structures and processes of representative democracy, including situations where they are under attack from the techniques of what have been called “stealth authoritarianism,”⁶ “abusive constitutionalism,”⁷ and “autocratic legalism.”⁸ However, for comparative purposes, Ely’s account is too narrow in a variety of ways and yet, as the first and still the only systematic treatment of the topic anywhere,⁹ there is no other. Accordingly, political process theory must be broadened, refined, and updated in order to fulfill its potential for relevance and application.

In the first place, a comparative theory must expand on (1) what types of political process failures exist for courts (and others) to police, and (2) what types of judicial review (or other protective mechanisms) they may call for. In addition to restricting voice or vote and enacting invidious discrimination, constitutional systems around

³ United States v. *Carolene Products Co.*, 304 U.S. 144, 152–3 n.4 (1938).

⁴ Ely, *supra* note 1, at 87.

⁵ *Id.* at 103.

⁶ Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2015).

⁷ David E. Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

⁸ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

⁹ I am unaware of any systematic work on the subject matter of political process theory outside the United States that either predates or postdates Ely’s book. Since its publication, in their partial or more limited treatments, non-US authors have tended to acknowledge Ely as the central source of the theory. See, e.g., NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA*, ch. 1 (2017); Luís Roberto Barroso, *Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts*, in *DEMOCRATIZING CONSTITUTIONAL LAW* 71 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016).

the world exhibit several other important kinds of democratic and political process failures, some of which have (justifiably) induced courts to intervene. Moreover, despite the “process theory” label, Ely’s account does not actually involve judicial review of process *per se*. Like the existing theories he rejected, it is still about review of legislative outputs (albeit of a specific sort) and not inputs. But certain types of political process failure call for the latter. In addition, rather than an interpretive theory of one or more particular systems, what is needed for comparative constitutional purposes is a broader, normative theory of the role of courts and other actors in protecting the processes and structures of representative democracy. Finally, Ely presents a theory of judicial review only, but in the comparative context courts cannot be relied upon as, or expected to be, the sole external protectors of the political process. Other actors and mechanisms will often be needed either instead or in support.

Accordingly, suitably refined, expanded, and adapted to address constitutional practices and developments around the world, a comparative political process theory (CPPT) can potentially make a valuable contribution to the discipline. It first isolates and focuses on the key and distinct function in all democratic constitutions of constituting not only the institutions and branches of government, but also the structures and processes of the system of representative democracy.¹⁰ These include not only electoral processes and the rules of free and fair elections, but *all* the processes by and through which public power is allocated, exercised, and held to account. CPPT also provides a vocabulary and conceptual framework for identifying the multiple ways that systems of representative democracy can be undermined and degraded. Here, it brings into focus the family resemblances among a seemingly disparate group of troubling practices that fall on either side of a procedure/substance divide, and explains why these should be conceived of as instances of a common problem—political process failure—rather than separate and isolated ones. Third, CPPT develops a normative theory of judicial review that is specifically geared towards this key function of constituting and maintaining a system of representative democracy, and the range of ways that courts can help to protect its structures and processes against the array of challenges. This normative theory seeks both to justify this type of judicial review and provide a standard for when and how courts should intervene. But, finally, as this task is not, and should not be, left to the courts alone, CPPT also addresses other mechanisms and actors that may be helpful in resisting threats to the integrity of the democratic process. This article seeks to explore and further develop such a political process theory for comparative constitutional law.

CPPT partly overlaps with, and builds on, the growing interest in the practice and theory of judicial review of legislative procedures over the past few years,¹¹ but, in transcending the procedure/substance divide, CPPT also encompasses political

¹⁰ That is, regardless of whether any particular democratic constitution contains far more “substantive values” than Ely (controversially) argued was true of the US Constitution. Unlike Ely’s theory, in the general comparative context this article is not claiming that representation reinforcement is the exclusive, or even necessarily the primary, mode of judicial review. See *infra* text accompanying notes 152–3.

¹¹ See *infra* text accompanying notes 99–104; see also note 128.

process failures that fall outside its ambit. Similarly, in line with recent theories of weak-form judicial review,¹² CPPT often does not disable the elected institutions from acting within the existing constitutional order. For it is designed to help make the democratic political process work in the way it is supposed to, rather than to displace it. On the other hand, certain types of acts and outcomes are impermissible *because* they threaten to displace, corrupt, or undermine the democratic political process, and here stronger forms of review may be necessary.¹³ Finally, it focuses on some of the same concerns as the large recent literature on authoritarian populism¹⁴ and the threats it poses to constitutional democracy,¹⁵ although not all such threats are directed at the political process and not all political process failures stem from this source.¹⁶

The article begins in Section 2 with a brief summary of Ely's political process theory, before explaining in Sections 3 and 4 how and why it needs to be refined and expanded in order to be made more relevant and useful for comparative constitutional purposes. Section 3 identifies other common types of political process failures that CPPT can helpfully address, and Section 4 adds to the judicial toolbox for addressing them by incorporating genuine process review into the theory. Section 5 first more fully situates CPPT and explains its analytical contribution to the field, as well as contrasting it with other recent work in comparative constitutional law and theory with which it partly overlaps. It then presents CPPT's normative account of the role of courts and other actors and mechanisms in protecting the processes and structures of representative democracy.

2. Ely's theory of judicial review

As a major contribution to American constitutional theory, Ely's magnum opus crafted a new third approach in between the then-dominant binary of "interpretivist" and "non-interpretivist" accounts of judicial review. Although he viewed the US Constitution as a whole as overwhelmingly concerned with process and structure,¹⁷ Ely rejected interpretivism as fatally undermined by the existence of such open-ended constitutional provisions requiring the importation of extratextual substantive values as the Ninth Amendment, and the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment.¹⁸ At the same time, he also

¹² For recent representative examples of the literature, see Symposium, *Weak-Form Review in Comparative Perspective*, 17 INT'L J. CONST. L. 807 (2019).

¹³ See *infra* text accompanying notes 120–2.

¹⁴ See, e.g., Varol, *supra* note 6; Landau, *supra* note 7; Scheppele, *supra* note 8.

¹⁵ See, e.g., CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark Graber, Sanford Levinson, & Mark Tushnet eds., 2018); TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD J. LEGAL STUD. 435 (2019).

¹⁶ As several of the examples in Section 3 indicate.

¹⁷ See Ely, *supra* note 1, at 92.

¹⁸ Ely, *supra* note 1, ch. 2. As Claudia Geiringer recently reminded us, Ely did not view the Due Process Clause as an open-ended provision in this way, but as clearly limited to process in its "strict (and nonsubstantive) sense." See Claudia Geiringer, *When Constitutional Theories Migrate: A Case Study*, 67 AM. J. COMP. L. 281, 286 (2019).

rejected non-interpretivism's reliance on judicial substitution of such substantive value choices for those of the majority as inconsistent with American conceptions of representative democracy.¹⁹

Ely presented his political process theory as an alternative with deep interpretive roots in the work products of James Madison, John Marshall, and (especially) Earl Warren. Designed to "ensure that the political process was open to those of all viewpoints, on something approaching an equal basis,"²⁰ Ely characterized his participation-oriented and representation-reinforcing approach to judicial review as taking an "antitrust" rather than a "regulatory" perspective, by focusing on systemic malfunctioning of the political market.²¹ The two types of political process failures—situations in which the process is undeserving of trust—that Ely identifies and specifies as calling for judicial review are: (i) government policies that close off the channels of political change by suppressing citizens' voices (freedom of speech, association, and publication) or their right to vote, and (ii) majority decisions disadvantaging those minorities who are more or less permanently locked out of protection through the political process due to hostility or prejudice.²² In doctrinal terms, this second type of failure prioritized the Equal Protection Clause over the Due Process Clause—perhaps the major modern vehicle of the rejected substantive value choices approach—of the Fourteenth Amendment, so that, for example, the unconstitutionality of bans on abortion and gay marriage would depend on their being viewed as discriminatory in this way.²³

Ely's work was immediately recognized as among the most significant of his generation, even though it attracted at least as much contemporary criticism as praise.²⁴ But since roughly a decade after publication and the initial wave of reaction, it has mostly continued to hover in the background of American constitutional law and theory. Although it has been influential with a small group of law of democracy scholars, who have developed its insights into "political lock-ups" and an antitrust approach to judicial review in sophisticated new directions,²⁵ more generally its third approach has largely been drowned out in between the subsequent rise of originalism as the

¹⁹ Ely, *supra* note 1, ch. 3.

²⁰ *Id.* at 74.

²¹ *Id.* at 102–3.

²² *Id.* at 103.

²³ Ely famously rejected the substantive due process-based decision in *Roe v. Wade* as "not constitutional law." See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴ For a very helpful summary of the initial reception in the United States, see Geiringer, *supra* note 18, at 290–2. The powerful contemporary critiques of Ely were centered primarily on (i) his interpretive account of the US Constitution as overwhelmingly concerned with process and structure; (ii) his claim that representation reinforcement is the only justified basis for judicial review (of its open-ended provisions); and (iii) his sharp distinction between process and substantive values. As this article does not make or rely on any of these three arguments—it is non-interpretive, non-exclusive, and views the function of protecting representative democracy as including both substantive values and (certain) outcomes—comparative political process theory is not tied to a successful defense of Ely against these critiques. See *infra* Section 5.

²⁵ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

new great hope of interpretivism,²⁶ on the one hand, and the centrality of the constitutional politics of substantive due process on the other. Whatever its prospects in the United States, however, suitably refined, updated, and extended, political process theory holds much promise in the field of comparative constitutional law.²⁷ Here, it would converge with other recent, compatible trends in the practice and theory of judicial review to provide a valuable, albeit non-exclusive, descriptive and normative account.

3. Other types of political process failure

The first task in developing CPPT is to broaden Ely's limited, US-specific conceptions of both political process failures and the type of judicial review that might address them. Ely's under-developed account of such failures simply defines political process malfunctions as situations where the political process is undeserving of trust,²⁸ and the two given instances are where incumbents are attempting to entrench their position by suppressing the voice and/or vote of citizens and the process results in invidious discrimination against powerless minorities. Even if we accept the definition, recent comparative examples demonstrate that these instances do not exhaust the situations in which failure occurs and courts may be justified in intervening to protect the processes and structures of representative democracy. To be sure, attempts by incumbents to entrench their power often involve harassing and targeting the speech of opponents and manipulation of electoral mechanisms, as by changing voting rules in their favor and (where possible) partisan gerrymandering. We have seen such actions all too frequently in recent years, in countries ranging from Turkey,²⁹ to Hungary,³⁰ to the United States, so that courts and independent electoral commissions certainly have work to do here.³¹ But (i) the political process extends well beyond the electoral process, and many attempts at political lock-ups involve these other dimensions of it; and (ii) not all malfunctions of the process are of the incumbent entrenchment variety. Similarly, although of course important and widespread, invidious discrimination against powerless minorities is not the only manifestation of an untrustworthy process. What follows is an illustrative, non-exhaustive list of other types of process

²⁶ What is widely viewed as the first major work of scholarship to take an originalist perspective was published just three years before Ely's book, so that originalism's growth and popularity among sections of the US constitutional community post-dated it. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

²⁷ Applying some of his analyses in *supra* note 25 and elsewhere to the comparative context, Samuel Issacharoff is among those who have begun to explore this promise. See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015). So, too, is Niels Petersen, who has extended Ely's theory to special interests. See PETERSEN, *supra* note 9, at 26–8; Section 3.3 below.

²⁸ Ely, *supra* note 1, at 103. For my attempt to further develop an account of political process failures, see Section 5.1 below.

²⁹ See, e.g., Ozan Varol, *Stealth Authoritarianism in Turkey*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?*, *supra* note 15, at 339, 353.

³⁰ See, e.g., Gábor Halmai, *A Coup Against Constitutional Democracy*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?*, *supra* note 15, at 243, 245–6.

³¹ See ISSACHAROFF, *supra* note 27.

failures that an extended, comparative political process theory needs to incorporate and address. The examples also begin to sketch out when and why judicial intervention aimed at preventing or correcting such failures is appropriate.

3.1. Legislative failure to hold the executive accountable

If a situation in which “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out”³² is the paradigmatic instance of a political process failure, then the recent history of South Africa demonstrates that suppressing the electoral mechanisms of free speech and the vote is not the only way that incumbent governments pursue this goal.

In the face of two separate corruption scandals and declining popular support,³³ President Jacob Zuma and the leadership of the African National Congress (ANC)—which has been the governing party since the end of apartheid—used their majority in, and control over, the country’s legislature to attempt to evade political accountability for their illegal actions. Especially in a parliamentary democracy where, lacking direct election of the chief executive, one of the two major functions of a legislature is to hold the executive politically accountable to it (as well as to the people),³⁴ such “weaponizing” of the legislature to achieve impunity amounts to a serious political process failure. Executive accountability and responsibility to the elected parliament are a key part of the democratic political process. In the face of this conduct, the South African Constitutional Court issued a series of controversial, increasingly robust, and, by comparative standards, unusual decisions reviewing the internal rules and procedures of the National Assembly (NA) in an attempt to address and reverse this failure.

Only a brief summary of events can be provided here.³⁵ Following a series of disclosures appearing in the media, the Public Protector, South Africa’s constitutionally created chief anticorruption official, began an investigation and, in 2015, issued a report that condemned President Zuma for using public funds for private purposes in remodeling his country home at Nklanda and contained recommendations for partial repayment.³⁶ In response, the ANC-dominated NA passed a resolution absolving the President of wrongdoing based on a report by the Minister of Police, a member of the President’s cabinet. In *Economic Freedom Fighters v. Speaker of the National Assembly*

³² Id.

³³ Apart from Nklanda discussed below, the other major scandal and Public Protector report involved President Zuma’s personal and business relationship with the Gupta brothers.

³⁴ The other, of course, is its role in the legislative process, which, in a parliamentary democracy, usually involves scrutinizing, proposing amendments to, and deciding whether to approve government bills.

³⁵ For more details, see Stephen Gardbaum, *Pushing the Boundaries: Judicial Review of Legislative Processes in South Africa*, 9 CONST. CT. REV. 1 (2019). See also Sujit Choudhry, *Will Democracy Die in Darkness? Calling Autocracy by Its Name*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, supra note 15, at 571; Heinz Kluge, *State Capture or Institutional Resilience: Is There a Crisis of Constitutional Democracy in South Africa?*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, supra note 15, at 295; Stuart Woolman, *A Politics of Accountability: How South Africa’s Judicial Recognition of the Binding Legal Effect of Public Protector’s Recommendations Had a Catalysing Effect that Brought Down a President*, 8 CONST. CT. REV. 155 (2018).

³⁶ See Public Protector, *Secure in Comfort*, Report No. 25 of 2013/14 (Mar. 2014) (containing the recommendations).

(*EFF* No. 1),³⁷ decided in 2016, the Constitutional Court unanimously reached the following conclusions. First, that the Public Protector's recommendations were legally binding. Second, that the NA has not only the political power and function, but also a constitutional obligation, to hold the President accountable, and that it had violated this duty by not facilitating and ensuring compliance with the recommendations of the Public Protector.³⁸

A few months later, following Zuma's dismissal of the Finance Minister, allegedly at the behest of the influence-peddling Gupta brothers, and the international downgrading of the South African economy to "junk status," three opposition parties in the NA called for a motion of no-confidence in the President to be held by secret ballot. However, the Speaker of the NA determined that she had no power to do so, as neither the Constitution nor the rules of the NA provide for secret ballot. In response, the opposition parties sued the Speaker. In June 2017, the Constitutional Court set aside the Speaker's ruling³⁹ and held that as the Constitution is silent on the voting procedures, a secret ballot is permissible and the NA has, though its Rules, effectively delegated to the Speaker the decision on what procedure to use, including a secret ballot. Although the Court refused the parties' request to affirmatively order the Speaker to hold a secret ballot, as "no legal power exists for such a radical and separation of powers-insensitive move,"⁴⁰ such an order was largely unnecessary. As the Court concluded: "[N]ow that it has been explained that she [the Speaker] has the power to do that which she is not averse to, she has the properly-guided latitude to prescribe what she considers to be the appropriate voting procedure under the circumstances."⁴¹ The circumstances of course included this unanimous judicial "guidance."

Finally, in *Economic Freedom Fighters* No. 2,⁴² decided in December 2017, a closely-divided Court took its intervention into the procedures surrounding parliament's task of holding the executive accountable to a new and higher level. Although the opposition parties had moved to impeach the President, and the motion was debated and defeated on a secret ballot ordered by the Speaker in light of the previous judicial ruling, the Court identified two process failures. First, the NA had failed to fulfill its implicit constitutional obligation under Section 89(1) of the Constitution to make rules creating a specially tailored procedure for impeachment.⁴³ The more general ad-hoc committee procedure used by the NA for the motion was, according to the majority, constitutionally insufficient. The procedure was also found inadequate in a second

³⁷ [2016] ZACC 11, 2016 (3) SA 580 (CC) [hereinafter *EFF* No. 1].

³⁸ The Court derived the obligation from Section 55(2) of the Constitution, which directs the NA to create mechanisms "to ensure that all executive organs of state . . . are accountable to it."

³⁹ *United Democratic Movement v. Speaker of the National Assembly* 2017 ZACC 21, 2017 (5) SA 300 (CC).

⁴⁰ *Id.* ¶ 92.

⁴¹ *Id.*

⁴² *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2017 ZACC 47, 2017 (2) SA 571 (CC) [hereinafter *EFF* No. 2].

⁴³ "The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its members, may remove the President only on the grounds of (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office." See S. AFR. CONST., 1996, § 89(1).

way: rather than the required antecedent judgment that one of the textual grounds for impeachment exists, such as a “serious violation of the Constitution or the law,”⁴⁴ the NA impermissibly held a one-step debate on the motion to impeach.⁴⁵ Chief Justice Mogoeng issued a vigorous dissent, accusing his colleagues of impermissible interference with, and violation of, the separation of powers. Before any new impeachment proceedings were brought, Zuma was ousted as ANC leader and soon after effectively forced to resign as President in favor of his successor, Cyril Ramaphosa.⁴⁶

In these cases, the Court’s intervention was an attempt to correct a series of increasingly serious political process failures created by the dominant governing party’s control over, and manipulation of, the constitutionally prescribed mechanism of political accountability in between elections. The Court’s actions are, and were viewed as, controversial in that they impinge on the autonomy of a co-equal branch to run its own internal affairs. But in attempting to pressure the legislature into performing its institutional function in the face of systematic abuse by the President and ANC leadership of its dominant position, the Court was seeking to protect, preserve, and reinforce the separation of powers and the country’s system of representative democracy. It is true that in parliamentary systems (like South Africa⁴⁷), with their “partial fusion” of legislative and executive power, there is an inherent tension between the legislature’s key separation of powers function of holding the executive politically accountable to it and the usual business of the government governing through its party majority in the legislature. However, the malfunction in the South African case was the extent to which the ANC leadership progressively abused or weaponized its dominant position to prevent accountability and create impunity, even for massive corruption. A political party may have a dominant electoral position, and this will usually be manifested in its political control of the legislature, but an “antitrust” approach rejects the systematic abuse of dominant position, of which the actions of Zuma and the ANC leadership are a clear and paradigmatic example.⁴⁸

An even more recent, although so far one-off rather than ongoing, example of abuse of political process involving executive accountability to the legislature is Boris Johnson’s ill-fated prorogation of the UK Parliament. Unlike the South African case, this was designed to hinder a conscientious legislature from fulfilling its functions by limiting its opportunities for holding the government accountable and enacting legislation of which the (minority) government disapproved.⁴⁹ The UK Supreme Court unanimously held that Johnson’s advice to the Queen was unlawful, as it frustrated

⁴⁴ *Id.*

⁴⁵ EFF No. 2, [2017] ZACC 47, 2017 (2) SA 571 (CC), ¶ 180.

⁴⁶ Norimitsu Onishi, *Jacob Zuma Resigns as South Africa’s President*, N.Y. TIMES (Feb. 14, 2018), <https://nyti.ms/34oyrZH>.

⁴⁷ South Africa has an unusual parliamentary system in that the President, who is elected by and responsible to the legislature (like a parliamentary prime minister), is both head of government and head of state.

⁴⁸ For a fuller justification of the Constitutional Court’s role, see Gardbaum, *supra* note 35, at 13–17.

⁴⁹ See, e.g., Jacob Rowbottom, *Political Purposes and the Prorogation of Parliament*, U.K. CONST. L. ASS’N BLOG (Sept. 3, 2019), <https://bit.ly/3oiSiRZ>.

or prevented Parliament from carrying out its constitutional functions as a legislature and as the body responsible for supervising the executive without reasonable justification.⁵⁰ The Court stated that in the particular context of the looming Brexit deadline, the prorogation had “an extreme effect upon the fundamentals of our democracy”⁵¹ and that judicial intervention “will not offend against . . . [but] be giving effect to the separation of powers.”⁵² In so doing, the Court converted what had traditionally been viewed as a matter of constitutional practice and convention into legally binding principle.⁵³ Notable again was that the Court did not act alone or in a vacuum. Its judgment was delivered after weeks of scathing critique of Johnson’s action in the media and following Parliament’s engaging in a form of self-help by passing a new law in the very brief window before the prorogation initially took effect.

Within presidential systems of government, executive accountability to, and oversight by, the legislature is also an important part of the political process.⁵⁴ Accordingly, either (likely partisan) unwillingness to undertake this task or inability to do so due to executive obstruction can rise to the level of a malfunction that may justify judicial and other forms of intervention. Although certainly particular episodes may amount to political process failures, the problem is structurally less serious here than in parliamentary systems. This is because in the latter the absence of direct public election,⁵⁵ and the less institutionally separated power, of the executive means that political accountability and responsibility to the legislature play a larger role in legitimating its exercise of public power.

3.2. Government capture of independent institutions

Another, related, type of political lock-up is where the government targets and captures institutions that are designed to be more *fully independent of political control* than parliamentary legislatures, such as courts, prosecutors, and electoral commissions. Such capture threatens to reduce or eliminate “horizontal accountability”⁵⁶ and consolidate power in the hands of the government in a way that undermines the constitutional structure of representative democracy and negates intended limits and checks on its authority. The new and corrupted political process that results is qualitatively different from, and far less “trustworthy” than, one premised on a greater dispersal of power and more robust institutions of accountability. In antitrust terms, here the government is effectively forging an artificial monopoly for itself, through hostile

⁵⁰ R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland 2019 UKSC 41.

⁵¹ *Id.* ¶ 58.

⁵² *Id.* ¶ 34.

⁵³ Mark Landler & Benjamin Mueller, *How the UK Supreme Court’s Rebuke to Boris Johnson Remakes British Law*, N.Y. TIMES (Sept. 24, 2019), <https://nyti.ms/3knwvX3>.

⁵⁴ As vividly evidenced by recent events in the United States, especially where the party not holding the presidency is in control of one or both Houses of Congress.

⁵⁵ Or sometimes any election except that of the political party caucus or membership, as in the case of Boris Johnson prior to the non-required December 2019 general election.

⁵⁶ See David Landau, *Constitution-Making and Authoritarianism in Venezuela*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 15, at 161, 162; Tarunabh Khaitan, *Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism*, 19 INT’L J. CONST. L. 342, 344 (2019).

takeovers of, if not “competitors,” those institutions designed to impose a form of (political) market discipline on it. Democratic governance is effectively converted from a multi- to a single-player enterprise.

Unfortunately, recent examples of this type of political process failure are all too common. At the more micro or institution-specific level, at the outset of Zuma’s leadership of the party in 2008, the ANC attempted to curtail the independence and effectiveness of the National Prosecuting Agency by disbanding its specialist anticorruption unit, known as “the Scorpions,” which had previously raided his properties as part of an ongoing investigation. The plan was to replace it with a new, less independent unit within the police service headed by a government minister.⁵⁷ This was ultimately blocked by the Constitutional Court, which ruled that there was a constitutional obligation to have an independent corruption-fighting unit, in significant part because corruption imperils representative democracy in South Africa.⁵⁸ At the more macro level and more successfully, the governments of Hungary, Turkey, and Poland have methodically worked their way through the countries’ respective institutional systems in the last few years, stripping first the constitutional courts, then the ordinary courts, as well as electoral commissions of their independence and subjecting them to control.

Viktor Orbán, creator and leader of Fidesz, came to power in 2010 with 68% of the seats in the unicameral legislature and 53% of the vote. Despite not campaigning on this, Fidesz quickly drafted a new constitution by itself and pushed it through the legislature in April 2011 with the required two-thirds vote along party lines to come into effect in the new year.⁵⁹ The new Constitution, along with both prior and subsequent constitutional amendments and cardinal laws,⁶⁰ systematically undermined the independence of the public institutions that subject the executive to various forms of accountability and disperse or check the exercise of public power. Beginning with the country’s previously powerful constitutional court, a constitutional amendment taking effect in September 2011 increased its membership from eleven to fifteen, resulting in the appointment of four new justices by the Fidesz-controlled legislature along similar party-line votes after it changed the rules to no longer require cross-party consensus. The new Constitution limited access to the court by ousting judicial review of tax and budgetary laws that violate the rights to property or equal treatment, and a new cardinal law abolished the *actio popularis* procedure whereby any citizen could seek abstract review of a law. The Fourth Amendment of 2013 voided all constitutional court decisions prior to the new Constitution, which primarily affected its many robust rulings on rights as the provisions governing them in the former constitution

⁵⁷ For analysis, see Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. CT. REV. 1 (2013).

⁵⁸ *Glenister v. President of South Africa and Others* 2011 ZACC 6.

⁵⁹ Halmai, *supra* note 30, at 245–6.

⁶⁰ Cardinal laws require a two-thirds vote to change.

were mostly retained in the text of the new one. The amendment also reinstated a number of laws previously declared unconstitutional by the court.⁶¹

Turning to the ordinary courts, the government lowered the retirement age of judges from seventy to sixty-two, immediately affecting over 200 sitting members of the judiciary including one quarter of the supreme court.⁶² The new cardinal law on the judiciary also created the National Judicial Office which, run by a Fidesz loyalist, has the power to nominate new judges, replace retiring ones, and move any sitting judge to a new court.⁶³ Other laws restructured various additional, previously independent institutions, including the electoral commission, the budget council, and the media board, to have all-Fidesz memberships and longer terms of office ranging from six to twelve years.⁶⁴ Combined with the Fourth Amendment provision banning political advertising during election campaigns in any venue except the public broadcast media controlled by the media board, this simultaneously consolidates the government's power and undermines the freedom of the electoral process.

In Turkey, the Justice and Development Party (AKP)-led government of then-prime minister, now president, Erdoğan began the process of consolidation through an initial series of constitutional amendments in 2010. Of the two dealing with the judiciary, the first expanded membership of the Constitutional Court from eleven to seventeen, limited the term of office for the first time to twelve years before the mandatory retirement age of sixty-five, and gave the National Assembly the power to elect three members by simple majority vote (previously all had been selected by the country's president). The second increased the membership of the Higher Council of the Judiciary (HSK), the body appointing judges to all other courts, as well as prosecutors, from seven to twenty-two, and opened up voting for these positions to all members of the judiciary and legal profession. In the immediate context of recent Constitutional Court decisions striking down an AKP constitutional amendment overturning the ban on headscarves at universities and finding the AKP to be an unconstitutional political party,⁶⁵ there were at the time those who saw this move as illegitimate court packing by Erdoğan and the AKP,⁶⁶ and others who viewed it as legitimate democratization of those parts of the unelected state (especially the military and judiciary) dominated by the elite guardians of Kemalist secularism.⁶⁷

⁶¹ Halmai, *supra* note 30, at 247.

⁶² *Id.* at 246.

⁶³ *Assessment of the Amended Hungarian Laws on the Judiciary*, HUNG. HELSINKI COMMITTEE (Sept. 2012), <https://bit.ly/31xPfeM>.

⁶⁴ Clava Brodsky, *Hungary's Dangerous Constitution*, COLUM. J. TRANS. L. BULLETIN, <https://bit.ly/3kJH6f4> (last visited Oct. 26, 2020).

⁶⁵ A six-five majority of the Court held that the AKP unconstitutionally violated secularism principles, but a seven-vote supermajority is required to ban and close a party down. See Sabrina Tavernise & Sebnem Arsu, *Turkish Court Calls Ruling Party Constitutional*, N.Y. TIMES (July 31, 2008), available at <https://nyti.ms/3joTEGY>.

⁶⁶ See, e.g., Can Yeginsu, *Turkey Packs the Court*, N.Y. REV. BOOKS (Sept. 22, 2010), <https://bit.ly/3ojNNGR>.

⁶⁷ Asli Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT'L J. CONST. L. 267 (2013). For an empirical analysis of the effects of the amendments, see Ozan Varol, Lucia Dalla Pellegrina, & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187 (2016).

The failed coup attempt by the opposition in 2015 accelerated the process and visibility of consolidation. Having switched offices to avoid term limits in 2014, now-President Erdoğan ruled first as *de facto* head of state and government, and through Constitutional Court-upheld emergency decrees⁶⁸ to target all sources of opposition, and then fulfilled his long-held, *de jure* ambitions through constitutional amendment in 2017. Now, Erdoğan not only followed Putin's example of toggling between offices to stay in power but also governed with the formal powers of a Russian-style presidency.⁶⁹ Along with various new unilateral powers under the 2017 amendments and the abolition of the office of prime minister, the president now appoints six of the thirteen members of the HSK (reduced from twenty-two), with the AKP-dominated National Assembly electing the other seven. This allows the AKP not only to fill the lower courts with its supporters, but also, because judges of the Constitutional Court are mostly drawn from those ranks, to further control its membership. Erdoğan has made extensive use of the courts to file civil and criminal libel lawsuits against those insulting or criticizing him, and has engineered the prosecution of opponents and independent media owners for such crimes as tax evasion, fraud, and building-code violations.⁷⁰

Similarly in Poland, the Law and Justice Party (PiS) capture of the Constitutional Tribunal (CT) by the end of 2016 did not occur in one fell swoop but via a series of complex, incremental, and multi-actor steps that combined formal legality, questionable lawfulness, and seeming outright illegality in about equal measure, although the time frame was far more compressed than in Turkey. I cannot go into the details here,⁷¹ but the process started with the new PiS-dominated Sejm elected in October 2015 declaring null and void the previous Sejm's pre-election selection of five new judges on the fifteen-member CT to fill upcoming vacancies. Three of these vacancies were scheduled to occur before the new parliamentary term and two during it. PiS President Duda refused to swear the five new judges into office, which he had no legal power to do. The new Sejm elected five new judges and President Duda swore them in just before the CT declared that the three original new judges filling vacancies before the new parliamentary term were properly elected. The existing President of the CT refused to include the three PiS "quasi-judges"⁷² on panels, but he reached retirement, and the Sejm enacted a statute creating the new post of "Acting President," which was filled by one of the two valid new judges, who then included the other three PiS nominated judges on panels and on the CT's General Assembly. During 2016, the Sejm enacted several statutes of questionable constitutionality targeting the CT, which had the effect of tying it up and paralyzing it from considering more substantive PiS legislation. Eventually, because of the single nine-year term of office for CT judges, natural

⁶⁸ Oya Armutçu, *State of Emergency Decrees are Law: Turkey's Top Court*, HÜRRİYET DAILY NEWS (June 30, 2018), <https://bit.ly/34oPdYs>.

⁶⁹ Varol, *supra* note 29.

⁷⁰ *Id.* at 353.

⁷¹ For more details, see WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN*, ch. 3 (2019); Choudhry, *supra* note 35.

⁷² As Sadurski refers to them: *see* SADURSKI, *supra* note 71, at 64.

attrition, combined with its five original new members, gave PiS a clear majority on the CT by the end of 2016. Since then, the CT has proven to be a useful instrument of the regime in providing formal legitimacy to its work product and permitting it effectively to amend the Constitution through ordinary statute.⁷³

With the CT's independence successfully undermined, PiS then turned its attention to the rest of the judiciary.⁷⁴ A 2017 statute transformed the composition of the National Council of the Judiciary (NCJ), the institution that makes nominations for all ordinary judicial appointments, by changing the method for selecting the fifteen judges on the twenty-five-member body. Previously selected by other sitting judges, the new statute gave nomination power to the Sejm. Another statute targeted the Supreme Court, the highest ordinary court, by reducing the retirement age from seventy to sixty-five, which immediately affected 40% of its members, and increasing the number of judges from eighty-two to 120. It also created a Disciplinary Chamber of the Supreme Court, appointed by the NCJ, with initial power to punish judges for their judicial decisions, and extended in January 2020 to sanction them for criticizing the judicial reforms or engaging in other “political activities.” A further statute grants the Minister of Justice power to appoint and dismiss the presidents of all lower courts, and the Sejm also enacted a law merging the previously separate offices of Minister of Justice and Prosecutor General, which effectively ends the independence of prosecutors. Finally, the country's electoral commission has also been restructured to permit parliament to appoint a majority of its members, so that electoral processes have effectively been brought under the ruling party's control.⁷⁵

With this type of political market failure involving a systemic restructuring of the political process from a pluralistic to a monopolistic one, the practical challenge is typically more one of prevention or containment than remedy.⁷⁶ For once it has occurred, the institutional basis for resistance and accountability, including but not limited to the courts, may have disappeared. Here, the existence, powers, and sociological legitimacy of an independent judiciary, along with other pluralistic design features, robust democratic norms, and appropriate substantive policies, may serve to deter such moves or increase the ability to resist, especially at the outset, and/or limit the political support for them.

3.3. Capture of the political process by special interests

In addition to the Elyean scenario in which the political process results in invidious discrimination against powerless minorities, another basic situation in which it is undeserving of trust is, to some extent, the opposite.⁷⁷ This is discrimination in favor

⁷³ *Id.*

⁷⁴ The following summary mostly draws from *id.* ch. 4.

⁷⁵ See *id.* at 140–3.

⁷⁶ For suggestions on various constitutional design mechanisms that may help to prevent or slow down such restructuring, see GINSBURG & HUQ, *supra* note 15, ch. 6; Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 59 COLUM. J. TRANSNAT'L L. 1 (2020). But cf. Wojciech Sadurski, *On the Relative Irrelevance of Constitutional Design* (Sydney Law School Research Paper No. 19/34, June 13, 2019), <https://ssrn.com/abstract=3403327>.

⁷⁷ PETERSEN, *supra* note 9, at 26.

of powerful minorities as a result of the capture of the political process by special interests. In such private political lock-ups, the malfunction (which may be systemic) is that the process fails to represent the interests and views of the general citizenry, as it is supposed to in a democracy. This general problem has been conceptualized in two different ways. The first views a prohibition on such “naked preferences” as reflecting a substantive value commitment of democratic constitutionalism that requires elected representatives to act in pursuit of the public interest.⁷⁸ This conception rejects the interest group model of politics, or politics as a type of market, entirely and does not seek to improve or perfect it by representing and aggregating the private interests of all citizens.⁷⁹ By contrast, the second conception endorses this model and sees the problem as the capture of the political process by narrow, powerful special interests at the expense of the more general interests of the diffuse majority, which are far harder to organize given the logic of collective action.⁸⁰ Such capture results in anticompetitive measures and wealth transfers from ordinary citizens as a form of modern mercantilism that would not occur in a better-functioning and more efficient political marketplace.⁸¹ These contrasting conceptions of the political process and its corresponding failure have their origins in Rousseau’s distinction between the general will and the will of all.⁸²

One difficulty in thinking about judicial (and other forms of) intervention to protect and reinforce the political process in this context is the seeming necessity of choosing between these two plausible and contestable substantive views about proper legislative outputs in a representative democracy. For example, a tax law pushed by the wealthy few that reduces everyone’s taxes, but theirs disproportionately, and yet is not aimed at or in the public interest might perhaps violate the first but not the second. The first conception also has overtones of *Lochner* insofar as it calls into question “class legislation” of any type as not promoting a legitimate public purpose.⁸³ A more important difficulty is that given the practical dominance of the interest group model alongside the enormous growth of the role of money in politics, drawing a principled and workable distinction between the ordinary reality of the political process and this type of failure, between influence and excessive influence, is not an easy task. To ask whether the legislative majority passed a law because of special or private interests⁸⁴ raises a host of further intricate questions of kind and degree about causation and motivation. An even harder task is fashioning judicial doctrine to enforce such a line, especially

⁷⁸ Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

⁷⁹ *Id.*

⁸⁰ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

⁸¹ See, e.g., Eyal Benvenisti & Amnon Morag, *Regulatory Capture and the Marginalized Majority: The Case for the Constitutional Protection of the Majority’s Disposable Income*, 22 U. PENN. J. CONST. L. 171 (2019).

⁸² JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 31 (Donald A. Cress trans., Hackett ed., 1983) (“there is often a great deal of difference between the will of all and the general will. The latter considers only the general interest, whereas the former considers private interest and is merely the sum of private wills”).

⁸³ *Lochner v. New York*, 198 U.S. 45 (1905).

⁸⁴ Niels Petersen, *The German Constitutional Court and Legislative Capture*, 12 INT’L J. CONST. L. 650, 657 (2014).

without engaging in arguably inappropriately close or robust substantive review, although a few scholars have attempted it.⁸⁵

In the face of these difficulties, I will make a distinct and narrower procedural claim. As with clear abuse of dominant party position vis-à-vis the legislature in the parliamentary model above, there is also clear abuse of the pluralist model that renders the legislative process not merely untrustworthy but also illegitimate. The most conspicuous recent example of this is the 2017 tax law in the United States that overwhelmingly favored the wealthy and special interests.⁸⁶ Several Republican legislators were caught on record stating they had no choice but to vote for the bill otherwise their biggest contributors would stop donating, and at least one donor issued such a threat.⁸⁷ However minimal and flexible the requirement of “due process of lawmaking”⁸⁸ may be, a legislative/political process in which private interests make or withhold payments in return for legislators’ votes on a specific bill is a failed one in a representative democracy.⁸⁹ Direct evidence of such undue influence and corruption of the lawmaking process will undoubtedly be rare, but even if not necessary it is surely sufficient for judicial intervention and protection of democracy.

3.4. Outright dysfunction of the political process

Sometimes the political process fails because of the outright dysfunction of one or all the institutions that participate in it. Here, an institution is unable adequately to

⁸⁵ *Id.* (arguing that review for loose means-end fit and legislative inconsistency are good proxies for capture by special interests); Benvenisti & Morag, *supra* note 81, at 196 (failing a least restrictive means test discloses that the real aim of a law was to effectuate a private transfer).

⁸⁶ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97. The Act reduced the highest federal income tax rate from 39.6% to 37%, cut the corporate tax rate from 35% to 21%, significantly scaled back the federal estate tax, and not only maintained, but extended to real estate profits, the “carried interest loophole” that famously permits Warren Buffett to pay a lower tax rate than his secretary. See Warren Buffet, *Stop Coddling the Super-Rich*, N.Y. TIMES (Aug. 14, 2011), <https://nyti.ms/3dVl32f>.

⁸⁷ Republican House member Chris Collins identified the pressure he was under to vote for the bill: “My donors are basically saying, ‘Get it [the tax bill] done or don’t ever call me again.’” Quoted in Cristina Marcos, *GOP Lawmaker: Donors Are Pushing Me to Get Tax Reform Done*, THE HILL (Nov. 7, 2017), <https://bit.ly/2HtRNUa>. Senator Lindsey Graham warned that if Republicans failed to pass the tax plan, “the financial contributions will stop.” Quoted in Rebecca Savransky, *Graham: “Financial Contributions Will Stop” if GOP Doesn’t Pass Tax Reform*, THE HILL (Nov. 9, 2017), <https://bit.ly/3mcGQFC>. For donors, Sean Lansing, former chief operating officer of the Koch brothers’ political advocacy group Americans for Prosperity, issued only a slightly-veiled confirmation: “if they don’t make good on these promises [for tax reform] . . . there are going to be consequences, and quite frankly there should be.” See *Koch Brothers’ Political Network Will Spend Between \$300 and \$400 Million on 2018*, CBSN LIVE (June 26, 2017), <https://cbsn.ws/3krjhUc>.

⁸⁸ This term is associated with Hans Linde: see Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). For more than a century beforehand, the US Supreme Court had held that the Due Process Clause of the Fifth Amendment applies to Congress in its lawmaking capacity. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856) (“the article [the Due Process Clause] is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will”).

⁸⁹ For an extended discussion of this claim, see Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 U. PENN. J. CONST. L. 1 (2018).

perform *any* of its key functions, rather than a particular one (as, for example, executive accountability to the legislature above), and not due to capture or abuse of dominant position but to chronic internal weakness or ineptitude. A complete political process failure can be said to occur when this situation is multiplied to affect most or all of the political process institutions. Because in this scenario the process is partly or totally crippled, the failure consists in its inability to generate the types of outputs it is designed and expected to achieve, in terms of policy and/or governance. As is well documented in the political science literature, this is a typical situation in which military or presidential coups occur.⁹⁰ But it has also been the type of situation in which constitutional courts have intervened either/both to help fill the vacuum or to push the dysfunctional institution into action.

Within the comparative literature, a well-known example of a frequently dysfunctional institution is the post-1991 Colombian legislature, which was designed as a consequential, counterbalancing presence to prevent a return to the history of overly powerful presidencies.⁹¹ However, due primarily to the weakly institutionalized political party system, the legislature has mostly failed in this task and has often proven to be a largely dysfunctional branch of government, resulting in either (or both) dominating presidents or (and) paralysis in dealing with the country's many serious problems.⁹² The Constitutional Court has on occasion stepped into this gap and conducted itself in quasi-legislative fashion, including holding legislative-style hearings and fact-finding sessions, before issuing managerial orders to deal with the problem at hand.⁹³ Two particular episodes in which the Court effectively replaced the legislature and initiated policy proposals dealt with the country's mortgage crisis in the late 1990s and the displaced persons crisis over a longer period of time.⁹⁴

Similarly, in response to the more system-wide or global dysfunction of the political institutions and bureaucracy combined, in the face of widespread corruption and an under-resourced state in a society characterized by extreme mass poverty, the Indian Supreme Court has on several occasions intervened to exercise what amounts to governance functions rather than orthodox judicial ones. It has quite commonly investigated, directed, and managed the response to pressing policy issues that the political institutions and the administrative apparatus have been unable to address effectively themselves.⁹⁵ Typically, this has been facilitated by the Court's extremely liberal standing rules permitting constitutional causes of action to be brought (via writ petitions) directly by public interest litigators and organizations, as well as by informal letter to one of its members.⁹⁶ The range of policy issues involved includes

⁹⁰ See, e.g., Juan Linz, *The Perils of Presidentialism*, 1 J. OF DEMOCRACY 1 (1990).

⁹¹ MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 303–5 (2017).

⁹² David E. Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L. L.J. 319 (2010).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See, e.g., Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989); S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29 (2001).

⁹⁶ Cassels, *supra* note 95.

environmental protection and toxic work cites, public transportation, and sexual harassment.⁹⁷ In the latter example, the Court promulgated a national code of sexual harassment law pending action by the legislature.⁹⁸

3.5. Non-deliberativeness of the legislature

A final example of a type of political process failure that has sometimes induced constitutional courts to intervene are laws pushed through the legislature by a government that provides insufficient notice or opportunity for deliberation. Unlike the previous scenarios of the dysfunctional legislature that is unable to act or an illegitimate legislative process captured by private interests, here the problem is one of lack of informed and deliberative consent to enacted legislation by elected representatives. Recent comparative instances of this type of failure range from one-off or occasional pressuring of the legislature to act hastily by an impatient government, often facing some sort of emergency or deadline, to the more systematic undermining of due legislative deliberation, as currently instigated by PiS in Poland.

This type of failure is one component of a widely held sense of a decline in how modern legislatures operate compared with how they are supposed to, particularly in the quality and quantity of meaningful deliberation about the public interest.⁹⁹ In an attempt to reverse it, there is an emerging trend around the world for courts to review legislative processes for this and related problems, a trend that belies the notion that such matters are inherently political questions not suitable for judicial review under separation of powers principles.

For example, in 2017 the Israeli Supreme Court struck down a tax law on procedural grounds alone for violating the right of all legislators to meaningfully participate in the lawmaking process, when they received the final version of an omnibus tax bill at the last minute.¹⁰⁰ The Colombian Constitution expressly grants the Constitutional Court the power to review legislation for errors of procedure,¹⁰¹ and in addition to fairly frequent exercise for violating the detailed textual rules of the legislative process,¹⁰² the Court has also invalidated a tax law for violating the “unwritten” principle of “minimum public deliberation.” This occurred when the government, in an attempt to close the budget deficit, added increased VAT rates on certain necessities at the last minute with no notice to legislators just before the final vote.¹⁰³ Slightly differently, but relatedly,

⁹⁷ Sathe, *supra* note 95.

⁹⁸ Vishaka and Others v. State of Rajasthan, AIR 1997 SC 3011 (India).

⁹⁹ For an excellent comparative survey, see SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, *DUE PROCESS OF LAWMAKING* (2014).

¹⁰⁰ Kwantiski v. The Knesset, HCJ 10042/16 (2017). The decision is discussed in Ittai Bar-Siman-Tov, *In Wake of Controversial Enactment Process of Trump’s Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation*, I-CONNECT BLOG (Dec. 13, 2017), <https://bit.ly/35q1snc>.

¹⁰¹ Constitución Política de Colombia [C.P.] art. 241.

¹⁰² See ESPINOSA & LANDAU, *supra* note 91, at 323–4.

¹⁰³ Corte Constitucional [C.C.] [Constitutional Court] Sentencia C-776, septiembre 9 de 2003 (Manuel José Cepeda Espinosa, J.), www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm discussed and translated in ESPINOSA & LANDAU, *supra* note 91, at 318–23.

the German Constitutional Court in 2010 invalidated the federal parliament's recent amendment of the country's welfare legislation because the flawed procedure that it used to determine the subsistence minimum violated the constitution.¹⁰⁴

In addition to its exemplifying a lack of due process of lawmaking for the private interest reasons mentioned above,¹⁰⁵ the 2017 US tax law is also a further example of political process failure for legislative non-deliberativeness, although one without the judicial intervention of the others. Passed quickly in response to a seemingly arbitrary presidentially imposed deadline,¹⁰⁶ the most significant tax legislation since 1986 was pushed through Congress without holding a single evidentiary hearing. The bill was largely drafted behind closed doors by a small group of the Republican leadership, substantially revised at the last minute to appeal to party holdouts, then released just before the final floor vote, which took place without debate or deliberation.¹⁰⁷ In these ways, the process of enactment contrasted in almost every respect with the 1986 statute.¹⁰⁸ For many critics, the flaws in the procedure and the reluctance to engage in deliberation or public consideration were directly related to—and an attempt to hide—its content, which vastly favors the rich at the expense of everyone else.¹⁰⁹ The action plan seems to have been to rush this through with the minimum scrutiny and maximum diversion possible.

By contrast, in Poland the PiS government has engaged in a far more systematic attack on deliberation in the lawmaking process. This has involved near-universal fast-tracking of important legislation and silencing of the opposition through an array of devices and tricks. These include failing to publish critical expert reports and reactions on the parliamentary website; placing new items on the legislative agenda without any notice; holding sessions late at night, early in the morning, or outside the normal assembly hall; limiting opposition speeches to one minute; excluding opposition members on disciplinary grounds; and providing insufficient time to read proposed amendments.¹¹⁰ Since PiS narrowly lost its majority in the upper chamber in the legislative elections of October 2019,¹¹¹ its ability to employ these tactics and avoid delay has been somewhat reduced.

¹⁰⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 9, 2010, 1BvL 1/09 [hereinafter *Hartz IV*].

¹⁰⁵ See *supra* Section 3.3.

¹⁰⁶ The bill was introduced into the House of Representatives on November 2, 2017, received its final vote of approval on December 20, and was signed into law by the President on December 22, 2017. The President had demanded that the bill must become law by Christmas.

¹⁰⁷ Tara Golshan, *Republicans are handwriting their tax bill at the last minute*, Vox (December 1, 2017), at: <https://www.cnbc.com/2017/12/01/republicans-are-handwriting-their-tax-bill-at-the-last-minute.html>; Seung Min Kim & Colin Wilhelm, *Republicans rewriting tax bill hours before possible vote: Senate GOP leaders are still making major changes to the plan in order to win over several hold-outs*, POLITICO (December 1, 2017), at: <https://www.politico.com/story/2017/11/30/mccain-to-vote-for-gop-tax-bill-270511>.

¹⁰⁸ The Tax Reform Act of 1986 took over a year to enact from the time the House Ways and Means Committee and the Senate Finance Committee began holding evidentiary hearings, in which more than 500 witnesses gave testimony, and was eventually passed with bipartisan input and support, with only two Democratic Senators voting against the final version of the bill. For details of this process, see David E. Rosenbaum, *The Tax Reform Act of 1986: How the Measure Came Together; A Tax Bill for the Textbooks*, N.Y. TIMES (Oct. 23, 1986), <https://nyti.ms/3mfTbjk>.

¹⁰⁹ See *supra* note 86.

¹¹⁰ Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 15, at 257, 267–8.

¹¹¹ PiS seats in the 100-member Senate fell from 61 to 48.

To sum up: none of the political process failures discussed in this section involve electoral processes or discrimination against discrete and insular minorities. Rather they illustrate other types of legislative process failures and antitrust-like problems with the political marketplace.

4. Types of judicial review

As we have seen, three of the above examples of political process failure have induced on the part of constitutional courts, or arguably call for, judicial review of the relevant legislative process as such.¹¹² That is, reviewing the constitutionality of the procedures employed, as distinct from the substance or content of legislative outcomes. Such “pure procedural review” may be contrasted not only with substantive review, but also with what has been termed “semi-procedural review,”¹¹³ in which certain aspects of what occurred during the enactment process may be relevant in determining the substantive constitutionality of its output. A leading example of the latter is the current framework in the United States for assessing the constitutionality of exercises of Congress’s commerce clause power, in which the existence, nature, and quality of congressional findings on the connection between the regulated activity and interstate commerce are deemed one of several factors in a multi-part test.¹¹⁴ In addition to the non-exclusive and non-dispositive nature of this factor, this is not pure procedural review because the focus is on the evidence gathered during the enactment process to satisfy the substantive criteria for use of a constitutionally limited legislative power.¹¹⁵

Despite its political process label, Ely’s theory as presented does not actually involve judicial review of the political process or procedural review at all. Rather, it prescribes judicial review of certain legislative outputs—what was done rather than how—albeit different ones than the proponents of its two rival approaches: interpretivism and non-interpretivism. Whereas the former focuses on the content of laws to determine whether they depart from text or original intent, and the latter on laws whose content violates extra-textual fundamental substantive values, existing political process theory identifies laws that suppress voice or vote, or systematically discriminate against minorities, as the primary legitimate object of judicial review. This is because of the *effect* of such laws on the electoral process or the harm, including expressive

¹¹² These are the South African cases, discussed in Section 3.1, where the Constitutional Court reviewed the internal procedures and rules of the NA, rather than enacted laws; the problem of private political lock-ups, examined in Section 3.3, where the constitutional problem with a law is exclusively the (illegitimate) process by which it is enacted; and legislative non-deliberativeness, analyzed in Section 3.3, where a bill is enacted with insufficient time, notice, and consideration to legislators in general, and opposition parties in particular, even if the prescribed formal steps have been satisfied.

¹¹³ Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6 LEGISPRUDENCE 271 (2012).

¹¹⁴ *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹⁵ Another leading example is the UK case of *R (On the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 (quality of parliamentary discussion relevant to intensity of judicial review of proportionality analysis). See Aileen Kavanagh, *Reasoning about Proportionality Under the Human Rights Act 1998: Outcomes, Substance and Process*, 130 LAW Q. REV. 235 (2014).

harm, they impose on equal citizenship status. In this way, they are incompatible with the values, norms, and structures of representative democracy, but they are not unconstitutional because of how they were enacted. In other words, existing political process theory narrows the scope of substantive judicial review compared to its two rivals, but what remains, and what the theory justifies, is still a subset of substantive review. It does not recognize or include the type of pure process review that several of the examples of process failure call for. Accordingly, in addition to the overly narrow conception of political process failures discussed above, this is a second way that political process theory needs to be broadened. CPPT must incorporate actual review of the political process if it is to account for, and potentially justify, some of the judicial attempts to solve political malfunctions discussed above. As we have seen, although at face value this may appear to be in general tension with the constitutional values of separation of powers and institutional autonomy, in two of the specific contexts discussed, the role of the courts is to protect legislative–executive separation of powers and the distinct role of the legislature from executive overreach.¹¹⁶

5. Situating and justifying comparative political process theory

5.1. Situating

Democratic constitutions typically do (at least) two things. First, they establish the institutional structure and political processes within which democratic politics operates. That is, they constitute not only the government and its branches but also the system of representative democracy that determines how, when, and to whom public power is both allocated and held accountable. Second, constitutions establish the sphere and boundaries of democratic politics and decision-making, by placing certain issues outside the scope of substantive contestation: outcomes that democratic politics cannot reach and, in some cases, others that it must. In this sense, this second function creates the parameters of the constitutionally discretionary. Of course, both of these standard constitutional functions involve value choices, with the first expressing a commitment to representative democracy and its associated values, such as liberty, dignity, and equality, as well as requiring choices among various conceptions and institutional/procedural versions of it.

CPPT is wholly situated within the space occupied by the first constitutional function.¹¹⁷ For it, “political process” refers to the full array of institutional, structural, and procedural mechanisms that constitute a particular system of representative democracy, as well as regulate and constrain how democratic politics operates within it. It of course includes, but *is not limited to*, electoral processes and the rules of free and fair elections. In addition, it encompasses (i) the institutional composition of the system,

¹¹⁶ These are executive accountability to the legislature and legislative non-deliberativeness.

¹¹⁷ Although it does not exhaust it, for this first function also includes the scope of powers allocated to the various established institutions.

(ii) the lawmaking process or processes,¹¹⁸ (iii) the modes and methods of executive accountability and oversight in between elections, and (iv) rules and procedures of the various branches of government, especially the legislature, executive, and administrative agencies. Political process is generally to be contrasted with political outputs, which are substantially the subject matter of the second constitutional function¹¹⁹: whether and how the products of the properly operating democratic system are proscribed, permitted, or mandated. But political process is not limited to procedures alone, as certain “substantive” acts may violate or undermine it, such as imprisoning or silencing opponents and capturing an independent accountability institution. In this way, there is some overlap between the two constitutional functions. Part of this entire political process is typically governed by law, including constitutional law, and part by non-legal norms and conventions, with the relative role of each varying widely among constitutional orders.¹²⁰ CPPT posits that as part of the resistance to, or remedies for, political process failures or violations of various types, judicial review is generally appropriate, as one among several possible “external” controls. To the extent that the political process is governed and regulated by law and legal principles, courts may be part of the system of accountability and protection.

As just stated, CPPT transcends the traditional procedure-substance division by recognizing that there are different types of political process failure, which in turn call for different types of preventive and remedial mechanisms. Just as antitrust law itself generally focuses on both process (for example, have independent businesses colluded or conspired to bring about an industry-wide price increase¹²¹) and substance (has a single entity engaged in abusive conduct or predatory pricing¹²²) to protect economic competition and free markets, so too does CPPT in protecting the political marketplace in a democracy. It focuses on a particular problem—political malfunctions in representative democracies—that takes a number of different forms both within and across jurisdictions, which in turn require varied approaches in addressing.

What is the general nature of this problem? Although systems of representative democracy differ widely in their particulars and no two are identical,¹²³ they are all institutionalizations of certain core democratic procedural values and principles. Very roughly, and at a minimum, these include (i) political competition, contestation, and opposition; (ii) governance as a pluralistic, not monopolistic, enterprise;

¹¹⁸ That is, both primary and secondary legislation, as per UK terminology, or statutes and executive/administrative lawmaking.

¹¹⁹ Substantially but not exclusively, as outputs are also regulated by that part of the first function dealing with the scope of powers allocated to the various established institutions.

¹²⁰ Towards the legal end of the spectrum is South Africa, where, for example, the legislature’s duty to hold the executive accountable is constitutionally mandated in the text, and towards the non-legal end is the United Kingdom, with its large role for constitutional conventions. However, in *R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland*, [2019] UKSC 41, the UK Supreme Court seemingly transferred the political accountability of the executive to Parliament from the category of convention to legally enforceable constitutional principle. See *supra* text accompanying notes 51–3.

¹²¹ As, for example, under Consolidated Version of the Treaty on the Functioning of the European Union, art. 101, 2008 O.J. C 115/47.

¹²² See, e.g., *id.* art. 102.

¹²³ Scheppele, *supra* note 8, at 565–8.

(iii) differentiated institutional roles;¹²⁴ (iv) accountability of public power; (v) the political equality of citizens; and (vi) representation of voters in terms of connecting public opinion and public policy. Political process failures occur when one or more of these principles, as institutionalized in a particular democratic system, are seriously violated on a specific occasion, so as to delegitimize the relevant process, or systematically undermined over time. Such failures contrast with the lesser and more frequent problem of political process weaknesses or imperfections.

CPPT provides an analytical lens or frame of reference that helps us to see as variations of this common problem what might otherwise be viewed as disparate or particularized, context-specific concerns. It gives us a category and perspective to properly identify, attempt to prevent, or seek an appropriate remedy for scenarios that at first glance might not appear to be similar or to call for judicial intervention. For example, in the South African scenario described above,¹²⁵ CPPT permits us to comprehend the progressively robust Constitutional Court review of NA procedures less as judicial overreach violating the separation of powers than as judicial protection of it, as a key part of the democratic political process and the principle of executive accountability to parliament. Viewed in this light, the Court was responding to, and seeking to remedy, a serious political process failure. As this example shows, CPPT takes legislative procedures per se as a key (though non-exclusive) part of the political process and a central site of failure. In so doing, it goes beyond the electoral process on which existing theory focuses. As important as they are, elections are far from the only relevant and important political process in a representative democracy.¹²⁶ CPPT also goes beyond asking merely whether the formal steps of the lawmaking process have been satisfied, by recognizing that, even if they have, the nature and quality of that process may independently constitute a failure, as in the private capture and non-deliberativeness scenarios above.¹²⁷

As noted in Section 1, CPPT partly overlaps with three other areas of recent interest in comparative constitutional law. The first is the practice and theory of judicial review of legislative processes, about which a small but growing doctrinal, empirical, and normative literature has developed in the last few years¹²⁸ to study the increasing oversight of this sort by certain courts.¹²⁹ As we have seen, the significant overlap is that, contrary to the original theory, part of CPPT involves pure legislative process failures of various kinds, ranging from the lawmaking process itself to internal parliamentary rules and procedures, and judicial review to address or remedy them. The second area of overlap is the topic of weak-form (or weakened¹³⁰) judicial review

¹²⁴ See AILEEN KAVANAGH, *THE COLLABORATIVE CONSTITUTION* (forthcoming 2021).

¹²⁵ See *supra* Section 3.1.

¹²⁶ Rowbottom, *supra* note 49.

¹²⁷ See *supra* Sections 3.1 and 3.5.

¹²⁸ See Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805 (2010); Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011); Gardbaum, *supra* note 35.

¹²⁹ See *supra* text accompanying notes 100–4.

¹³⁰ See Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019).

versus strong-form. Very generally speaking, this subject concerns ways in which judicial review may not be final, or in which the elected institutions may have leeway to resolve constitutional issues and/or respond to exercises of judicial review. Various mechanisms of such review have been identified and analyzed in the extensive literature.¹³¹ These include formal legislative override powers or judicial declarations of incompatibility with no legal effect on the laws at issue,¹³² flexible constitutional amendment rules,¹³³ jurisdiction-stripping powers, suspended declarations of invalidity and other “dialogic” rulings and remedies,¹³⁴ narrow holdings, and political contexts (including the existence of a dominant political party) that render constitutional courts relatively quiescent or deferential.¹³⁵ In this context, again contrary to the original theory, CPPT will often function as a weak-form theory, as its focus on identifying and remedying process failures of various kinds frequently leaves open a broad range of outcomes that the political institutions may legitimately pursue. Finally, CPPT also shares conceptual and normative space with the contemporary literature attempting to diagnose the current populist moment and the challenge it poses to constitutional democracy,¹³⁶ as a significant focus of its attack has been the political process, as illustrated by some of the examples of failure discussed above.

But there are also limits to these overlaps. Although pure process review is a key part of CPPT, it is not the whole of it. Not all political process failures are narrowly procedural, i.e. failures of legislative, or indeed any other, particular process. And some non-procedural failures involve acts or outputs that are impermissible because of their intended or likely effects on the political marketplace, and so may require strong(er) forms of judicial review.¹³⁷ CPPT includes *both* pure procedural and more substantive failures; a comprehensive and comparative treatment must include both and not only one. Accordingly, CPPT engages with, but also transcends, both of these approaches to judicial review. Finally, again as the examples illustrate, not all instances of political

¹³¹ For a recent summary of, and contribution to, this literature, see *id*; see also Symposium, *Weak-Form Review in Comparative Perspective*, *supra* note 12.

¹³² See Canadian Charter of Rights and Freedoms, § 33, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 (override); Human Rights Act 1998, sec. 4 (U.K.) (declaration of incompatibility).

¹³³ Rosalind Dixon & Adrienne Stone, *Constitutional Amendments and Political Constitutionalism*, in DAVID DYZENHAUS & MALCOLM THORBURN EDs., *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 95 (2016).

¹³⁴ See, e.g., Kent Roach, *Dialogical Remedies*, 17 INT’L J. CONST. L. 860 (2019).

¹³⁵ See Rosalind Dixon & Mark Tushnet, *Weak-Form Review and its Constitutional Relatives: An Asian Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 102 (Rosalind Dixon & Tom Ginsburg eds., 2011); Scott Stephenson, *Is the Commonwealth’s Approach to Rights Constitutionalism Exportable?*, 17 INT’L J. CONST. L. 884 (2019); Stephen Gardbaum, *What Makes For More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMP. & INT’L L. 1 (2018).

¹³⁶ See Varol, *supra* note 6; Landau, *supra* note 7; Scheppele, *supra* note 8.

¹³⁷ See *supra* text accompanying notes 120–2; see also *infra* text accompanying note 151. Apart from the example of government capture of independent institutions in Section 3.2 above, another instance is the Australian High Court’s “implied freedom of political communication,” which it inferred from the constitution’s commitment to representative democracy in order to invalidate a federal statute banning political advertising on television and radio during election campaigns. *Australian Capital Television v Commonwealth* [1992] HCA 45.

process failure of concern to CPPT involve ones emanating from authoritarian populist challenges to constitutional democracy.¹³⁸

5.2. Justifying

If this situates CPPT in terms of its scope, focus, and neighboring approaches, and also presents its analytical contribution to the field, what is to be said for it from a normative perspective? As stated in Section 1, given its comparative nature, CPPT is not, and cannot be, simply an interpretive theory (as with domestic counterparts) but contains a normative dimension that seeks to justify its claimed centrality as well as a distinct role for courts and other institutions.

The centrality of process theory stems from the fact that, as described above, establishing the structure and processes of a system of representative democracy is a major function of *all* democratic constitutions, even those that contain far more “substantive value choices” of the sort Ely was concerned about¹³⁹ than that of the United States. Beyond this fact, protecting the integrity of this political process (in the broad way that CPPT conceives it) ought to be understood as a key task in any democracy. This is so for at least three reasons. First, the political process is the foundation of the legitimacy of both the exercise of public power and the outputs generated. Second, it expresses and institutionalizes the democratic principle of equal citizenship. Third, and more instrumentally, the political process in a democracy is designed to maintain and maximize political competition, and to prevent the consolidation of power, with its usual consequences.

At this particular juncture, protecting the structure and processes of constitutional democracy is not only an important task but also an urgent and necessary one. As some of the examples of contemporary political process failures clearly disclose, the main threats to constitutional democracy are being directed here. Both the causes and effects of the assault on constitutional democracy involve serious challenges to its structures and processes. The perceived elite capture of the institutions of representative democracy and of the mainstream political parties have resulted in widespread dissatisfaction fuelling the growth of authoritarian populism of the right and left, with its more “direct,” unmediated, or unfiltered relationship of accountability between the leader and “the people.”¹⁴⁰ And the primary work product of many resulting regimes, including those referenced above, has been the attempt to undermine and dismantle the institutional and procedural structure of constitutional democracy, rather than a widespread violation of rights or the rule of law.¹⁴¹ Several of the political process failures involve attempts by incumbents to consolidate and entrench their power, and so tilt the democratic process heavily in their favor. Accordingly, in seeking to protect the processes of representative democracy from the types of erosion, corruption, and capture we see widely today, CPPT has a particularly timely resonance.

¹³⁸ Indeed, of the examples, only capture of independent institutions primarily emanates from this source.

¹³⁹ That is, with respect to a constitution’s second function of specifying political outcomes that are prohibited or mandated.

¹⁴⁰ See, e.g., Rogers Brubaker, *Why Populism?*, 46 *THEORY & SOC.* 357 (2017).

¹⁴¹ See Gardbaum, *supra* note 76; Scheppele, *supra* note 8; SADURSKI, *supra* note 71.

As all the instances discussed in Section 3 above amply demonstrate, protecting the integrity of the political process cannot be left entirely to politicians themselves, because this is where the threats to it primarily come from.¹⁴² Given the typical incentives and motives of those elected and/or entrusted with public power under the legitimacy-granting rules, protecting and preserving them from self-seeking or partisan manipulation and change is not something that is prudently reserved exclusively for the ordinary democratic process itself.¹⁴³ They should not be treated as part of the spoils of electoral victory. Even though the normal forces of political competition, opposition, and accountability—that is, one part of the political process—may function as envisioned to check governmental abuse, the strength or capacity of these forces are often themselves directly related to electoral outcomes, i.e. another part of the process.¹⁴⁴ Those in power usually have strong incentives to try and extend their incumbency, rebuff or weaken accountability mechanisms, or tilt aspects of the process in their favor, and may have the electoral support, know-how, networks, ingenuity, and/or leverage to succeed.

All of this is, of course, why varying parts of the political process are typically constitutionalized or otherwise entrenched through such mechanisms as organic laws, so that they are not fair game for, or up for grabs in, the hurly burly of ordinary politics; second-order structuring norms rather than first-order policy objectives. But this strategy is not self-executing; a constitution cannot defend itself. Constitutional practice within, and consistent with, the formal text need not be uniform or specifically prescribed and can often change quite radically over time.¹⁴⁵ Ambiguities and gaps can be exploited. “Constitutional hardball” may erode the norms of comity and self-restraint on which any constitutional order depends.¹⁴⁶ The “constitution of settlement” shrinks over time.¹⁴⁷ Disputes often need to be adjudicated. Electoral outcomes may provide the supermajorities to formally change the rules and process.

Accordingly, whether constitutionalized or not, there is a systemic need for some form or forms of external, politically independent supervision to protect the structures and processes of representative democracy and public decision-making against corruption, degradation, or failure. Here, a role for courts as independent institutions in

¹⁴² Even capture by special interests depends on the interest of politicians in being re-elected or, if not, employed.

¹⁴³ Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in *OUT OF AND INTO AUTHORITARIAN LAW* 125 (Andras Sajó ed., 2003).

¹⁴⁴ They may also be related to the institutional structure of the political process in a given democracy.

¹⁴⁵ Examples of radical change over time in the United States include that from the substantive and decisive original role of the Electoral College in the election of the President to the (almost) purely ceremonial, and the decline of the role of the political parties themselves in selecting their candidates for President, with the rise to dominance of the primary system. On the latter, see Richard H. Pildes & Stephen Gardbaum, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 79 N.Y.U. L. REV. 647, 651–67 (2018).

¹⁴⁶ Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 522 (2004); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018). On the norms of comity and self-restraint, see KAVANAGH, *supra* note 124.

¹⁴⁷ David Pozen, *The Shrinking Constitution of Settlement*, BALKINIZATION (May 6, 2019), <https://bit.ly/34oXc85>.

enforcing the law of the political process appears appropriate. Importantly, the justification for this type of judicial role is different from that (if any) supporting output-oriented, content-based review. For in this context, the common critique that judicial review disables, displaces, or suffocates democratic politics has far less traction;¹⁴⁸ rather the point and intended effect is the judicial protection of democratic politics.¹⁴⁹

Moreover, as we have seen, unlike original political process theory, CPPT significantly encompasses judicial review of “pure” political process and often functions as a form of weak or weakened review. As such, it is generally less problematic from the perspective of representative democracy than more traditional judicial review premised on the second constitutional function because, unlike the latter, it does not prevent the political institutions from acting. Rather, it requires that the particular political process failure be fixed. Curiously, judicial review of legislative procedures is sometimes deemed more problematic than review of legislative outputs, because it is thought to violate the autonomy of a co-equal branch and hence the separation of powers. For example, in the United States, the constitutionality of the Senate’s often byzantine internal rules, including the well-known filibuster rule for legislation, is firmly understood to be a non-justiciable issue left to its discretion.¹⁵⁰ Apart from the South African example above, demonstrating how, at least in the context of abuse of dominant power, separation of powers may sometimes *justify* or require judicial review of legislative processes, more generally, the point of CPPT is to bolster, improve, or defend the democratic political process rather than bypass or override it. Its goal is to make the process work the way it is supposed to, and to prevent or remedy failures or corruption. Again, in this sense and to this extent, CPPT is often a form of weak judicial review, because it leaves expansive room for action by the elected branches.

But even insofar as CPPT does involve more substantive review—for example, when addressing outright institutional/systemic dysfunction or the capture of independent institutions, as well of course as the original Elyean scenarios—it is still directed at protecting, or resisting erosion of, the overall democratic political process against these ways of degrading, undermining, or paralyzing it. The goal is to replace a deeply flawed or corrupted process with the constitutionally designated and intended one. Similarly again, as we have seen, judicial review in some of these contexts is less in tension with the separation of powers (that the various governments are intent on undermining) than supportive of it.¹⁵¹

Additionally, unlike Ely’s theory, as a normative rather than an interpretive account, CPPT need not be justified as the exclusive, or even primary, mode of judicial review.

¹⁴⁸ This critique ranges chronologically from Thayer to Waldron (and beyond). See JAMES BRADLEY THAYER, JOHN MARSHALL (1901); Jeremy Waldron, *The Core Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

¹⁴⁹ See Hayley J. Hooper, *Keeping the Lights On: Contrasting Miller v. Prime Minister and Cherry v. The Advocate General*, U.K. CONST. L. BLOG (Sept. 16, 2019), <https://bit.ly/3mgSF7i>. Of course, there is always the possibility of *unintended* effects, which must also be factored in.

¹⁵⁰ Adam Winkler, *Is the Filibuster Unconstitutional?*, THE NEW REPUBLIC (Mar. 7, 2013), <https://bit.ly/2J03vGY>; Michael Miller, *The Justiciability of Legislative Rules and the “Political” Political Question Doctrine*, 78 CAL. L.REV. 934 (1990).

¹⁵¹ See, e.g., Section 3.1 above.

It need not compete with other theories of judicial review for a single position as *the* best or most fitting justificatory account for a particular jurisdiction; it is not necessarily an either/or proposition. Accordingly, a constitutional court's role in bolstering the multiple processes of representative democracy may be appropriate even if other, more "substantive" or "second function" types of judicial review are also. For the same reason, and again unlike Ely's account, CPPT is not essentially presented or defended as a theory of judicial restraint, along the lines of Footnote 4,¹⁵² according to which courts exercise judicial review only in limited or exceptional circumstances. As we have seen, it can call for robust interventions in situations where most courts have feared to tread, and thereby serve as a sword as well as a shield.¹⁵³ That said, in exercising the CPPT part of whatever their total judicial review powers may be, courts are inherently secondary or subsidiary actors, for the primary protection of the democratic process (and the various principles it manifests) takes place through the ordinary forces of political competition, opposition, and accountability. *Only* when these fail, or to prevent imminent failure, may courts be justified in intervening.

Accordingly, the criteria for judicial intervention are linked to the general concept, and types, of political process failure discussed above: serious violation of one or more core democratic process values or their systematic undermining over time. This is in contrast to the lesser and more common problem of political process weaknesses or imperfections. But although such actual or imminent failure is a necessary condition for intervention, it is not always sufficient. Whether it is in any particular situation will depend on elements of contextual judgment including likely effectiveness, the type or extent of intervention needed (a nudge or definitive order), anticipated consequences of acting or not acting, legitimacy in the particular situation, and the risks of political attack or loss of institutional capital. This necessarily amounts to, at most, a general standard for intervention rather than more specific rules or principles. But the examples in Section 3 above illustrate the types of scenarios in which intervention by courts would typically be appropriate: continuing and systematic abuse of dominant position to evade accountability, the monopolization and concentration of power via capture of independent institutions, illegitimate legislative procedures, and denying opportunities for legislative deliberation.

Finally, to claim that courts have a legitimate (and even necessary) role in protecting democratic processes is not necessarily to claim an exclusive role. To the contrary, judicial review by itself is likely to be insufficient, may sometimes be inappropriate, and must be part of a multipronged strategy employing both other methods of protection, including democratic design, and other actors. In terms of other actors, these in turn may have sole protective functions for some aspect of the political process that exclude judicial oversight, or joint functions that supplement and complement the work of the courts. An example of the former might be independent election commissions to draw constituency/district boundaries to deal with the problem and political process failure of partisan gerrymandering. An example of the latter is the multi-institutional

¹⁵² See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–3 n.4 (1938).

¹⁵³ See the examples in Section 3 above.

attempt to hold the South African president accountable. In addition to the courts, the story of the corruption scandals was taken up first by the robust and independent media, and then formally investigated and reported on by the Public Protector, the country's chief anticorruption official. The Constitutional Court's first important foray into the scandal was to support the work of the Public Protector by finding her recommendations to be legally binding on the President and NA.¹⁵⁴

6. Conclusion

Political process theory has become not only relevant but urgent because of the current moment in which attacks on the structure and processes of representative democracy have been the primary and distinctive tool of authoritarian populists, rather than widespread violation of rights.¹⁵⁵ In order to understand and address these attacks, and operate usefully in the comparative context, existing political process theory that largely revolves around Ely's interpretive account of American judicial review needs to be updated, expanded, and refined. In particular, the range and types of contemporary political process failures—and assaults—are significantly more varied and numerous than identified in the original theory; the types of preventive and remedial measures they call for, including judicial review of “pure process,” are more extensive; and an interpretive theory of a particular constitutional system must be replaced by a broader and more varied one that includes analytical, normative, and pragmatic components.

CPPT attempts to expand the existing theory in one additional and important way. Ely's book is subtitled *A Theory of Judicial Review*. But a theory that seeks to help address the current scale and scope of the attacks on the structure and processes of representative democracy must go beyond the role of the courts. They are, to be sure, important actors in defending and protecting the processes of democratic politics and, as I have argued, their general legitimacy in performing this function is well-grounded and their tools for doing so should be understood to include some previously thought questionable. Despite this, the powers of courts to solve the problem are limited and, as we have seen, they may be subject to capture. Accordingly, judicial review cannot be relied upon alone. A full CPPT must expand beyond the courts and include democratic design methods, the forces of political competition, the revitalization of democratic norms,¹⁵⁶ responsive political policies and programs,¹⁵⁷ as well as other independent institutional actors to protect the processes and structures of representative democracy.

¹⁵⁴ See EFF No. 1, [2016] ZACC 11, 2016 (3) SA 580 (CC); Woolman, *supra* note 35.

¹⁵⁵ See Gardbaum, *supra* note 76; Scheppele, *supra* note 8; SADURSKI, *supra* note 71.

¹⁵⁶ See Loughlin, *supra* note 15.

¹⁵⁷ See Bojan Bugaric, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, 17 INT'L J. CONST. L. 597 (2019).