DOES WHAT WE KNOW ABOUT THE LIFE CYCLE OF DEMOCRACY FIT CONSTITUTIONAL LAW?

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The empirical political science relating to the survival of republican government has not been incorporated into constitutional law. Although specific protections in the Constitution are often hailed as essential for democratic society, the broader issue of what may be necessary to protect American democracy has received little attention, either in the context of the Republican Government Clause or elsewhere.

Political scientists are posing a particularly strong challenge to constitutional law because one of the strongest conclusions to emerge from their study of the breakdown of democratic government has been the importance of a reasonably egalitarian society with a reasonable division of resources among the population.

For constitutional law, the first problem is whether such research is even relevant to constitutional analysis. Even if it is, it runs directly counter to the insistence on judicial restraint in economic matters that has dominated much constitutional thinking since early in the twentieth century. Although the Rehnquist Court reinvigorated some protections for the accumulation of wealth, the thrust of empirical findings are to protect the distribution of wealth and not merely its accumulation.

This Article addresses those issues and argues, contrary to the dominant paradigm, that constitutional law should incorporate those empirical findings.

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I. INTRODUCTION: THE CHALLENGE

The empirical political science regarding the survival of republican government has not made it into constitutional law. Although specific protections in the Constitution are often hailed as essential for democratic society, the larger issue of what may be necessary to protect American democracy has received little attention, either in the context of the Republican Government Clause or elsewhere.

By contrast, the study of democracy by political scientists has made enormous strides with the appearance and decline of a multitude of more or less democratic governments in the last half of the twentieth and beginning of the twenty-first centuries.

That body of work presents a challenge to constitutional law because it addresses the issue of economic equality for which constitutional law has not made a place. For constitutional law, the first problem is whether that research is even relevant to constitutional analysis. Even if it is, it runs directly counter to the insistence on judicial restraint in economic matters. In the face of those issues, the question is whether the vastly increased knowledge of why democracies arise, survive, or die, has anything to contribute to constitutional law, and if so, how constitutional law can or should take account of those developments.

American constitutional law is bathed in the light of the Federalist Papers. Written as an argument for the adoption of the Constitution in 1788, they embodied the best of eighteenth century thinking about democracy, particularly with respect to the separation and division of powers. The American Constitution improved on...
received ideas about the ways that power should be shared among the branches of government and between national and local bodies. Hamilton, Madison, and Jay gave those improvements an elegant explanation and defense. American courts have assumed in turn that the success of our Constitution is sufficiently explained by its structure and by the explanation in The Federalist.5

Empirical science has told a different story. It turns out that little seems to depend on whether a nation adopts a presidential or a parliamentary system.6 Indeed, presidential systems may be more prone to coups, takeovers, and surrender to a variety of authoritarian systems than parliamentary ones. The best that can be said for presidential systems is that it is somewhat difficult to tease out the tribulations of presidential systems from the Latin American nations in which they have so often failed but which have many other problems in keeping democracy when they have it.

Federal systems have fared only slightly better, though there are battles raging among political scientists about them as well. Some blame federal systems for disunion and civil war. Others argue that federal systems relieve tensions that would tear nations apart. But nothing in the disagreements among political scientists supports a particular kind of allocation of national and local powers.7

Empirical work has shown the importance, instead, of several

5. The literature on the Federalist Papers and the use of them by the Court is enormous. Some of the more recent contributions which review the literature include Ira C. Lupu, The Most-Cited Federalist Papers, 15 CONST. COMMENT. 403 (1998) (identifying which papers the justices have relied on); Gregory E. Maggs, A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution, 87 B.U. L. REV. 801, 802-03 (2007) (reviewing the Court's attention to the papers and suggesting that the justices have poorly understood the material they cited); J. Christopher Jennings, Note, Madison's New Audience: The Supreme Court and the Tenth Federalist Visited, 82 B.U. L. REV. 817 (2002) (describing the extensive secondary literature on the Court's use of THE FEDERALIST NO. 10 (James Madison)). For use in a pair of recent cases, see, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006) (quoting THE FEDERALIST NO. 47 (James Madison) on the separation of powers); id. at 675 n.8 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 28 (Alexander Hamilton)); id. at 679, 691 (Thomas, J., dissenting) (quoting THE FEDERALIST NOS. 47 (James Madison), 70 (Alexander Hamilton)); Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting) (quoting THE FEDERALIST NO. 45 (Alexander Hamilton) on federalism); id. at 65, 66 n.5, 69 (Thomas, J., dissenting) (quoting THE FEDERALIST NOS. 33, 44, 45 (Alexander Hamilton)).


factors that are not detailed in the American Constitution or explained by the Federalist Papers, even though some of the Founders did have thoughts about what would turn out to be important. Empirical work has focused most heavily on the importance of a reasonably egalitarian society with a reasonable division of resources among the population, as well as a sense of community and a culture of democracy.

The Supreme Court would not have been surprised by the theories about the relevance of public opinion for the survival of democracy that were developed around the middle of the twentieth century. Although it had denied that schools were any place for a "pall of orthodoxy" during the Second World War, and although


11. See, e.g., NIE, JUNN & STEHLIK-BARRY, supra note 10 (discussing the effect of education on political participation).

12. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or
what it thought important to teach may be counterproductive, the Burger Court described indoctrination as one of the purposes of public education. But the Court has had less to say about the relationship between either community or equality and the survival of democratic government.

Thus the modern recovery of the sources for the survival of democratic government poses a challenge to constitutional law.

The next section will explore the relevant findings from political science. The succeeding sections will examine whether there is constitutional warrant for taking account of these findings, and whether the history of constitutional law counsels avoidance.

II. POLITICAL SCIENCE INSIGHTS INTO THE SURVIVAL OF DEMOCRACY

There are many threats to democracy from internal and external sources and combinations of them. But one of the most prominent and consistent findings of modern political science has been the relation between democracy and wealth. Although the founding generation talked about both egalitarian ideology and a reasonable dispersion of wealth as important for the young republic, most political scientists would trace the modern concern over economic disparities to the comments of Seymour M. Lipset in 1959. Lipset basically presented a correlation: wealthy countries were much more likely to be democratic; poor countries were quite unlikely to be


14. The concept of compelling government interests would seem to address community, but the interpretive approach of the Rehnquist and Roberts Courts has turned away from functional analysis in favor of textualism, which squeezes out conceptions of community. I have argued that implicit functional distinctions underlie the Court's formalism, but the vocabulary has changed. See Stephen E. Gottlieb, The Paradox of Balancing Significant Interests, 45 HASTINGS L.J. 825 (1994).


...democratic. Two outliers were difficult to explain: Germany between the wars because it was relatively wealthy, although suffering from a severe economic depression, and India because it was very poor and largely illiterate.

This hypothesis has been confirmed by large scale international studies. In 1994, Vice President Al Gore convened a State Failure Task Force, a group of political scientists both inside and outside of the government, working with the Central Intelligence Agency, to figure out, if it could, the chances that countries would "fail"—that is, would become engulfed in civil war, be taken over by a coup, or otherwise become autocratic.

The Task Force reanalyzed its own data to focus only on the thirty-five cases in its database from 1955 to 1996 in which democratic governments had been replaced by autocratic ones. When they took that closer look, two variables stood out as best predicting the survival of democracy, accounting for seventy-five percent of all the instances in which democracy had been replaced by autocracy. The first was infant mortality, which powerfully predicted the failure of democracy, and which the Task Force interpreted as an indicator of widespread poverty and serious infrastructure problems. The other was the length of time in which the country had been governed as a democracy. In effect, democracies which provided a decent quality of life survived.

20. Id. at 59-62.
21. Id. at 62.
22. Id. at 56-57.
23. Id. at 62.
24. See id. at 66-67. It should be noted for non-specialists that statistical data of this type rarely explains more than a portion of the variance. Social scientists are ecstatic when they find relationships that explain even a large minority of the cases. In this case, the Task Force was looking for correlations, not causes. Causes are likely to show up in correlations, but many correlations do not turn out to be causal. Moreover, correlations only show up when human beings are able to conceptualize what might be relevant and create appropriate data. For example, we do not have a database that accounts for the individual decisions of those in power to protect or scuttle democracy. So the Task Force data is important, but one should not make the mistake of believing that they have identified everything that matters. Gary King and Langche Zeng suggest that there is a burden on those who would identify causes not in the Task Force data. Given the scope of the Task Force study, there is practical sense in that comment.

Infant mortality also reflects the poverty of the people. Extreme poverty not only breeds dissatisfaction, it makes people more willing to accept bribes for votes,
It is not clear that the Task Force would have reached the same conclusion if it had examined the failures of democracy in the first half of the century.\textsuperscript{25} The countries that tried democracy and failed in the first half of the twentieth century were in fact among the wealthier countries of the world. Although some had faced serious economic difficulties, those countries were generally improving at the time of the takeovers.

That early twentieth century data confirm that national or average wealth is neither a necessary nor a sufficient condition for democracy. Still, post-World War II data make clear that wealth is important. Per capita wealth is one of the strongest predictors of democracy.\textsuperscript{26} The poorest countries provide the least fertile soil for democracy and rising income stabilizes their democracies.\textsuperscript{27} Usually, contests over political systems in more economically developed countries are less deadly.\textsuperscript{28} Democracy has been very stable in the richest countries.

It is less clear from their data whether the reason for that stability has been the absolute level of wealth or the extent to which wealth is dispersed or concentrated in the society, insofar as the two have tended to run together. Robert Dahl wrote that “we indeed do find an extraordinarily strong correlation between economic well-being and democracy,”\textsuperscript{29} but went on to explain that more was involved than merely wealth:

[W]e must not misread the evidence . . . . Democracy requires . . . a widespread sense of relative economic well-being, fairness, and opportunity, a condition derived not from absolute standards but from perceptions of relative advantage and deprivation.\textsuperscript{30}


\textsuperscript{26} Powell, supra note 6, at 35-38, 71 (showing a strong correlation between economic development and participation).

\textsuperscript{27} Id. at 35-37.

\textsuperscript{28} Id. at 69-71.


\textsuperscript{30} Id. at 45-46. In a very interesting study of the durability of constitutions, Tom Ginsburg, Zachary Elkins & James Melton, The Lifespan of Written Constitutions 16 (Center for the Study of Democratic Governance, Working Paper No. SES-0648288, 2007), http://jenni.uchicago.edu/WJP/Vienna_2008/Ginsburg-Lifespan-California.pdf, found that economic development also correlated with the longevity of constitutions, including both democratic and authoritarian constitutions. Robert MacCulloch, Income Inequality and the Taste for Revolution, 48 J. L. & ECON. 93 (2005), reports from polling data that the preference for revolution increases with inequality.
Disparity matters. Indeed, focus on inequality brings the data from the first and second halves of the twentieth century much more in line.

Whether wealth, as Lipset initially described it, or disparity, as Dahl discussed it, is critical for democracy, makes a significant difference with respect to the implications for constitutional law. If the question is whether America is wealthy enough, then it seems unlikely that there is cause for concern, and even if there were, it seems unlikely that constitutional law would have anything to contribute. But if the issue is disparity, neither conclusion is as easy to reach. America may be headed toward considerably greater disparities in wealth, and there are ways that constitutional law has and could deal with such disparities. So how this issue is resolved in political science can make a difference in how issues of constitutional law should be resolved.

A second, complementary strand in political science has been historical. Juan Linz and Alfred Stepan brought together a number of investigators in a four volume set on the breakdown of democracy in many European and Latin American countries. They found that a common theme among the many countries that had, but then lost, democratic institutions, was the way that powerful elites, fearing attacks on their wealth, circled their wagons against more popular parties.31 Nancy Bermeo followed with a powerful reinterpretation of the data that focused even more tightly on the actions of the elites rather than the part played by the masses.32

A third strand emerged from game theory. Daron Acemoglu and James A. Robinson spelled out how disparities in wealth create incentives that lead elites to fight against democracy with all the weapons at their command.33 Based on data from 1850 to 1990, Carles Boix developed a model that described a path of relationships between equality and democracy that underscored both the historical insights of the Linz and Stepan studies and the game theory insights of Acemoglu and Robinson.34 Boix concluded that the likelihood of democracy increased with increasing equality.35 Although these studies differed with respect to some predictions, both the Boix and Acemoglu-Robinson studies found that greater equality diminished the incentives of elites to repress democracy and increased the costs to them of doing so. Great inequalities encourage the wealthy to

31. See Linz, supra note 6, at 11-13.
35. Id.
circle their wagons against the public.36

A fourth strand of research has focused on the ways that great inequalities make the poor more vulnerable, and therefore more willing, to be bribed for their votes or be available for use as thugs to coerce the population.37 Both pathologies were extensively reflected in the heyday of American political machines prior to the New Deal.38

Tatu Vanhanen has developed a fifth strand of research, which could be summarized as Murphy's Law of democracy—whoever can suppress democracy and rule will.39 Vanhanen has written a series of books showing correlations between the degree to which nations are democratic and indexes of the degree of concentration or dispersal of resources.40 He has tried to improve the explanation and the data in

36. CHUA, supra note 8, at 11 (describing this in the context of combined class and ethnic differences, globalization and democracy).
each book, but has been steadfast with respect to his theory. Vanhanen is widely known among political scientists outside of the United States and plays a significant role in the International Political Science Association; however, he is known to relatively few American political scientists. As he describes in his latest study of democratization, he was much influenced by Lipset's seminal work describing the relationship between wealth and democracy.\textsuperscript{41} But Vanhanen was intrigued by the example of India, which has remained democratic since independence despite its great poverty. His studies emerged from the effort to solve that puzzle.\textsuperscript{42}

In each of his studies, Vanhanen has relied on extensive measures of the resources of democracy.\textsuperscript{43} His basic hypothesis was well stated in his 1984 study:

[D]emocratic institutions cannot be expected to succeed in circumstances in which power resources are highly concentrated, whereas the emergence of democracy is highly probable in societies in which crucial power resources are widely distributed among the

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41. See Lipset, Political Man, supra note 17.

42. Democratization, supra note 40, at 1; see id. at 7-24 (reviewing the literature on the wealth and modernization hypotheses).

43. Vanhanen based his measure of democratization on the work of Robert Dahl, and focused on competition and participation. Vanhanen measured competition by the smaller parties' share of votes in elections. He measured participation by the percent of population who voted. A country with a small electorate may be an aristocracy; it is not a democracy. And a country with little competition may be one of many kinds of one-party and autocratic regimes, but it is not a democracy. Vanhanen multiplies these two percentages to get an index of democratization. He changed his definition of participation for Democratization, supra note 40, at 4, by including participation in referenda. See also Emergence of Democracy, supra note 40, at 38.

This measure of democracy is outcome-based. Vanhanen does not define democracy in a simply procedural way. Instead, he asks if the procedures are working. We know, for example, that democracy is often corrupted by fudging the count. Competition is also minimized by restrictions on campaigning, barring popular individuals from appearing on the ballot, and other measures designed to prevent elections from reflecting the will of the people. Vanhanen assumes this will be reflected in the share of power of the minority parties. Similarly, Vanhanen's focus on the size of the voting population is designed to distinguish aristocracy from democracy. If those in power restrict either the electorate or the power of the minority, to that extent, the country is less of a democracy.

Among equally competitive countries, this measure of democratization favors those countries in which a larger share of the public participates in elections. However, Vanhanen's measure correlates well with broader categories of change to non-democratic forms like coups, takeovers, military government, etc.
competing groups and sections of the population.44 That is, whoever can take power probably will.

Vanhanen bases his work on an extension of the theory of natural selection by Charles Darwin.45 His basic point is that groups compete for power, and groups with sufficient resources take power from competitors. The Darwinian claim is likely to bother American empiricists.46 While the American empiricists' measurements reveal whether countries are democratic and various other conditions prevailing in each country, they resist large jumps from description to explanation, especially when the explanation is based on observations in a different field. There have also been a number of criticisms of the indices Vanhanen used to test his argument.47

Nevertheless, Vanhanen's central insight is important because it focuses on power instead of motives. Studies have now suggested that revolutions are generated by the resources to wage them.48 And Carles Boix points to the degree to which people can solve the collective action problem as critical to the likelihood of revolution or takeover.49 In other words, payoff matrices and the likelihood of action are always in flux, which makes Vanhanen's focus on power an important corrective to models focusing on motives.

44. EMERGENCE OF DEMOCRACY, supra note 40, at 129. Also see Vanhanen's 2003 work, DEMOCRATIZATION, supra note 40, at 1-2, in which he introduces another hypothesis: nations tend to become democratic at about the same level of resource distribution. Id. at 5. Because, in common with many who have looked at his work, I find his theory stronger than his data, I have not taken that second hypothesis too seriously.


46. And it has. See id. at 3-4.

47. See PROSPECTS FOR DEMOCRACY, supra note 40, 277-343 (providing commentary on Vanhanen's work by a variety of social scientists). Vanhanen's datasets do not directly measure the distribution of resources because only some resources are easily measured. So, for example, his measure of the distribution of occupational resources actually measures modernity as a surrogate. Vanhanen himself pointed out: "It should be noted that my measures of resource distribution and measures of economic development are highly intercorrelated and partly the same." DEMOCRATIZATION, supra note 40, at 2.

48. Gary King and Langche Zeng concluded that the percentage of the population in the military, the density of population, and the effectiveness of the legislature, if any, help to predict revolution or takeover. The military population matters because "the larger the fraction of the population that has weapons and is trained in military conflict, the more risk there is that internal dissent may lead to state failure." King & Zeng, supra note 37, at 637. James Fearon and David Laitin concluded that poverty, political instability, rough terrain, and large populations favor insurgency and civil war and are crucial for the overthrow of regimes. In other words, what matters most is the opportunity to rebel. If people have the opportunity to take power, watch out. Everything else is an excuse. James D. Fearon & David D. Laitin, Ethnicity, Insurgency, and Civil War, 97 AM. POL. SCI. REV. 75, 88 (2003).

49. BOIX, supra note 34, at 13-14.
Together, all these strands of political science converge on the relationship between inequality and the likelihood that democracy will break down. The fact that such different approaches yield complementary results adds considerable weight to their findings. All of this work counsels against the self-satisfying conclusion that we are bound to be different from Germany and other eastern European countries between the wars, or Paraguay and other southern hemisphere countries after. It is also important because it brings together the various and persistent observations that large economic inequalities endanger democratic government. These suggest an economic dimension to constitutional law that has been denied in prior scholarship and opinions on constitutional law.50 Democracy, as Vanhanen argues, is threatened by concentrations of power, economic or otherwise.

III. THE U.S. SUPREME COURT'S APPROACH TO DEMOCRACY AND EQUALITY

American law and American courts had been moving away from protection for economic rights from 1937 until the Rehnquist Court gave the area a new look.51 While reexamining economic rights, the Rehnquist and Roberts Courts have been moving decisively away from any protection for the egalitarian elements of American society in constitutional, statutory, and common law.52

This has been true of its decisions dealing directly with participatory rights.53 It has diluted the standard for apportionment of legislative districts,54 refused to address gerrymandering,55 narrowed the protection of minority voters,56 and stopped the count in a presidential election.57 Most recently, it accepted a financial

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50. See, e.g., Dandridge v. Williams, 397 U.S. 471, reh'g denied, 398 U.S. 914 (1970) (holding that state regulation limiting welfare under AFDC to $250 regardless of family size and need did not violate equal protection clause).


barrier to voting considerably steeper than the poll tax found unconstitutional in *Harper v. Virginia State Board of Elections*.

The movement away from protecting the weak and powerless has been strong in the Court’s handling of fields of law that are not generally treated as constitutional, but which affect the distribution of wealth and personal autonomy, from the enforcement of arbitration clauses in contracts of adhesion to the hobbling of regulatory systems. The Rehnquist Court developed a lengthy record of removing regulatory restraints and protections for ordinary folk and imposing significant costs of regulation on the government via takings law. The Roberts Court has continued that trend. To give a few recent examples, the Court has eliminated protection for employees narrowed the reach of state law by expansive interpretation of the preemption created by federal statutes narrowed the enforceability of federal anti-discrimination law with procedural barriers eviscerated the federal antitrust laws and denied access to federal wage and hour guarantees.

This trend cannot be described as required by clear and unavoidable rules, doctrine, legislation, or constitutional clauses. For example, in 2001, the Court applied a 1925 federal arbitration statute to employees who were excluded when the statute was enacted, and did it by elaborate textual analysis to avoid having to

62. Id. at 61.
interpret the word "commerce" in the same way in the clauses defining inclusion and exclusion.\(^{68}\) Plainly the Court wanted to have its own arbitration policy in favor of corporations regardless of the congressional intent to exclude employees.

Similarly, in *Ledbetter v. Goodyear Tire & Rubber Co.*,\(^{69}\) the Court reversed the longstanding interpretation of the great majority of lower federal courts that allowed employees to complain about pay differentials after they were discovered,\(^{70}\) and held instead that the employees had only a short period to make the discovery,\(^{71}\) thus effectively making litigation over discrimination in pay impossible. Again, this was Court policy making. Nothing was inevitable about the decision other than the determination of the people on the Court to change the law.

One can credit the effort to prevent voting fraud by means of an approved form of identification in *Crawford v. Marion County Election Board.*\(^{72}\) But the cost and burdens imposed on voters to get it and the lack of an alternative to the time and expense for the elderly, poor, and disabled were unnecessary to the objective of getting an approved form of identification.\(^{73}\) And those elaborate requirements clearly discouraged some of the most vulnerable from voting. Those burdens could pass muster only by minimizing the scrutiny required by a lengthy series of prior decisions for restrictions on voting.\(^{74}\)

These cases are examples of a trend to remake American law in a conservative image.\(^{75}\) And yet, if the findings of political scientists are correct, they suggest the importance of recapturing the Founders' emphasis on equality as the central bastion of democratic society, and of re-conceiving aspects of constitutional law to enable those developments. This disjunction of empirical work and theory is important for constitutional law. It suggests the inadequacy of the received model of the separation and division of powers, though those models have value in the American context. Other models, which have not always been treated as aspects of constitutional law, may be

\(^{69}\) 550 U.S. 618 (2007).
\(^{70}\) See *id.* at 644-46 (Ginsburg, J., dissenting).
\(^{71}\) *Id.* at 621 (majority opinion).
\(^{72}\) 128 S. Ct. 1610 (2008).
\(^{73}\) Compare *id.* at 1620-23 (describing the justification for burdens on voters), and *id.* at 1628-40 (Souter, J., dissenting) (noting that burdens on voting must be strictly scrutinized), with *id.* at 1644-45 (Breyer, J., dissenting) (finding that the burdens outweigh the state's objective).
\(^{74}\) See *id.* at 1615-16 (majority opinion); *id.* at 1624 (Scalia, J., concurring); *id.* at 1627-28 (Souter, J., dissenting); *id.* at 1643 (Breyer, J., dissenting).
\(^{75}\) See supra notes 60-67.
essential in protecting democratic government here because of the growth of inequality in America.\textsuperscript{76}

In order to assess the significance of this information, we will explore in the next section whether and how the Constitution supports the use of these insights, after which we will explore whether the history of constitutional law suggests that incorporating these findings into constitutional law would be a greater problem than the problems that incorporating these findings into constitutional law might solve, and conclude by discussing whether all matters.

IV. DOES THE CONSTITUTION PROTECT DEMOCRACY-PRESERVING MEASURES?

This section relates the political science of preserving democratic government with constitutional requirements. Before specifying the links more precisely, it is important to refer first to the foundations in the Constitution's numerous clauses concerned with democracy.

The Founders protected a "Republican Form of Government"\textsuperscript{77} and, whatever play that concept allowed in the system, it clearly depended on respect for popular elections at some level in the system.\textsuperscript{78} The political science is about those elections.


\textsuperscript{77} U.S. CONST. art. IV, § 4.

\textsuperscript{78} WIECEK, supra note 2, at 17-23.
The constitutional language revolving around its representative and electoral features were the result of a struggle, which occupied more than half the Convention and a number of later Amendments. Both the Court, individual Justices, and many commentators have repeatedly explained the constitutional commitment to democratic government. As is well known, the Constitution nowhere specifically spells out a right to vote, but plainly requires elections and then hedges any discrimination among voters so tightly that the Court and numerous commentators have treated it as a well-established fundamental right. Other closely connected democratic rights are strongly protected.

Perhaps the most well-known statement of the incorporation of democracy in the Constitution is in paragraph two of the famous *Caroline Products* footnote suggesting careful scrutiny of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and giving as examples restrictions on "the right to vote, . . . the dissemination of information, . . . interferences with political organizations, . . .

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79. See U.S. CONST. art. I, § 2, cl. 1; id. § 3, cl. 1; id. § 4, cl. 1; id. art. II, § 1, cls. 1-3.

80. The discussion of the basis of representation began with the introduction of the Virginia Plan on May 29, 1787, James Madison, Notes From the Federal Convention (Tues., May 29), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 17-24 (Max Farrand ed., 1966), and continued through acceptance of the bargain over the different representation and selection methods for the two houses of Congress, often described as the Connecticut Compromise, on July 16, Madison, Notes From the Federal Convention (Mon., July 16), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra, at 15, 15-20, and was periodically revived as the Convention sought to refine the provisions and define the selection of the President, which ultimately reflected both the Connecticut Compromise and the Three-Fifths Clause. See U.S. CONST. art. II, § 1, cl. 2; CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 94-100 (1988) (describing the struggle over representation); Staughton Lynd, The Compromise of 1787, 81 POL. SCI. Q. 225, 229-50 (1966) (describing the sectional implications).

81. See United States v. Caroline Products Co., 304 U.S. 144, 152 n.4 (1938), and the cases cited in the famous paragraph two of footnote four. See also Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616, 1623-24 (2008) (plurality opinion) (discussing the standard of scrutiny while holding antifraud measures valid); id. at 1624 (Scalia, J., concurring) (same); id. at 1627 (Souter, J., dissenting) (same); Bush v. Gore, 531 U.S. 1046, 1046-47 (2000) (discussing the right to vote while stopping recount); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (invalidating waiting period); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding poll tax unconstitutional); Wesberry v. Sanders, 376 U.S. 1, 7-19 (1964) (requiring one person per vote in congressional elections).


[and] prohibition of peaceable assembly."84 Since Carolene Products, the courts have continued to hold, as outlined in paragraph two, that restrictions on political processes deserve careful scrutiny to protect democratic government.

This is, of course, ground that was plowed by John Hart Ely in his explication of the Carolene Products footnote.85 Ely's treatment of the footnote has been extensively criticized. It is important, however, to be more specific about the criticisms of Ely's treatment of the footnote. Treatment of paragraph three will be discussed below in connection with discussion of the connection between economics and democracy.86 Criticisms of his treatment of paragraph two are largely about the negative inference against strict scrutiny of infringement of other rights, particularly economic ones.87 Paragraph two gives reasons why political rights should be carefully protected by the courts, but those reasons are not sufficient to explain a negative implication regarding other rights, including economic ones. Neither the footnote nor Ely's explication of it satisfactorily explain what other rights should and should not get deferential review. And the manageability of standards and other issues catalogued in Baker v. Carr88 do not neatly distinguish between political and economic rights. The more basic claim, however, is that the Constitution is suffused with electoral and political rights and procedures that require protection. And there is much in the text of the Constitution that supports that inference, both in the explicit language of the Guarantee Clause, which applies to the states, and in the mechanisms of electoral democracy laid out in the document.

The courts have generally accepted the conclusion that they must protect the avenues of political change, both by protecting the rights of expression, press, assembly, and petition in the First Amendment, and by protecting against the entrenchment of political power, although that position has only a slim majority on the Roberts Court.89 Justices Scalia and Thomas have claimed that there is no

84. Carolene Products, 304 U.S. at 152 n.4 (internal citations omitted).
85. JOHN HART ELY, DEMOCRACY AND DISTRUST 73-183 (1980).
86. See infra notes 97-128 and accompanying text.
88. 369 U.S. 186 (1962).
theory of democracy sufficiently clear to resolve cases before the Court.\textsuperscript{90} The political science, however, is about the most basic theory of democracy—the ability to hold elections that determine who holds office. It does not appear that Justices Scalia and Thomas’ objections run that deep\textsuperscript{91} or should be credited if they did.

Perhaps the larger question in this context is whether the courts should examine the science in light of the purposes of the constitutional language or merely examine the eighteenth century text.\textsuperscript{92} There is, of course, an enormous literature on the proper way(s) to read the Constitution,\textsuperscript{93} and it would change the focus of this Article to address that question fully. But in addition to the elaborate electoral procedures canvassed above, it is worth noting that the Founders were empirically oriented, aspiring to a science of politics and government.\textsuperscript{94} The Constitution was written in what we know as the Enlightenment, a time when men, the Founders included, though skeptical of men’s motives and skills, were also modest about their own understanding as compared to what future generations would understand.\textsuperscript{95} And there is considerable evidence

\begin{itemize}
    \item districts properly drawn and one improperly drawn under the Voting Rights Act and refusing to evaluate whether they were unconstitutionally gerrymandered.
    \item See LULAC, 548 U.S. at 511 (Scalia, J., concurring in part, dissenting in part); Holder v. Hall, 512 U.S. 874, 896-903 (1994) (Thomas, J., concurring).
    \item See Crawford, 128 S. Ct. at 1624-25 (Scalia, J., concurring) (discussing the levels of scrutiny appropriate to restrictions on the right to vote).
    \item See D.C. v. Heller, 128 S. Ct. 2783, 2789 (2008) (treating the purpose of the preamble to the Second Amendment as mandating a logical connection, but not governing the extent of the coverage of the paragraph).
    \item See Larry Kramer, Fidelity to History—And Through It, 65 FORDHAM L. REV. 1627, 1629-37 (1997) (describing the views of Jefferson and Madison toward change in constitutional interpretation); Jack N. Rakove, Fidelity Through History (Or to It), 65 FORDHAM L. REV. 1587, 1608-09 (1997) (describing the Founders’ understanding of progress and of change in interpretation); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 80, at 85 (Benjamin Franklin on June 2, 1787,
that they also cared deeply about nourishing a republican society capable of protecting republican government. So it is entirely natural to apply their work with the tools of modern science in an instrumental mode of interpretation to accomplish their democratic and republican purposes with information not available to them. Ignoring the purposes of the Founders does not bring us closer to their intentions or meaning.

V. THE CONNECTION BETWEEN DEMOCRACY AND ECONOMICS

So if step one is correct—that the Constitution should be read to protect democracy and that indeed it would be bizarre if it did not—what does that imply? That brings to the fore a dispute about what the commitment to democracy entails, and specifically, whether it entails attention to distributive justice. It is important to note here that the political science described above relating distributive justice to democracy speaks to both minimalist and maximalist conceptions of democracy. The findings of political science predict a likelihood of coups, takeovers, and revolutions that completely eliminate elections. At the same time, the work of Vanhanen (among others) gauges the depth of democracy by comparing competitiveness and participation in elections. That measure ranks some democracies more highly than others and therefore offers conclusions that some would reject so long as some more basic system persists. But most of the literature focuses on the survival of democratic government at the most basic level, generating conclusions, therefore, that are philosophically more robust. And that makes the economic and distributive issues all the harder to ignore.

Again, the most famous, though flawed, statement in the legal literature of the connection between democracy and economic issues is in footnote four of Carolene Products:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. [W]ether prejudice against discrete and

expressing faith in the wisdom of those yet to come); id. at 267 (John Lansing on June 16, 1787, expressing humility about the present national government); id. at 451 (Benjamin Franklin on June 28, 1787, expressing humility about the Convention results); id. at 583 (Governor Morris, on July 11, 1787, expressing confidence in "those who come after us . . . [to] judge better of things" in their own time); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 80, at 126 (Governor Morris on July 26, 1787, concluding that it is foolish "from our short & scanty experience [to create] rules that are to operate through succeeding ages . . .").


97. See discussion supra note 43.
insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.98

Claims from footnote four of *Carolene Products* have been repeatedly criticized, including the inference that economic rights do not deserve the same protection as political, religious, and equal rights,99 and the assertion that discrete and insular groups are powerless.100 The whole of the footnote is designed to create a two-tiered constitution. But economic rights, properly defined, provide important protections. And discreteness and insularity may magnify the influence of groups with significant resources.

Justice Stone and the Court were making two kinds of connections, one causal and one philosophical, between democratic processes and statutes that treat minorities unfairly.101 The causal connection between discreteness and insularity and the curtailment of political processes for change cannot be accepted without numerous qualifications based on collective action problems,102 rent-seeking,103 and assumptions about the nature of political bargaining and trades.104 The philosophical position has fared better, but both its application and its meanings are contested.105 And the negative

101. See The Moral Tradition, supra note 93, at 159-65, for an eloquent exploration of the philosophical commitments of the *Carolene Products* Court expressed in footnote four of the opinion. See also Oppenheimer & Frohlich, supra note 76, at 86 (discussing some of the philosophical issues relating democracy and equality).
implication against economic rights has been under sustained attack. 106

Carolene Products notwithstanding, there are significant traditions that support protection for the economic foundations of democracy, including those from other countries, from the logic of American constitutional law, from the origination of our constitutional traditions, and from the text of the Constitution itself.

Several foreign constitutions explicitly require that appropriate courts “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom” when interpreting their Bills of Rights. 107 In addition, some modern commentators have cited the pragmatism and creativity of several foreign courts in developing ways to advance socio-economic rights without usurping the policy-making functions of the legislature and executive, 108 and have urged American courts to find ways to support minimum entitlements in such areas as food, shelter, and healthcare. 109 Foreign precedent will not impress those who believe that the Constitution is limited by the minds of the framers. 110 But the growth of understanding about the protection of democracy is relevant to an instrumental or consequentialist treatment of constitutional language and values. 111

Some of us have argued that the logic of American constitutional


111. See sources cited supra note 93.
law also points toward constitutional concern with aspects of distributive justice. So, for example, I have previously argued that the resort to so-called compelling interests to override constitutional text implied recognition of fundamental rights, including some economic ones. 112 Although the turn to textualism suggests a detour around that logic, I also argued that similar unacknowledged values dominate apparently textual analysis. 113 And many commentators have argued that the Court’s handling of the state action issue is logically unsustainable, with the consequence that government bears some responsibilities, economic ones included, that it has been unwilling to shoulder. 114

There is also historical support for an inference of concern for distributive justice from the protection of the democratic system. Indeed, the Founders themselves made the connection that the survival of a republican government depended on a republican population, 115 including the dispersal of property so that most of the population would have a stake in the society. 116 Egalitarian currents were strong in the colonies and young republic. 117 Republican principles were understood to imply a greater concern for the general

113. See Gottlieb, supra note 14, at 833-37.
114. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1688-1720 (2d ed. 1988); Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); see also Symposium on the State Action Doctrine, 10 CONSTITUTIONAL COMMENT. 309-441 (1993). Rehnquist himself recognized the problem in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 165 (1978), but preferred to define state action as government decisions that require the unconstitutional result. Id. at 164. Justice White, writing for the Court in Lugar v. Edmondson Oil Co., 457 U.S. 922, 933 (1982), corrected Flagg Brothers, making it clear that the state bore responsibility for its statutes and redefining state action. Id. at 937. But whether Lugar will eventually bear fruit in the kinds of cases the doctrine has been used to exclude state responsibility remains to be seen. The roots of the problem are stated in WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 35-50, 97-99 (Walter Wheeler Cook ed., 1919). For an excellent brief explanation of Hohfeld’s categories and their implications for the extent of responsibility, see James L. Kainen, Nineteenth Century Interpretations of the Contract Clause: The Transformation from Vested to Substantive Rights Against the State, 31 BUFF. L. REV. 438-40 (1982).
115. See Onuf, supra note 96.
than merely private welfare.\textsuperscript{118} Both the Preamble and the first clause of Article I, Section 8 state the commitment to the general welfare. And it was reflected in judicial dislike of monopolies, as in Chief Justice Taney's opinion in \textit{Charles R. Bridge v. Warren Bridge}.\textsuperscript{119}

Although the law and economics movement has reinterpreted welfare in laissez faire terms as the simple aggregate of private wealth, that standard is both controversial among economists and at variance with founding era understanding.\textsuperscript{120} The utilitarians originated the description of the market at around the time of the American founding, and for them, those with the least had a greater, not a lesser, value in their understanding of utility.\textsuperscript{121} Utilitarianism is subject to well-known difficulties of both justice and interpretation, but is distributive in a way that simple aggregates or gross measures are not, and it considers non-monetary issues as well.\textsuperscript{122}

The text of the Constitution protects socio-economic rights via due process of law,\textsuperscript{123} rights to contract\textsuperscript{124} and compensation,\textsuperscript{125} and an injunction against state bills of credit,\textsuperscript{126} but is devoid of a precise statement of either what is prohibited or what might be required or encouraged. They are now treated as self-referential rights, although we know they were contemporaneously limited by general welfare concerns.\textsuperscript{127}

Crucial here, however, is the empirical link rather than the logical and philosophic claims about distributive justice. The political science speaks most strongly about this connection between


\textsuperscript{120} \textsc{Jules L. Coleman}, \textit{Markets, Morals and the Law} 95-132 (1988).

\textsuperscript{121} \textit{Id.} For a discussion of different types of utilitarian thinking, see Robin West, \textit{The Other Utilitarians}, in \textit{Analyzing Law: New Essays in Legal Theory} 197, 197-222 (Brian Bix ed., 1998).

\textsuperscript{122} Coleman, \textit{supra} note 120; \textit{see also} Oppenheimer & Frohlich, \textit{supra} note 76, at 93, 98-103 (discussing distributive justice).

\textsuperscript{123} U.S. CONST. amends. V, XIV, § 1.

\textsuperscript{124} \textit{Id.} art. I, § 10, cl. 1.

\textsuperscript{125} \textit{Id.} amend. V.

\textsuperscript{126} \textit{Id.} art. I, § 10, cl. 1.

democracy and economics. In effect, the political science has partly reversed Justice Stone's insight: it is the distribution of wealth that protects democracy, instead of democracy which protects beleaguered groups. Justice Stone, in *Carolene Products*, may have been too broad in his philosophical claims and in the mechanisms he identified, but may have gotten it empirically right nonetheless. In addition to philosophical and moral objections to the prejudices outlined in paragraph three and other similar ones, democracies depend on a healthy dose of egalitarianism, mutual concern, respect, and tolerance.\(^\text{128}\)

VI. DID THE CONSTITUTION ENSHRINE AN ECONOMIC SYSTEM?

Any implication of economic consequences must wrestle with the ghost of *Lochner v. New York*.\(^\text{129}\) The *Lochner* Court thought that any transfer or redistribution played class against class or labor against management and was therefore impermissible. For that Court, the state had to be neutral among inhabitants. But modern political science sees the risk not in philosophical terms, but in terms of the actual distribution of wealth in the society: class war is the consequences of extremes rather than communal responsibility.

The Constitution does not enshrine any particular economic order. It was written in a mercantilist era just eleven years after Adam Smith published *Wealth of Nations*. Several of the Founders were actively involved in thinking through the economic policies the new nation should pursue. They made no effort to convince the Convention what those should be, and even the proposal to authorize a national bank was defeated.\(^\text{130}\) The original nation coexisted with feudalism in the South and mercantilism and nascent capitalism in other regions.\(^\text{131}\)


\(^{129}\) 198 U.S. 45 (1905).

\(^{130}\) See 2 The Records of the Federal Convention of 1787, supra note 80, at 615-16.

Economic issues, however, are no strangers to constitutional law. Justices Taney and Story clashed over different theories of economic prosperity.132 In the pre-1937 era, the Court turned to economic theories to inform its notion of reasonableness under the due process and other clauses.133 Famously attacked by Justice Holmes in Lochner v. New York,134 economic theories have seemed illegitimate after 1937. The Court denied the legitimacy of economic claims in the education135 and welfare cases, among others.136 More recently still, the Court has treated a variety of statutory claims as if the Court itself were entitled to have an economic policy.137

Justice Scalia attacked economic claims before joining the Court,138 but has famously supported conservative versions of economic rights since joining the Court.139 Other conservative commentators have also urged a conservative and activist assertion of economic rights.140

One could respond that the Court has no business having its own economic policy. Those are for the executive and legislative branches, the Federal Reserve, and other specialty agencies. But a stronger response is that, for the preservation of our democracy, the Constitution requires the Court to consider the impact of its decisions on the distribution of wealth as part of its approach to the interpretation of statutory as well as constitutional issues.141

134. Id. at 75-76 (Holmes, J., dissenting).
137. See supra text accompanying notes 52-60.
139. Perhaps the most extreme examples were Brown v. Legal Foundation of Washington, 538 U.S. 216, 242-43 (2003) (Scalia, J., dissenting) (arguing that an appropriation of a fund created to collect interest on individual escrow accounts too small to generate interest to individual owners of the principal was a taking despite the lack of measurable damages), and Phillips v. Washington Legal Foundation, 524 U.S. 156, 172 (1998) (finding a taking in the same situation and remanding for calculation of damages).
140. EPSTEIN, supra note 106 (asserting the unconstitutionality of regulation and taxation which does not provide equivalent resources for the individuals or entities regulated or taxed); see also Peter Boettke & J. Robert Subrick, Rule of Law, Development, and Human Capabilities, 10 SUP. CT. ECON. REV. 109, 113, 126 (2003) (objecting to public welfare based standards and defending protections for property); Todd J. Zywicki, The Rule of Law, Freedom, and Prosperity, 10 SUP. CT. ECON. REV. 1, 20-21 (2003) (treating public welfare as outside the bounds of the rule of law because not neutral).
141. This suggests an aspect of the body of thought contemporary to the founding
That response will seem somewhat "political" in the eyes of some. But a constitutional and democratic system cannot be without commitment to basic values. The U.S. Constitution includes equality and due process,¹⁴² a variety of economic and non-economic prohibitions,¹⁴³ and the explicit constitutional rejection of aristocracy.¹⁴⁴ Some forms of social and economic organization are outside the boundaries for a free and democratic people.

The findings of political science on the connection between economic justice and political democracy therefore challenge constitutional law to reconsider its commitments and the zone in which it is neutral on principle.¹⁴⁵ There is a range of policies and systems of social and economic organization that fit comfortably within the constitutional framework, and the democratic system confers on the people and their representatives the right and ability to choose. The range, however, is not without boundaries. If the belief that some have the right to amass whatever property or fortunes they can, regardless of the impact on everyone else, conflicts with the requisites of the survival of a democratic system of government, it may be that the philosophy should yield to the democratic system. Indeed, that has been the historic conclusion of Americans as applied to other deeply hierarchical societies.¹⁴⁶

Now known as "civic republican." See Novak, supra note 118. Republican thought is notoriously indeterminate on many issues. But modern social science is consistent with a significant strand of republican thought and points toward it not for historical but for scientific reasons coupled with democratic purposes.

¹⁴³ E.g., U.S. CONST. art. I, § 9; id. amends. I-IX, XIII-XV (structuring the extent of control over individuals and slavery, between the president and Congress, and between the federal government and the states, as political—they limit power and therefore shape the type of republic we can constitutionally be).
¹⁴⁴ U.S. CONST. art. I, § 9, cl. 8; id. § 10, cl. 1.
If modern political science is correct, then, Holmes was only partly right in *Lochner*. The Constitution does not enshrine Mr. Spencer's *Social Statics*, it forbids it.

For virtually all students of the birth and demise of democracy in the twentieth century, the distribution of wealth is crucial. Their differences are largely in their explanations of this relationship. Collectively, their work cannot be assumed away as so much irrelevant political science. Those who have been studying the rise and breakdown of democracy for decades are pointing at the fundamentals for the survival of democracy. We can ignore their work only if we disclaim fidelity to democracy itself.

The proper constitutional response is a major, and difficult, study in itself. But we may not have the luxury to ignore it.

VII. A Judicial Role for the American Republic

The finding about the relationship between what the Founders would have called republican equality and the survival of the republic they created takes us back to the question of interpretation in a different guise. Two well-known problems with judicial enforcement of so-called "positive rights," or more properly with rights that have large financial implications, are the problems of definition and enforceability, and those problems make judicial actions overriding other branches more questionable. So here, the problems are whether enforcement of norms of republican government and republican equality require overriding other branches and whether the task is too large or ambiguous.

There is a tendency to impose all tasks on courts and a tendency of courts to undertake too much. That tendency needs to be resisted. Nevertheless, protection of democratic government and republican equality does not necessarily involve overriding injunctive action. One approach is actually quite traditional in this country—the use of powerful standards in interstitial ways. So the Supreme Court used natural law in its formative years under Chief Justice Marshall. Natural law was not used to override provisions of

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148. See supra text accompanying notes 15-50.
positive law, but to supplement them in cases not fully determined by positive law.

In a similar, but perhaps slightly stronger mode, the Court might protect democratic government and republican society by incorporating those values in the way it interprets ambiguous and previously undecided terms in statutes and the common law.\textsuperscript{152} A still more muscular approach that nevertheless does not require overruling the legislature would extend contract-of-adhesion type doctrine to statutes.\textsuperscript{153} Under that approach, the Court would read statutes in ways most favorable to the least protected. Adhesion doctrine has been sufficiently cabin ed so that it is rarely effective.\textsuperscript{154} But it could serve a function.

As several scholars have recently pointed out, there are also examples drawn from the constitutional practice of foreign courts of taking actions that are nevertheless subordinate to the commands of positive legislation, in the form of what have been called “weak rights” and weak modes of enforcement.\textsuperscript{155} So courts might announce that the legislature has not satisfied its constitutional obligations without deciding how that should be done. That approach bears some similarities to declaratory judgments.\textsuperscript{156} To some extent, American courts have already been announcing the unconstitutionality of governmental action in desegregation and reapportionment cases, where they have, at least initially, left it to the legislatures to devise a constitutionally satisfactory plan.\textsuperscript{157} American courts have followed

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\textsuperscript{155} TUSHNET, supra note 108, at 18-41 (2008) (canvassing a number of foreign jurisdictions that have asserted important values without claiming them as trumps which require overturning positive law).


\textsuperscript{157} See Reynolds v. Sims, 377 U.S. 533, 587 (1964) (approving action by District
those judgments with the threat of judicially constructed plans. Foreign courts have instead followed with much more limited orders, like refusing to order removal of squatters where the government had not made adequate provision for housing.\textsuperscript{158}

Courts also serve an ideological function, reminding all of the principles by which we need to abide.\textsuperscript{159} They signal what is and is not acceptable. Courts educate. And their educational function is not entirely dependent on coercive orders, much as Chief Justice Marshall's attack on Jefferson was possible precisely because Marshall did not try to coerce the Administration into commissioning Marbury.\textsuperscript{160}

Such interstitial, interpretive, and declaratory tools can lead to specific choices among the many ways of protecting democracy. They are designed to address judicial restraint by narrowing the occasions for intervention and limiting the force of judicial orders. Interstitial and interpretive canons can be powerful, as Justice Cardozo and other great jurists have repeatedly shown.\textsuperscript{161} Nevertheless, if judgments are too narrow and limited, they may not accomplish anything, and if judgments accomplish something, they need to be justified. The fact that the Court can act without violating legislative commands responds to Bickel's countermajoritarian difficulty,\textsuperscript{162} but does not respond fully to Justice Scalia's objections against judicial overreaching\textsuperscript{163} by supplying adequate standards\textsuperscript{164} and proper

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\textsuperscript{159} The Court's ideological function is explored in SANFORD LEVINSON, CONSTITUTIONAL FAITH 16-17 (1988).

\textsuperscript{160} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{161} See Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 242 (1921) (describing his approach to the interpretation of contracts); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66, 142, 150 (1922) (describing his view that public welfare should be the basis of interpretation).

\textsuperscript{162} One of the major sources of the modern critique has been ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962), a book-long attack on judicial activism. For his statement of the "counter-majoritarian difficulty," see id. at 16. Bickel was a clerk to Justice Frankfurter, himself a major advocate of judicial restraint in an earlier generation. The author should add that he was a student of Bickel, but also of Alpheus Mason, himself a protégé of Louis Brandeis and a lifelong advocate of the values expressed in Carolene Products.


limits\textsuperscript{165} to cabin the exercise of judgment.\textsuperscript{166} His objections to unconstrained judges do not go away by eliminating some countermajoritarian remedies. The absence of explicit text counsels against judicial activism, against any judge made economic regime or institutional management, and in favor of judicial restraint.

The ambiguity is evident in the many ways to accomplish a republican and egalitarian society capable of maintaining a republic, whether, for example, by safety net, transfer payments, services, or regulation. And there is little constitutional guidance regarding the choices to be made. Indeed, the definitional problem may be much larger in the economic area than in the definition of democracy that Justices Scalia and Thomas thought inherently contested and judicially undefinable.\textsuperscript{167}

Still, the courts are addressing a multitude of economic issues as if it were the courts' job to skew the law to avoid distributing benefits. And that cannot be right.\textsuperscript{168} Inevitably, judges impose their own philosophy on the law. If judges, all judges, impose their will on the law as both Justices Scalia and Rehnquist recognized,\textsuperscript{169} then should we not cabin their discretion, as Justice Scalia constantly demands, but in the direction of republican equality?

VIII. DOES IT MATTER?

Whether any of this matters will depend, as all law does, on the people making the decisions. But certainly it can matter and, I have been arguing, it should.

Some of the suggested techniques imply stating large principles without making detailed orders. Large changes need legislative collaboration. Courts make large differences when they make it possible to break legislative deadlocks, goad legislatures into action, contribute to the definition of political symbols, or, in the opposite

\textsuperscript{165} Since all principles extended to the limit of their logic become unjust, JAMES S. FISHKIN, TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES (1979), we are more realistically confronted with the specification of limits or grounds for judgment. Legal principles are often attacked for evils created by overextension, but the point proves too much because it is universal. The problem is how sticky or slippery the slope will be.

\textsuperscript{166} Plainly all constitutional decision making depends on judgment. See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395 (1950). My colleagues and I explored this issue in several different ways in STEPHEN E. GOTTLIEB, BRIAN H. BIX, TIMOTHY D. LYTON & ROBIN L. WEST, JURISPRUDENCE, CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 560-91, 724-59, 799-844 (2d ed. 2006).


\textsuperscript{168} See Issaicharoff, supra note 150, at 265.

direction, create a backlash.\textsuperscript{170}

Other changes that are more within the grasp of courts make fewer demands on the government and on taxpayers, but nevertheless change law in ways that make it less likely for ordinary taxpayers to find themselves suddenly hurtling down the rabbit hole.\textsuperscript{171} Courts are a critical part of the web of regulation that create a reliable climate for investment and moderate the vortex created by practices that deceive and plunder segments of the population.\textsuperscript{172} Those rulings can make a significant difference for portions of the population. Sometimes wide-scale practices enforced by private law remedies threaten general harm to the society at large.\textsuperscript{173} And all of those benefits help to protect, not only the individual's and society's economic interests, but also the future of democratic government.

There is no simple assessment about how much the courts can accomplish. But courts matter. They can play their part in protecting republican government.


\textsuperscript{172} \textit{Id.}

\textsuperscript{173} See, \textit{e.g.}, \textit{Home Bldg. & Loan Ass'n v. Blaisdell}, 290 U.S. 398 (1934) (sustaining a mortgage moratorium law).