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SPECIAL ISSUE INTRODUCTION

SPECIAL ISSUE: THE NEW COMPARATIVE POLITICAL PROCESS THEORY

Courts and comparative representation-reinforcing theory

Rosalind Dixon

University of New South Wales, Faculty of Law and Justice, Sydney, Australia
Email: rosalind.dixon@unsw.edu.au

Abstract

In the same vein as John Hart Ely, but with a modern, global focus, a new wave of comparative constitutional scholarship focuses on the role of courts in protecting and promoting democracy. This article introduces this new wave of 'comparative political process' theory (CPPT), and explains its origins and utility, but also suggests it is best conceptualized as a form of 'comparative representation-reinforcing' theory (CRRT). Labels are not everything, but they do matter. And CRRT better captures the varieties of different forms of judicial democracy protection and promotion, and avoids any false claim of neutrality for such an approach.

Keywords: constitutions; courts; Ely; political process; representation reinforcement

Introduction

We live in an age of constitutional courts.[1] Courts around the world now exercise broad powers of concrete and abstract review and play a central role in enforcing constitutional guarantees of the separation of powers, federalism and rights. Yet, worries about both the effectiveness and legitimacy of courts' role remain. Notably, debates remain about whether courts can serve as agents of social change.[2] Constitutional theorists also continue to debate the democratic legitimacy of courts exercising powers of constitutional judicial review.[3]

[1]See, for example, R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007).

[2]G Rosenburg, *The Hollow Hope: Can Courts Bring About Social Change?*, 3rd edn (University of Chicago Press, 2023); R Dixon, 'Dynamic, Regressive, or Obstructionist Courts? What Kinds of Hopes for Judicial Review' (2024) *Law & Social Inquiry* (forthcoming).

[3]J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; R Fallon Jr, 'The Core of an Uneasy Case For Judicial Review' (2008) 121 *Harvard Law Review* 1693; M Tushnett, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?' (2010) 30 *Oxford Journal of Legal Studies* 49; R Dixon, 'The Core for Weak-Form Judicial Review' (2017) 38 *Cardozo Law Review* 2193; E Delaney, 'The Federal Case for Judicial Review' (2022) 42 *Oxford Journal of Legal Studies* 733.

Alexander Bickel famously labelled this worry the 'counter-majoritarian difficulty' with judicial review,[4] and as Barry Friedman notes, these worries have been remarkably persistent,[5] even in the face of growing global acceptance of practical constitutional judicial review. If anything, they have only increased in many parts of the world in the last few decades – as previously progressive courts have turned conservative (as, e.g., happened in the United States between the Warren and Burger-Rehnquist Courts),[6] or even become instruments of authoritarian regimes.[7]

A recent wave of constitutional scholarship has also questioned the very foundations of constitutional judicial review – and the model of legal, entrenched constitutionalism on which it relies. In *Against Constitutionalism*, Martin Loughlin takes aim at US-style constitutionalism on democratic and other grounds.[8] Further, new work by Ryan D. Doerfler and Samuel Moyn makes a similar argument from across the Atlantic.[9]

Against this backdrop, other scholars have sought to recover and renovate a strand of constitutional scholarship that focuses on the role of courts as protectors and promoters of representative government. Stephen Gardbaum has labelled this school of thought as the new 'comparative political process theory' (CPPT) and has been a leading contributor to this sub-field of thought.[10]

This new wave of CPPT includes articles and book-length works by Stephen Gardbaum, Michaela Hailbronner, Sam Issacharoff, Niels Petersen, David Landau, Manuel Cepeda and myself, among others.[11] It is also a direct inheritor to the ideas set out by John Hart Ely in *Democracy and Distrust*, published in 1981.[12] However, it seeks to update those ideas to take account of the wide-ranging critiques Ely's scholarship has attracted, the insights into social science and comparative constitutional experience, and thereby to provide a vision of judicial representation reinforcement that is fit for the modern era.[13]

[4]A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).

[5]B Friedman, 'The History of the Countermajoritarian Difficult, Part One: The Road to Judicial Supremacy' (1998) 73 *NYU Law Review* 333; B Friedman, 'Dialogue and Judicial Review' (1993) 91 *Michigan Law Review* 577.

[6]M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000).

[7]D Landau and R Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *U.C. Davis Law Review* 1313.

[8]M Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

[9]R Doerfler and S Moyn, 'The Ghost of John Hart Ely' (2023) 75 *Vanderbilt Law Review* 769; R Doerfler and S Moyn, 'Democratizing the Supreme Court' (2021) 109 *California Law Review* 1703 (2021).

[10]S Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429.

[11]Id.; R Dixon and M Hailbronner, 'Ely in the World: The Global Legacy of Democracy and Distrust Forty Years on' (2021) 19 *International Journal of Constitutional Law* 427; S Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press, 2023); N Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, Cambridge, 2017); D Landau and MJ Cepeda Espinosa, 'A Broad Read of Ely: Political Process Theory for New Democracies' (2021) 19(2) *International Journal of Constitutional Law* 548; R Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023).

[12]JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1981).

[13]See Landau and Cepeda Espinosa, *supra* note 11; Dixon, *Responsive Judicial Review*, *supra* note 11.

Courts in this new form of CPPT do not act alone. They collaborate or partner with legislative and executive actors to implement constitutional norms.[14] They interact with independent or 'fourth-branch' agencies to uphold the constitution, and their role is shaped by the broader democratic context.[15] Nonetheless, they play an important role in deterring and slowing down certain forms of abusive constitutional change or promoting a more dynamic, responsive form of democracy.[16]

This symposium investigates this new strand of CPPT as an important new sub-field in comparative constitutional studies (CCS) and invites reflection and ongoing conversation around two key questions:

(1) What are the contours and variants of CPPT?
(2) What is the relevance of these ideas for countries in the Global South, as well as North, and courts in a transnational context?

This introduction, however, focuses on a much narrower question of nomenclature, namely whether this new school of neo-Elyian work is best described as a form of CPPT or, instead, *comparative representation reinforcing* theory (CRRT). There are two reasons, I argue, to prefer the label CRRT to CPPT for this new, emerging school of thought: first, it avoids any perception of a false claim of neutrality in the definition of democracy and what it entails and second, it is broad enough to encompass a wide variety of democracy-protecting judicial interventions, including those that are substantive and procedural in nature, or a mix of both.

The remainder of the introduction proceeds in three sections. The next section sets out the shift from Elyian to neo-Elyian constitutional theory, informed by comparative constitutional experience. Then it explores the doctrinal implications and variants of CPPT, and how this points both to the broad utility of CPPT insights and the appropriateness of labelling this emerging school of thought as a form of CRRT rather than CPPT. The last section offers a brief conclusion on future directions in CRRT scholarship.

From Ely to CPPT

In *Democracy and Distrust*, Ely famously argued that when interpreting open-ended constitutional provisions, such as the due process clause of the 14th amendment to the US Constitution, courts encounter significant legitimacy difficulties, but that those difficulties do not apply to a role in protecting the channels of political change and the interests of discrete and insular minorities. In this way, Ely laid the groundwork for modern representation-reinforcing theory.

[14]A Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).

[15]M Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021). See also T Khaitan, 'Guarantor Institutions' (2021) 16 *Asian Journal of Comparative Law* 40.

[16]See R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606; Dixon, *Responsive Judicial Review*, *supra* note 11; Y Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 *William & Mary Bill of Rights Journal* 327; B Bugaric, 'Can Law Protect Democracy? Legal Institutions as "Speed Bumps"' (2019) 11 *Hague Journal on the Rule of Law* 447.

However, Ely's own ideas have been met with criticism. He seemed to conceptualize the judiciary's role as neutral or purely procedural, in ways that have clearly been subject to challenge. How we conceptualize democracy is a matter of disagreement.[17] Our understanding of the court's role in this context is therefore anything but neutral or procedural.[18] It embeds substantive judgements all the way down or at every level.[19]

Ely's conception of discrete and insular minorities was also both over- and under-inclusive. He failed to capture the experience of many historically disadvantaged minorities with significant political influence, for instance, gays and lesbians, or those with increasing social power, but who face ongoing political obstacles to change, such as women.[20] His ideas were likewise over-inclusive in characterizing certain groups as deserving heightened scrutiny (e.g., those in gated communities), even though they enjoyed historical privilege rather than disadvantage. In effect, Ely sidestepped the need to consider the ways in which democratic processes functioned adequately to protect underlying equality values – that is, concerns about equality of opportunity, equal dignity and commitments to ending the historical subordination of certain groups.[21]

Similarly, Ely's vision did not capture the full range of modern threats to democracy, including ways in which the channels of political change can be undermined.[22] For Ely, the image was of a single party seeking to entrench itself in power through a range of tactics that in some ways narrowed the space for fair political testation and competition. However, in the modern era, those tactics have become far more extreme.[23] Dominant political parties and executive actors have sought to entrench themselves through tactics that go far beyond tilting the playing field in their own favour – yet, still fall short of an all-out military coup.[24] Instead, they have used the forms of law and constitutional change to undermine federalism, rights, the separation of powers, and especially the set of norms that form what David Landau and I have labelled the 'minimum core' of constitutional democracy.[25]

Against this backdrop, modern CRRT conceptualizes a role for courts that is at once broader and narrower than Ely envisaged.[26] CPPT starts with similar assumptions to Ely, about the nature of courts and their power(s) and jurisdiction, namely that there are (1) independent courts with (2) relatively broad remedial powers and (3) meaningful political support and support in civil society.

[17]See J Waldron, *Law and Disagreement* (Oxford University Press, 1999) (on disagreement within and about democracy).

[18]See, for example, L Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063; M Tushnet, 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89 *Yale Law Journal* 1037.

[19]Id.

[20]Dixon, *Responsive Judicial Review*, *supra* note 11, at 43; Dixon and Hailbronner, *supra* note 11.

[21]Dixon, *Responsive Judicial Review*, *supra* note 11.

[22]Id.

[23]Id. See also T Ginsburg and AZ Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018); S Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press, 2023).

[24]O Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa Law Review* 1673.

[25]See R Dixon and D Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021). See also *supra* note 21.

[26]Dixon, *Responsive Judicial Review*, *supra* note 11.

Without some meaningful degree of independence from the executive, courts cannot hope to check attempts by legislative or executive actors to entrench themselves in power or degrade the channels of political change. Indeed, judicial review in these circumstances will at best do nothing to protect democracy and, at worse, actively contribute to its erosion.[27]

Courts must have the jurisdiction and remedial authority to counter relevant threats to democratic representation or responsiveness. This power may be expressed or implied. However, it must be an accepted part of what it means for a court to engage in constitutional judicial review. In some continental systems, where there is limited scope for concrete review, or strict limits on access to a court even in abstract cases, this may pose significant obstacles to judicial representation-reinforcement.[28]

Courts must also enjoy some degree of support from political elites and civil society. Without political support or at least tolerance for their decisions, courts are likely to face damaging forms of institutional backlash.[29] In addition, without some form of 'litigation support structure' in civil society, courts may not have the opportunity to hear the kinds of cases that raise issues of representation reinforcement.[30] They will also have limited capacity to enforce their decisions against unwilling or hostile government actors. The implementation of court orders ultimately depends upon the executive, and without significant public support or support from other institutional actors, courts cannot force compliance with their own decisions.

However, assuming these preconditions are met, CPPT or CRRT envisages a role for courts that is at once broader and narrower than Ely proposed. In his work on CPPT, Stephen Gardbaum suggests that there is an important role for courts in countering four distinct political market failures: (1) non-deliberativeness of the legislature, (2) legislative failures to hold the executive accountable, (3) government capture of independent institutions and (4) capture of the political process by special interests.[31]

Niels Petersen proposes a similar taxonomy of 'political market failures'[32] as a guide to a modern theory of representation-reinforcing review. Like Ely, Petersen notes the important role of constitutional courts in protecting minorities and courts' traditional role as 'arbitrators in competency disputes'.[33] However, Petersen suggests that courts also have an important role to play in 'safeguarding the integrity of the legislative process', protecting against 'legislative capture' and 'correcting [for] external effects'.[34]

[27]Landau and Dixon, 'Abusive Judicial Review', *supra* note 7.

[28]See, for example, I Gruev, 'Responsive Judicial Review in Kelsenian Constitutional Courts: The Impeding Effects of Limited Standing and Formalism' (2023) 48 *Review of Central and East European Law* 426.

[29]See S Stephenson, 'Are Political "Attacks" on the Judiciary Ever Justifiable? The Relationship Between Unfair Criticism and Public Accountability' (2023) *American Journal of Comparative Law* (forthcoming); M Klarman, 'Courts, Social Change, and Political Backlash' (Hart Lecture, Georgetown Law Center, 31 March 2011); Dixon, *Responsive Judicial Review*, *supra* note 11.

[30]See C Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); M McCann, 'How Does Law Matter for Social Movements?' in B Garth and A Sarat (eds), *How Does Law Matter*? (1998). See discussion in Dixon, *Responsive Judicial Review*, *supra* note 11.

[31]Gardbaum, *supra* note 10.

[32]For the idea of a political market failure as analogous to economic market failure (i.e., a structural breakdown of the good functioning of a market), see S Issacharoff and R Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643.

[33]Petersen, *supra* note 11.

[34]Id.

Manuel Cepeda and David Landau likewise suggest that courts can play three broad roles in protecting and promoting democracy, in addition to the functions identified by Ely: (1) guarding against democratic breakdown, (2) improving the quality of democratic institutions and (3) responding to failures of political institutions impacting majoritarian groups.[35] In earlier work, Landau also highlighted the potential role of courts in building up democratic institutions and fixing problems with political systems, and opening up alternative spaces for democratic contestation.[36]

I identify three related sources of democratic dysfunction as the basis for a modern CRRT: (1) the actual or attempted accumulation of electoral or institutional monopoly power, (2) democratic blind spots and (3) democratic burdens of inertia. In this account, the accumulation of electoral and institutional monopoly power is in key respects the precursor to what Cepeda and Landau label democratic breakdown: it is the beginning of practices that can effectively erode what Landau and I insist is the *minimum core* set of institutions and norms necessary for a functioning constitutional democracy.[37] Democratic blind spots and burdens of inertia are effectively specific sources of dysfunction affecting majoritarian and minority groups: they involve ways in which laws limit the enjoyment of rights supported by democratic majorities, for the benefit of either those majorities or a minority, because of lack of time, foresight, expertise or a willingness to expend the political capital necessary to put an issue on the legislative agenda.

All CPPT/CRRT scholars further suggest that these ideas represent the adaptation and extension of Elyian ideas to fit a global context.[38] Some scholars doubt whether CPPT or CRRT are in fact neo-Elyian at all: Bo Tiojanco, for example, argues that these ideas endorse a role for the court far broader than Ely himself would have endorsed, and that Ely was largely an interpretivist scholar when much of this scholarship is non-interpretivist in character.[39] Other scholars embrace the connection between Ely and comparative judicial democracy protection.[40] In part, they do so because it helps make sense of and situate these ideas in relation to past debates and traditions.[41]

However, they also do so on grounds of principle: many of Ely's arguments were premised on the limits of interpretivism and there are ways of linking judicial democracy protection to formal legal modalities, sources and values.[42] There is also a connection between comparative theories of judicial democracy promotion and the kinds of concerns about judicial legitimacy that animated Ely's work. In her insightful contribution to the symposium, Sarah Murray traces these connections and further offers a valuable 'systemic' account of how we should think about notions of judicial legitimacy in this

[35]Landau and Cepeda Espinosa, *supra* note 11.

[36]D Landau, 'A Dynamic Theory of the Judicial Role' (2014) 55 *Boston College Law Review* 1501.

[37]See Dixon and Landau, *Abusive Constitutional Borrowing*, *supra* note 25; Dixon and Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *supra* note 16; R Dixon and T Roux, 'Marking Constitutional Transitions', in T Ginsburg and AZ Huq (eds), *From Parchment to Practice: Implementing New Constitutions* (Cambridge University Press, 2020).

[38]Cf Dixon and Hailbronner, *supra* note 11.

[39]See, for example, B Tiojanco, 'John Hart Ely Would Disown Comparative Political Process Theory, *Dobbs*, and Most His other intellectual Heirs (or Maybe Not) ' (2024) *Global Constitutionalism* 1-31; but for a challenge to this, in part on the grounds that Ely accepted a broader role for courts in statutory or weak-form cases, see Dixon, *Responsive Judicial Review*, *supra* note 11.

[40]See, for example, *supra* note 11.

[41]Dixon, *Responsive Judicial Review*, *supra* note 11.

[42]See discussion in Id.

context.[43] In doing so, she also points the way to the importance of locating courts in a broader institutional and political context in ways that fit squarely within the broader concern of neo-Elyian scholars about courts and context-sensitive forms of judicial review.[44]

Gardbaum, for example, suggests that 'Ely'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', but 'that for comparative purposes, Ely's account [of erosion or degradation] is too narrow in a variety of ways'.[45] Cepeda and Landau likewise argue that their broader reading of Ely is designed to respond to the various challenges facing 'legal orders around the world', especially those in the 'Global South'.[46]

CPPT v CRRT: Procedure versus substance?

One of the important questions raised in the various contributions to the symposium, and in the conference that led to it, relates to the best way of labelling this emerging school of comparative constitutional thought. In an important article in ICON, Gardbaum labelled this school of thought as a form of 'comparative political process theory'[47] and the term has already attracted scholarly attention.[48] Indeed, it was an inspiration for this symposium.[49] Yet, in subsequent work, in this volume and elsewhere, Gardbaum has sought to outline a role for courts in protecting democracy and the rule of law that he openly acknowledges is substantive or at least semi-substantive in nature.[50]

There are also two additional reasons to avoid the language of 'political process theory'. First, as already noted, the 'process' label was a part of Ely's own ideas that attracted significant controversy. Ely claimed that his 'process-based theory' avoided substantive evaluative judgements about what democratic constitutional norms required.[51] Yet, this claim has been convincingly and consistently rebutted by US scholars for more than four decades.[52] Hence, when US scholars talk about process-based theory, few do so with a view to endorsing rather than rejecting its contemporary relevance.[53]

Second, the reference to process theory is inherently ambiguous. Conceptually, it could refer to judicial review of the political process – for example, review by courts of processes of legislation or executive decision-making, and whether they comply with constitutional or

[43]S Murray, 'Comparative Political Process Theory: Systemic Legitimacy and the Constitutional Judgment' (2023, WIP).

[44]Id.

[45]Gardbaum, *supra* note 10.

[46]Landau and Cepeda Espinosa, *supra* note 11.

[47]Gardbaum, *supra* note 10.

[48]Dixon and Hailbronner, *supra* note 11; Landau and Cepeda Espinosa, *supra* note 11; S Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press, 2023).

[49]R Dixon and PJ Yap, 'Responsive Judicial Remedies' (WIP, 2023).

[50]See S Gardbaum, 'Comparative Political Process Theory: A Rejoinder' (2020) 18 *International Journal of Constitutional Law* 1503.

[51]Ely, *supra* note 12.

[52]L Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063; Tushnet, 'Darkness on the Edge of Town', *supra* note 18.

[53]See, for example, R Doerfler and S Moyn, 'The Ghost of John Hart Ely' (2023) 75 *Vanderbilt Law Review* 769. But see J Choper and S Ross, 'The Political Process, Equal Protection, and Substantive Due Process' (2018) 20 *University of Pennsylvania Journal of Constitutional Law* 983.

sub-constitutional requirements of fair, open and reasoned deliberation. Or it could refer to the review of legislative or executive decisional outputs, with a view to courts playing a role in protecting, complementing or scaffolding processes of political decision-making.

Ely himself seemed largely to envisage review of the latter kind: hence, he used the term judicial 'representation reinforcement' as synonymous with the language of political process theory. In addition, most modern CPPT theorists adopt a similar approach. Indeed, even in proposing CPPT as a label, Gardbaum has proposed a mix of judicial review of inputs and outputs, or review that is procedural, substantive or semi-procedural and semi-substantive in nature. This also accords with broader scholarship within the CPPT tradition.

For instance, most courts worldwide adopt some form of 'proportionality' test in determining whether limitations on constitutional guarantees can be considered justified. That is, they ask whether a law has a legitimate aim and, if so, imposes limits on constitutional guarantees that are proportionate to that aim – in the sense of rational, suitable and adequate in the balance.[54] In the United States, the Supreme Court adopts a more rule-like approach, which divides proportionality-style judgements into three distinct tiers of 'strict scrutiny', 'intermediate scrutiny' and 'rational basis review', and avoids explicit judgements about whether a law is 'adequate in the balance'.[55] However, even still, many leading US scholars argue that the court's approach resembles a form of implicit proportionality-style test.[56]

Proportionality judgements also naturally invite attention to the functioning of the democratic process: for instance, if elected representatives have given careful consideration to alternative policy measures, this will increase the case for courts to apply a relaxed version of a 'minimal impairment' or narrow tailoring requirements, whereas if they have not considered or debated these options, or done so for a long period of time, there will be a much stronger case for more robust judicial oversight and application of minimal impairment requirements.[57]

A key part of CRRT, as Hailbronner and Kujus note, is that it has both an activist and restraintist element: it is both a 'sword' that provides a defence of robust, strong forms of review by courts in certain circumstances and a 'shield' against arguments that courts should exercise review of this kind in all cases.[58] This twin understanding can also shape any proportionality-style judgement – including the degree of deference, or 'margin of appreciation', applied by national and transnational courts in the making of those judgements. For instance, Hailbronner and Kujus suggest that if a court identified national law as altering the democratic minimum core of a country's constitutional system, this points towards a reduced margin of appreciation on the part of the

[54]I Porat and M Cohen-Eliya, 'Proportionality in the Age of Populism' (2021) 69 *American Journal of Comparative Law* 449; V Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017); A S Sweet and J Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019).

[55]E Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47 *Federal Law Review* 551; R Dixon, 'Calibrated Proportionality' (2020) 48 *Federal Law Review* 92.

[56]Jackson and Tushnet, *Proportionality, supra* note 54.

[57]Cf Dixon, *Responsive Judicial Review*, *supra* note 11; M Kumm, 'The Idea of Socratic Contestation: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law and Ethics of Human Rights* 141.

[58]See M Hailbronner and L Kujus, 'Comparative Political Process Theory in the European Court of Human Rights' (WIP, 2023). See also Dixon and Hailbronner, *supra* note 11.

European Court of Human Rights, whereas in other cases, the appropriate margin would depend on a range of factors, including the presence of other sources of democratic dysfunction.[59]

However, there are also elements of CRRT-informed proportionality analysis that are procedural and substantive in nature. Judicial judgements about narrow tailoring, for example, are ultimately semi-procedural in nature: they involve courts identifying alternative legislative approaches that are at least plausibly as effective, and yet more rights protective, than the approach taken by the legislature. However, because courts ultimately afford some deference to, or a margin of appreciation, to the legislature on these questions, the role of courts is at once procedural and substantive. The substantive judgement involves courts identifying an alternative regime as plausibly effective, and the procedural judgement involves a finding that the legislature did not give adequate attention or consideration to this alternative.

Another doctrinal implication of CRRT involves a preference for a mix of 'strong' and 'weak' judicial remedies, or at the very least, careful attention to remedial issues – and an approach to them that is explicitly democracy-sensitive. As Po Jen Yap and I note in our article, *Responsive Judicial Remedies in Asia*, there is now a wide range of remedies courts can deploy in engaging in a process of constitutional judicial review – globally and in Asia. CRRT further suggests that courts should deploy remedies strong enough to counter the particular democratic dysfunction underpinning a constitutional complaint, but weak enough to avoid creating damaging forms of institutional backlash or reverse democratic inertia. In this way, we also link the idea of CRRT to ideas about constitutional dialogue and strong–weak and weak–strong judicial review.[60]

In *Reading Ely in Tokyo*, Yvonne Tew likewise emphasizes the importance of 'judicial statecraft' as a factor informing the success of efforts by courts not only to protect and preserve democracy, but also to help construct successful democratic transitions.[61] Statecraft, for Tew, also consists of several elements: judicial approaches that involve a mix of strong and weak review, engagement with elites and broader civil society and a carefully constructed *narrative* or set of rhetorical choices about what the court is in fact doing.[62]

Tew also introduces a new and interesting way of distinguishing between decisions that are weak–strong versus strong–weak in approach: decisions that are legally narrow but substantively strong, she labels 'mini-maximalist' in character. Indeed, she suggests that narrow reasoning is often most effective, in this context, where it involves an emphasis by courts on legal precedent and continuity. In addition, decisions that are

[59]Hailbronner and Kujus, *supra* note 58.

[60]Dixon and Yap, *supra* note 49; Cf PJ Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015); P Hogg and A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35(1) *Osgoode Hall Law Journal* 75; R Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391; R Dixon, '*The Supreme Court of Canada, Charter Dialogue, and Deference*' (2009) 47(2) Osgoode Hall Law Journal 235. On weak form review, see M Tushnet, *Weak Courts Strong Rights* (Princeton University Press, 2008); R Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 904. For a more critical account, see A Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66(1) *University of Toronto Law Journal* 83.

[61]Y Tew, 'Reading Ely in Tokyo' (WIP, 2023). See also Y Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press, 2020).

[62]Tew, *Constitutional Statecraft in Asian Courts*, *supra* note 61.

substantively broad and strong, but remedially weak, she labels 'maxi-minimalist'. Echoing work by Sam Issacharoff and myself on this topic, she suggests that decisions 'ai[d] a fragile court in delaying or avoiding immediate public or political assaults, while building up institutional strength for stronger judicial assertions in future confrontations with the political branches'.[63]

But again, weak judicial remedies can take more or less substantive or procedural forms. A classic form of weak–strong remedy is a suspended declaration of incompatibility: remedies of this kind are squarely substantive, but they give legislatures additional time and political opportunities to define a preferred response to an exercise of representation-reinforcing judicial review. However, other weak–strong remedies can be viewed as far more procedural in character. For example, 'engagement'-style remedies require executive actors to go through certain processes of consultation before a final decision can be reached. Moreover, it is the failure to undertake consultation of this kind that gives rise to a decision to set aside a prior action as unconstitutional.

A third important doctrinal question facing courts is the question of the scope or outer limits of judicial review, and whether courts can or should review certain forms of 'political questions'.[64] In the United States, the Supreme Court has long held that the federal judiciary cannot review such questions, whereas in most countries, courts take a broader view of their own jurisdiction, but a flexible approach as to whether they will review such questions in a particular case. Indeed, as Erin Delaney notes, they employ alternative jurisprudential devices for 'avoidance', which allow such judgements to be made on a more case-by-case basis.[65]

CRRT also points to the value of this latter approach: like Ely's own theory of representation reinforcement, it rejects any strict division between law and politics. It further suggests the importance of courts responding to a range of political threats to the health of democratic processes and functioning – including risks not envisaged by Ely and risks that Ely foresaw but regarded as too thorny for judicial involvement.[66]

Traditional notions of the political question doctrine, for example, suggest that courts cannot or should not review the validity of proposed or actual constitutional amendments. According to this view, amendments represent an exercise of constituent power, or popular sovereignty, which is before rather than subservient to a court's own legal power and authority.[67] Alternatively, judgements of this kind would involve courts entering the 'political thicket' in ways that undermine the distinction between constitutional law and politics.

Scholars working in or adjacent to CRRT, however, have directly challenged these ideas: Yaniv Roznai, for instance, has argued that constitutional amendments reflect the exercise of delegated or 'secondary' forms of constituent power and, hence, that it is legitimate for courts to enforce limits on the scope of that power, by reference to the gap

[63]Id at 11, citing R Dixon and S Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 2016(4) *Wisconsin Law Review* 683 and Y Tew, 'Strategic Judicial Empowerment' (2023) *American Journal of Comparative Law* (forthcoming).

[64]E Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Journal* 1.

[65]Id.

[66]See Gardbaum, *supra* note 10; Petersen, *supra* note 11; Landau and Cepeda Espinosa, *supra* note 11; Dixon, *Responsive Judicial Review*, *supra* note 11.

[67]See, for example, W Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) 48(3) *The Review of Politics* 401.

between primary and secondary constituent power.[68] Others, such as Amal Sethi and Sergio Verdugo, have challenged the very idea of constituent power as a useful organizing device.[69] In addition, almost all CRRT scholars point to the inherent fluidity of the law – politics distinction. Because of this, CRRT proponents also argue for the desirability of courts playing a role in policing the legitimate boundaries of formal constitutional change, including through processes of formal amendment.

Often, this will take the form of courts applying an 'unconstitutional constitutional amendment' doctrine (UCA), which imposes substantive and procedural limits on the scope for formal amendment powers.[70] However, it can also involve courts imposing purely procedural limits, for example, by insisting that certain amendments are invalid because of how they are proposed, debated, or approved.[71]

Hence, one of the decisions explored in detail in the symposium is the decision of the Supreme Court of Kenya in the *BBI Case*.[72] This case involved a successful challenge to various proposed amendments to the Constitution of Kenya initiated by former President Kenyatta. The proposals were struck down by the High Court and Court of Appeal applying a form of the UCA doctrine. However, the Supreme Court relied on a narrower, more procedural reason for invalidating the amendment: it held that they had been improperly proposed by the President, when the Constitution set out exclusive procedures for the proposal of amendments – either by Parliament or popular initiative.[73] Gautam Bhatia ties this approach by the Supreme Court of Kenya to a version of CRRT. In effect, the Court's decision in the *BBI Case* imposed additional obstacles on attempts by President Kenyatta to undermine electoral and institutional pluralism, but without purporting to prevent all such change.

However, to describe the decision as purely procedural would be a misnomer: in focusing on the procedures for constitutional change, rather than substantive limits on such change, the Supreme Court of Kenya was arguably threading the needle between an overly weak or strong review, from a prudential perspective. A decision of this kind was, in contrast, clearly representation reinforcing in nature.[74]

The less confusing term for modern, neo-Elyian ideas, I suggest therefore, is in fact the language of judicial representation reinforcement. The label avoids any (false) claim to theoretical or political neutrality. Further, it is broad enough to embrace all the varieties of judicial review in aid of democracy protection and promotion – whatever form of precise focus they may have or take. It is, in a sense, the larger envelope that can include sub-strands of debate about the virtues of more or less substantive versus procedural, or strong versus weak, approaches to judicial representation reinforcement.

[68]Y Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (Oxford University Press, 2017).

[69]See S Verdugo, 'Is it time to abandon the theory of constituent power?' (2023) 21(1) *International Journal of Constitutional Law* 14; A Sethi, 'Looking Beyond The Constituent Power Theory: The Theory of Equitable Elite Bargaining' (2023) *Global Constitutionalism* (forthcoming).

[70]See D Landau, Y Roznai and R Dixon, 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' in A Baturo and R Elgie (eds), *Politics of Presidential Term Limits* (Oxford University Press, 2019); Dixon and Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *supra* note 16.

[71]See, for example, R Dixon and F Uhlmann, 'The Swiss Constitution and a weak-form unconstitutional amendment doctrine?' (2018) 16(1) *International Journal of Constitutional Law* 54.

[72]G Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (forthcoming, 2023).

[73]*Constitution of Kenya* 2010, Arts 256–7.

[74]Dixon, *Responsive Judicial Review*, *supra* note 11; Bhatia, *supra* note 72.

Judicial representation goes global? Frontiers and limits

What is the ultimate reach of these ideas or CRRT as a theory of comparative constitutional review? As part of this, and earlier symposia, CCS scholars have questioned the relevance or usefulness of CRRT to jurisdictions in the Global South and North that conceptualize their own constitutional project as transformative in nature.

Transformative constitutionalism implies a quite broad and ambitious role for constitutional courts in promoting a more inclusive and materially just democratic system – a role that goes far beyond what both Ely and many modern CRRT proponents envisage.[75] Hence, a range of scholars have questioned the usefulness of CRRT to jurisdictions – such as South Africa, India or Colombia – in which the dominant understanding of the constitutional order is transformative in nature.

However, in his thoughtful essay, *Transforming Process Theory*, James Fowkes suggests that CRRT may, in fact, still have some value even in these contexts.[76] Specifically, he suggests that for transformative constitutionalism to succeed, it needs to encourage a dynamic conception of the judicial role (such as that advocated by David Landau),[77] whereby courts intervene to counter political dynamics that may be undermining social and economic transformation, but then recede from view, as the political branches become more able to take an active role in leading this ongoing process of transformation. In addition, CRRT, he suggests, offers important conceptual and intellectual resources for thinking about this kind of dynamic, democracy-sensitive role.[78]

Another important question facing representation reinforcement theory concerns the role of transnational institutions, including courts such as the European Court of Justice or the European Court of Human Rights. In countries such as Hungary and Poland, one of the big questions has become how the EU and adjacent transnational institutions can respond to the erosion of democracy within Europe, either through sanctions or expulsion.[79]

However, another strand of comparative representation reinforcing theory looks at the role of transnational courts. Some scholars have expressed scepticism about the capacity of transnational institutions or courts alone to protect and promote democracy,[80] but as Michaela Hailbronner and Lisa Kujus show in their essay on *Comparative Representation Reinforcement Theory in the European Court of Human Rights*, there may be conditions under which courts have greater promise as agents of democratic representation reinforcement. One is a history of institutions being created with these goals in mind: Hailbronner and Kujus show compelling evidence of this in the case of the European

[75]See, for example, K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146, and discussion in Dixon and Hailbronner, *supra* note 11; J Fowkes, 'A Hole Where Ely Could Be: Democracy and Trust in South Africa' (2021) 19 *International Journal of Constitutional Law* 476; RN Ortega, 'John Hart Ely in the Mexican Supreme Court' (2021) 19 *International Journal of Constitutional Law* 533.

[76]J Fowkes, 'Transforming Process Theory' (WIP, 2023).

[77]Landau, 'A Dynamic Theory of the Judicial Role', *supra* note 36.

[78]Fowkes, *supra* note 76. I express strong agreement with this view in Dixon, *Responsive Judicial Review*, *supra* note 11.

[79]See, for example, T Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28(4) *Res Publica* 693; W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider' (2010) 16(3) *Columbia Journal of European Law* 385.

[80]See, for example, T Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge University Press, 2017).

Court of Human Rights. Another is the degree of existing support for such an approach in a transnational court's jurisprudence.[81]

In other contexts, CRRT may have more limited relevance or applicability, yet legal and political elites may still invoke it as a defence of the legitimacy of certain forms of judicial review. This may be done in good faith but out of a mistaken belief that CRRT applies to all countries and cases – even those where basic preconditions of judicial power and independence are not met.[82] Or it could involve an exercise of bad faith, or form of 'abusive' constitutional borrowing of these ideas in the service of anti-democratic constitutional change.[83] As Landau and I note, constitutional theories as well as doctrine often travel across national borders, in ways that serve both to bolster democracy and, in the wrong hands, legitimate attempts to undermine it.

The line between these two cases may also be a fine one. For instance, in his essay in this symposium, Amal Sethi advances arguments *in favour* of courts upholding a UCA doctrine as a means of protecting democracy and democratic processes.[84] Thus, he highlights the role of the 'basic structure' doctrine in early Indian cases, in setting limits on the arbitrary exercise of executive power. However, he also notes the dangers of judicial over-enforcement of these doctrines. Indeed, he suggests that India may currently be witnessing the application of the doctrine in ways that, at best, are misplaced, and at worst are 'self-aggrandizing' or even 'abusive' in nature.[85]

The promise, and limits, of CRRT across these various contexts is a deeply important question, but also one that invites further scholarly dialogue and debate. Ultimately, the symposium offers just a slice of what a modern comparative representation reinforcing theory might involve or look like. It is the beginning, not the end, of a conversation on new ways of thinking about the relationship between judicial review and democracy.

However, it is an invitation to scholars around the world to continue thinking about what courts can and should contribute to a project of democratic representation reinforcement in an age of increasing doubt about the legitimacy and effectiveness of courts as agents of progressive social change and democratic resilience.

The framing of that conversation also matters: courts will often need to go beyond a focus on democratic procedures, or procedural doctrines and approaches alone, to protect democracy.[86] Hence, as scholars, we should embrace language that invites attention to substantive and procedural forms of judicial review. This article also suggests that this is the language of comparative representation reinforcement.

[81]Hailbronner and Kujus, *supra* note 58 (analysing the EctHR's existing jurisprudence in CRRT terms). Cf also R Dixon and T Roux, 'Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa' in T Ginsburg and AZ Huq (eds), *From Parchment to Practice: Implementing New Constitutions* (Cambridge University Press, 2020).

[82]Landau and Dixon, 'Abusive Judicial Review', *supra* note 7.

[83]Dixon and Landau, *Abusive Constitutional Borrowing*, *supra* note 25.

[84]A Sethi, 'Expeditions in Exercise of Judicial Power: The Comparative Political Process Theory and Judicial Invalidation of Constitutional Amendments in India' (WIP, 2023).

[85]Id. See also R Abeyratne and PJ Yap, 'Constitutional Dismemberments, Basic Structure Doctrine, and Pragmatic Justifications in Context: A Rejoinder' (2022) 20(2) *International Journal of Constitutional Law* 905. Cf Landau and Dixon, 'Abusive Judicial Review', *supra* note 7.

[86]Gardbaum himself acknowledges this in his contribution to the symposium.

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