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Brian Christopher Jones
School of Law, University of Sheffield

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THE LEGAL CONTRIBUTION TO DEMOCRATIC DISAFFECTION

Brian Christopher Jones*

I. INTRODUCTION

At its best, law and legal processes contain the ability to not just complement the acrimony of politics but lift it onto a higher plane, where independent thought can lead to valuable and extremely useful revelations. Such insights may help provide solutions for intractable or highly sophisticated societal problems, ensure equality under the law, or help uphold the structures of democratic government. Alas, law is not always at its best. At times law may damage and undermine politics by condemning the political realm or its agents, squandering opportunities to dignify politics, and belittling the people that make difficult, albeit sometimes poor, decisions. These condemnations can contribute to an unhealthy view of the political realm, which often highlights and accentuates its failures. No doubt much work has been put into law at its best, but its downsides must also be acknowledged. The idea that law—pure and pristine and supposedly detached from politics, as many want to make it seem—could be at least partially blamed for the state of democratic governance may be difficult for many to accept. But in reality the legal and political realms are so intimately connected that it is virtually impossible to disconnect one from the other. After all, the most significant outputs of politics remain its creation of law in the form of statutes, constitutions, treaties, and other varieties of legislation. It is the legal realm that interprets and adjudicates these outputs and helps uphold constitutional principles. Ultimately, the

* Lecturer in Law (Asst. Prof.), School of Law, University of Sheffield. Many thanks to the *Arkansas Law Review* staff for all the diligent work on this piece, and special thanks to Colin Reid, Richard Kirkham, Matthew Flinders, Bojan Bugaric, and Graham Gee for comments on an earlier version of this Article.

relationship between law and politics is not distinct or unconnected but inseparable.

The contribution of law and courts to the operation of democracy has long been downplayed. Simplistic—and what we may now consider naïve—views on the judiciary often highlighted its fragility, lack of power, and lack of influence on state functionality. Federalist No. 78 famously refers to it as the “least dangerous” branch and goes on to say:

The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹

Montesquieu also states in *The Spirit of the Laws*, “Of the three powers above mentioned, the judiciary is in some measure next to nothing”² These canonical statements provide a distorted picture of the judiciary, portraying the branch as an extremely fragile or delicate part of state operation or as one that cannot really produce significant effects on state operation even if it tried to do so. And yet as constitutional government has evolved, it seems increasingly clear that law, legal processes, and especially *judgment* are certainly not “next to nothing.”³ In fact, judgment has been a remarkably resilient institutional quality to possess, and its influence on the other branches—and on the operation of constitutionalism more generally—has been considerable. Far from having no influence or direction over the elected branches, judiciaries have been and continue to be major constitutional players whose judgment can deeply influence—even threaten—the political realm.⁴

1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

3. *Id.*

4. FRANK VIBERT, THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS 181-82 (2007) (“In practice, the authority of the judiciary is more powerful than Hamilton allowed and the judiciary can act as a threat to other and lesser jurisdictions. It can also act in collusion with the other branches.”); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35-36 (Yale Univ. Press 2d ed. 1986) (1962).

Given the influence of these antiquated views of the judiciary in relation to constitutional government, one may be forgiven for thinking the problems facing contemporary democracy rest entirely on the failings of politics or the disengagement of citizens, but that story is an incomplete one. Although most of the literature on democratic disaffection focuses on one or both of these subgroups,⁵ understanding the puzzle brought about by disaffection should not stop there. A more complete picture of what democracies are going through is required. And if this is going to be provided, then we must acknowledge and accept that there have been dramatic changes to the legal realm over the past century in many democracies and that these changes have likely influenced democratic disaffection, perhaps even significantly. Indeed, many such changes have been central to the function and operation of democracy and call into question not only the fundamental nature of where power lies but also the proper roles of various constitutional actors. As many democracies struggle to overcome populist or authoritarian tendencies,⁶ these questions regarding the evolution of the legal realm have only become more pronounced.

This Article, primarily focused on common law jurisdictions, discusses the relationship between law and democratic disaffection. Its main contention is that the judiciary's contribution to democratic disaffection has been downplayed and even ignored throughout the years, and that recent legal developments may have had very real effects on democratic

5. Some prominent foundational works I draw upon throughout this Article are: JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 1-5 (1995); DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 1-27 (Susan J. Pharr & Robert D. Putnam eds., 2000); RUSSELL J. DALTON, DEMOCRATIC CHALLENGES, DEMOCRATIC CHOICES: THE EROSION OF POLITICAL SUPPORT IN ADVANCED INDUSTRIAL DEMOCRACIES 1-5 (2004); COLIN HAY, WHY WE HATE POLITICS 3-5 (2007); MATTHEW FLINDERS, DEFENDING POLITICS: WHY DEMOCRACY MATTERS IN THE TWENTY-FIRST CENTURY 33-34 (2012); PIPPA NORRIS, DEMOCRATIC DEFICIT: CRITICAL CITIZENS REVISITED 3-8 (2011); PETER MAIR, RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY 1-2 (2013); Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, J. DEMOCRACY, July 2016, at 5, 6-10.

6. See ANNIKA SILVA-LEANDER, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021, at 7-9 (Alistair Scrutton & Seema Shah eds., 2021).

disaffection. Law is, after all, in the unique position of being able to “check” various actions of the political realm.⁷ In performing these functions, law usually functions quite admirably. But sometimes law drifts beyond its checking function, undermining and potentially damaging the political realm.

This Article proceeds in three main parts. Part II describes the origins and definitions of democratic disaffection and questions why the law may have been marginalized when studying the phenomenon. Part III explores the different possible relationships between law, politics, and democratic disaffection by looking at both how courts may contribute to but also counter disaffection. Part IV articulates some of the democratic distancing measures the law has engaged in over the past few decades and questions whether such distancing may be stopped. The Article concludes by suggesting that law should acknowledge and accept its impact on democratic disaffection, and that it should do more to ennoble the political realm.⁸

A couple quick caveats: I am certainly not excluding the elected branches from sharing the brunt of democratic disaffection. As the most accountable people in government, they provide the closest link to citizens and, therefore, the most direct link to the operation of democracy.⁹ Thus, it is virtually impossible to let them off the hook. It follows that I am also not asserting that the law is the primary or sole reason for contemporary disaffection. The law, after all, largely responds to politics, culture, and society,¹⁰ and thus to say that it is the driving force would be irresponsible. But the law, just like the other elements and mechanisms of government, must own up to its pathologies. Finally, democratic disaffection is a multifaceted and highly complex phenomenon. Below I have articulated a theoretical, not empirical, claim that law and courts contribute to disaffection.

7. Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT’L & COMPAR. L. 19, 20 (2009).

8. See *infra* Part V.

9. Elmer B. Staats, U.S. Comptroller Gen., Keynote Address at The Annual Conference of NCAC/ASPA: Who Is Accountable? To Whom? For What? How? 2, 5 (Dec. 6, 1979).

10. See Tamar Frankel & Tomasz Braun, *Law and Culture*, 101 B.U. L. REV. ONLINE 157, 157-58, 160 (2021).

II. WHAT IS DEMOCRATIC DISAFFECTION?

Democratic disaffection goes by a number of different labels and incorporates a variety of elements. It is also known as democratic disillusionment,¹¹ democratic disengagement,¹² political disengagement,¹³ political alienation,¹⁴ anti-politics,¹⁵ and democratic drift,¹⁶ among other labels.¹⁷ Generally, two main elements comprise the phenomenon. First, democratic disaffection refers to the fact that confidence in government and democratic institutions—and democracy more generally—has been slowly decreasing from a comparative perspective.¹⁸ This research often focuses on the contemporary lack of faith or trust that citizens currently possess in politicians, politics, and the political process.¹⁹ The second major element is the disengagement with formal democratic structures that citizens have shown throughout the world (e.g., lower levels of voter turnout, decreasing enrollment in political parties, etc.).²⁰ Early studies of disaffection mostly used attitudinal surveys identifying

11. Roberto Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment with Democracy*, N.Y. TIMES (Sept. 15, 2015), [<https://perma.cc/D6B5-AMA9>] (also invoking the term “democratic dysfunction”).

12. PAUL HOWE, *CITIZENS ADRIFT: THE DEMOCRATIC DISENGAGEMENT OF YOUNG CANADIANS*, at xiiv-xviii (2010).

13. ELISE UBEROI & NEIL JOHNSTON, HOUSE OF COMMONS LIBR., *POLITICAL DISENGAGEMENT IN THE UK: WHO IS DISENGAGED?* 6 (2021), [<https://perma.cc/9LNG-KCRD>].

14. Ada W. Finifter, *Dimensions of Political Alienation*, 64 AM. POL. SCI. REV. 389, 389 (1970).

15. ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE 5-8 (Paul Fawcett et al. eds., 2017).

16. MATTHEW FLINDERS, *DEMOCRATIC DRIFT: MAJORITARIAN MODIFICATION AND DEMOCRATIC ANOMIE IN THE UNITED KINGDOM* 14, 86, 287-88 (2010).

17. Some other labels may be: democratic indifference, political disenchantment, and political apathy. MAIR, *supra* note 5, at 2-3; Gerry Stoker, *Explaining Political Disenchantment: Finding Pathways to Democratic Renewal*, 77 POL. Q. 184, 184 (2006); Erica Weintraub Austin & Bruce Pinkleton, *Positive and Negative Effects of Political Disaffection on the Less Experienced Voter*, 39 J. BROAD. & ELEC. MEDIA 215, 215-16 (1995).

18. See, e.g., DALTON, *supra* note 5, at 1-5, 10, 21; Robert D. Putnam et al., *What's Troubling the Trilateral Democracies?*, in *DISAFFECTED DEMOCRACIES*, *supra* note 5, at 1, 6-13; HAY, *supra* note 5, at 5-6, 11.

19. See, e.g., DALTON, *supra* note 5, at 1-4; Putnam et al., *supra* note 18, at 13-21; HAY, *supra* note 5, at 27-31.

20. See, e.g., MAIR, *supra* note 5, at 20-29, 35-40.

citizens' views towards various aspects of democracy and their levels of trust in government.²¹ The citizen engagement element, and the steady decrease of political participation throughout the years, came further down the line and has been tracked as these post-World War II trends developed.²²

Democratic disaffection can be distinguished from other forms of recent scholarship such as democratic decay, democratic backsliding, or constitutional rot.²³ These fascinating emerging areas of study are mostly focused on contemporary threats to democratic states, such as increasing authoritarian and populist governments and the wider challenges to liberal democracy more generally.²⁴ However, studies regarding democratic disaffection go back over half a century, focusing primarily on the attitudes that citizens have towards government and their corresponding democratic engagement.²⁵ Democratic decay takes disaffection into consideration but is often more focused on the erosion of the mechanisms or principles of constitutional democracy (e.g., threats to the rule of law or judicial independence) than it is on how and why citizens have become disenchanted with democracy.²⁶ Thus, while these domains are certainly not unrelated, democratic disaffection research stretches back further and also has a slightly different focus in terms of the interaction between law and democracy.

But contemporary democratic disaffection encapsulates more than decreasing political participation and confidence in elected institutions. A third, perhaps more ominous and wide-ranging, component to democratic disaffection resides in a general anti-political sentiment towards politics, democracy, and

21. See, e.g., Arthur H. Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951, 951-52 (1974).

22. See DALTON, *supra* note 5, at 21.

23. This goes by a variety of other names. See, e.g., Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 HAGUE J. ON RULE L. 9, 9-11 (2019) (considering “democratic decay” and noting that it may be referred to as “democratic backsliding,” among other terms); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017) (introducing the idea of “constitutional rot”).

24. See, e.g., Daly, *supra* note 23, at 9-11.

25. See MICHEL CROZIER ET AL., *THE CRISIS OF DEMOCRACY* 59-61 (1975).

26. Tom Gerald Daly, *Democratic Decay: The Threat with a Thousand Names*, LONDON SCH. OF ECON. & POL. SCI. (Mar. 9, 2019), [<https://perma.cc/C9KA-PCEC>] (summarizing Daly, *supra* note 23).

the political realm.²⁷ It stems from the idea that politics is not beneficial, but harmful. Many contemporary citizens do not just have negative views of politics and the political realm but openly loathe or “hate” them.²⁸ And the sentiment appears to be unrelenting. Indeed, the very idea of “‘politics’, has . . . become a dirty word” for many, synonymous “with notions of duplicity, corruption, dogmatism, inefficiency, undue interference in essentially private matters, and a lack of transparency in decision making.”²⁹ Although cynical views of politics and politicians have been present throughout history, of late the Madisonian fears of unenlightened statesmen and the dangers of passion and self-interest have gone into overdrive. Attacking politics and vilifying elected leaders has become “a national blood sport” in many jurisdictions.³⁰ And if much anti-political sentiment boils down to whether people are optimistic or pessimistic about the human condition, then it seems contemporary democracies “have been overcome with pessimism.”³¹ This is no small problem. Considerations about human nature readily connect to the structure and operation of states, including how power is distributed and what types of checks and balances should be implemented in the political process.³² These considerations also connect to how much power citizens may hold, how involved they are in decision-making, and ultimately, how responsive governments are to citizen views.

Profound shifts in the trust and confidence citizens possess in elected officials have occurred since the mid-twentieth century. For example, in 1958 around 70% of American citizens thought that government officials were honest, cared about people, and tried to do what was right.³³ These numbers held steady until the mid-1960s—close to two decades after the end of World War II—when they began to decline.³⁴ The contemporary picture

27. ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE, *supra* note 15, at 6.

28. See E. J. DIONNE, JR., WHY AMERICANS HATE POLITICS 10 (1991).

29. HAY, *supra* note 5, at 1, 4-5.

30. FLINDERS, *supra* note 5, at 27.

31. HAY, *supra* note 5, at 9-10.

32. Bruce Thornton, *The Laws of Human Nature*, HOOVER INST. (Apr. 20, 2016), [<https://perma.cc/WRW3-HS5M>].

33. DALTON, *supra* note 5, at 26; see also Putnam et al., *supra* note 18, at 8-10.

34. DALTON, *supra* note 5, at 25-26.

regarding trust and confidence in public officials is drastically different, almost disturbingly so. Today, around 60% of Americans possess little or no trust in the federal government to handle international or domestic problems.³⁵ As recently as 1997 this figure only stood at 30%, meaning it has doubled in just over two decades.³⁶ Trust in the individual branches (executive, legislative, and judicial) has also declined, with the legislative figures being the most staggering.³⁷ In 1972 only 3% of survey respondents had no trust or confidence *at all* in Congress; this figure now sits at 25%.³⁸ Additionally, the decreases seen in trust and faith in government are not limited to any specific social groups and tend to cut across all demographic and geographic characteristics.³⁹ Thus, the problem of democratic disaffection cannot be limited to merely one jurisdiction or one particular social group.

Although scholars have produced a wealth of empirical data on democratic disaffection,⁴⁰ explanations for the phenomenon vary significantly. Some theories point to political events such as scandals, wars, and other contentious incidents affecting citizens' perceptions of elected officials.⁴¹ After all, in the late 1960s issues such as Watergate, the Vietnam War, and struggles over

35. *Trust in Government*, GALLUP, [<https://perma.cc/82AY-ZZWR>] (last visited Nov. 1, 2022).

36. *Id.*

37. *Id.*

38. *Id.* (as of September 2021).

39. DALTON, *supra* note 5, at 80-81; see also Putnam et al., *supra* note 18, at 22, where the authors note that country-specific explanations are somewhat limited, as it seems unlikely “that so many independent democracies just happened to encounter rough water or careless captains simultaneously.” However, researchers have examined such demographic and geographical differences at various times and have seen subtle differences. See Finifter, *supra* note 14, at 397, 405-06. For a more recent account, see Michael Kenny & Davide Luca, *The Urban-Rural Polarisation of Political Disenchantment: An Investigation of Social and Political Attitudes in 30 European Countries*, 14 CAMBRIDGE J. REGIONS ECON. & SOC’Y 565, 566, 570-77 (2021).

40. See, e.g., RICHARD WIKE ET AL., PEW RSCH. CTR., MANY ACROSS THE GLOBE ARE DISSATISFIED WITH HOW DEMOCRACY IS WORKING 5-7 (2019), [<https://perma.cc/MZ7D-A66X>]; Ali Abdelzadeh et al., *Dissatisfied Citizens: An Asset to or a Liability on the Democratic Functioning of Society?*, 38 SCANDINAVIAN POL. STUD. 410, 416-29 (2015); *Trust in Government*, *supra* note 35.

41. See, e.g., CROZIER ET AL., *supra* note 25, at 4-6.

civil rights led to “shocks” within the system.⁴² Thus, attitudes towards government were widely perceived as responses to particular events or societal tumult, and the potential failure of the political realm to remedy these. However, as noted above, findings in relation to citizen trust in government and disengagement have not just come from America but have also been found in many long-established democracies.⁴³ And they have not been tied merely to the spectacular events of the 1960s and 1970s. Citizen disengagement around the world has been a noticeable and sustained long-term trend.⁴⁴

Most explanations for increasing levels of disaffection place blame on the failures of politics. For example, an influential 1970s article on the phenomenon in the American context concluded “that the widespread discontent prevalent in the U.S. today arises, in part, out of dissatisfaction with the policy alternatives that have been offered as solutions to contemporary problems.”⁴⁵ This conclusion places significant emphasis on the failures of politics and the political realm to resolve contemporary challenges. It seems that some things never change. A recent international report on worldwide democratic disaffection lays the underlying problem on failures of the political realm, stating:

[T]he most likely explanation is that democratically elected governments have not been seen to succeed in addressing some of the major challenges of our era, including economic coordination in the eurozone, the management of refugee flows, and providing a credible response to the threat of global climate change. The best means of restoring democratic legitimacy would be for this to change.⁴⁶

A host of complementary theories seek to explain why democratic disaffection has taken hold around the world. Some point to an increasing expectations gap between what is promised by politicians, and then heightened in the media, from what can

42. GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS* 177 (2009).

43. See CROZIER ET AL., *supra* note 25, at 18; see also *supra* note 39 and accompanying text.

44. See Uberoi & Johnston, *supra* note 13, at 5.

45. Miller, *supra* note 21, at 970.

46. R.S. FOA ET AL., *CTR. FOR THE FUTURE OF DEMOCRACY, GLOBAL SATISFACTION WITH DEMOCRACY 2020*, at 42 (2020), [<https://perma.cc/53Y4-YVSF>].

actually be achieved in practice.⁴⁷ Others point to less deferential and increasingly critical citizens who may have more education and increasingly sophisticated understandings of democracy.⁴⁸ Another theory regarding disengagement argues that lowering the voting age has produced long-term negative effects on political engagement.⁴⁹ Beyond this, authors have recognized increasing levels of indifference to politics and democracy⁵⁰ and the effects of depoliticization at the national or global level.⁵¹

Researchers have also found that feelings of powerlessness among the general public have intensified, and that some believe they have been shut out of the political process.⁵² Many citizens “feel as if no one is listening to them anymore,”⁵³ and they are “less hopeful that anything they do might influence public policy.”⁵⁴ According to a recent U.K. study, close to half of respondents believe they have no influence on national policymaking.⁵⁵ This finding chimes with those who point to depoliticization as one of the main factors influencing disaffection. Peter Mair notes that ordinary citizens have gone from being “semi-sovereign” to essentially “*non-sovereign*,” as democracy has been “steadily stripped of its popular component.”⁵⁶ For democracies, which rest on the power of citizens to influence government, these findings are highly problematic.

47. Miller, *supra* note 21, at 969-70, 972; FLINDERS, *supra* note 5, at 36.

48. Pippa Norris, *The Growth of Critical Citizens?*, in CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNANCE 1, 9 (Pippa Norris ed., 1999).

49. MARK N. FRANKLIN ET AL., VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945, at 61 (2004).

50. MAIR, *supra* note 5, at 2-3.

51. HAY, *supra* note 5, at 82-87.

52. For one of the original studies on this, see Finifter, *supra* note 14, at 391-402.

53. Regarding the latter, see HIBBING & THEISS-MORSE, *supra* note 5, at 10.

54. Foa & Mounk, *supra* note 5, at 7.

55. JOEL BLACKWELL ET AL., HANSARD SOC’Y, AUDIT OF POLITICAL ENGAGEMENT 16, at 6 (2019), [<https://perma.cc/NBJ6-Y6FH>].

56. MAIR, *supra* note 5, at 2.

A. Why Has the Law Been Marginalized in the Study of Disaffection?

When it comes to diagnosing democratic disaffection, commentators rarely focus on the contribution of the legal realm. Indeed, when law has been mentioned as a factor in disaffection, this attention has only been fleeting.⁵⁷ But even if one does not believe that “[l]aw is politics carried on by other means,”⁵⁸ the lack of attention in relation to law’s contribution to disaffection seems especially odd. This may come down to the fact that frequently this “intimate relationship is treated as no more than the chance meeting of two disparate disciplines.”⁵⁹ And yet, this view is increasingly difficult to reconcile today. The study of law and democracy remains a booming if not illustrious field for contemporary scholars and is awash with texts on law and politics,⁶⁰ law and democracy,⁶¹ democratic and constitutional theory,⁶² theories of jurisprudence,⁶³ and law and society,⁶⁴ to name a few relevant subjects. But even with this abundance of literature, a significant part of democratic disaffection’s story appears to be left out. Admittedly, part of this may be down to methodological considerations.

When examining democratic disaffection much of the analysis has gone into demand-side factors, or as Colin Hay characterizes them: “changes in the responsiveness to, and desire

57. See, e.g., Anthony King, *Distrust of Government: Explaining American Exceptionalism*, in *DISAFFECTED DEMOCRACIES*, *supra* note 5, at 74, 83-85.

58. J.A.G. Griffith, *The Study of Law and Politics*, 1 *J. LEGIS. STUD.* 3, 3 (1995).

59. *Id.*

60. See, e.g., Keith E. Whittington et al., *The Study of Law and Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 3, 3 (Keith E. Whittington et al. eds., 2008).

61. See, e.g., TOM CAMPBELL & ADRIENNE STONE, *LAW AND DEMOCRACY*, at xi (2003).

62. See, e.g., Gary Jacobsohn & Miguel Schor, *The Comparative Turn in Constitutional Theory*, in *COMPARATIVE CONSTITUTIONAL THEORY* 1, 1-2 (Gary Jacobsohn & Miguel Schor eds., 2018).

63. See, e.g., H. L. A. HART, *Introduction*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1, 1 (1983).

64. See, e.g., Patricia Ewick & Austin Sarat, *On the Emerging Maturity of Law and Society: An Introduction*, in *THE HANDBOOK OF LAW AND SOCIETY*, at xiii-xiv (Austin Sarat & Patricia Ewick eds., 2015).

for, such goods by their potential consumers.”⁶⁵ Demand-side analyses mostly focus on citizen engagement (or lack thereof) and put significant weight on the idea that citizens themselves may be to blame for a lack of engagement (e.g., political party membership, voting turnout levels, etc.).⁶⁶

Law and legal processes do not fit neatly into this demand-side story of disaffection. Unlike members of the executive and legislative branches, judges are unelected.⁶⁷ Thus, there are no readily identifiable “engagement” figures to examine, and it would seem especially odd to group figures related to judicial review or litigation more generally as “democratic” engagement, especially when some of these legal actions may be seeking to challenge governmental or majority decision-making. The legal realm also does not contain anything akin to “political parties,” where participation and engagement could be easily measured year to year and trends detected. Thus, the lack of readily identifiable democratic engagement figures could be one significant reason why the legal realm has not been prominently featured in the disaffection literature.

Another reason may come down to law’s relatively positive results on attitudinal surveys. As noted above, one of the elements relevant to disaffection is the decreasing faith or trust in the elected branches.⁶⁸ But judiciaries—or in some cases apex courts—have at times bucked this trend. In some jurisdictions trust in judges or apex courts outweighs trust in elected officials or the elected branches. For example, in Ipsos MORI’s latest Veracity Index, 80% of U.K. citizens trusted judges, while only 16% trusted government ministers, and 12% trusted politicians generally.⁶⁹ These findings come during an era of supposed “hostility towards the judiciary” and not long after the media

65. HAY, *supra* note 5, at 39; *see also* John Boswell et al., *State of the Field: What Can Political Ethnography Tell Us About Anti-Politics and Democratic Disaffection?*, 58 EUR. J. POL. RSCH. 56, 57-58 (2019).

66. *See* Boswell, *supra* note 65, at 57-58.

67. *About Federal Judges*, U.S. CTS., [<https://perma.cc/4ZAD-UYMV>] (last visited Nov. 3, 2022).

68. *See supra* notes 37-38 and accompanying text; *see also* *Trust in Government*, *supra* note 35.

69. Michael Clemence, *Ipsos Veracity Index 2022*, IPSOS (Nov. 23, 2022), [<https://perma.cc/4MMZ-N396>].

branded a trio of U.K. judges as “Enemies of the People” following a major Brexit-related decision.⁷⁰ In America, there is a less drastic but similar picture: trust in the judiciary has exceeded trust in the elected branches since the early 1970s.⁷¹ In fact, when assessing the function and operation of democracy and state operation, law and legal institutions may often be at the periphery of citizens’ concerns. Focus group research has found that compared to Congress and the presidency, U.S. citizens do not frequently think about the Supreme Court and its Justices.⁷² This was even true when the researchers prompted participants to discuss the Court in relation to other governmental branches.⁷³ This led John R. Hibbing & Elizabeth Theiss-Morse to note:

The Supreme Court may hold a hallowed place in the institutional structure, but most people do not perceive it as playing a major role in the day-to-day decisions of the political system. . . . This is all to the good as far as public support for the Court is concerned.⁷⁴

Thus, even though the courts may possess substantial powers from an institutional or constitutional perspective, citizens may not view them as having a significant impact on the day-to-day operation of democracy.

But the picture is not all rosy when looking at legal institutions on survey data, and this is especially true when the focus moves away from judges or particular apex courts. Recent data from the Organisation for Economic Co-operation and Development on trust in governmental institutions shows that judicial systems are only trusted by an average of 57% of citizens—slightly better than trust in national governments (41%) but lower than trust in education systems (58%), health care

70. Caroline Davies, *Thousands Spent on Judges’ Security Amid Growing Hostility*, GUARDIAN (Feb. 26, 2017, 7:01 PM), [https://perma.cc/KN34-TY28].

71. See Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), [https://perma.cc/XG7F-2D9Y]. Although, this survey differed from the Ipsos MORI one above—this Gallup survey was based on institutional trust, whereas the Ipsos MORI one was based on trust in certain professions, not institutions. See *id.*; Clemence, *supra* note 69.

72. HIBBING & THEISS-MORSE, *supra* note 5, at 88-89.

73. *Id.*

74. *Id.* at 92.

systems (62%), and local police (67%).⁷⁵ A large scale study focused on the trilateral democracies found that confidence in legal systems decreased from the 1980s to the 1990s and that these decreases aligned with other public institutions.⁷⁶ Cracks can also be seen on the domestic front in various jurisdictions. Close to one in five people in a 2012-2013 survey said that courts did not treat people equally within the United Kingdom.⁷⁷ Additionally, Hibbing and Theiss-Morse have found that a majority of people believe the U.S. Supreme Court is involved in too many issues and that many citizens admit to having been upset about Court decisions.⁷⁸ Researchers focused on the sub-national level have also found that confidence in state courts is often lower compared to that in state executives.⁷⁹ This less-flattering picture of the judiciary and legal systems more generally calls into question why law and legal processes have commonly been left out of studies on democratic disaffection.

Finally, given the judiciary's role as an independent interpreter of law, mediator of conflicts, and potential "check" on the political branches, there may be an implicit assumption that anything the law does is at least *attempting* to ennoble the political realm. Judges do, after all, endeavor to provide an independent perspective to the resolution of disputes, and often this perspective can be helpful for democracies.⁸⁰ This "checking," rather than "leading" or "governing," function that the judiciary traditionally engages in may be another reason why the legal realm has not been subject to scrutiny as regards democratic disaffection. As one study puts it, "confidence in courts partly stems from an expectation that courts are an

75. BUILDING TRUST TO REINFORCE DEMOCRACY: MAIN FINDINGS FROM THE 2021 OECD SURVEY ON DRIVERS OF TRUST IN PUBLIC INSTITUTIONS 18, 35-36 (2022), [<https://perma.cc/YG7B-V8UV>].

76. Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture, or Performance?*, in DISAFFECTED DEMOCRACIES, *supra* note 5, at 52, 54-55.

77. Sarah Butt & Rory Fitzgerald, *Critical Consensus? Britain's Expectations and Evaluations of Democracy*, in BRITISH SOCIAL ATTITUDES 1, 14 (Alison Park et al. eds., 2014).

78. HIBBING & THEISS-MORSE, *supra* note 5, at 47.

79. Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RSCH. Q. 707, 718 (2007).

80. *See Rule of Law and the Courts*, AM. BAR. ASS'N. (Aug. 22, 2019), [<https://perma.cc/EE8F-T4KW>].

important part of a democratic system and that they mostly function properly.”⁸¹ This may also be the reason why, when the legal realm is mentioned in the same breath as democratic disaffection, it is almost always mentioned as a way to “protect” or “defend” democratic institutions, rather than as a possible contributing source of democratic disaffection itself.⁸² There are exceptions to this, but these voices are few and far between.⁸³ However, the attractive idea that anything the law does is attempting to ennoble politics should not be taken at face value. In fact, for reasons articulated below, this notion should be discarded.⁸⁴ The law certainly does possess the potential to ennoble the political realm and help resolve intractable or sophisticated societal problems. However, because it is so highly trusted by citizens, and because it operates on principles such as judicial independence and the rule of law, it also possesses the potential to influence—as well as harm—the political realm.

Although the demand-side does not appear to suit the legal realm in relation to democratic disaffection, that may not be true for the supply-side. As Hay identifies, “Virtually no consideration” has been given to supply-side factors of disaffection, such as “changes in the substantive content of the ‘goods’ that politics offers to political ‘consumers’, and changes in the capacity of national-level governments to deliver genuine political choice to voters.”⁸⁵ Law’s contribution to political disaffection could certainly be one such supply-side factor: something that possesses the ability to change the substantive content of goods on offer and also to impact the capacity of national-level governments. This is true not just for constitutional issues, which are increasingly policed by judiciaries and apex courts, but also for other areas of domestic policy, in which

81. Aylin Aydın Çakır & Eser Şekercioğlu, *Public Confidence in the Judiciary: The Interaction Between Political Awareness and Level of Democracy*, 23 *DEMOCRATIZATION* 634, 635 (2016).

82. See SILVERSTEIN, *supra* note 42, at 177.

83. See, e.g., MAIR, *supra* note 5, at 19-20; SILVERSTEIN, *supra* note 42, at 269-70; see also JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* 42-83 (2014) (discussing judges as one of four causes for democratic decline, particularly as seen in five select Anglo-American countries).

84. See *infra* Section III.A.

85. HAY, *supra* note 5, at 55.

popular influence and control has noticeably decreased. Indeed, many contemporary democracies explicitly place constitutions and constitutional law above popular control, and popular elements within states have become increasingly downgraded with respect to constitutional elements.⁸⁶ These constitutional trends complement what is happening in other areas of public policy, where there is a clear and obvious trend “to ‘depoliticize’ public policy by displacing responsibility for policy making and/or implementation to independent public bodies.”⁸⁷

Of course, some may argue that as a supply-side factor, law’s impact on the substantive content of political “goods” may be positive, rather than negative. After all, as noted above, law may improve public decision-making, help solve intractable societal problems, and also provide an independent perspective on difficult legal and constitutional issues.⁸⁸ These potential benefits that law may bring to democracy are explored in the next Part, which discusses the various relationships between law and democratic disaffection.

III. THE RELATIONSHIP(S) BETWEEN LAW, POLITICS, AND DEMOCRATIC DISAFFECTION

As views from Montesquieu and the American founders demonstrate, law and courts were thought of differently over two centuries ago. The judiciary was not conceived of as a powerful state entity that could wield extensive influence over the political branches and thus significantly impact the operation of democracy. Indeed, Montesquieu described court power in relation to the other branches as “next to nothing,”⁸⁹ a view that feels odd and out of place today. And although contemporary powers of the judiciary are still at times downplayed or characterized as fragile, it would be very difficult to say that these early views of judicial power have withstood the test of time.

86. See MAIR, *supra* note 5, at 10-11.

87. HAY, *supra* note 5, at 57-58; MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY, *in* COMPARATIVE CONSTITUTIONAL LAW AND POLICY 1-5 (Tom Ginsburg et al. eds., 2021).

88. See discussion *supra* Introduction.

89. MONTESQUIEU, *supra* note 2, at 156.

Courts are now major constitutional players—in some jurisdictions—actively involved in the direction and governance of the state, and in other jurisdictions the leading adjudicator of rights, liberties, and constitutions.⁹⁰

The middle of the twentieth century is key to understanding the connection between law and democratic disaffection, as this period is around when researchers began finding noticeable declines in trust and confidence in government.⁹¹ The era seems to have brought about a different type of relationship between law and politics: one that was more antagonistic and predicated on the taming or subordination of the other. This new relationship also coincides with a significant period of growth in law and legal mechanisms more generally, such as the number of written constitutions, the constitutionalization of rights, and the expansion of judicial review throughout the world.⁹² While quite a lot of work has been done on the growth of these legal mechanisms, less is known about how the increasingly antagonistic relationship between law and politics evolved during this period, including the similarities between the economic and legal views of constitutionalism. Some have termed this development “constitutional economics” and attributed it to those who “look at political institutions through the lens of economics.”⁹³ Below I discuss these similarities in more detail, and then focus on possible ways that law and courts have contributed to disaffection, may counter disaffection, and could perhaps do both at the same time.⁹⁴

90. See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 56-58 (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 100-01 (2004).

91. DALTON, *supra* note 5, at 1, 21.

92. On the rise of constitutionalism more generally, see Bruce Ackerman, Essay, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 774 (1997). On the worldwide growth of judicial power, see, for example, C. Neal Tate, *Why the Expansion of Judicial Power?*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 27, 27 (C. Neal Tate & Torbjörn Vallinder eds., 1995). On the rise of written constitutions, see BRIAN CHRISTOPHER JONES, *CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS* 5 (2020); for a visual timeline, see also *Data Visualizations*, COMPAR. CONSTS. PROJECT, [<https://perma.cc/96X9-QN8H>] (last visited Nov. 22, 2022) (specifically, the chart titled “New Constitutions”).

93. VIBERT, *supra* note 4, at 78-79. From a U.K. perspective, see generally TONY PROSSER, *THE ECONOMIC CONSTITUTION* (2014).

94. See discussion *infra* Section III.A; see also *infra* note 126 and accompanying text.

In the middle of the twentieth century—as citizen views on trust and confidence in government were changing—a bold new theory called Public Choice was gaining steam.⁹⁵ It went on to have a profound impact on the development of liberal democracies.⁹⁶ In short, it painted an extremely unflattering picture of politics and the political realm. The theory is based around the idea that politicians are rational self-interested actors, and even though they are elected public officials, they will act not in the public’s interest but in their own best interests.⁹⁷ Ultimately, they will “behave in ways that are costly to citizens” and cannot be trusted to carry out the general will—either of their constituents or of the people more generally.⁹⁸ The theory also contains an exceptionally negative view of the public, which it views as self-interested, largely ignorant when it comes to politics and the political realm, and unable to effectively monitor government.⁹⁹ But that hardly covers everything. A gloomy view of civil-servant bureaucrats manifests as well, viewing them as captured by special interests and mostly focused on maximizing departmental budgets.¹⁰⁰ And to top it all off, because politicians, the public, and civil servants cannot be trusted, the theory advocates using a small set of technocrat guardians to oversee certain areas, such as fiscal policy, to ensure that decisions are

95. See Jane S. Shaw, *Public Choice Theory*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 1993).

96. Public choice theory was not the only major economic theory to influence the trajectory of the political realm. Following this was the “political overload thesis,” the “bureaucratic overload thesis,” “new public management theory,” and “rational expectations.” See HAY, *supra* note 5, at 101-03; Jenny Harrow, *New Public Management and Social Justice: Just Efficiency or Equity As Well?*, in NEW PUBLIC MANAGEMENT: CURRENT TRENDS AND FUTURE PROSPECTS 141, 142 (Kate McLaughlin et al. eds., 2002) (discussing new public management theory); Steven Pressman, *What Is Wrong with Public Choice*, 27 J. POST KEYNESIAN ECON. 3, 14 (2004) (discussing rational expectations). All these offshoots share a common view of politics and the political realm: without adequate supervision, politicians and other actors in the political realm will make self-interested decisions and ultimately threaten the viability of the state. See HAY, *supra* note 5, at 102-03; Harrow, *supra*, at 142; Pressman, *supra*, at 14.

97. Shaw, *supra* note 95.

98. *Id.*

99. *Id.*; see also William F. Shughart II, *Public Choice*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, *supra* note 95.

100. Shughart II, *supra* note 99.

made in the public's interest.¹⁰¹ Its central authors and advocates went on to win Nobel Prizes¹⁰² and write celebrated books,¹⁰³ and its influence continues well into the twenty-first century.

At the heart of public choice theory is a deeply cynical view of the political realm: politicians and legislatures are not to be trusted, especially when it comes to important decisions in an election year.¹⁰⁴ These views align with some prominent legal philosophies of the mid-twentieth century. For example, in 1964, Judith N. Shklar recognized, "Politics is regarded not only as something apart from law, but as *inferior* to law. Law aims at justice, while politics looks only to expediency."¹⁰⁵ Her book goes on to equate the political realm with an uncontrolled child.¹⁰⁶ Shklar's focus on expediency demonstrates clear similarities with public choice: politics and politicians are opportunistic, self-interested actors that cannot be trusted.¹⁰⁷ Some viewed this newfound skepticism of politics as healthy, suggesting that at the time there was too much deference to authority and trust placed in political leaders.¹⁰⁸ And because politicians could not be trusted to make major decisions without thinking about their own best interests, the remedy for public choice theorists was to "depoliticize" policy choices in a whole range of areas.¹⁰⁹ Only through depoliticization could certain essential elements be protected.

101. See ALASDAIR ROBERTS, *THE LOGIC OF DISCIPLINE: GLOBAL CAPITALISM AND THE ARCHITECTURE OF GOVERNMENT* 47-49 (2010).

102. See, for example, Press Release, Royal Swedish Acad. of Scis., This Year's Economics Prize Awarded for a Synthesis of the Theories of Political and Economic Decision-Making (Public Choice) (Oct. 16, 1986), [<https://perma.cc/9QZB-HPAR>], announcing James Buchanan as the winner of the Nobel Prize in Economic Sciences in 1986 and listing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962), as James Buchanan's best-known work.

103. See generally, for example, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957), which was discussed as a key work in *THE OXFORD HANDBOOK OF CLASSICS IN CONTEMPORARY POLITICAL THEORY* (Jacob T. Levy ed., 2015).

104. See generally DOWNS, *supra* note 103, at 11-12, 27-28.

105. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRAITS* 111 (2d ed. 1986) (emphasis added).

106. *Id.* ("The former [law] is neutral and objective, the latter [politics] the uncontrolled child of competing interests and ideologies.")

107. See *id.* at 9, 17, 111.

108. MAIR, *supra* note 5, at 133.

109. HAY, *supra* note 5, at 90-91, 93.

The idea of depoliticization has been common in many areas of government, as elements are often taken out of the governmental context and given to other public or quasi-public bodies.¹¹⁰ As Alasdair Roberts describes, the approach to depoliticization is usually two-pronged. Firstly, those advocating reform “usually begin[] with an expression of deep skepticism about the merits of conventional methods of democratic governance.”¹¹¹ This skepticism often focuses around politics and politicians being unstable, short-sighted, and selfish, which leads them to make ill-advised decisions.¹¹² Secondly, depoliticization must impose some type of formal constraint on elected officials.¹¹³ Indeed, “it involves removing certain subjects from the realm of everyday politics,” and the method by which this is done is primarily, if not exclusively, through legal instruments.¹¹⁴ Implementation of these depoliticization measures in recent decades has allowed for the creation or furthering of a plethora of arms-length bodies that are disconnected from the political realm but which touch on people’s daily lives, including those that provide essential services (e.g., Bank of England), are responsible for assessing risk (e.g., Food Standards Agency), straddle the boundaries between public and private (e.g., Financial Services Authority), and determine if powers are being used appropriately (e.g., Pensions Ombudsman).¹¹⁵

The operation of constitutionalism over the past few decades shares much in common with public choice theory. In particular, it views ordinary citizens and the political realm extremely skeptically, and the idea of depoliticization has been thoroughly taken on board. For example, in defending the idea of liberal constitutionalism, one celebrated account paints a damaging and tremendously dark picture of the political realm and of the general public:

110. VIBERT, *supra* note 4, at 18; HAY, *supra* note 5, at 82-87.

111. ROBERTS, *supra* note 101, at 4.

112. *Id.*

113. *Id.* at 5.

114. *Id.*

115. VIBERT, *supra* note 4, at 20-30.

[L]iberal constitutions are crafted to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, unaccountability, instability, *and the ignorance and stupidity of politicians*. . . . Present-day citizens are myopic; they have little self-control, are sadly undisciplined, and are always prone to sacrifice enduring principles to short-term pleasures and benefits.¹¹⁶

Although the author of this work was not writing from a public choice perspective, he undoubtedly employs similar justifications. Holmes criticizes the public for its “inability to subject public officials to ongoing scrutiny.”¹¹⁷ He goes on to talk about “irrational desire,” “unconstrained passions,” and “the unrestrained capacity to satisfy immediate or given desires.”¹¹⁸ But that is not all. The author notes that constitutionalism has been developed “to free people from the effects of a debilitating passion,” and that “[d]eliberative democracy . . . compensates for the disabling inflexibilities and obsessions of spontaneous thinking.”¹¹⁹ Holmes’ writing presents quite the image: citizens running mad with debilitating passion, disabling obsessions, and unrestrained desire.¹²⁰

This extreme depiction of the political realm is nothing new. Politics is often viewed as “dangerous and potentially destructive,” needing to “be tamed and placed within” certain legal bounds.¹²¹ Legal academics encourage the perception that politics is “ruled by the passions, which can run wild,” while law speaks “the cool language of reason and logic.”¹²² And because the political realm cannot be trusted, depoliticizing measures have been implemented in many jurisdictions. On one level, written constitutions and bills of rights were used to decrease the stakes of politics.¹²³ The implementation of constitutional supremacy, which has replaced parliamentary sovereignty in many

116. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 6, 135 (1995) (emphasis added).

117. *Id.* at 271.

118. *Id.* at 267-68 (emphasis omitted).

119. *Id.* at 273 (emphasis omitted).

120. *See id.* at 267-68.

121. MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* 223 (2000).

122. ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 12-13 (2005).

123. *See id.* at 9-10, 12.

jurisdictions throughout the world, was one such method. The depoliticization strategy was best articulated by Jutta Limbach, who stated that “the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator.”¹²⁴ This, like implementation of other distancing, was entirely purposeful and is articulated in more detail below.¹²⁵

Ultimately, these highly influential theories on the operation of constitutionalism—both from the economic and legal realm—have emphasized the negative downsides of politics and the political process.¹²⁶ This unabashedly pessimistic attitude towards the political realm has impacted the relationship between law, democracy, and disaffection.

A. Law and Courts Contributing to Disaffection

Below I identify three instances in which law and courts may contribute to disaffection: (1) the courts as a viable or “better” alternative; (2) the overly critical court; and (3) the court as domineering constitutional authority. It is important to recognize that these relationships or representations are not mutually exclusive and that they can, and do, overlap in various ways.

1. *The Courts as a Viable or “Better” Alternative*

In some ways the courts have been presented as a viable or better alternative to politics and the political realm, and they have been in three primary ways: in their potential to hold the government accountable,¹²⁷ in acting as a venue for furthering policy goals,¹²⁸ and in presenting themselves as a form of “anti-

124. Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L. REV. 1, 1 (2001).

125. See *infra* notes 228-29 and accompanying text.

126. See, e.g., HOLMES, *supra* note 116, at 6; TOMKINS, *supra* note 122, at 12-13.

127. See BETH COLE ET AL., U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION, at 7-81 to -82, -84 (2009).

128. See CHRISTOPHER A. SIMON ET AL., STATE AND LOCAL GOVERNMENT AND POLITICS: PROSPECTS FOR SUSTAINABILITY 325, 362, 364 (2d ed. 2018).

politics.”¹²⁹ These views may contribute to democratic disaffection because if the courts are perceived as a better alternative to making policy and also to constraining political actors, then the political realm may be increasingly viewed as insufficient or even obsolete at some of its primary functions. Thus, less time and effort may be placed on fostering a healthy, sustainable, and vibrant political domain, and more time and effort will be placed on strategic litigation and other judicial concerns.

Theories of democracy focus on elections as the primary component of democratic accountability: if representatives want to be re-elected, they need to pass laws and govern in ways that secure citizen trust and confidence. But in between elections, there is vigorous debate over how best to hold governments accountable.¹³⁰ Almost every governmental system provides some role for the courts to check the power of the executive, which often connects to upholding the rule of law.¹³¹ But questions remain as to how effective court-centered accountability mechanisms are compared to other mechanisms, and also to what degree the courts should undertake this role. An over-reliance on legal measures for accountability can water down or even strip away political accountability measures. This is especially true when there are viable political-accountability mechanisms available that could produce similar or just as effective results, and yet the courts still intervene. Ultimately, if courts alone are perceived as effective in holding governments to account, then there may be less incentive for citizens to contact their representatives, become a member of a political party, participate in a public protest, or even visit the ballot box at the next election.

Another way that courts can contribute to democratic disaffection is through presenting themselves as viable alternatives to the normal political process. Here, courts may

129. See Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 102, 104 (Tom Ginsburg & Tamir Moustafa eds., 2008).

130. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 115-17 (2010).

131. See *id.*; *Rule of Law and the Courts*, *supra* note 80.

allow citizens to further policy-related goals through litigation, rather than through the more typical political process. Indeed, it is no secret that “[p]olitical losers and political minorities turn to the independent, that is, unelected and unaccountable, judiciary in the hopes of persuading judges of claims that fail to command a majority in the legislature.”¹³² Even the courts have acknowledged this at times,¹³³ and this may also be why we have seen the law not quell but perpetuate the culture wars.¹³⁴ In his excellent study of how law can shape, constrain, save, and kill politics, Gordon Silverstein acknowledges this has taken place in a variety of areas in the U.S. context, but perhaps mostly notably in relation to poverty and abortion.¹³⁵ In fact, going down the litigation route may also be a more efficient or effective means of changing or developing policy,¹³⁶ as the slower-moving political realm relies on mobilization and political support. If citizens can advance policy goals by effectively bypassing the political process for a legal one, then the incentives to participate in democracy are certainly weakened, perhaps considerably so.

Finally, courts can even present themselves as a form of “anti-politics,” which may be considered more respectable to those disenchanted with the political realm. The idea that courts are “non-majoritarian” or apolitical may be highly attractive to citizens, especially those that view politics with disdain or associate it with corruption, misdeeds, self-interest, or other negative features, as is often highlighted in constitutional economics. For these citizens, the legal realm may be a more respectable and desirable path. Rather than a focus on

132. Amanda Hollis-Brusky, *An Activist's Court: Political Polarization and the Roberts Court*, in *PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER* 80, 82 (Zachary Courser et al. eds., 2018). Of course, some advocate this element as inherent to constitutional government. Ginsburg notes, “By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain.” TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 25 (2003).

133. See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (“Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.”).

134. See Christopher McCrudden, *Transnational Culture Wars*, 13 *INT’L J. CONST. L.* 434, 435-36 (2015).

135. SILVERSTEIN, *supra* note 42, at 95-127.

136. *Id.* at 21-25.

expediency, there is a focus on the fundamental. Rather than having to use traditional political tools to change minds and influence public opinion on a large scale, there is a focus on quality and strength of argument.

Appealing to something detached from the “politics of the day” will always be attractive to citizens, especially if these appeals can be focused on “higher” fundamental values or principles. But there are major questions regarding whether courts can be viewed as a form of anti-politics. At their heart, courts are undoubtedly majoritarian institutions, just on a much smaller scale than the legislature.¹³⁷ And whether they are “apolitical” and more concerned with the fundamental is certainly up for debate.

2. *The Overly Critical Court*

Given that the new relationship between law and politics forged in the twentieth century was predicated on the taming or subordination of politics through law, it may be unsurprising that in some instances courts have been overly critical of the elected branches. These instances of harsh criticism may lead to increased disaffection among the general public. After all, any heightened skepticism of politics by the judiciary may produce “ripple effects . . . in the public’s trust of the democratic process.”¹³⁸ And if these ripple effects are significant enough, they could influence citizen perception of the elected branches.

One common criticism courts engage in is complaining about the drafting or preparation of legislation, which can make the work of legislators appear messy, incompetent, or downright lazy. A notorious example from the United Kingdom is Justice Harman in *Davy v. Leeds Corporation*, who lamented the “monstrous legislative morass” judges had to examine in this particular case.¹³⁹ Similarly, in a 2010 U.K. Supreme Court

137. On the U.S. Supreme Court, this amounts to a “Rule of Five.” H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 16-17 (2008) (“A five-justice majority on the Court, the strong Rule of Five asserts, can do anything, at least in deciding constitutional-law cases . . .”).

138. Hollis-Brusky, *supra* note 132, at 86.

139. [1964] 1 WLR 1218 at 1224 (Eng.).

judgment, Lord Judge found it “outrageous” that “elementary principles of justice” were buried in a “legislative morass.”¹⁴⁰ But the problem crosses boundaries. Even the late Ruth Bader Ginsburg had complaints about legislation, noting, “Detecting the will of the legislature, however, time and again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes. Bad law breeds unnecessarily hard cases.”¹⁴¹ These complaints, even if primarily circulated among lawyers, could breed disaffection.

Other criticisms carry more constitutional bite. When attempting to determine the constitutionality of a statute, courts may point to an unsatisfactory legislative record. Ruth Colker and James J. Brudney note the U.S. Supreme Court did this in a number of cases at the turn of the century, “convey[ing] the message that Congress is suspect in the powers it exercises and the manner in which it exercises them.”¹⁴² In one notable case, *City of Boerne v. Flores*, the Court struck down a provision of a statute that was passed unanimously in the House and flew through the Senate by a vote of 97-3.¹⁴³ Scholars have noted that the Court’s approach in *Boerne* and similar cases has attempted “to subordinate the primary political function of legislatures”¹⁴⁴ and essentially turn Congress into a lower court it could ridicule.¹⁴⁵ The Court did this again in 2013 when striking down a reauthorization of the Voting Rights Act of 1965.¹⁴⁶ The justices noted that “Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act” but that it “did not use the record it compiled to shape a coverage formula

140. R *In re* Noone v. Governor of HMP Drake Hall [2010] UKSC 30, [86]-[87].

141. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1417 (1987).

142. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 98-100, 104-07, 144 (2001).

143. 521 U.S. 507, 511 (1997); H.R. REP. NO. 103-88, at 2 (1993); 139 CONG. REC. S26416 (1993).

144. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1710-11 (2002).

145. Colker & Brudney, *supra* note 142, at 83, 144.

146. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), [<https://perma.cc/Z3B7-JS3A>].

grounded in current conditions.”¹⁴⁷ They further noted the congressional re-enactment was based on “40-year-old facts having no logical relation to the present day.”¹⁴⁸ These are extraordinary statements to make for a statute that was re-authorized by large congressional majorities in 2006.¹⁴⁹

Instances of courts intentionally embarrassing the elected branches in their judgments have also occurred. I have recently explored this from a common law perspective, focusing on the United States, United Kingdom, and Canada.¹⁵⁰ Although some form of moderate embarrassment is built into the judicial review process—given the public nature of adjudication—I contend that in some instances courts have transitioned from unintentionally to intentionally embarrassing the elected branches. For instance, recent judgments from the United Kingdom have compared government policy to that seen in totalitarian regimes,¹⁵¹ have accused governments of acting in a “clandestine” manner,¹⁵² and have accused governments of incompetence in relation to basic constitutional architecture.¹⁵³ These unnecessary statements allow the courts to portray the elected branches in an extremely

147. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553-54 (2013).

148. *Id.* at 554.

149. Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), [<https://perma.cc/K32E-DAWR>].

150. Brian Christopher Jones, *Judicial Review and Embarrassment*, PUB. L. 179, 179-85 (2022).

151. *Christian Institute v. Lord Advocate*, [2016] UKSC 51, [73]. Lady Hale said:

Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world. Within limits, families must be left to bring up their children in their own way.

Id.

152. *Cherry v. Advocate General* [2019] CSIH 49, [50], [54]. The Scottish Inner House of the Court of Session said that, in requesting the prorogation of Parliament, the Prime Minister had acted “in a clandestine manner.” *Id.*

153. *R In re Miller v. Sec’y of State for Exiting the Eur. Union*, [2016] EWHC (Admin) 2768, [85]. The United Kingdom’s High Court noted that the Government’s case was “flawed” at even a “basic level.” *Id.*

harsh light and could negatively impact how the public views its elected officials.¹⁵⁴

This relationship connects to the prominent constitutional theories discussed above, which emphasize the negative aspects of the political realm.¹⁵⁵ Overly critical courts may contribute to democratic disaffection by portraying the outputs of the elected branches as deficient, confused, or suspect. Although casting a critical eye on institutional outputs may at times be beneficial and provide valuable institutional feedback, courts should be cautious to not be overly critical in their assessments.

3. *The Court as Domineering Constitutional Authority*

Since the new relationship between law and politics was forged in the mid-twentieth century, courts have been much more bullish about their central role in constitutional adjudication. As Robin West notes, oftentimes the point of law—and especially constitutional law—is to “stop the political animal dead in his tracks.”¹⁵⁶ Beyond this, law can be used as a “battering ram” that does not merely “take the wind out of the political sails” but effectively kills politics.¹⁵⁷ No doubt this is how some lawyers, judges, and legal academics view their roles: as agents who can provide a substitute for the passionate, rancorous, and often brutal political realm.

In the mid-twentieth century, courts around the globe began asserting their role as ultimate constitutional adjudicators in a more forceful fashion.¹⁵⁸ I have previously documented instances of this in relation to a number of jurisdictions, where courts have asserted themselves as the ultimate authority when determining constitutionality, upholding constitutional principles, or indeed

154. Jones, *supra* note 150, at 179-80, 188. In my previous article, I developed three different types of portrayals that the courts use to embarrass the elected branches: constitutional newbies, constitutional fools, and constitutional villains. *Id.* at 180.

155. *See supra* notes 116-26 and accompanying text.

156. Robin West, *Ennobling Politics*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 58, 59-60 (H. Jefferson Powell & James Boyd White eds., 2009).

157. SILVERSTEIN, *supra* note 42, at 268-69.

158. *See Tate, supra* note 92, at 2-5.

protecting the constitution more generally.¹⁵⁹ Under these bold pronouncements any view of constitutionality outside of the court's assessment may be viewed as amateurish, naïve, or unsophisticated. For example, in 2013, the Canadian Supreme Court noted that it "cannot be barred by *mere statutes* from issuing a declaration on a fundamental constitutional matter."¹⁶⁰ The U.S. Supreme Court has repeatedly asserted its dominant role as "supreme in the exposition of the law of the Constitution."¹⁶¹ And the Australian Supreme Court has at times flaunted its authority, declaring that no other institution possesses "the power and the will to" protect the constitution.¹⁶² In relation to constitutional matters, these views clearly attempt to make politics and the political realm subservient to law.

Whether prominently intervening in the electoral process,¹⁶³ second-guessing decisions historically left to the executive,¹⁶⁴ or rejecting validly passed constitutional amendments,¹⁶⁵ it is obvious the courts in many jurisdictions are far from "next to nothing."¹⁶⁶ In fact, they have asserted themselves as domineering constitutional authority in many contexts.

B. Law and Courts Working to Counter Disaffection

Two primary ways in which courts may counter disaffection are: (1) by helping uphold collective societal values and principles such as justice, the rule of law, and democracy, among other things¹⁶⁷ and (2) by acting as an alternative or backstop venue for advancing political agendas or for resolving

159. Jones, *supra* note 92, at 148-53. Examples here came from the United States, Israel, Australia, and Canada. *Id.*

160. *Man. Metis Fed'n Inc. v. Att'y Gen.*, [2013] 1 S.C.R. 623, 685 (Can.) (emphasis added).

161. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

162. *NSW v Commonwealth*, (2006) 231 ALR 1, 148 (Austl.).

163. *See* *Bush v. Gore*, 531 U.S. 98, 110 (2000).

164. *See R In re Miller v. Prime Minister (Miller II)* [2019] UKSC 41, [30]-[50].

165. For more on this, see Richard Albert, *Constitutional Amendment and Dismemberment*, 43 *YALE J. INT'L L.* 1, 6 (2018).

166. MONTESQUIEU, *supra* note 2, at 156.

167. *See infra* Section III.B.1.

controversial societal issues.¹⁶⁸ I explore both of these aspects below.

1. The Courts as Upholders of Collective Societal Values and Principles

Perhaps the most decisive way that the courts work to counter democratic disaffection is by helping uphold collective societal values and principles such as justice, equality, the rule of law, and other ideals, such as democracy.¹⁶⁹ After all, the collective values and principles present in societies should also be seen and furthered within the courts. These values and principles may be inscribed in statutes or written constitutions, found in the customs or traditions of politics and law (such as the procedures of a legislative body or in the common law), or be commonly advocated by citizens. Similar to the other governmental branches, the courts have a role to play in upholding and defending these values. Some may even say that the courts institutionally lead on some of these, such as administering justice and protecting the rule of law.¹⁷⁰ Undoubtedly, some citizens may be drawn to particular values and principles over others and may even believe that courts uphold certain values better than the elected branches.¹⁷¹ If the courts do an adequate job of protecting these collective values, or even protect certain values better than the political realm, then they may counter democratic disaffection, even if they do not explicitly address this as an outcome.

At times, courts have even signaled positivity towards politics and the political process and upheld democratic innovations that bring citizens closer to self-government. Scholars have noted that the U.S. Supreme Court under Earl Warren was “optimistic about the possibility of politics” and demonstrated trust in Congress by upholding major pieces of

168. See *infra* Section III.B.2.

169. See, e.g., Alexander Wohl, *The Role of Courts in Our Society*, HUM. RTS. MAG., June 2017, at 1, 1.

170. See, e.g., *The Responsibilities of the Judiciary in Strengthening the Rule of Law*, ACT 4 RULE OF L., [<https://perma.cc/9JNS-UVEU>] (last visited Nov. 6, 2022).

171. See *The Court and Constitutional Interpretation*, U.S. SUP. CT., [<https://perma.cc/F96G-LPK7>] (last visited Nov. 6, 2022).

legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.¹⁷² Before this, America's highest Court also allowed controversial democratic innovations to take shape, many of which are now recognized as essential democratic mechanisms. In 1912, the Court declined to rule on the constitutionality of state referendums as a valid form of law-making.¹⁷³ Eventually, twenty-four U.S. states passed some form of citizen-referendum process, and such processes are widely used today.¹⁷⁴ Declining jurisdiction was undoubtedly important, as scholars have demonstrated that referendums can lead to increased political knowledge and engagement among citizens,¹⁷⁵ which may thwart democratic disaffection.

There is no doubt that upholding these cherished societal standards comes with significant difficulties. Scholars have found that the operation of the legal system may entrench inequalities¹⁷⁶ or continually favor "repeat players" in the courtroom.¹⁷⁷ But the protection of cherished societal values does not just happen through the elected branches or the democratic process. It also happens in the courts. Indeed, judiciaries may lead when it comes to particular values, such as justice and the rule of law, and they also have a role to play in the public perceptions of politics and the political process.¹⁷⁸ Upholding these precious values may counter democratic disaffection.

172. Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 18-25 (2012).

173. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133-34, 151 (1912).

174. See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 41-42, 50 (2009).

175. MATT QVORTRUP, *THE REFERENDUM & OTHER ESSAYS ON CONSTITUTIONAL POLITICS* 91 (2019).

176. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95, 103-104, 125 (1974).

177. See DONALD BLACK, *THE BEHAVIOR OF LAW* 27 (1976).

178. See *The Responsibilities of the Judiciary in Strengthening the Rule of Law*, *supra* note 170; Natalie Anne Knowlton, *Trusting the Public's Perception of Our Justice System*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 27, 2020), [<https://perma.cc/5QHS-4HD9>].

2. *The Courts as an Alternative or Backstop Venue for
Advancing Political Agendas or Resolving Controversial
Societal Issues*

Although this item was listed above as potentially furthering disaffection,¹⁷⁹ it is also possible that this element could counter democratic disaffection. Indeed, as democratic disaffection has increased throughout the years, it seems only natural that citizens pursue alternative venues to the political arena. Politics can be frustrating, slow, and messy, and it is inevitable that citizens may occasionally get disenchanted with the political process. Nowadays, citizens often have another place they can turn. Courts in many jurisdictions have undoubtedly become an alternative or backstop venue for advancing political agendas or resolving controversial societal issues. In the American context, it is readily acknowledged that if citizens “cannot win at the ballot box they will try to win in the courtroom.”¹⁸⁰ Of course, not all jurisdictions subscribe to this level of court intervention. However, as the judicialization of politics has grown around the world, an increasing number of decisions that were made in the political realm are now made in the legal realm.¹⁸¹

The transition to increased judicialization has happened for a variety of reasons, some of which may counter democratic disaffection. As noted above, some citizens may prefer courts to the political arena, in part because judiciaries are beyond the reach of political parties and electoral politics.¹⁸² Additionally, resolution of disputes may be more efficient and straightforward in the legal realm and may not require as much time and effort as a political campaign does. It may also be the case that courts have been increasingly courted or invited by the elected branches to resolve disputes, either through statutory or other means.¹⁸³ Indeed, some legal and political science literature notes that the elected branches have been hesitant to make decisions on

179. See *supra* Section III.A.1.

180. Martin Shapiro, *The United States*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER*, *supra* note 92, at 43, 63.

181. See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *LAW & CONTEMP. PROBS.* 41, 41-43 (2002).

182. See *supra* Section III.A.1; *supra* notes 179-81 and accompanying text.

183. See *infra* Section IV.A.

controversial issues or have even increasingly pushed controversial issues to the judiciary.¹⁸⁴ This is the flip-side of judicialization: it is not just that courts have been expanding their jurisdictions through judicial review, but also that the political branches have been actively sending more disputes to the judiciary for resolution. Some citizens may be happy to see disputes settled somewhere, even if it does not occur through ordinary politics or the political process. Finally, increased judicial intervention may be associated with attempting to alleviate the significant failings or breakdowns in the political realm.¹⁸⁵ But determining what qualifies as a “failing” or “breakdown” is difficult, and may be highly dependent on one’s political perspective.

If courts have become institutions that are ready and willing to make controversial decisions, correct breakdowns within the political realm, and do so more efficiently than the political realm, then perhaps these characteristics have countered democratic disaffection to a certain degree.

C. Law and Courts Both Contributing to and Countering Disaffection

Probably the most realistic perspective of the relationship between law and democratic disaffection is that courts both contribute to disaffection and also counter it in various ways. This connects to the function and status of judges within the state and how judicial review operates, which can be a countermajoritarian exercise or have mixed effects on democratic processes. Below, I discuss three issues relating to how courts may contribute to but also counter disaffection.

184. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 143 (2007).

185. This seemed to be Ely’s focus in developing a theory of judicial review. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76, 103 (1980).

1. The Unique Constitutional Position of Judicial Review, Both as Countermajoritarian—But Also Essential—To Any Working Democracy

As the opening paragraph to this Article states, law and legal processes possess the potential to complement politics and the political realm, leading to extremely useful and insightful revelations, but they also possess the potential to damage it.¹⁸⁶ There is no getting around the fact that the role of judges and the operation of judicial review contain anti-democratic or countermajoritarian characteristics.¹⁸⁷ But these anti-democratic or countermajoritarian characteristics also provide democracies a unique perspective, which can, and often does, positively affect state operation.

In many states, judges are unelected actors that are provided an independent status and function within the state.¹⁸⁸ This detachment from the executive and legislative branches is purposeful, as judges are intentionally not subject to mechanisms of democratic accountability.¹⁸⁹ The judicial role carries a number of functions, such as interpreting constitutions, statutes, and regulations; determining lawful or unlawful behavior; and providing other checks on the elected branches.¹⁹⁰ Many of these—such as the interpretation of legal texts—are essential to how democracies operate and can help democracies protect vulnerable citizens, safeguard human rights, or indeed make the elected branches think twice about implementing particular policies. In fact, many people believe that judicial review should

186. See *supra* Introduction.

187. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 711-12 (1995).

188. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), [https://perma.cc/GD5F-KKEY].

189. See Brian Christopher Jones, *The Widely Ignored and Underdeveloped Problem with Judicial Power*, UK CONST. L. ASS'N (Feb. 25, 2020), [https://perma.cc/J7CV-GRW4]. Of course, that does not mean that judges possess no accountability measures. Most judicial decisions are subject to appeal, and judges are also subject to various conduct and complaint procedures. However, there is a purposeful lack of democratic accountability measures. See, e.g., *id.* The major exception to this is the large amount of U.S. state judges that are elected. See *Judicial Selection: Significant Figures*, *supra* note 188.

190. *Court Role and Structure*, U.S. CTS., [https://perma.cc/S7GK-YVM9] (last visited Nov. 6, 2022); *About the Supreme Court*, U.S. CTS., [https://perma.cc/MT8H-8C53] (last visited Nov. 6, 2022).

act as a braking mechanism to the developments in the political realm and consider this countermajoritarian function as essential to its operation.¹⁹¹

But judicial review also contains elements that may hinder democracy, such as second-guessing difficult decisions made by elected and accountable lawmakers, constraining future actions of governments, or even allowing for increased criticism of national governments. Although to some degree all of these may benefit the operation of democracy in some ways, there is little doubt that too much second-guessing, too much fettering, and too much criticism of government will have detrimental effects. Also, while some consider the braking function of judicial review as essential to state operation, most of the evidence points to judicial review developing alongside public opinion rather than counter to it.¹⁹² The fact that judicial review often mirrors public opinion raises significant questions as to its use and overall influence. Thus, the unique position of judges and judicial review provides for opportunities to both contribute to and also counter democratic disaffection.

2. Mixed Judicial Records on Protecting Democracy and Democratic Principles

Records demonstrate that judges have both furthered democratic principles and at times also hindered the fruits of democracy. Examining the judicial record of the U.S. Supreme Court displays both these realizations. The Warren Court's treatment of democracy is often held up as positively reinforcing

191. For discussion on this, see Bojan Bugarcic, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps"*, 11 HAGUE J. ON RULE L. 447, 448-50 (2019).

192. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14-15 (2009); FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* 46 (2018) ("The historical and comparative evidence shows that courts seldom stray far from the preferences of elected governments, and when they do, it is usually in the direction of public opinion rather than away from it. This makes them unreliable checks on majority hostility to minorities. Democracies do better than nondemocracies at protecting minority rights, and courts do not improve on what democracies do. Working with electoral incentives might not always solve the problem, but it seems clear that nothing else will."); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 861 (2009).

democratic principles.¹⁹³ This is especially true with the major “one-person, one-vote” rulings, which have been championed by scholars as some of the best rulings ever by the Supreme Court.¹⁹⁴ *Baker v. Carr* allowed challenges to legislative redistricting, deeming issues such as gerrymandering justiciable before the courts.¹⁹⁵ *Reynolds v. Sims*¹⁹⁶ and *Wesberry v. Sanders*¹⁹⁷ furthered the development of “one person, one vote” jurisprudence at the state and federal levels, respectively. Perhaps these rulings helped foster increased trust in the political realm or a deeper commitment to democracy.¹⁹⁸ But SCOTUS has also delivered judgments that could have done the opposite, significantly harming the political realm. *Bush v. Gore* stopped a state-wide recount for presidential ballots, essentially handing the presidency to a candidate that did not receive the most national votes.¹⁹⁹ Additionally, much of the Court’s campaign finance jurisprudence—such as *Buckley*,²⁰⁰ *Citizens United*,²⁰¹ and *McCutcheon*²⁰²—have major implications for the political realm and also run contrary to public opinion.²⁰³

More recent SCOTUS decisions on gerrymandering,²⁰⁴ voter ID laws,²⁰⁵ the Voting Rights Act,²⁰⁶ and voter roll purges²⁰⁷

193. See Karlan, *supra* note 172, at 4 (“The animating impulse behind many of the Warren Court’s major decisions was a commitment to civic inclusion and democratic decisionmaking.”).

194. Andrea Sachs, *The Best Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:47 AM), [<https://perma.cc/2XTD-EK5J>].

195. 369 U.S. 186, 198-99, 209-10, 237 (1962).

196. 377 U.S. 533, 565-66, 568 (1964).

197. 376 U.S. 1, 18 (1964).

198. Of course, it is acknowledged that subsequent rulings have essentially overruled these cases. See *Vieth v. Jubelirer*, 541 U.S. 267, 267, 306 (2004); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

199. 531 U.S. 98, 110 (2000); Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), [<https://perma.cc/759C-UGAS>].

200. See *Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976).

201. See *Citizens United v. FEC*, 558 U.S. 310, 312-16 (2010).

202. See *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

203. See Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), [<https://perma.cc/SKA5-MR4M>].

204. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 267, 306 (2004); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

205. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 181-82 (2008).

206. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 530 (2013).

207. See, e.g., *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018).

appear to have limited, not expanded, the franchise and may further hinder the democratic process. Perhaps the most damning assessments of these decisions have come not from the media or the elected branches but from the justices themselves. For example, in *Bush v. Gore*, Justice Stevens delivered a severe indictment of the decision, noting: “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”²⁰⁸

This is reminiscent of a fiery dissent from Lord Atkin during World War II, where he declared that the attitudes of some U.K. judges were “more executive minded than the executive.”²⁰⁹ Both *Bush v. Gore* and *Liversidge v. Anderson* have been evaluated by contemporary academics as highly problematic and evidence that the judiciary may at times get things worryingly wrong.²¹⁰

Although there may be periods of potential democratic enhancement from judicial review, there have also been periods of democratic erosion. Ultimately, the judicial record on upholding democracy and democratic principles remains decidedly mixed.

3. *The Boundaries of Judicial Involvement with Politics Are Fraught with Disagreement*

Finally, the boundaries of judicial involvement with politics are fraught with disagreement. This continues to be one of the most contentious areas of constitutional theory, as any bright lines regarding such involvement are frequently blurred.²¹¹ The recent Brexit litigation in the United Kingdom, *Miller I*²¹² and *Miller*

208. 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

209. *Liversidge v. Anderson* [1941] UKHL 1, [244], 1 AC (HL) 206 (appeal taken from Eng.) (Lord Atkin of Averdovey, dissenting).

210. See, e.g., Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), [https://perma.cc/8EQG-MLXZ]; Lord Bingham of Cornhill, *The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms*, 43 INT’L LAW. 33, 33, 37 (2009).

211. Perhaps the most famous is that put forward in *Baker v. Carr* regarding the “political question doctrine.” 369 U.S. 186, 210-11, 215 (1962).

212. R *In re Miller v. Sec’y of State for Exiting the Eur. Union (Miller I)* [2017] UKSC 5, [3], [35], [52], [144]-[146], [151].

II/Cherry,²¹³ both embody the potential benefits and risks that the courts assume if they intervene in politics or the political process.

The prominent *Miller I* Brexit judgment ruled that Article 50 could not be triggered by the government without parliamentary authority (i.e., an Act of Parliament).²¹⁴ The decision both upheld parliamentary sovereignty—something highly valued by Brexit supporters—but also expanded the U.K. Supreme Court’s jurisdiction in relation to prerogative powers.²¹⁵ Even if the court was merely trying to ensure that the proper constitutional procedures were followed in Britain’s EU exit, the decision provided the perception that the judiciary was willing to slow down or potentially even halt Brexit.²¹⁶ This perception led to the belief in some quarters that individuals were using the courts as an alternative or backstop venue for resolving Brexit rather than handling it through more direct political channels. At the time, Lord Reed, who dissented in the case and who subsequently became Supreme Court President, said, “It is important for courts to understand that the legalization of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.”²¹⁷

The *Miller II/Cherry* case provided even more intense debate about the appropriate role of judicial intervention. In August 2019, newly implemented Prime Minister Boris Johnson prorogued Parliament for five weeks, fueling views that he wanted to leave the EU without a negotiated trade deal.²¹⁸ While there were mixed opinions in the lower courts regarding whether

213. See *Miller II* [2019] UKSC 41, [31], [34], [57]-[58].

214. See *Miller I* [2017] UKSC 5, [274].

215. JOHN FINNIS, JUD. POWER PROJECT, BREXIT AND THE BALANCE OF OUR CONSTITUTION 2-3 (2016), [<https://perma.cc/UQD8-9BJB>].

216. James Slack, *Enemies of the People: Fury Over ‘Out of Touch’ Judges Who Have ‘Declared War on Democracy’ by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, DAILY MAIL (Nov. 4, 2016, 11:26 AM), [<https://perma.cc/ED4X-GR7C>]. After all, Westminster Parliamentarians at the time were firmly against Brexit. *Government Loses ‘Meaningful Vote’ in the Commons*, UK PARLIAMENT (Jan. 16, 2019), [<https://perma.cc/74LJ-ES9A>]. Famously, after the Divisional Court ruling in the case, three judges were branded “enemies of the people” by the Daily Mail newspaper. Slack, *supra*.

217. *Miller I* [2017] UKSC 5, [240] (Lord Reed P, dissenting).

218. Michael Holden, *Scottish Court Says UK PM Johnson’s Suspension of Parliament Is Unlawful*, REUTERS (Sept. 11, 2019, 4:16 AM), [<https://perma.cc/SA3E-236L>].

prorogation was a justiciable issue,²¹⁹ a unanimous U.K. Supreme Court eventually ruled that prorogation was justiciable and also that it was unlawful, thus recalling Parliament and embarrassing the government.²²⁰ The court justified its decision as upholding the constitutional principles of parliamentary sovereignty and political accountability and maintained that the judgment was within the court's traditional purview of policing the prerogative rather than an incursion into parliamentary matters.²²¹ This provoked powerful rebuttals from a number of scholars arguing that the courts had effectively attempted to legalize politics.²²² While the U.K. Supreme Court judgment divided many, the eighty-seat majority won by the Conservative Party in the general election just a couple months afterward demonstrated that the courts perhaps should have taken Lord Reed's advice in *Miller I* regarding judicial restraint.²²³

Determining when courts should get involved in disputes is fraught with disagreement. Some may view judicial incursions into the political realm as protecting fundamental values and principles, while others may view these as unnecessary expansions of jurisdiction and a further legalization of politics.

219. *Cherry v. Advoc. Gen.* [2019] CSOH 70, [26]-[29]; *Cherry v. Advoc. Gen.* [2019] CSIH 49, [50], [60]; *R In re Miller v. Prime Minister* [2019] EWHC (QB) 2381, [H4]-[H5], [H8]-[H9], [H11], [H13].

220. See Jones, *supra* note 150, at 187-88.

221. Interestingly, "parliamentary accountability" had not previously been recognized by the court as a major constitutional principle. Mark Elliott, *A New Approach to Constitutional Adjudication? Miller II in the Supreme Court*, PUB. L. FOR EVERYONE (Sept. 24, 2019), [<https://perma.cc/BV3T-RMNU>].

222. See, e.g., JOHN FINNIS, POL'Y EXCH., THE UNCONSTITUTIONALITY OF THE SUPREME COURT'S PROROGATION JUDGMENT 5-6 (2019), [<https://perma.cc/JEH3-HWJB>]; Timothy Endicott, *Making Constitutional Principles into Law*, 136 LAW Q. REV. 175, 180 (2020); Stephen Tierney, *Turning Political Principles into Legal Rules: The Unconvincing Alchemy of the Miller/Cherry Decision*, POL'Y EXCH.: JUD. POWER PROJECT (Sept. 30, 2019), [<https://perma.cc/TQ2F-ZV28>].

223. See Matt Clinch & Spriha Srivastava, *Boris Johnson Secures Biggest Conservative Party Election Win Since 1987*, CNBC (Dec. 13, 2019, 10:50 AM), [<https://perma.cc/KG8Z-FXH9>]; *supra* note 217 and accompanying text.

IV. THE LAW'S DEMOCRATIC DISTANCING

Above, I have sketched out what democratic disaffection is²²⁴ and also provided reasons why the law may have been excluded from studies on the topic.²²⁵ Additionally, I have also explored some of the relationships between law, politics, and democratic disaffection, articulating how law and courts may both contribute to, but also counter, democratic disaffection in various ways.²²⁶ This Part connects the theoretical material on how disaffection arises to some of the practical steps law and courts have taken throughout the years, thus potentially contributing to disaffection.

One of the most significant constitutional developments over the past century has been the purposeful and incremental implementation of what I shall term “democratic distancing.” Democratic distancing in the legal realm shares similar characteristics to the depoliticization that has taken place more widely.²²⁷ Generally, it is the implementation of inherently legal mechanisms that takes features of democracy either further away—or potentially off the table—from political resolution. States have consciously inserted mechanisms to separate themselves from the potential negative effects, or so-called “downsides,” of democracy.²²⁸ On a one-off basis, these instances can seem innocuous, legitimate, and even much needed within societies. Yet when analyzed collectively, they demonstrate a significant amount of change to the political realm and to the operation of democracy more generally. Indeed, it seems undeniable that “the net effect of having so many decisions that affect the fabric of daily life being taken outside traditional democratic channels is that modern democracies now seem very far from providing for popular government.”²²⁹

These distancing measures are important when assessing democratic disaffection for two reasons in particular. First, if

224. *See supra* Part II.

225. *See supra* Section II.A.

226. *See supra* Part III.

227. *See supra* notes 109-25 and accompanying text.

228. *See, e.g.*, Imer B. Flores, *The Problem of Democracy in Contexts of Polarization* 7-8 (Geo. Pub. L. & Legal Theory, Rsch. Paper No. 13-017, 2013).

229. VIBERT, *supra* note 4, at 9.

popular or political control is decreased, then ultimately citizens have less control over these mechanisms, which may lead to further political alienation and feelings of powerlessness.²³⁰ Citizens already feel a sense of displacement within many democracies,²³¹ and further decreasing popular control mechanisms seems antithetical to remedying this situation. Second, democratic distancing measures provide the impression that politics—or indeed the citizenry—does not deserve these powers or has been irresponsible in using them. No doubt the political realm has made mistakes, but whether or not these mistakes are serious enough to strip representatives or citizens of powers is up for debate.²³² Thus, while the legal realm may argue that increased court powers only rarely prevent the government from doing what it wants, this argument misses the point: it is the *perception* that politics and the political realm are unfit to possess these powers that matters and which ultimately affects democratic disaffection. Some of these incremental distancing steps are explored more below.

A. Judicial Policymaking Capacity: A One-Way Street

Although the courts have not been at the forefront of championing distancing measures, it would be a mistake to say that they have never done so. Accounts of courts lobbying to significantly expand their jurisdictions,²³³ and also pushing for

230. As noted in Part II above, citizen powerlessness has been highlighted by some of the democratic disaffection literature. *See, e.g.*, HIBBING & THEISS-MORSE, *supra* note 5, at 10; Foa & Mounk, *supra* note 5, at 7; BLACKWELL ET AL., *supra* note 55.

231. *See* Phil Parvin, *Democracy Without Participation: A New Politics for a Disengaged Era*, 24 RES PUBLICA 31, 37 (2017).

232. As Robert Dahl once said:

[T]he risk of mistake exists in all regimes in the real world . . . the opportunity to make mistakes is an opportunity to learn. Just as we reject paternalism in individual decisions, because it prevents the development of our moral capacities, so too we should reject guardianship in public affairs, because it will stunt the development of the moral capacities of an entire people.

ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 78-79 (1989).

233. *See, e.g.*, Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1-3 (2003).

stronger codification on certain issues (e.g., human rights),²³⁴ have been well documented over the past century.

While descriptions of judicial policymaking expansion often emphasize that the courts have been handed newly fashioned powers directly from the legislature, these accounts tend to downplay the role of judiciaries, or senior judges, in helping make these changes come about. Take the Judiciary Act of 1925, which allowed the U.S. Supreme Court to fully take control of its docket by amending certiorari jurisdiction.²³⁵ Before this, the Court's docket was largely made up of mandatory cases that it was required to hear if they came through the correct channels in the lower courts.²³⁶ Amending certiorari allowed it to pick and choose its own cases and take a larger role "as a prominent [national] policymaker."²³⁷ This, as one author put it, represented a "quantum leap" forward regarding how the Court set its agenda.²³⁸ William Howard Taft, former U.S. President and then Chief Justice of the Supreme Court, energetically lobbied for the change to take place.²³⁹ In fact, a panel of Supreme Court Justices helped write the Bill that was presented in the Senate, and Taft's lobbying for the 1925 Bill possessed one central aim: "to increase the policymaking capacity of the federal judiciary, and of the Supreme Court in particular."²⁴⁰ Buchman adds:

Taft sought to give the Court full control over its docket not only to reduce the Court's workload, but also to transform the Court's fundamental purpose within the federal judicial hierarchy. Instead of serving primarily as the federal court of last resort, charged with correcting lower court's errors and vindicating the rights of particular litigants, the Court would become a tribunal whose significance would rest in its power to rule on issues of great legal or political significance to the public at-large, to supervise the federal judicial

234. Anthony Lester, *The Magnetism of the Human Rights Act 1998*, 33 VICT. U. WELLINGTON L. REV. 477, 481-82 (2002).

235. Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1-3 (1928).

236. Buchman, *supra* note 233, at 2.

237. *See id.*

238. *Id.* at 1.

239. *Id.* at 2.

240. *Id.* at 10.

hierarchy, and to ensure uniformity throughout the system.²⁴¹

Examining the role of the Court in American politics today, it is difficult to conclude this change was insignificant. The Court as a national policymaker seems widely accepted, if not uncontested.²⁴²

As dramatic and potentially inappropriate as the above example would be considered today—with a Chief Justice actively lobbying for reforms—contemporary campaigns to increase the policymaking capacity of courts can be seen in other jurisdictions. For instance, senior judges in the United Kingdom openly lobbied to domesticate the European Convention on Human Rights (ECHR), a change that undoubtedly increased the policymaking capabilities of domestic U.K. courts.²⁴³

As a sitting Appeal Court judge, Lord Scarman gave the 1974 Hamlyn Lectures,²⁴⁴ which “presented a full and cogent case” for domesticating the ECHR.²⁴⁵ Scarman’s lectures were a major intervention, and in 1976, the Labour Party published *A Charter of Human Rights*, which advocated incorporating the ECHR into domestic law—the first time the Party had officially done so.²⁴⁶ In 1985, just before he retired from being a Lord of Appeal in Ordinary in the House of Lords (at the time, the United Kingdom’s highest court), Lord Scarman introduced a Bill in the House of Lords to domesticate the ECHR.²⁴⁷ The measure ended up passing the Lords, but it fell in the Commons.²⁴⁸ Lord Scarman, however, was not the only judge advocating for incorporation of the Human Rights Act.²⁴⁹

241. Buchman, *supra* note 233, at 10.

242. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 275, 275, 281 (1957).

243. Lester, *supra* note 234, at 481-82.

244. Leslie Scarman, *English Law: The New Dimension*, in 26 THE HAMLYN LECTURES 1, 88 (1974).

245. STEPHEN SEDLEY, LAW AND THE WHIRLIGIG OF TIME 208-09 (2018); *see also* FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UK’S NEW BILL OF RIGHTS 153, 156-57 (2000).

246. KLUG, *supra* note 245, at 156.

247. SEDLEY, *supra* note 245, at 208.

248. *Id.*

249. Indeed, Lord Scarman did not just stop at promoting a human rights charter. In 1992, he advocated that Britain should have a written constitution. Leslie Scarman, *Why*

In 2002, Lord Lester revealed that senior judges supported his 1994 Private Members' Bill to incorporate the ECHR and even gave him advice on how a future version should be drafted, noting the Bill should not allow the judiciary to strike down Acts of Parliament.²⁵⁰ Additionally, in a celebrated maiden speech as Lord Chief Justice in 1996, Lord Bingham—who served on the United Kingdom's highest court from 2000-2008—also stressed the need for domestication of the ECHR, noting “the convention is not part of our domestic law” and that “[t]he courts have no powers to enforce convention rights directly.”²⁵¹ Further, a number of academic articles by senior judges around this time argued for the incorporation of the ECHR or other fundamental aspects into the U.K. constitution.²⁵² Thus, although it would be incorrect to say that senior members of the judiciary were “leading” the charge for domestication of the ECHR, it would also be incorrect to say that they sat idly by to see what transpired or that the judiciary was merely “handed” these powers from Parliament. After all, prominent senior judges were advising on the drafting of bills, making prominent public speeches, and writing in law review articles for the incorporation of something that would undoubtedly expand their power and increase their policymaking capacity.

Finally, it is important to emphasize that judicial policymaking capacity only travels one way: towards further expansion. Although some courts or judges may prove more deferential than others, that does not mean that their jurisdiction or ability to rule on controversial issues has been diminished.

Britain Needs a Written Constitution, CHARTER 88 TR. PUBL'NS (1992), reprinted in 19 COMMW. L. BULL. 317, 317-18 (1993).

250. Lester, *supra* note 234, at 482. He identifies these judges as the following: “Lord Taylor of Gosforth, Lord Browne-Wilkinson, and [then] present Lord Chief Justice, Lord Woolf of Barnes.” *Id.*

251. HL Deb (3 July 1996) (573) cols. 1465-67.

252. DANNY NICOL, EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS 237-38 (2001).

B. The Implementation and Expansion of Written Constitutions and Bills of Rights

The world currently has more written constitutions than ever, longer and more detailed constitutions than ever, more articulation of rights (civil, social, cultural, and economic) than ever, and wider enforcement by constitutional courts than ever.²⁵³ And yet, as this post-World War II explosion of constitutional writtenness has come about,²⁵⁴ democratic disaffection throughout the world has increased significantly.²⁵⁵ In addition to the effects of constitutional expansion, questions about the efficacy of bills of rights continue to arise, with some authors demonstrating that the articulation of rights provisions does not automatically lead to enhanced protection of enumerated rights.²⁵⁶ These developments beg the question: has the constitutional pendulum swung too far in favor of law and legal processes and away from politics and political resolution?

In some sense written constitutions have always had a contentious relationship with democracy.²⁵⁷ Even the authors of the American Constitution, the document which allegedly ushered in the idea of “We the People,” celebrated the fact that the people had no formal share in government.²⁵⁸ And it is no secret that constitutional designers past and present attempt to protect the state from the passions of the political realm.²⁵⁹ This

253. On the increasing length and detail of written constitutions, see Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement*, in CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS 69, 72, 88 (András Sajó & Renáta Uitz eds., 2010). On the increasing number of written constitutions, see *Data Visualizations*, *supra* note 92. See *supra* Section IV.A, for a discussion of the expanding jurisdiction of constitutional courts.

254. See *Data Visualizations*, *supra* note 92.

255. See WIKE ET AL., *supra* note 40, at 5.

256. See ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 60 (2020).

257. See ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15, 20 (2d ed. 2003); ALLAN C. HUTCHINSON, DEMOCRACY AND CONSTITUTIONS: PUTTING CITIZENS FIRST 37-39, 52 (2021).

258. See, e.g., George Thomas, *The Madisonian Constitution, Political Dysfunction, and Polarized Politics*, in PARCHMENT BARRIERS, *supra* note 132, at 15, 18.

259. See Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD J. LEGAL STUD. 435, 452 (2019) (“The ambition and ambiguity of modern constitutional documents is remarkable. Drafted in the name of the people, they are

is not to say that written constitutions are inherently anti-democratic in nature but to acknowledge that many features of written constitutions, and the idea of constitutionalism more generally, are in tension with democracy and always have been.

Post-World War II developments enhanced these tensions. The further implementation of written constitutions around the world and the widespread adoption of constitutional supremacy was performed not merely “to tie policy to law” but to also “subordinate it to law.”²⁶⁰ The subordination of policy (i.e., politics, legislation, etc.) appears to be one of the main goals of contemporary constitutionalism, with law (i.e., constitutions, rights, fundamental values, etc.) moving into a superior position above politics and the political realm. Whatever effects on democratic government these arrangements may allegedly provide (e.g., enhanced protection of rights, better scrutiny of government policy, more reasoned decision-making processes in government, etc.), it is unavoidable that the power of the democratic vote, and indeed the power of those with the closest connection to the people—representatives—are decreased.²⁶¹

Of course, some may quibble with constitutions and bills of rights being listed as elements of democratic distancing, especially given that many of these documents begin with “We the People.” But the idea of citizens being the “supreme authority” has always been problematic.²⁶² As I have argued elsewhere,²⁶³ contemporary “We the People” constitutions do not provide increased powers to citizens, and they intentionally devalue politics and the political process by lowering the status of legislators and statutes.²⁶⁴ There is little doubt that implementation of these devices has changed the way that

presented as instruments of settlement, whilst incorporating multiple techniques of evasion.”).

260. Limbach, *supra* note 124, at 7.

261. See JONES, *supra* note 92, at 58-59, 69-73.

262. Indeed, this may very well be a fiction. See, e.g., EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 56-60, 65 (1989).

263. JONES, *supra* note 92, at 86.

264. Limbach, *supra* note 124, at 1 (“[T]he supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator.”).

decisions on constitutional government operate from a more political structure to a more legal structure, without guaranteeing positive social change will take place or that better decisions will be made.²⁶⁵ Nowadays, it is not uncommon to find unamendable eternity clauses in constitutions;²⁶⁶ and if these are not present in the written constitution, judges may feel the need to determine for themselves which parts of the constitution are “unamendable.”²⁶⁷ Further, explicit statements that judicial rulings are final and incontestable by the political realm are common and expected nowadays, and it is also not uncommon for apex courts to reject constitutional amendments that have gone through proper amendment procedures.²⁶⁸ These developments provide a strange juxtaposition to those advocating contemporary “We the People” constitutions and still championing citizens as the ultimate authority.

The increase in the number, length, and detail of written constitutions around the world, which has happened in conjunction with increasing levels of democratic disaffection, is impossible to ignore. At the very least, such changes raise serious questions as to whether the pendulum may have swung too far in one direction.

265. For the classic text in relation to the futility of law and courts to bring about social change, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420-22 (2d ed. 2008). In relation to Canada’s experience, for example, see Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. BAR REV. 30, 49-52 (1983).

266. Basic Law for the Federal Republic of Germany has a number of these. Änderung des Grundgesetzes [Amendment of Basic Law], May 8, 1949, BGBl I at 968, art. 79(3) (Ger.), translation at [<https://perma.cc/A5QA-LGPX>] (“Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”).

267. This is often referred to as the “basic structure” doctrine. As it regards judges feeling the need to do this themselves, this recently happened in Kenya. See *Ndii v. Att’y Gen.* [2021] K.L.R. 9746 (H.C.K.).

268. Regarding courts rejecting constitutional amendments, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (Feb. 2014) (Ph.D. dissertation, London School of Economics and Political Science) [<https://perma.cc/CT9P-L72L>]; RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 1-4 (2019).

C. Judicial Regionalism and Supra-National Jurisdictions

The expansion of regional and supra-national courts contained noble origins: they would serve as recognized tribunals that could handle the most serious and difficult cases the world confronted.²⁶⁹ But the development of some of these courts has drifted far from these virtuous beginnings. The establishment of regional and supra-national courts has provided a structure whereby ordinary decisions taken by national political actors are being questioned or second-guessed by judges far removed from domestic politics.²⁷⁰ As evidenced by court caseloads, the dockets of regional and supra-national courts are not merely focused on the most significant human rights abuses or the most grievous breaches of law.²⁷¹ Additionally, some regional and supra-national structures have strengthened their commitment to legal-only procedures and solutions, while spurning political processes and resolutions.²⁷² As these courts have come into being and evolved, democratic disaffection has evolved alongside them.

One of the most significant examples of court development traversing into the political arena comes from the European Court of Human Rights (ECtHR).²⁷³ Originally conceived as a venue that would focus on major breaches of human rights from around Europe, the court has developed into what some now consider the “Supreme European Court”²⁷⁴ and “one of the world’s most

269. See Hermann Mosler, *Supra-National Judicial Decisions and National Courts*, 4 HASTINGS INT’L & COMPAR. L. REV. 425, 426-28 (1981).

270. *Id.* at 460-61.

271. See, e.g., Richard H. Pildes, *Supranational Courts and the Law of Democracy: The European Court of Human Rights*, 9 J. INT’L DISP. SETTLEMENT 154, 162-75 (2017) (discussing claims the court has faced concerning democratic rights).

272. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141, 171 (2016).

273. The court explicitly adjudicates on whether certain changes are “necessary in a democratic society,” where a political perspective may not just prove valuable but essential. Pildes, *supra* note 271, at 164-65.

274. Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOC. INQUIRY 137, 137, 139-40 (2007).

influential and effective” institutions.²⁷⁵ Growth of the court’s docket has been nothing short of staggering. From 1960-1975, the court delivered eighteen judgments in total, or just over one judgment per year.²⁷⁶ This rose to about fourteen per year from 1976-1985.²⁷⁷ From 1990-1999, the court delivered 809 judgments, or about eighty-one per year.²⁷⁸ But from 2000-2014, the court delivered 16,740 judgments, or 1,116 per year.²⁷⁹ The most recent statistics suggest the court delivers close to 2,000 judgments per year.²⁸⁰ While the ECtHR possesses honorable intentions, its current operation appears quite far from what members originally signed up for, and its continued operation could be displacing, not improving, national politics.

The ECtHR’s enforcement mechanisms have also transformed since its establishment. Originally, the Council of Europe contained a Human Rights Commissioner that served as the court’s gatekeeper.²⁸¹ The main focus during this time was to find “[f]riendly settlements” “on the basis of respect for human rights.”²⁸² The 11th and 14th Protocols significantly changed the enforcement of the Convention into a highly legal exercise. They eliminated the Human Rights Commission and instituted a full-time court that sat in a number of forms.²⁸³ States were also obligated to accept the court’s compulsory jurisdiction, which

275. JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (2019). However, the effectiveness of the ECtHR is also up for debate, as scholars have noted that non-execution of the court’s judgments is a distinct problem. See, e.g., Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights*, 66 INT’L & COMP. L.Q. 467, 469-70 (2017).

276. Madsen, *supra* note 272, at 154 fig.1.

277. *Id.*

278. *Id.* at 160 fig.3.

279. *Id.*

280. See EUR. CT. OF HUM. RTS., STATISTICS 2020 (2021), [<https://perma.cc/QYS4-LSLR>].

281. Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, 706-07 & n.63 (Helen Keller & Alec Stone Sweet eds., 2008).

282. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 28, Nov. 4, 1950, E.T.S. No. 005 (currently Article 39).

283. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155; Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, E.T.S. No. 194.

was previously voluntary.²⁸⁴ These changes fully legalized Europe's operation of human rights protection, thus eliminating its most significant political elements.

Scholars believe that the court has profoundly, even “radically,” affected some of its member states.²⁸⁵ If this is the case, then some major issues linger, such as how these courts are affecting the perception and operation of democracy around the world. Although the goals of regional or supra-national courts may be honorable—to increase human rights protection among member states—the fact that increased human rights enforcement has not led to increased satisfaction with the operation of democratic government remains highly problematic. Indeed, it seems that increasing rights adjudication may not be bringing citizens together but tearing them apart.²⁸⁶ For example, the United Kingdom currently has less than 0.2% of the pending cases before the ECtHR and has also had significantly fewer violations than in years past.²⁸⁷ But many rights advocates still decry the lack of an elusive “human rights culture” within the United Kingdom,²⁸⁸ and some even assert the United Kingdom is “abandoning human rights.”²⁸⁹ Ultimately, if over seventy years of Council of Europe membership and two-plus decades of domestic human rights enforcement has not yet created the “new and better relationship between the Government and the people” that was desired upon passage of the Human Rights Act 1998,

284. Keller & Sweet, *supra* note 281, at 678-79.

285. *Id.* at 677.

286. This claim has recently been made at the domestic level. *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at xiv-xxi, 163 (2021); *see also* LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM 4 (2021) (“[T]he Constitution encourages Americans to formulate ordinary political disputes in terms of ‘rights’ that are absolute and nonnegotiable. The tendency exacerbates political tension and obstructs authentic dialogue that actually has the potential to persuade participants. It is driving the country toward irreparable fissure.”).

287. U.K. MINISTRY OF JUST., RESPONDING TO HUMAN RIGHTS JUDGEMENTS 10 (2020), [<https://perma.cc/UQ3Q-72XN>].

288. In fact, this point was made by the Joint Committee on Human Rights itself. JOINT COMMITTEE ON HUMAN RIGHTS, ENFORCING HUMAN RIGHTS, 2017-19, HC 669, HL 171, ¶¶ 133-64 (UK).

289. Kate Hodal, *UK's 'Headlong Rush into Abandoning Human Rights' Rebuked by Amnesty*, GUARDIAN (Apr. 7, 2021, 1:01 AM), [<https://perma.cc/XPK6-CFRQ>].

then one wonders whether it will ever do so.²⁹⁰ For all the ECtHR's successes, a strong argument could be made that, since its implementation, an increasingly tenuous and distrustful relationship between government and the people has been cultivated.

D. Citizens' Lack of a Role in Burgeoning Constitutional Adjudication

On July 11, 1789, Thomas Jefferson wrote to Thomas Paine that he considered trial by jury “the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution.”²⁹¹ Almost two centuries later in the U.K. context, Lord Devlin called trial by jury “more than one wheel of the constitution: it is the lamp that shows that freedom lives.”²⁹² And yet presently, any form of trial by jury in relation to constitutional adjudication is non-existent. There is no anchor, nor lamp.

Citizens' role in constitutional adjudication begins and ends with an individual or interest group bringing a case to court. And courts—especially apex courts—operate on majoritarian voting procedures.²⁹³ As constitutional adjudication has grown in strength and volume throughout the world—and even as constitutional cases have become increasingly political in nature and more explicitly focused on democracy—no role for citizen participation has been identified or allowed.²⁹⁴ Adjudicative processes for constitutional, administrative, and human rights

290. LEGISLATING FOR HUMAN RIGHTS: THE PARLIAMENTARY DEBATES ON THE HUMAN RIGHTS BILL 3 (Jonathan Cooper & Adrian Marshall-Williams eds., 2000).

291. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), [<https://perma.cc/7MTD-CCZL>].

292. PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

293. Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1692 (2014) (also published in Chapter 10 of JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS (2016)).

294. Regarding the rise of judicial review throughout the world, see 1 STEVEN GOW CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 COMMON LAW COUNTRIES AND ISRAEL 3 (2021); 2 STEVEN GOW CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 CIVIL LAW COUNTRIES 1 (2021).

issues remain entirely judge-led.²⁹⁵ This is true both at the national level and also the supra-national level, as identified in the section above.²⁹⁶ But, given the slumping levels of civic participation worldwide, should there not at least be attempts to insert the public more into constitutional adjudication?

The situation in relation to constitutional adjudication sits in marked contrast to the development of other areas of law, such as criminal, where citizen participation has been highly valued in legal systems throughout the world. As Sanford Levinson points out, trial by jury “meant that ‘We the People’ would have yet another check on potentially unscrupulous or overreaching prosecutors.”²⁹⁷ Why should the same principle not apply to apex court judges, especially those that openly invite political issues to be resolved in the courtroom? Given the way constitutional adjudication is currently set up in many countries, the people have little say on what issues should remain in the political realm and what issues should be pushed to the legal realm.²⁹⁸ Some may argue that constitutional amendments provide this role, but this idea is seriously flawed. Having to employ constitutional amendment procedures to reverse a decision by an apex court seems an overly dramatic hurdle that may discourage citizens from participating in constitutional politics, not least because of the excessively high barriers to amendment, but also because the apex court may just eventually reject it (even if the amendment passes).

As constitutional adjudication has grown by leaps and bounds over the past few decades, providing judiciaries immense powers within many constitutional democracies, no enhanced role for the people has developed within it. But if constitutional adjudication is going to remain an essential feature of

295. See *The Court and Constitutional Interpretation*, *supra* note 171; BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021); U.N. Human Rights Office of the High Commissioner, Basic Principles on the Independence of the Judiciary (Sept. 6, 1985), [<https://perma.cc/RWU7-7SPJ>].

296. See *supra* Section IV.C.

297. SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL 316 (2015).

298. See ANDREW HARDING, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *The Fundamentals of Constitutional Courts* 1-2 (2017), [<https://perma.cc/YW9U-WMAV>].

constitutional government going forward, then finding a suitable role for the people—be that through jury trials or some other mechanism—is essential.²⁹⁹

E. Can Democratic Distancing Be Stopped?

The allure of distancing is powerful, and for many its aims are completely legitimate: democracies must be protected from the debilitating whims of the electorate or from the passion of politics more generally. But how much distancing can take place before democracy becomes ineffective or potentially even obsolete, and has the balance swung too far in one direction? Continually shifting governmental decision-making outside of popular control to depoliticized non-majoritarian institutions may have opened up “a space that lends itself readily to exploitation by populist parties of both the right and the left.”³⁰⁰ This begs the question as to whether there is a point where democratic distancing becomes no longer useful, but even harmful.

One of the interesting things that Roberts points out in his logic of discipline study is that all the entities that were removed from the democratic sphere (e.g., central banking, fiscal rules, port authority, etc.) eventually had to adopt political strategies in order to survive.³⁰¹ Thus, although they were supposedly removed or detached from politics, they all ended up either working closely with politics and politicians or adopting overtly political strategies into their operations. This should come as no surprise to legal scholars. As courts have grown in power and stature since WWII, and as many political issues have been turned into legal or constitutional issues, judiciaries around the world have adopted overtly political strategies. For example, many scholars in the American context justify the overwhelming power of the Supreme Court by saying that it rarely departs from the

299. Loughlin, *supra* note 259, at 453 (“Remedies must be considered that take seriously the need to reinvigorate democratic aspirations. . . . A more balanced appraisal might therefore enquire into the evident deficiencies of the workings of many counter-democratic institutions and take seriously a conception of democracy as a social and cultural practice rather than a mere mechanism for choosing leaders.”).

300. MAIR, *supra* note 5, at 137.

301. See ROBERTS, *supra* note 101, at 13-17.

views of the general public.³⁰² Toeing this line provides the Court a sense of legitimacy, but it also displays that the Court is unable to go against political opinion without risking its legitimacy and institutional position. Such strategies also abound in the international court context. Scholars have demonstrated that regional human rights courts are strategic in the way they deliver their judgments, often thinking about things such as when judgments will cause less controversy or when an issue has faded from the political radar.³⁰³ Thus, when push comes to shove regarding many of these non-political or newly independent entities, what we often see is overtly political methods being adopted or some type of explicit or benign alignment with the political class. Some may say that this demonstrates the influence of the political realm has been sustained. Conversely, it may also make one question why these items were removed from the political realm to begin with.

Another interesting parallel between the depoliticizing measures in the economic realm and the democratic distancing provided by the legal realm has been the lack of evidence that these changes have improved performance. As Hay notes, “There is no statistically significant correlation between the granting of independence and improved anti-inflationary performance.”³⁰⁴ This is similar to what has been found in the legal realm regarding the expansion and protection of rights, which have become highly judicialized in recent years. There seems to be no solid or consistent evidence that the move from the political to the judicial realm has increased protections.³⁰⁵ In fact, some scholars have been highly critical of the overfocus on human rights, noting that “politics has become obsessed *with the protection of human rights to the detriment of any focus on human responsibilities* across a range of dimensions (e.g. to the planet, to other species, or to future generations).”³⁰⁶

302. See FRIEDMAN, *supra* note 192, at 4; William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87, 96-97 (1993).

303. See Madsen, *supra* note 274, at 155-57.

304. HAY, *supra* note 5, at 117 (citation omitted).

305. See CHILTON & VERSTEEG, *supra* note 256, at 11.

306. FLINDERS, *supra* note 5, at 132 (emphasis added).

Although law has not led the charge in terms of democratic distancing, it has adopted and applied—and therefore furthered—similar depoliticization measures that have arisen within other realms, such as economics.³⁰⁷ And beyond this, law has also embraced something more sinister: a depiction of the public realm that takes an extremely depressing view of human nature. It views ordinary individuals and the politicians that represent them as dangerous: either they are entirely self-interested and neglect their public duties, or they are debilitated by passions that need to be tamed.³⁰⁸ And if these people are not acting in self-interest or overcome with emotion, then they are portrayed as ignorant and stupid.³⁰⁹ This view of the political realm is inaccurate and unacceptable. As Bernard Crick once wrote, “To renounce or destroy politics is to destroy the very thing which gives order to the pluralism and variety of civilized society, the thing which enables us to enjoy variety without suffering either anarchy or the tyranny of single truths”³¹⁰

Even a cursory look at judicial operation from a comparative perspective demonstrates that “if there were otherwise any doubt . . . the law is applied by human beings some of whom suffer from all the prejudices, vanities and irrationalities common to our species.”³¹¹ Ultimately, attempting to renounce the political realm or depoliticize issues because of the supposed dangers present in the political realm does not remove those dangers; it simply camouflages them.

V. ACCEPTING LAW’S ROLE IN DEMOCRATIC DISAFFECTION

Acknowledging that law and legal processes have contributed to democratic disaffection does not absolve the political realm of its pathologies and mistakes, nor does it condemn the legal realm’s contributions to upholding and

307. See *supra* notes 91-94 and accompanying text.

308. See *supra* text accompanying notes 95-99, 116-22.

309. See HOLMES, *supra* note 116, at 6, 135.

310. BERNARD CRICK, IN DEFENCE OF POLITICS 26 (4th ed. 1992).

311. DAVID PANNICK, I HAVE TO MOVE MY CAR: TALES OF UNPERSUASIVE ADVOCATES AND INJUDICIOUS JUDGES 4 (2008).

furthering democracy and democratic practices. But acknowledging that law is intimately connected to the political realm, and that its outputs can and do affect not just the practicalities or procedures of the elected branches but also the attitudes and feelings citizens possess towards these branches, is something legal professionals (i.e., judges, lawyers, law professors, etc.) must recognize and accept. Law and legal processes may not be the primary drivers of anti-political sentiment, but it would be mistaken to say they do not contribute to it.

Investigations into the rise of democratic disaffection have produced fascinating insights into the evolution and operation of democracy. The phenomenon is certainly complex, and it seems increasingly clear “that there is unlikely to be a single explanation for the declines in” participation seen around the world.³¹² As one prominent scholar has noted, “we have to look elsewhere for plausible explanations.”³¹³ Unfortunate as it may be for some to acknowledge, law and legal processes are likely part of democratic disaffection’s story. Although law can uphold and enhance democracy and democratic practices,³¹⁴ it may also damage and undermine the political realm in various ways.³¹⁵ Democratic distancing by judiciaries and the increasing subordination of politics to law have produced very real effects. As Mair points out, some already identify and advocate for democracy under the following formula: “NGOs (*non-governmental organizations*) + judges = democracy.”³¹⁶ The public vote—and the political realm more generally—is nowhere to be found in this bleak blueprint. Perhaps this view corresponds to the “postelectoral era” that Benjamin Ginsberg and Martin Shefter described before the turn of the century.³¹⁷ But if “having governments that pay attention is the aim and constant effort of

312. DALTON, *supra* note 5, at 78.

313. Newton & Norris, *supra* note 76, at 59.

314. *See supra* Section III.B.

315. *See supra* Section III.A.

316. MAIR, *supra* note 5, at 11.

317. BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA* 1 (1990) (emphasis omitted).

democracy,”³¹⁸ then too much displacement will make this much-needed attention increasingly unlikely.

Compared to the views of early theorists, the judiciary’s trajectory within constitutional government has been nothing short of remarkable. Today, judicial power around the world is far from “next to nothing.”³¹⁹ Indeed, the power of judgment has proven to be a resilient if not extraordinary institutional quality that rivals or even supersedes force or will, and that can highly influence and affect the political realm. This has been especially true in recent decades, as constitutional supremacy has tried—and in many cases succeeded—to subordinate politics and the political realm.³²⁰ Law and courts have displayed some of the same pathologies found elsewhere. Just as economists worked to “depoliticize” the public realm and establish economic theocracies based on technocrat guardians,³²¹ so too has law and the legal realm risked asserting its place above politics as the more principled, more thoughtful, and less chaotic realm. Additionally, just as technocrat guardians were asserted as the main players in the economic realm, so-called “constitutional guardians” (i.e., constitutional and supreme court judges) have been implemented in the legal realm, tasked with wide powers to police the entire constitutional state.³²² Far from helping solve the intractable problems located in the political realm, these developments have merely led to the displacement of politics and further distancing of citizens from the idea of self-government.³²³

Given the inseparable relationship between law and politics—including their intimate connection to the operation of government—both realms should be attempting to ennoble, not displace, one another. After all, “diverse groups hold together, firstly, because they have a common interest in sheer survival and, secondly, because they practice politics—not because they agree about ‘fundamentals’, or some such concept too vague, too

318. ROBERT TOMBS, *THIS SOVEREIGN ISLE: BRITAIN IN AND OUT OF EUROPE* 151 (2021).

319. MONTESQUIEU, *supra* note 2, at 156.

320. *See supra* text accompanying notes 260-61.

321. *See* ROBERTS, *supra* note 101, at 139.

322. JONES, *supra* note 92, at 131-57.

323. *See supra* Sections IV.A, IV.B, IV.C, IV.D.

personal, or too divine ever to do the job of politics for it.”³²⁴ There is little doubt that, at this point in history, the political realm needs ennobling more than ever, and certainly more than the legal realm. Attempting to further subordinate politics to law or further depoliticizing governmental decision-making will not end constitutional tumult. Indeed, this “widening gap between rulers and ruled has facilitated the often strident populist challenge” increasingly present in many democracies.³²⁵

Law and democracy can coexist without never-ending battles for supremacy and the subordination of the other realm. But that assumes that we still want to live in democracies.³²⁶ And if we do, then it seems clear that now—perhaps more than any time in history—politics needs ennobling, not simply degradation.

324. CRICK, *supra* note 310, at 24.

325. MAIR, *supra* note 5, at 19.

326. SILVA-LEANDER, *supra* note 6, at 1; (“The number of countries moving in an authoritarian direction in 2020 outnumbered those going in a democratic direction.”); *see also* Noam Lupu et al., *Would Americans Ever Support a Coup? 40 Percent Now Say Yes*, WASH. POST (Jan. 6, 2022, 7:45 AM), [<https://perma.cc/3LFU-HPE3>]; BLACKWELL ET AL., *supra* note 55, at 5 (54% of those surveyed in the 2019 Audit said that Britain needs “a strong leader who is willing to break the rules”).