A CORE CASE FOR JUDICIAL REVIEW:
STRIKING A DYNAMIC BALANCE
BETWEEN CONSTITUTIONALISM AND
DEMOCRACY

Wen-Cheng Chen
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Abstract

Is judicial review a *deus ex machina* institution? Commentators disagree on the legitimacy of judicial review in a constitutional democracy. Many scholars who argue for (or against) judicial review have based their claims on democracy or democratic theory, while other scholars have founded their positive (or negative) arguments on constitutionalism or constitutional theory. Based on a general assessment of the literature, this article finds that most scholars have overlooked a core case for judicial review that the central role of judicial review in a constitutional democracy is to strike a dynamic balance between constitutionalism and democracy. Taking three current trends of worldwide development — the global spread of democratization, the global adoption of constitutionalism, and the global proliferation of judicial review — into consideration, the article tries to justify the core case on the basis of necessity, feasibility, and suitability. Accordingly, judicial review is a necessary, feasible, and suitable institution for maintaining a proper balance between constitutionalism and democracy in modern democracies.
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Key Words: Judicial Review, Dynamic Balance, Constitutionalism, Democracy, Constitutionalization, Necessity, Feasibility, Suitability.
I. INTRODUCTION

Most people recognize that we live in an era of globalization, and that many things, if not all, are likely to be globalized. As the engine of globalization keeps churning, for good or ill, three worldwide development trends — the global spread of democratization,\(^1\) the global adoption of constitutionalism,\(^2\) and the global proliferation of judicial review\(^3\) — have become increasingly evident. Examining the spread of these trends, one finds a growing number of constitutional democracies worldwide that make their democracy work with an institution of judicial review.

Commentators disagree on the legitimacy of judicial review in a constitutional

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\(^1\) According to Freedom House, the number of democratic states has expanded from 40 in 1974, the year the third wave of democratization began, to 116 in 2010. Doh Chull Shin, a political scientist, affirmed that “as a set of political ideals as well as political practices, democracy has finally reached every corner of the globe, including the Middle East and North Africa, the two regions known as the most inhospitable to it.” See Doh Chull Shin, CONFUCIANISM AND DEMOCRATIZATION IN EAST ASIA 1 (2012); What is more, three Arab autocracies, i.e., Tunisia, Egypt, and Libya, fell in 2011. This democratization trend will continue to prevail and spread to East Asian countries, such as Singapore, Malaysia, and even China. See Larry Diamond, China and East Asian Democracy: The Coming Wave, 23(1) J. OF DEMOCRACY 5, 13 (2012).

\(^2\) David Law and Mila Versteeg argued that “success breeds imitation, and constitutionalism is no exception,” and the global adoption of constitutionalism has become a common phenomenon around the globe. See David Law and Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, 99 CAL. L. REV. 1163, 1166-71, 1173 (2011). This article uses the term “global adoption of constitutionalism” as referring to the global adoption of a written constitution and the principles of classical constitutionalism, such as limiting government powers, protecting human rights, and adhering to the rule of law. This term is a sub-concept of the umbrella concept of “global constitutionalism.” For the time being, “global constitutionalism” is still a contested concept, which may encompass: (1) the global adoption of a written constitution; (2) a single global constitution used to govern a world government; (3) global judicial dialogue; (4) the global adoption of judicial review; and (5) the global trend of constitutional interpretation methods, such as proportionality analysis (PA). See David Law and Mila Versteeg, id.; Frederick J. Lee, Global Institutional Choice, 85 N. Y. U. L. REV. 328, 328-357 (2010); David S. Law and Wen-Chen Chang, The Limits of Global Judicial Dialogue, 86 WASH. L. REV. 523, 523-577 (2011); Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES- CONSTITUTIONAL COURTS IN ASIAN CASES 90 (2003); Tom Ginsburg, “The Global Spread of Constitutional Court,” in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira Eds., THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-88 (2010); Jud Mathews and Alec Stone Sweet, All Things in Proportion? American Rights Review and the Problem of Balancing, 60 EMORY L. J. 797, 797-875 (2011); John F. Stinneford, Rethinking Proportionality under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899, 899-978 (2011); Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM. J. OF TRANSNATIONAL L. 73, 73-165 (2008); Tor-Inge Harbo, The Function of the Proportionality Principle in EU Law, 16(2) EUROPEAN L. J. 158, 158-185 (2010).

\(^3\) Scholars have showed this trend. Tom Ginsburg, for instance, found that as three waves of democratization developed, the global spread of judicial review also underwent three waves: (1) 1978-1945, from American enforcement of the Constitution to the end of World War II; (2) 1945-1989, from the end of World War II to the collapse of communism; (3) from 1989 onwards. As of 2008, 158 out of 191 constitutional systems had adopted some formal provision for constitutional review. See Tom Ginsburg, supra note 2, at 90-91(2003); Tom Ginsburg, supra note 2, at 82-88 (2010); In 2007, out of 193 independent states, 164 had some form of judicial review. See Ruthann Robson, Judicial Review and Sexual Freedom, 30 U. OF HAWAII L. REV. 1, 4-5 (2007); Another study on global constitutionalism demonstrated that only 35% of countries had either de jure or de facto judicial review in 1946, but 87% had it in 2006. See David Law and Mila Versteeg, supra note 2, at 1199; Miguel Schor, Mapping Comparative Judicial Review, 7 WASH. U. GLOBAL STUDIES L. REV. 257, 261-64 (2008) (arguing that the world underwent a global transformation concerning the prevalence of judicial review, and the Second World War was a watershed).
democracy. Even in the concept’s birthplace, the United States of America, judicial review has been regarded by many critics as a *deus ex machina*⁴ institution. There are other scholars in the country, however, who extol and defend this institution. Generally speaking, many commentators who argue for (or against) judicial review have based their claims on democracy or democratic theory, while other scholars have founded their positive (or negative) arguments on constitutionalism or constitutional theory. What is the role of judicial review within a constitutional democracy amid these rising global trends? The answer varies widely in extant literature, but based on a general assessment of the literature, this article finds that most scholars, both opponents and proponents, have overlooked a core case for judicial review – that the central role of judicial review in a constitutional democracy, *inter alia*, is to strike a dynamic balance between constitutionalism and democracy.

This paper explores this core case for judicial review, starting with some preliminary comments outlining the issue in Part I. Part II reviews the literature concerning the debate over judicial review and then offers some comments. Part III to Part V will support the core case for judicial review on the basis of three pillars — necessity, feasibility, and suitability. Finally, some concluding remarks will be presented in Part VI.

II. ARGUING FOR/AGAINST JUDICIAL REVIEW: OVERVIEW AND COMMENT

This section will summarize the literature concerning the debate over judicial review to shed light on the controversy this article intends to explore. It then reveals a serious gap in extant literature — the fact that it overlooks a core case for judicial review.

A. Overview: Literature on the Judicial Review Debate

The extant literature related to the debate over judicial review may be mainly categorized into three types of arguments — power-acquisition arguments, power-exercise arguments, and power-validity arguments — and each of them might be seen as a model.

1. Power-Acquisition Arguments

The arguments of this model are concerned with the “upstream” power of judicial review institutions. Two questions posed by the debaters, especially in American scholarship, are: (1) Does the Constitution really grant courts a mandate to have the power of judicial review? (2) Are unelected justices qualified to wield the

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⁴ In Latin sense, *deus ex machina* means “god out of machine.” It refers to “abrupt,” “inextricable,” or “incompatible” in the context of this article. This phrase was also employed by Levinson to evaluate institutional stability. *See* Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 Harv. L. Rev. 658, 682 (2011).
power of judicial review? Most American commentators answer the first question in the negative, because “the text of the Constitution…nowhere mentions the power of judicial review.”5 Simply put, they say American judicial review embraces an atextual nature.6 Conversely, there are proponents who strongly defend the constitutional foundation on the basis of “the supremacy clause,”7 the text, history and structure of the Constitution.8

The second question involves whether unelected federal judges can legitimately exercise the power of judicial review. Opponents use democratic theories9 to challenge the legitimacy of unelected justices, arguing that unelected judges are unaccountable to the people. Critics also express concern over the tendency of judicial appointments to be used as tools of party patronage and cronyism.10 In contrast, proponents of judicial review consistently back the legitimacy of unelected judges in two ways: by demonstrating the merits of judicial appointment and highlighting the flaws of judicial election. Those who defend judicial review contend that unelected judges possess technical proficiency and have the opportunity, the incentive and the ability to interpret the Constitution carefully.11 Furthermore, because unelected judges are insulated from momentary political pressures,12 they are able to act as impartial

7 Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 2 (1959); Bradford R. Clark, Unitary Judicial Review, 72 GEO. WASH. L. REV. 319, 321, 322 (2003); U. S. CONST., art. VI, § 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
arbiters of political disputes and protect democracy, minority rights, and values that people care about. These judicial review proponents also rely on empirical data to plausibly prove that judicial elections are self-defeating arrangements in which the disadvantages outweigh the advantages. They argue that judicial elections undermine the functions of state courts to enforce the rule of law, generate favoritism and bias, result in more corruption than judicial appointments, and thus tarnish the judicial integrity of courts, compromising procedural fairness and infringing on litigants’ rights.

2. Power-Exercise Arguments

The second type of argument may be described as the “power-exercise model,” or “democracy-based model.” The arguments under this model involve the “midstream” power of judicial review institutions and can be classified under three subtypes: process-based arguments, substance-based arguments, and synthetic arguments.

Process-based arguments focus on whether the institution of judicial review is consistent with procedural principles of democracy, especially the principle of majority rule. Skeptics, inspired by Alexander M. Bickel’s concept of “countermajoritarian difficulty,” assert that the institution of judicial review does not square with majority rule -- a critical procedural principle of democracy. By this inference, judicial review is illegitimate, and its countermajoritarian difficulty is real and insoluble. Jeremy Waldron, for example, asserts process-related reasons and legislative supremacy in contending that a society ought to settle disagreements about rights by means of majority decisions.

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On the opposite side, a number of scholars, such as Harry H. Wellington, Barry Friedman, Christopher L. Eisgruber, and Frederick Schauer, reject the idea that there is a countermajoritarian difficulty with judicial review and describe the countermajoritarian difficulty as a fallacious, overstated, and misguided problem. It is especially noteworthy that most process-based arguments in favor of judicial review recognize that judicial review potentially entails countermajoritarian difficulty, but they defend the legitimacy of judicial review by justifying it as being compatible with democracy at a procedural level. Robert A. Dahl’s “supporting ruling regime theory,” John H. Ely’s “representation-reinforcing theory,” Michael J. Perry’s “promoting deliberative politics theory,” Lee Epstein et al.’s “supporting majority preference theory,” and Eylon & Harel’s “facilitating participation right theory” all make arguments along these lines.

Substance-based arguments also recognize that judicial review has a problem of countermajoritarian difficulty. They assume, however, that judicial review is legitimate because it comports with some substantive values in a democratic regime. The salient arguments falling into this category include Alexander M. Bickel’s “enduring values theory,” Bruce Ackerman’s “democracy preservationist theory” or

22 See Harry H. Wellington, Foreword, in ALEXANDER M. BICKEL, supra note 20, at xi-xii.
24 CHRISTOPHER L. EISGRUBER, supra note 15, at 50, 62, 77-78.
26 Robert A. Dahl, supra note 14, at 570, 581 (Dahl’s thesis of “supporting ruling regime” rests on an empirical analysis of unconstitutional laws. It suggests that “the policy views dominant on the Court are never for longout of line with the policy views dominant among the lawmaking majority of the United States.” Also, “the main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition.” Thus, the power of judicial review is not at odds with the principle of majority rule.)
27 JOHN HART ELY, DEMOCRACY AND DISTRUST- A THEORY OF JUDICIAL REVIEW 105, 135 (1980). (Ely opined that the power of judicial review, by “clearing the channels of political change” and “facilitating the representation of minorities,” is compatible with democracy).
28 MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 159-60 (1988) (Perry argued that judicial review is consistent with democracy by facilitating deliberative politics.)
29 Lee Epstein, Jack Knight, and Andrew D. Martin, The Supreme Court as a Strategic National Policymaker, 50 EMORY L. J. 583-611 (2001) (To some extent, Lee Epstein et al.’s “supporting majority preference theory” confirmed Dahl’s “ruling regime thesis.” They found that “the Justices deviate from their personal preferences when those preferences are not shared by the members of the ruling regime,” and “adjust their decisions in anticipation of the potential responses of the other branches of government.” Under this explanation, judicial review would not run afoul of the principle of majority rule).
30 Yuval Eylon and Alon Harel, The Right to Judicial Review, 92 VA. L. REV. 991, 1021-22 (2006) (Eylon and Harel contended that the right to judicial review is a right to a hearing, and that judicial review, by rendering a right to a hearing, is able to further the values of participatory democracy).
31 ALEXANDER M. BICKEL, supra note 20, at 16, 18, 24, 25-26 (Although Alexander M. Bickel coined the term “countermajoritarian difficulty” and characterized judicial review as a deviant system in American democracy, his ultimate goal was to reconcile judicial review with democracy, especially with majority rule; Bickel claimed that democratic governments should serve not simply the immediate material needs of their people but also certain enduring values, and that courts should be

the appropriate pronouncer and guardian of such values, because courts have capacities and advantages that legislatures and executives do not possess. In this case, if courts adhere to passive virtues, the power of judicial review will substantially promote the legitimacy of whole government, and hence will not be at odds with majority rule).

32 Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L. J. 1013, 1051 (1984); Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L. J. 453, 461 (1989); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7, 267, 288-89 (1991). Ackerman grounded his “democracy preservationist theory” or “constitutional moment theory” on the dual nature of American politics, that is, normal politics and constitutional politics. The decisions are made by government in the normal politics; by contrast, the decisions are made by “We the People” in constitutional politics. Significantly, the degree to which constitutional politics enjoy legitimacy is superior to that of normal politics. Under these circumstances, when the Court incorporates the mobilized will of the people into constitutional interpretation by judicial review, it actually acts as a democracy preservationist, and hence stays in tune with democracy. Ackerman eloquently announced that “the democratic task of the Supreme Court is to interpret the Constitution of the United States.”

33 JESSE H. CHOPER, supra note 14, at 7, 60, 64, 68 (Choper adopted a rights-based argument in defending the legitimacy of judicial review. First, he asserted that democracy is not equivalent to pure majoritarianism, and that basic human rights are the essential values of a democratic society. Second, Choper argued that the power of judicial review is granted to guard against governmental infringement of human rights secured by the Constitution, especially the rights of minorities. As a result, Choper concluded that the Court’s role as final constitutional arbiter is conducive to promote the precepts of democracy).

34 Ronald Dworkin explored two arguments for judicial review -- “maintaining constitutional principles theory” and “partnership democracy theory.” So far as “maintaining constitutional principles theory” is concerned, Dworkin described that what legislatures make are momentary policies, and what the judiciary should maintain are enduring principles; there are many moral principles embedded in the Constitution, and judges protect them by means of judicial review. See RONALD DWORIN, TAKING RIGHTS SERIOUSLY 84 (1978); RONALD DWORIN, LAW'S EMPIRE 244 (1986); RONALD DWORIN, FREEDOM'S LAW–THE MORAL READING OF THE AMERICAN CONSTITUTION 7-8, 354-55 (1996). As to “partnership democracy theory,” Dworkin opined that democracy not only consists of majority rule but also involves a partnership in self-government; Americans are committed by history to granting judges the power to enforce protections of equal citizenship, and thus judicial review is conducive to the realization of partnership democracy. See RONALD DWORIN, JUSTICE IN ROBES 139 (2006); RONALD DWORIN, JUSTICE FOR HEDGEHOGS 382-99 (2011).

35 William N. Eskridge Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 YALE L. J. 1279, 1293, 1294-95 (2005). Eskridge’s theory rests on the notion that pluralist democracy is dynamic and fragile, that the polity shall encourage existing groups and emerging groups to participate in the marketplace of politics, and that if groups drop out of or never drop into the democratic system, it will not be favorable to democracy. Therefore, if the results of judicial review do not aim to insulate groups from democratic politics, or even strengthen the participatory chances of groups, then the institution of judicial review will remain in line with democracy. See also Robert Post and Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C. R.-C. L. L. REV. 373, 396-98 (2007).

36 Richard H. Fallon Jr., The Core of an Uneasy Case for Judicial Review, 121 HARV. L. REV. 1693, 1700, 1709, 1713-1715, 1716, 1718, 1720, 1726, 1727-28 (2008); Fallon adopted a results-based reason to justify the legitimacy of judicial review. He plausibly asserted that because judicial review may produce morally better results, such as rectifying the errors of rights underenforcement, helping to minimize fundamental rights violations, protecting the constitutive norms of political democracy, and promoting the overall moral quality of political decisions, it is relatively beneficial to a democratic society. Fallon concluded that “a constitutional democracy with a well-designed system
There are also some commentators who have embarked on the task of reconciling judicial review with democracy from a synthetic perspective. Synthetic arguments take account of both process-based and substance-based models. In this category, there are two eminent arguments to the best of my knowledge -- Samuel Freeman’s “theory of social and historical circumstances,”38 and Cass R. Sunstein’s “judicial minimalism.”39

3. Power-Validity Arguments

The arguments under this model involve the “downstream” power of judicial review institutions. Essentially, they can be expressed through two questions: First, is the judicial branch granted the exclusive authority to interpret the Constitution? Second, does judicial interpretation of the Constitution have a final and binding effect? These two questions constitute the elements of judicial supremacy.40 This model has

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37 David S. Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L. J. 723, 723-24, 730-34, 793-94 (2009). David S. Law tried to construct a theoretical foundation for overcoming the countermajoritarian dilemma. He contended that “judicial review supports popular sovereignty by mitigating the principal-agent problem that lies at the heart of democratic government,” and thus, “the relationship between judicial power and popular rule is not antagonistic, but symbiotic.” Because judicial review actually underpins and reinforces the power of the people over their government, he argues, the power of judicial review substantively guards the interests of the public and is compatible with majority rule.

38 Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9(4) LAW AND PHILOSOPHY 327, 327, 354, 361, 362, 365-66, 367 (1991). Samuel Freeman emphasized that majority rule is not the best means to protect all citizens in a democracy from infringement, meaning that “whether judicial review is needed to maintain the requirements of a democratic constitution is then dependent on social and historical circumstances.” Freeman argued that people should not single out a feature of democratic constitutions (such as majority rule, political accountability, or equal participation) and criticize judicial review as being undemocratic because it does not meet the demands of the particular standard. Generally speaking, judicial review will correspond with democracy if it is able to protect basic human rights, promote clear democratic procedures, cultivate a shared sense of justice and public good, promote public discussion and legislative deliberation, and compensate for legislative failures.

39 Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 6, 10, 13, 15, 20 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10, 11, 77 (1999). In broad sense, Sunstein’s “judicial minimalism” consists of two parts -- “procedural minimalism” and “substantive minimalism.” See Christopher J. Peters, Assessing the New Judicial Minimalism, 100 COLUM. L. REV. 1454, 1464-66, 1522 (2000). That is why this article attributes it to a synthetic model. Pragmatically, “procedural minimalism” is manifested by the two principles of “narrow rather than wide” and “shallow rather than deep.” The former principle means that judges “decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so.” In other words, “minimalists try to decide cases rather than to set down broad rules.” The latter principle means that judges “generally try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements.” Second, as far as “substantive minimalism” is concerned, it means that courts pay deference to the decisions of political branches unless the decisions involve infringing basic human rights or hollowing the core values of the Constitution. If judicial actions rely on “procedural minimalism” and “substantive minimalism,” then the power of judicial review will not run afoul of democracy.

three subtypes: arguments for judicial supremacy, arguments against judicial supremacy and for popular supremacy, and eclectic arguments.

a. Arguments for Judicial Supremacy

In the American context, the best-known argument for judicial supremacy was made by the U.S. Supreme Court. In the ruling on Marbury v. Madison, which was handed down in 1803, Chief Justice John Marshall wrote that “it is, emphatically, the province and duty of the judicial department, to say what the law is.” Subsequently, the Court reiterated its exclusive and final authority in the cases of Cooper v. Aaron in 1958 and Baker v. Carr in 1962.

Commentators have traditionally defended the notion of judicial supremacy based on the principles of the separation of powers and checks and balances. Since the 1990s, scholars have advanced additional theoretical foundations in support of the concept. For instance, Alexander and Shauer argued it from the perspective of preconstitutional norm and settlement, Keith E. Whittington defended it on the basis of political foundations, and Tom Donnelly argued it using the angle of political culture. Generally speaking, most Americans accept judicial supremacy, a fact...
confirmed by some prominent commentators, such as Larry Kramer,47 Dawn E. Johnsen,48 and others.49

b. Arguments for Popular Supremacy

Conversely, some commentators resist judicial supremacy and advance the concept of popular sovereignty -- the notion that democracy means people’s self-government. These “arguments for popular supremacy” assert that people themselves should be the masters or the final arbiters of the constitutional meaning and represent the antitheses to the arguments for judicial supremacy. Mark Tushnet’s “populist constitutionalism, or abolition of judicial review”50 and Larry Kramer’s “popular constitutionalism”51 fall within this category. It is worth noting that Larry

47 Kramer confessed that “it seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.” See Larry D. Kramer, The Supreme Court 2000 Term, Foreword: We the Court, 115 HARV. L. REV. 4, 6-7 (2001).


49 E.g., Todd E. Pettys, a legal scholar who recognized that “indeed, it often seems as if we are hardwired to defer to the courts on questions of constitutional meaning.” See Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted? 86 WASH. U. L. REV. 313, 317 (2008).

50 See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 166, 172, 175, 181, 194 (1999). Tushnet based his analysis on costs and benefits, concluding that Americans were generally losing more from judicial review than they were getting, and that “eliminating judicial review would not eliminate our ability to appeal to those principles in constitutional discourse outside the courts.” He radically called for a resolution that Americans should amend the Constitution to abolish judicial review and allow the people to “participate in shaping constitutional law more directly and openly.” Tushnet’s radical proposal gave rise to some rebuttals. Erwin Chemerinsky, for example, criticized Tushnet for not only minimizing the benefits of judicial review but also overestimating the costs of judicial review. Further, Chemerinsky argued that Tushnet selectively chose examples to justify his reasoning. See Erwin Chemerinsky, Losing Faith: America without Judicial Review, 98 MICH. L. REV. 1416, 1423-32 (2000).

51 See Larry D. Kramer, Foreword: We the Court, supra note 47, at 27-28; Larry D. Kramer, Popular Constitutionalism, 92 CAL. L. REV. 959, 959 (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 25-27, 208, 248 (2004). In the first place, Kramer grounded his popular constitutionalism on the notion that “the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law.” Second, he developed his argument based on the American history of popular constitutionalism, arguing that from the colonial era to the 18th century, the central means for constitution making were the right to vote, the right to petition, the right of free speech, pamphleteering, and mobbing. Significantly, these were launched by the public. Accordingly, the liberal Kramer, setting the conservative Rehnquist Court as his target, claimed that
Kramer’s argument has attracted many supporters and critics and has shaped a new trend in the debate over judicial review.

c. Arguments from Eclectic Stances

There are still some other scholars who reject judicial supremacy but do not oppose judicial review; their arguments can be positioned between “arguments for judicial supremacy” and “arguments for popular supremacy.” Put another way, they neither accept the notion of judicial supremacy nor embrace popular supremacy without reservation. Three eclectic arguments are prominent: departmentalism, democratic constitutionalism, and living constitutionalism.

“Departmentalism” is premised on the concept that the authority of constitutional interpretation is shared by the three branches of government. Under this logic, no single branch of government has exclusive interpretative authority or can offer interpretations that are binding on other branches. Those who might be classified as departmentalists include Michael Stokes Paulsen, Dawn E. Johnsen, George Thomas, and others.

the public should be the final arbiter of the Constitution’s meaning. Without a doubt, Kramer’s “popular constitutionalism” has become the most provocative argument among American constitutional academics since the outset of the 21st century.


See Larry Alexander and Lawrence B. Solum, supra note 40, at 1609-15. Alexander and Solum divided arguments for departmentalism into two types: “divided departmentalism” and “overlapping departmentalism.”

See Michael Stokes Paulsen, supra note 5, at 241, 344. Relying on departmentalism, or what he called a “model of coordinate review,” Paulsen concluded that “the model of coordinate review highlights the legitimacy of the inter-branch contest over the proper interpretation of the Constitution and laws of the United States.”

See Dawn E. Johnsen, supra note 48, at 147 (claiming that “efforts at increasing the quality, accountability, and legitimacy of political branch interpretation in the public’s eye would better safeguard individual liberty and equality and the fundamental features of the constitutional structure, than would dependence on one branch (namely, the Court) that has not consistently been at the forefront of the protection of individual rights”).

“Democratic constitutionalism” is proffered by Robert Post and Reva Siegel. Relying on the interplay between judge-made constitutional law and democratic politics, Post and Siegel emphasize that the meaning of the Constitution is embedded in the interplay or struggle between judge-made constitutional law and democratic politics in American history, and it has been shaped by norm contestations. Such contestations are demonstrated by two facts: Americans have historically mobilized for and against judicial efforts to enforce the Constitution, and in the meantime, courts have exercised their professional legal reasoning to resist and at times respond to the popular claims on the Constitution. In a nutshell, democratic constitutionalism affirms the role of mobilized citizens and representative government and also the role of courts in interpreting the Constitution.

Jack M. Balkin’s “living constitutionalism” refers to a “process of permissible constitutional construction,” in which the three branches of government rather than the Court alone coordinate responses to the popular will by building institutions of government and enforcing and applying the constitutional text and its underlying principles. According to this argument, the Court’s interpretation of the constitution is just one dimension of the system of constitutional construction.

B. Comment: A Core Case for Judicial Review Overlooked

Is judicial review an institution that is totally incompatible with modern constitutional democracies? Evidently, as seen above, there are many different answers. The extant literature manifests many schools of thought that all try to contend for attention. All commentators, whether advancing power-acquisition arguments, power-exercise arguments, or power-validity arguments, devote themselves to demonstrating the plausibility of their own argumentation. In this context, every argument seems to have merit to some extent.

Convincingly speaking, the fact that judicial review has spread globally would compromise the vehemence generated by critics of judicial review. But that does not

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57 See Robert Post and Reva Siegel, supra note 35, at 395.
58 According to Post and Siegel, norm contestation is a pathway for seeking to transform the values that underlie judicial interpretations of the Constitution. The backlash toward judicial interpretation from the public and representative government is best considered as a norm contestation. See id., at 381, 382-83.
59 Id., at 375.
60 Id., at 379. According to Robert Post and Reva Siegel, democratic constitutionalism neither seeks to take the Constitution away from courts, nor adopts a juricentric stance.
mean that the existence of judicial review is self-evident in all aspects and that those who support judicial review no longer need to offer any other plausible justifications for the institution. In particular, judicial review cannot be said to have “triumphed.” Instead, proponents of judicial review should not shy away from further enhancing the legitimacy of judicial review in modern constitutional democracies. Because judicial review is an institution with an inherently fragile character, that is, the Court has neither “sword” nor “purse” for enforcing its own decisions.

After reexamining the above-mentioned arguments, especially those supportive of judicial review, this study found that most debaters, whether on the “pro” or “con” side, based their rationales on democracy or democratic theory, illustrated especially by those who engage in power-exercise arguments. Many other scholars founded their arguments, positive or negative, on constitutionalism or constitutional theory, and this reality is mainly exemplified by those who engage in power-acquisition arguments and power-validity arguments. Certainly, every argument has its own merits. By comparison, however, the central role of judicial review in striking a dynamic balance between constitutionalism and democracy has been overlooked. This article argues that the central balancing role judicial review plays in a constitutional democracy can be considered as the core case supporting judicial review amid wide-ranging global political developments.

This article will justify this core case by advocating the legitimate role of judicial review in constitutional democracies, based on three major pillars: necessity, feasibility, and suitability.

III. NECESSITY: BALANCING UNEASY FORCES NEEDS JUDICIAL REVIEW

Necessity enhances legitimacy. Judicial review is necessary, if not fully sufficient, for reaching a balance between two interdependent forces — constitutionalism and democracy — that co-exist uneasily within a constitutional democracy.

A. Constitutionalism and Democracy: Co-existing in Dynamic Balance

Constitutional democracy is a popular system that most countries in the world have adopted to guide their political and daily lives. Because it consists of two potentially incompatible components — constitutionalism and democracy — some critics ridicule the term “constitutional democracy” as an oxymoron.63 As this article will show below, it is appropriate to regard it as a grand system in which two subsystems co-exist or in which two forces jostle against each other.

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1. Constitutionalism: A Force of Limiting Government for Easing Fears

Throughout history, the fact that constitutionalism has preceded democracy may evidence that people tend to harbor a deep and constant fear of government power before they push to express their aspirations by empowering a democratic representative government.

Based on the idea of ridding the people of fear of an arbitrary government and thus protecting human rights, constitutionalists have devoted themselves to seeking to curb government powers by deploying various tethering mechanisms, such as a rigid constitution, the separation of powers, checks and balances, constitutional supremacy, and so forth. In this sense, constitutionalism is about the rule of the constitution.

Subsequently, liberal constitutionalists had no alternative but to recognize that government is a necessary evil, because government’s actions are conducive to maintaining social order and economic welfare under certain circumstances. By balancing the loss against the gain, constitutionalists accept the necessity of government power but employ laws, institutions, and norms to circumscribe that power. In other words, they adopt the rule of law as the essential means to protect human rights by limiting government powers.

To sum up, constitutionalism at its core is a power-constraining system in which people, hoping to eliminate the constant fear of arbitrary government, try to protect their own rights based on the rule of law. In this scenario, constitutionalism is a force against fear in practical and empirical perspectives. As such, constitutionalism is basically characterized as a constraining system comprised of three elements — limiting government power, enforcing the rule of law, and protecting human rights. The former two serve as the means of constitutionalism and protecting human rights serves as an end. This idea parallels Adrian Vermeule’s observation that constitutionalism is a system of systems.

2. Democracy: A Force of Self-Government for Pursuing Hopes


Indeed, the constant fear of arbitrary government within people’s minds constitutes a philosophical and psychological basis for constitutionalism. As Donald S. Lutz writes that “constitutionalism is a human creation that results from the interaction between human nature and the brute facts of social existence in a postneolithic world.” See DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 26 (2006); Yasmin Dawood reaffirms a common belief among the American founding fathers that “the abuse of power posed a constant and inevitable threat to the sustainability of republic government.” See Yasmin Dawood, The Antidomination Model and the Judicial Oversight of Democracy, 96 GEO. L. J. 1411, 1414 (2008).


Admittedly, many scholars recognize that there is no widely accepted definition of democracy. According to conventional wisdom in the social sciences, the original and minimal sense of democracy is commonly regarded as “rule by the people” or “self-rule,” or “a form of government in which the people rule” or “people govern themselves.”

Like constitutionalism, democracy can be seen as a system. By comparison, however, democracy at its core is an empowering system in which people empower government through certain procedures, and, in the name of self-rule, pursue their aspirations, namely substantive goals. Under this scenario, democracy may be considered as a force of hope from both practical and empirical perspectives. Furthermore, because the rule of law is among the essential pillars upon which any high-quality democracy rests, and because both democratic procedures and substantive goals are effectively secured through the rule of law — thus preventing self-rule from turning into self-destruction — democratic theorists embrace the rule of law as a central element of democracy.

Table 1: Dimensions of Democracy

<table>
<thead>
<tr>
<th>Procedural dimension of democracy (means)</th>
<th>Protective dimension of democracy (means)</th>
<th>Substantive dimension of democracy (ends)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal participation</td>
<td>The rule of law</td>
<td>Human rights</td>
</tr>
<tr>
<td>Majority rule</td>
<td></td>
<td>Minority rights</td>
</tr>
<tr>
<td>Representative governance</td>
<td></td>
<td>Enduring values</td>
</tr>
<tr>
<td>Deliberative discourse</td>
<td></td>
<td>Pluralistic tolerance</td>
</tr>
</tbody>
</table>

To date, democracy at its most basic level is characterized as a self-governing system consisting of three dimensions — a “procedural” dimension, a “substantive”

69 ANDREW HEYWOOD, KEY CONCEPTS IN POLITICS 125 (2000).
71 GEORG SØRENSEN, DEMOCRACY AND DEMOCRATIZATION- PROCESSES AND PROSPECTS IN A CHANGING WORLD, 3rd ed. 3 (2008).
75 There is plenty of social science literature elaborating on democracy. This article draws from some of it to provide a brief summary. See Steven P. Croley, THE MAJORITARIAN DIFFICULTY : ELECTIVE JUDICIARIES and the Rule of Law, 62 U. OF CHI. L. REV. 689, 701-702 (1995); Pierre Manent, Modern Democracy as a System of Separations, 14(1) J. OF DEMOCRACY 114, 114 (2003); Owen M. Fiss, The History of an Idea, 78 FORDHAM L. REV. 1273, 1275 (2009); CHRISTOPHER F. ZURN,
dimension, and a “protective” dimension. Broadly speaking, the “procedural dimension of democracy” entails four procedural principles — equal participation, majority rule, representative governance, and deliberative discourse; the “substantive dimension of democracy” consists of four goals — human rights, minority rights, enduring values, and pluralistic tolerance; and the “protective dimension of democracy” embraces a core principle, that is, the rule of law (Table 1). As a whole, the “procedural dimension of democracy” and “protective dimension of democracy” serve as the means of democracy, and the “substantive dimension of democracy” serves as an end. As with constitutionalism, democracy is a system of systems.

3. A Hybrid System: Keeping Two Forces in Dynamic Balance

This leads to an obvious question: what is the real relationship between constitutionalism and democracy? To date, neither social scientists nor politicians have been able to proffer a satisfactory answer. Some contend that constitutionalism and democracy stand in an “insoluble tension,” while other scholars claim that these two are not antithetical systems, but rather mutually presuppose each other. Admittedly, as noted earlier, the fact that constitutionalism precedes democracy convinces us that the modern system of democracy is built into constitutionalism. As history has evolved, constitutionalism and democracy, which respectively represent people’s fears and hopes, have blended into a hybrid system that is called “constitutional democracy.”

Accordingly, most people can plausibly agree that constitutionalism and democracy, each playing the role of a subsystem, co-exist uneasily in a hybrid system, because fear and hope are ambivalent while power-constraining and empowerment are to some extent contradictory. Moreover, the world is in a state of constant flux and has changed in incalculable ways; both constitutionalism and democracy are susceptible to such transient upheavals. In other words, constitutionalism and democracy blend in a hybrid system of constitutional democracy and co-exist in a

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76 See Wouter G. Werner, Democracy, Constitutionalism and the Question of Authority, 39(3) RECHTSFILOSOFIE & RECHTSTHEORIE 267, 267 (2010); Amanda Frost and Stefanie A. Lindquist, supra note 63, at 729 (claiming that constitutionalism may be viewed as the antithesis of democracy).
77 CHRISTOPHER F. ZURN, supra note 75, at 1-2. Zurn argued that there are three options for understanding the relationship between constitutionalism and democracy: equivalent, antithetical, and mutually presuppositional. See ZURN, id., at 104.
78 ANDRÁS SÁJO, LIMITED GOVERNMENT- AN INTRODUCTION TO CONSTITUTIONALISM 8 (1999).
dynamic state. Consequently, based on the need for stability and the systemic need for stability with balance, the most compelling and inescapable responsibility of a constitutional democracy is to strike a sustainable balance between constitutionalism and democracy.

**B. Systemic Balance in Constitutional Democracy Depends on Judicial Review**

Balance generates stability. Modern constitutional democracies have to overcome many difficulties and rely, to a great extent, on the positive effects arising from systemic stability to deal with those challenges. From this point of view, the global prevalence of judicial review might be partly or mainly attributed to the positive effects of systemic stability that judicial review has brought in empirical practice. Evidenced by the fact that constitutional democracies embrace systems and subsystems, the necessity of judicial review in maintaining a balance between systems becomes even more important.

1. **Inter-System Balance Is Dependent on Nexus-Reinforcement**

   Based on the argument above, the overall framework of modern constitutional democracies might be structured as a grand system (Figure 1) consisting of two main subsystems — constitutionalism and democracy — that each comprise certain components. Delving into this structural framework of modern constitutional democracies, it is quickly apparent that there is a distinct nexus between constitutionalism and democracy. This nexus, as Figure 1 and Figure 2 indicate, clearly manifests two elements shared by constitutionalism and democracy — the rule of law and human rights protection. Relying on this nexus, the claim that there is an irreconcilable tension between constitutionalism and democracy seems to be vulnerable to criticism.

   As such, the relationship between constitutionalism and democracy would, and should, be comprehensively understood from two dimensions. On the one hand, they coexist in tension in a grand system in which a number of ostensibly contradictory forces — the forces of fear and forces of hope; power-constraint and empowerment; and the rule of the constitution and the rule of the people — are all intertwined. On the other hand, they connect with each other through an interdependent nexus in which they share both a means (the rule of law) and an end (human rights protection). From a structural perspective, reinforcing this interdependent nexus is essential to maintaining the systemic balance of a constitutional democracy.

2. **Reinforcing Inter-System Nexus Depends on Judicial Review**

   [81]Stephen Breyer, a United States Supreme Court justice, emphasizes that all governments need stability, and stability runs afoul of a legal system whose content varies daily and directly with changes in public opinion. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 4 (2010).

   [82]Wouter G. Werner, supra note 76.
How should this interdependent nexus be reinforced? That is, how can the rule of law be enforced to serve the end of protecting human rights? Because human rights protection rests on securing the rule of law, and the rule of law is built on the cornerstone of an efficient and effective judicial system, judicially enforcing the rule of law and thus protecting human rights lies at the heart of enhancing the nexus and thus balancing constitutionalism and democracy.

![Diagram](image)

Figure 1: Balancing Constitutionalism and Democracy via Judicial Review

Then, a further question arises. What is the relationship between the rule of law and judicial review? Conventional wisdom and current research have confirmed that the institution of judicial review is necessary, if not sufficient, for the enforcement of the rule of law. For instance, Dieter Grimm, a former justice of the German Constitutional Court, contends that “all experience teaches us, the rule of law is on shaky ground

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without judicial review.” Ittai Bar-Siman-Tov makes a plausible argument through a syllogism as follows: First, the rule of law requires that all government actions are bound by laws. Second, judicial review is necessary, or at least extremely important, to keeping a disinterested eye on government actions; therefore, third, judicial review is central to the rule of law.

In a nutshell, judicial review plays a crucial role both in enforcing the rule of law and in protecting human rights, and thus consolidates the nexus between constitutionalism and democracy. Analogically speaking, judicial review serves as essential sprockets in the twin wheels of constitutionalism and democracy in constitutional democracies. Under these conditions, constitutionalism and democracy might be viewed as compatible tools for achieving the same basic task (human rights protection); they complement each other at systematic and functional levels (Figure 2). Accordingly,

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84 Dieter Grimm, supra note 74, at 10.
judicial review actually plays a necessary and vital role in striking a dynamic balance between constitutionalism and democracy.

IV. FEASIBILITY: JUDICIAL REVIEW IS ARMED WITH BALANCING TOOLS

In this section, this article highlights feasibility as the second pillar that underscores the core case for judicial review in striking a dynamic balance between constitutionalism and democracy. This is because judicial review has been developed as a full-fledged institution in practice, and, most importantly, has been armed with certain useful methods that enable courts to perform balancing functions.

A. Judically Feasible Balancing: A Two-layer Mechanism

As one popular Chinese proverb says, “good tools are a prerequisite for the successful execution of a job.” The feasibility of maintaining a balance between constitutionalism and democracy via judicial review has been demonstrated by a series of balancing methods developed in practice and adopted by many advanced constitutional courts around the world. In summarizing these methods, this article classifies them as a general scheme, called a “two-layer judicial balancing mechanism,” that applies two levels of tools. As the name implies, the mechanism has two layers (Figure 1 and Figure 2): a first-layer balancing mechanism that is the judicially enforced rule of law via pluralistic methods and a second-layer balancing mechanism consisting of the judicial constitutionalization of democracy.

1. Basic Concept behind First-layer Balancing Mechanism

The first-layer balancing mechanism is concerned with judicially enforcing the rule of law via pluralistic methods. As this paper discussed in Part III, because the enforcement of the rule of law by the judiciary and its subsequent human rights protection structurally lie at the heart of enhancing the nexus of constitutionalism and democracy, the rule of law (and protecting human rights) in fact becomes the consensus, or at least a modus vivendi, of theorists of constitutionalism and democracy. Although many commentators contend that the rule of law is a complex, or an essentially contested, concept, four aspects of the rule of law are taken

87 The significance of the rule of law, even if no standard of its content has been recognized, is accepted worldwide. For instance, at the United Nations World Summit in 2005, Member States unanimously recognized the need for “universal adherence to and implementation of the rule of law at both the national and international levels.” Some other influential organizations have endorsed the rule of law, such as the World Bank, the World Social Forum, and the American Bar Association (ABA). The ABA in particular contends that “the rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today.” See Simon Chesterman, An International Rule of Law? 56 AM. J. OF COMP. LAW 331, 332 (2008); Petea Dobner, “More Law, Less Democracy? Democracy and Transnational Constitutionalism,” in PETRA DOBNER AND MARTIN LOUGHLIN Eds., THE TWILIGHT OF CONSTITUTIONALISM? 142 (2010) (Oxford University Press).

seriously as the foundation of modern constitutional democracies. The four aspects are:\(^{89}\) (1) *procedural aspect*: includes democratic legislation, rule by law, formal legality, and the subjecting of all state actions to the law; (2) *substantive aspect*: includes rule of good law, the guarantee of social justice, and the safeguarding of fundamental values; (3) *jurisprudential aspect*: laws must be enacted in accordance with some principles that are proffered by pundits, such as generality, publicity, clarity, consistency, feasibility, stability, prospectivity, and congruence; (4) *protective aspect*: establishing an independent judiciary with the power of judicial review to enforce the rule of law.

Because judicial review does matter in securing the rule of law, it is obviously critical to explore the way that the rule of law is enforced via the judiciary in practice. Adopting the first-layer balancing mechanism, courts or justices can achieve their balancing function by flexibly employing well-developed or newer pluralistic methods, including proportionality analysis (or proportionality review), equilibrium adjustment, structural balancing, risk analysis, cost-benefit analysis, interest balancing, rights-enlargement and remedy-implementation, the incorporation of values, structural interpretation, and so forth.\(^ {90}\) The adoption of the first-layer balancing mechanism is capable of attaining three goals that will lead to the systemic balance of constitutional democracies. The first goal is to maintain the balance between limiting government powers and protecting human rights within the bounds of constitutionalism, which is a subsystem of a constitutional democracy. The second goal is to maintain equilibrium between procedural democracy and substantive democracy within the confines of democracy, which is also a subsystem of a constitutional democracy. The third goal is to strike a balance between constitutionalism and democracy by continuously strengthening their nexus — the rule of law and human rights protection. Notably, achieving the third goal is closely linked to the former two.

2. The Second-layer Balancing Mechanism

At its core, the second-layer balancing mechanism is concerned with the judicial constitutionalization of democracy and perhaps with a need for the judicialization of politics. Broadly defined, the judicial constitutionalization of democracy refers to a judicially enforced process of subjecting the exercise of all types of political power.

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\(^{89}\) The essentials of this review are derived from the following works: (1) *Aharon Barak*, *The Judge in a Democracy* 53-56 (2006); (2) Adriaan Bednet, *An Elementary Approach to the Rule of Law*, 2(1) HAGUE J. ON THE RULE OF LAW 48, 49 (2010);

\(^{90}\) This article is going to discuss the application of these methods by courts in part IV-B.
democratic political activities, and even intractable political controversies, to the discipline of constitutional procedures and norms. The judicialization of politics is characterized as either an expansion of judicial authority over public affairs or a reliance on the judiciary to resolve core moral predicaments, public policy issues and political conflicts. Both the judicial constitutionalization of democracy and the judicialization of politics embody to some extent Alexis De Tocqueville’s observation years ago that the American experience involves a spontaneous or inevitable transformation of political questions into legal ones.

Generally speaking, both the judicial constitutionalization of democracy and the judicialization of politics subject democracy to constitutional norms or tame democracy through constitutionalism. In this scenario, democracy represents a centrifugal force, and constitutionalism is tantamount to a centripetal force, with the two forces reaching a basic equilibrium through judicial patrol of constitutional boundaries. As such, democracy will not run off its constitutional trajectory, and constitutional democracy can constantly function even in a state of a changing balance.

B. First-Layer Balancing: Enforcing the Rule of Law via Judicial Review

In practice, the first-layer balancing mechanism has been employed by courts to enforce the rule of law in modern constitutional democracies. By mastering this mechanism, courts are able to strike a balance between subsystems of a given constitutional democracy.

1. Balancing Subsystems within Constitutionalism

The pivotal role that judicial review plays within constitutionalism is to maintain a dynamic balance between two subsystems — limiting government powers and protecting human rights. To achieve this goal, courts worldwide often employ pluralistic methods, such as proportionality analysis, equilibrium adjustment, and structural balancing.

   a. Proportionality Analysis

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94 What de Tocqueville emphasized is that “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” See ALEX DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1835/1994) (Everyman’s Library).
Proportionality analysis (PA) was initially established to regulate the conflict between police power and individual freedom in Germany. In 1965, the German Federal Constitutional Court (GFCC) recognized PA’s constitutional status and declared in 1968 that PA is a “transcendent standard for all state action” binding all public authorities. With the evolution of constitutional theory and practice, PA has been recognized as an overarching principle of constitutional adjudication. In a theoretical sense, judges around the world have ranked PA as a fundamental as well as a constitutional principle. In practice, proportionality analysis has become a cornerstone of jurisprudence across Europe and in Canada, South Africa, Israel, New Zealand, the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the Appellate Body of the World Trade Organization. Functionally, proportionality analysis is usually used for resolving a conflict between two competing rights claims or between a rights provision and a legitimate government interest. To date, proportionality analysis has emerged as a best practice standard in sustaining the balance between government power and human rights.

As far as the application of PA is concerned, especially for cases involving a conflict between a rights provision and a government action, three tests must be undertaken, one at a time: (a) suitability test: this requires that there must be a suitable, rational or appropriate relationship between the means adopted and ends pursued. In this test, government has the burden of proof to demonstrate the relationship; (b) necessity test: this is called a “least-restrictive-means” (LRM) test. LRM tests require that the means chosen by the government do the minimum harm to

96 Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism, supra note 2, at 98.
97 Id., at 110.
98 Id., at 74.
101 Jud Mathews and Alec Stone Sweet, id., at 802; Tor-Inge Harbo, id., at 158.
102 Jud Mathews and Alec Stone Sweet, id.; Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism, supra note 2, at 75.
103 Alec Stone Sweet and Jud Mathews contend that there must be an additional legitimacy test in which judges, at a preliminary stage, confirm whether the government’s means at issue is constitutionally authorized. See Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism, supra note 2, at 76; Jud Mathews and Alec Stone Sweet, All Things in Proportion? American Rights Review and the Problem of Balancing, supra note 2, at 802-803; Normally, however, a three-part test is enough for most cases. See Tor-Inge Harbo, supra note 98, at 165; Andenas Mads and Stefan Zleptnig, Proportionality and Balancing in WTO Law: A Comparative Perspective, supra note 100, at 75-76; Andenas Mads and Stefan Zleptnig, Proportionality: WTO Law: in Comparative Perspective, supra note 100, at 386-89.
individuals or a community. Simply put, the government should adopt a measure, *inter alia*, that is the least restrictive option; (c) test of proportionality in the narrow sense: it is also called “balancing in the strict sense.” In this last step, judges need to weigh whether or not the costs of a measure adopted disproportionately overweigh the benefits of an end pursued and thus impose an excessive burden on individuals or communities.

In practice, many courts around the world have employed PA in their constitutional jurisprudence. Symbolically, although the United States Supreme Court normally employs a three-tier review in many cases — rational basis review, intermediate scrutiny, and strict scrutiny — it does not ignore the jurisprudential significance of PA. It has tried, for instance, to incorporate PA into its death penalty jurisprudence insequent cases over the past decade, such as *Atkins v. Virginia* in 2002, *Roper v. Simmons* in 2005, *Kennedy v. Louisiana* in 2008, and *Graham v. Florida* in 2010. Accordingly, the United States Supreme Court recognized that “the concept of proportionality is central” to death penalty cases.

As a whole, proportionality analysis is becoming more popular around the world, because it provides judges a useful tool for handing down plausible opinions and balancing human rights and government powers in their efforts to enforce the rule of law.

**b. Equilibrium Adjustment**

Police power is an important government power. It inherently reflects the twofold nature of government powers: a government’s actions may contribute to

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104 Paradigmatically, the United States Supreme Court employs a three-tier test. But Jud Mathews and Alec Stone Sweet have suggested that the American scheme of three-tier test suffers three serious pathologies, including judicial abdication, analytical incompleteness, and doctrinal instability. See Jud Mathews and Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, supra note 2, at 836, 837.


106 536 U. S. 304 (2002) (the Court found that all people with mental retardation are constitutionally exempt from capital punishment based on their diagnosis); See Bruce J. Winick, *supra* note 105, at 786.

107 543 U. S. 551 (2005) (in this case, the Court held that juveniles lack sufficient culpability and deterrability to permit the death penalty consistent with the Eighth Amendment); See Bruce J. Winick, *supra* note 105, at 786.

108 128 S. Ct. 2641 (2008) (in this case, the Court held that the Eighth Amendment prohibited the death penalty for the rape of a child where the crime did not lead to the victim's death); See Bruce J. Winick, *supra* note 106, at 787.

109 130 S. Ct. 2011 (2010) (in this case, by considering the proportionality between the culpability of the offender and the severity of the punishment, the Court ruled that a life sentence without parole for any juvenile non-homicide offender is unconstitutional); See Rebecca Shepard, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Employment Restriction for Juvenile Offenders*, 28 GA. ST. L. REV. 529, 540 (2012).

social order and help protect human life, but they can also threaten human rights and individual liberties. Simply put, government power has always represented both hope and fear, and police power is no exception.

Equilibrium adjustment might be seen as a judicial tool for maintaining the balance of the Fourth Amendment of the United States Constitution in a changing world. Courts adjust legal restrictions in response to changing technology and social practice for the purpose of balancing police power and individual rights. According to Oris S. Kerr, the mechanism of equilibrium adjustment has been deployed by the Supreme Court. When changing social conditions have made it harder for the government to obtain evidence, the Supreme Court has tended to loosen Fourth Amendment restrictions to help restore the strength of government power. But when it has been easier for the government to obtain evidence, the Supreme Court generally embraces higher protections to help restore the prior level of privacy protection. Under this scenario, Fourth Amendment jurisprudence resembles a situation in which a car tries to sustain a constant speed on a mountain road, with the Supreme Court acting as the driver. It steps on the gas when the car is facing an uphill climb and eases off the accelerator when the car is heading downhill.

In practice, the Supreme Court has adopted equilibrium adjustment in several cases involving the government’s use of radio beepers, thermal imaging devices, and global positioning system (GPS) devices. Among radio-beeper cases, the Supreme Court found in United States v. Knotts that the use of a beeper to follow a given car on highways did not constitute a search. But the next year, the Court adjusted its equilibrium mechanism in United States v. Karo by holding that employing a beeper to collect information inside a home amounted to a search that required a warrant. In other words, using a beeper to monitor facts in the public sphere is constitutionally allowed but doing the same thing in a person’s home is not. Likewise, in United States v. Jones, the Court held that “the Government’s attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search under the Fourth Amendment.” Placing a physical

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112 The Fourth Amendment of the United States Constitution prohibits “unreasonable searches and seizures,” and it provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shal
114 Id., at 496-501.
GPS device on the defendant’s car to monitor the defendant 24 hours a day constituted a “search” in the Court’s mind.\textsuperscript{119}

Obviously, if the government’s use of surveillance technology, such as GPS devices, is not subject to constitutional curbs, such as the need to get a warrant, then these devices could potentially be abused and encroach significantly on individual privacy.\textsuperscript{120} Fortunately, the Court has been able to strike a dynamic balance between government power and human rights through equilibrium adjustment.

c. Structural Balancing

Structural balancing is calculated to indirectly rather than directly protect human rights through the judicial enforcement of a balance between government branches. Usually, both vertical checks and horizontal checks between government branches are rooted in a constitution. Theoretically, therefore, the structural design of government should create politically self-sustaining protections for the rights of citizens.\textsuperscript{121} The critical point is how courts handle their structural balancing responsibilities.

In practice, in ordinary situations, courts simply enforce constitutional provisions concerning the separation of powers and checks and balances, because a constitution’s structural provisions always contain rules about how, where and when institutions of government operate.\textsuperscript{122} In times of crisis, however, courts are not always capable of fulfilling their balancing function as would normally be the case, for courts are laden with an institutional weakness -- they have neither sword nor purse. In such circumstances, according to Daryl Levinson,\textsuperscript{123} judges may shift responsibility for checking executive decision-making from the courts to Congress, or shift responsibility for checking legislative power from the courts to the president. Consequently, employing a flexible method of structural balancing, courts can maintain the overall balance of a government in a changing world, a balance that indirectly effects human rights protection.

2. Balancing Subsystems within Democracy

Although the above-mentioned methods are robust in practice, courts can also make use of other techniques to fulfill the function of balancing subsystems within a democracy.

a. Additional Balancing Techniques

\textsuperscript{119} A concise comment on \textit{United States v. Jones} has been proffered by Peter Swire. See Peter Swire, \textit{A Reasonableness Approach to Searches after the Jones GPS Tracking Case}, 66 STAN. L. REV. ONLINE 57, 57-62 (2012).


\textsuperscript{121} Daryl Levinson, \textit{Rights and Votes}, 121 YALE L. J. 1286, 1296 (2012).


\textsuperscript{123} Daryl Levinson, \textit{supra} note 121, at 1289, 1302.
“Balancing techniques” may be the most popular tools for courts and are particularly well-suited for carrying out judicial functions. The concept can be defined as “a normative process by which one attempts to resolve a clash between conflicting values.” At its core, the role of balancing is to determine the proper boundary between competing values rather than eliminate the inferior value. In a value-laden and pluralistic democracy, the technique of balancing has been broadly applied in cases with competing values involved.

Around the world, there have been many practical methods crafted or developed to help judges do their jobs. They are risk balancing (or risk analysis), interest balancing, cost-benefit analysis, rights-enlargement and remedy-implementation analysis, purposive interpretation or teleological interpretation, arbitrary and capricious review, representation-reinforcing review, structural reasoning (interpretation), incorporation, and so forth.

124 AHARON BARAK, supra note 89, at 166, 172, 173.
125 Id., at 165.
127 Rachel A. Harmon, supra note 111, at 769; Jonathan Remy Nash, id., at 182.
129 The rights-enlargement and remedy-implementation analysis is considered as a conventional paradigm for balancing police power and human rights. It originated in Warren Court jurisprudence. The Warren Court enlarged the Fourth Amendment right against unreasonable searches and seizures on the one hand, and implemented the remedy for the enlarged rights on the other hand. See Rachel A. Harmon, supra note 111, at 765-768.
130 Purposive interpretation means that the interpreter must extract the legal significance that best realizes the purpose of the constitution in order to strike a proper balance between subjective intent of the framers and objective social conditions. Put simply, judges have to discover, and then put into effect, the end of the Constitution. See AHARON BARAK, supra note 89, at 127-28; Donald P. Kommers, “Germany: Balancing Rights and Duties,” in JEFFREY GOLDSWORTHY Ed., INTERPRETING CONSTITUTIONS- A COMPARATIVE STUDY 200-01 (2007).
131 Courts use arbitrary and capricious review to ensure that executive agencies vindicate their actions with adequate reasons. See Glen Strasszewski, Political Reasons, Deliberative Democracy, and Administrative Law, 97 IOWA L. REV. 849, 891, 901, 902 (2012).
133 Structural reasoning, or structural interpretation, is based on a concept that the Constitution is a unified structure of various values and relationships. Under this approach, every provision of the Constitution should be interpreted as being compatible with the fundamental principles of the Constitution as a whole. See Donald P. Kommers, supra note 130, at 199-200; MARK TUSHNET, id.,
b. Balancing Democracy in Practice

As mentioned above, like constitutionalism, democracy is a system of systems. Structurally, it encompasses three subsystems — procedural democracy, substantive democracy, and the rule of law — and each of them has subordinate values. Therefore, democracy is in fact a reservoir of values. But these values do not always exist in harmony. They may conflict with each other and lead to instability.

In practice, based on the necessity of combining stability with balance, courts seek to maintain the systemic balance within a democracy by mastering pluralistic methods. Generally, courts broadly apply “balancing techniques” and many other tools to strike a balance between procedural democracy and substantive democracy while carrying out the rule of law. Both procedural democracy and substantive democracy are precious values embedded into the legal system, and the legal system of a given democratic regime embraces the proper balances between the different values.135 Let us take a look at the American case.

On the side of balancing values in procedural democracy, we may check the influence of American judicial review on basic procedural principles of democracy — equal participation, majority rule, representative governance, and deliberative discourse (Table 1) — to determine whether the institution has positive effects on democracy. First, the U. S. Supreme Court has gradually expanded participatory rights of citizens by establishing principles like “one person, one vote” in Reynolds v. Sims.136 Through this process, the Court has stabilized American democracy step by step.137 Second, on the principle of majority rule, a growing literature138 has suggested

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135 AHARON BARAK, supra note 89, at 175.

136 377 U. S. 533 (1964). The U. S. Supreme Court found that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” See 377 U. S. at 535. Significantly, the Court viewed the right to vote as special, because this right is “preservative of other basic civil and political rights.” See 377 U. S. at 562; Daryl Levinson, supra note 121, at 1306.

137 Fiskin claims that the Court sought to sidestep the criticism that it intended to restructure American democracy, leading it to shift its focus from intervention in public decision-making to the expansion of individual rights, like the right to vote. See Joseph Fiskin, Weightless Votes, 121 Yale L. J. 1888, 1891-92 (2012); However, this shift generated an incidental effect on stabilizing American democracy.

138 See Robert A. Dahl, supra note 14, at 570, 581 (Dahl suggested that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majority of the United States,” and “the main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition”; Lee Epstein, Jack Knight, and Andrew D. Martin, supra note 29, at 583-611 (Lee Epstein et al.’s “supporting majority preference theory” confirmed
that the exercise of American judicial review has not run afoul of majority rule, for the Supreme Court has usually remained safely within the boundaries of the will of the political majority over the course of history.139 Third, there is still the question of whether American judicial review is capable of promoting representative governance in a democracy. By adopting a representation-reinforcing review, in United States v. Carolene Products Co.,140 for example, the Court sought to facilitate the nation’s system of democratic representation by reinforcing participatory channels for underrepresented people.141 Further, the Court is one of the agents in a democratic regime, so we cannot completely deny that unelected justices are able to serve as representatives,142 because they are appointed by presidents and confirmed by the Senate. Fourth, regarding the democratic procedure of deliberative discourse, a growing number of commentators confirm that American judicial review, by issuing hundreds of decisions with reasoned opinions, plays a role in encouraging deliberative discourse between citizens and their representatives,143 between the Court and the people,144 and between the judiciary and other branches.145 From the viewpoint of comparative interest, Scott M. Noveck emphasizes that judges possess a unique institutional posture146 and may be better suited than legislators to deliberate on

139 See Daryl Levinson, supra note 4, at 735.
140 304 U. S. 144 (1938).
141 JOHN HART ELY, supra note 27.
142 Timothy Sandefur, In Defense of Substantive Due Process, or the Promise of Lawful Rule, 35 HARV. J. OF LAW & PUB. POL’Y 283, 345 (2012) (Sandefur asserts that federal judges do represent the community, because they are chosen within the community and through a constitutional process).
143 Michael J. Perry confirms that “the courts have an important role to play in encouraging citizens and their representatives to take seriously the possibility of a deliberative politics.” See MICHAEL J. PERRY, supra note 28, at 160.
144 Barry Friedman contends that judicial review provides a catalyst and method for people to understand the constitution’s meaning. See BARRY FRIEDMAN, supra note 138, at 367.
145 The Court may purport to enhance the democratic process by rewarding agencies for resolving difficult legal problems via an open and deliberative process, and by punishing agencies for pursuing narrower ideological agenda in lieu of a secret, nonpublic process. See William N. Eskridge Jr. and John Ferejohn, Constitutional Horticulture: Deliberation-Respecting Judicial Review, 87 TEXAS L. REV. 1273, 1301-02 (2009).
146 The unique institutional posture of American judges is characterized by some features: (1) they get life tenure, (2) they are insulated from momentary political pressures, (3) they face better incentives to write themselves into office, and (4) they -face better incentives to police the political process. See Scott M. Noveck, supra note 12, at 419.
certain matters of principle. Based on these positive findings, we are convinced that judicial review is beneficial in balancing different democratic procedures.

On the side of substantive democracy, let us evaluate whether the exercise of judicial review results in safeguarding the core substantive values of democracy. These values (Table 1) include protecting human rights, assuring minority rights, maintaining enduring values, and preserving pluralistic tolerance. First of all, it goes without saying that in practice, by handing down many decisions regarding human rights, American judicial review has effectuated a robust function of protecting various kinds of rights. This is easily demonstrated in many constitutional textbooks. The rights buttressed by the Court may be briefly listed as encompassing economic rights, freedom of speech, freedom of the press, freedom of association, freedom of religion, the right to counsel and procedural guarantees, the right to freedom from cruel and unusual punishment, the right of privacy, and numerous rights that are beyond enumerating.

The second substantive value of democracy is assuring minority rights. It is well known that there are many ethnic minorities in American society, and minorities can easily be consistent losers in normal but majority-based political games. In order to protect minority rights, the U. S. Supreme Court, in the famous footnote 4 in United States v. Carolene Products Co., established a strict scrutiny test for reviewing government regulations concerning “discrete and insular minorities.” Following that footnote, many great successes, such as Brown v. Board of Education, “one person, one vote,” and the expansion of free speech rights for political dissidents were unified in protecting minority rights. Though the U. S. Supreme Court handed down historically notorious decisions like Dred Scott v. Sandford and Plessy v. Ferguson, it changed its views and returned to the road of protecting minority rights in Brown.

Third, let us look at the substantive value of maintaining enduring values that underpin democracy. Alexander M. Bickel is right when he notes the truism that democratic governments should serve not simply the immediate material needs of their people but also uphold certain enduring values, and that the Court should be the

147 Id., at 430.
149 304 U. S. 144, 152, n.4 (1938);
151 David A. Strauss, Is Carolene Products Obsolete? 2010 U. ILL. OF L. REV. 1251, 1251 (2010); in fact, the view that combining the debates over judicial review legitimacy with the protection of individual and minority rights has become conventional wisdom around the world. See Ittai Bar-Siman-Tov, supra note 85, at 1926.
152 60 U. S. (19 How.) 393 (1857).
153 163 U. S. 537 (1896).
appropriate pronouner and guardian of such values. The school segregation cases that were ultimately rectified by Brown v. Board of Education in 1954 for example, illustrated the critical role the Court has played in maintaining enduring values, such as human dignity, justice, morality, and equality.

Finally, let us turn to the substantive value of democracy-preserving pluralistic tolerance. A pluralist democracy, like the United States of America, will face the institutional challenge of keeping rival groups engaged in politics, directing their efforts toward the public good, and avoiding feuds and other mutually destructive conflicts. As William N. Eskridge Jr. observes and suggests, American judicial review can strengthen pluralist democracy by (1) enforcing neutral rules of political engagement, such as in the case of United States v. Lopez, (2) ameliorating cultural wars in lieu of defending freedom of religion, such as the case of Lee v. Weisman or Church of the Lukumi Babalu Aye v. City of Hialeah, and (3) reversing the burden of inertia for obsolete statutory policies.

The judicially enforced balance of procedural democracy and substantive democracy is also illustrated by its resolution of the potential conflict between majority rule and minority rights. Majority rule is a necessary, but not sufficient, procedure for realizing democratic ideals, but it is premised on the fact that there are no permanent losers in the only game in town. Therefore, majority rule will lose its moral justification if there are discrete and insular minorities whose political views and interests are consistently less likely to prevail than that of any other group. In such circumstances, minorities are entitled to be protected by certain basic rights that majorities cannot take away through majority rule. As such, minority rights protection has been recognized as a substantive value of democracy. Under these conditions, the task of balancing majority rule and minority rights is crucial to

154 See ALEXANDER M. BICKEL, supra note 20, at 24.
160 Many critics embrace the same concept. See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 131, 140 (2006) (arguing that the United States is certainly not a pure example of the majoritarian conception of democracy, and that majority rule is by no means always an appropriate decision-making procedure); Glen Straszewski, supra note 132, at 861, 875 (claiming that policymaking in a constitutional democracy is not, and should not try to be, purely majoritarian, and that majority rule is not the true end of constitutional democracy); Timothy Sandefur, supra note 142, at 285 (contending that the Constitution is not a morally neutral framework for mere majority-rules decisionmaking).
161 Glen Straszewski, supra note 132, at 863, n.57.
democracy’s stability. The American case is highly instructive. Notorious cases, such as *Scott* and *Plessy*, signify the fact that the majority’s will prevailed in America for many years. Fortunately, the Court balanced that will with its famous decision in *Brown*. From then onwards, the balance has been sustained for decades by embodying certain policies beneficial to minorities, such as affirmative action. Interestingly and symbolically, as pluralism anxiety, symbolized by the growing diversification of minorities, has mounted in American society since the 1970s, the Court has systematically denied constitutional protection to new groups, according to a study by Kenji Yoshino. It has acted this way because this pluralism anxiety could have potentially compromised collective actions that are necessary for and conducive to national development. In so doing, the Court has sought to restore the balance between majority rule and minority rights.

Taking these cases as a whole, it is plausible to argue that the courts are both willing and able to fulfill their function of balancing democratic procedures and democratic substance.

### 3. Balancing Constitutionalism and Democracy

As noted earlier, the grand system of constitutional democracy consists of two subsystems—constitutionalism and democracy. The nexus between the two subsystems is shaped by a structural interdependence characterized by a shared means (the rule of law) and end (protecting human rights), and reinforcing this interdependent nexus is essential to maintaining systemic balance within a constitutional democracy.

In previous depictions, this article has demonstrated that judicially enforced the rule of law is the key to reinforcing the very nexus. If the courts are to continuously enhance the rule of law, and ensuing human rights protection, through the flexible application of pluralistic methods, especially the adoption of structural interpretation (reasoning) and incorporation, then keeping the dynamic balance between constitutionalism and democracy is feasible in modern constitutional democracies. In describing the American experience, Barry Friedman contends that “in its evolution, judicial review actually has become the American way of mitigating the tension between government by the people and government under a

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164 *Id.*, at 748.

165 Although American scholars are calling for some constraints on judicial methodological freedom, judges are entitled to have ample space so as to nimbly interpret the constitution, because the world is transient, and the democratic process of legal change is redundant. See Jennifer Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L. J. 651, 651-91 (2011).
Constitution.”\textsuperscript{166}

Notably, to sustain the dynamic balance between constitutionalism and democracy, judges should make efforts to deepen the procedural, substantive, jurisprudential, and protective aspects of the rule of law to assure that the nexus between two subsystems is robust. As seen in the American example and in many other advanced constitutional democracies, it is feasible for courts and judges, by wielding the power of judicial review, to strike a proper balance between constitutionalism and democracy.

\textbf{C. Second-Layer Balancing: Judicial Constitutionalization of Democracy}

Strictly put, the judicial constitutionalization of democracy is not a brand new process, because political activities held in a liberal democracy are closely connected with constitutional norms. In the process of implementing the constitution, courts and judges find it hard to remain insulated from political issues. Initially, courts and judges are reluctant to enter into the political morass and try to dodge those cases that involve high-profile political controversies by adhering to the doctrine of political question.\textsuperscript{167} As time goes on, however, a series of political cases come to the courts, and the doctrine of political question is loosened, with the concept of justiciability\textsuperscript{168} gradually embraced by the courts. Admittedly, Hirschl is right to some extent when he writes that the idea that “anything and everything is justiciable appears to have become a widely accepted motto by courts worldwide.”\textsuperscript{169} In principle, based on the principle that the “constitution is justiciable,” as Joseph Raz asserts, any political activity bound by the constitution should be justiciable.

As the global trend of widely accepted justiciability gains momentum, the fervor

\textsuperscript{166} BARRY FRIEDMAN, supra note 138, at 367.
\textsuperscript{167} Baker v. Carr, 369 U.S. 186, 217(1962); in this case, the U. S. Supreme Court described six criteria concerning the doctrine of political question as follows: (1) Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question; See also David H. Coar, It Is Emphatically the Province and Duty of the Judicial Department to Say Who the President Is ?, 34 LOYOLA U. CHI. L. J. 121. 126 (2002); Sanford Levinson and Ernest A. Young, Who’s Afraid of the Twelfth Amendment ?, 29 FLORIDA ST. U. L. REV. 925, 957 (2001).
\textsuperscript{168} Justiciability has been considered as a principle of constitutional interpretation; it means that a controversy or conflict is appropriate, and able to be resolved by the judiciary.
\textsuperscript{169} RAN HIRSCHL, TOWARDS JURISTOCRACY-THE ORIGINS AND CONSEQUENCES OF NEW CONSTITUTIONALISM 221 (2004).
of judicialization of politics becomes more powerful. In other words, judicial oversight of democracy is actually inevitable in ordinary political practice. Under these constitutional moments, courts and judges may have frequent opportunities to translate democratic values into constitutional norms. Synthetically, according to the main aspects of democracy identified in Table 1, the judicial constitutionalization of democracy might be realized by three processes:

1. **Judicial Constitutionalization of Procedural Democracy**

   In this process, courts and judges can translate the evolving values of different democratic procedures into a system of constitutional norms. For example, majority rule is a critical procedural value, but some terribly undemocratic results, such as Nazism, Jim Crow, and South African apartheid, have been produced by democratic majorities in human history. Consequently, the fundamental spirit of majority rule, designed to promote democracy, was lost. Confronting these situations, courts and judges have the chance, in lieu of striking down self-defeating legislation, to ignore undemocratic results and enshrine the real spirit of majority rule, as in the well-known case of *Brown v. Board of Education* in 1954. Likewise, courts might clear all political processes and prevent incumbent politicians from distorting the political process through actions such as gerrymandering, resulting in the value of political equality being incorporated into constitutional norms.

2. **Judicial Constitutionalization of Substantive Democracy**

   Through this mechanism, courts and judges can incorporate enduring values that have not been explicitly stipulated in the Constitution. For example, although the term “human dignity” is not mentioned in the Constitution, the U.S. Supreme Court has invoked the concept of “dignity” in many opinions. The Roberts Court invoked “dignity” in 34 cases between 2005 and 2011. Arthur Chaskalson is right when he

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171 Ran Hirschl analyzes that judicialization of politics includes three interrelated processes: (1) it refers to the spread of legal discourse, jargon, rules, and procedures into the political arena and policy-making process; (2) it refers to the expansion of the courts’ authority in public policy decision-making by redrawning the boundaries of state powers; (3) it refers to the reliance on courts and judges for resolving the core political conflicts that define whole polities, like judicialization of the national electoral process, national-building process, and so forth. See Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 723, 724, 727 (2006); Ran Hirschl, “The Judicialization of Politics,” supra note 2, at 121-23.

172 Yasmin Dawood contends that judicial oversight of democracy has posed intractable problems for constitutional law. See Yasmin Dawood, *supra* note 65, at 1411. However, judicial oversight of democracy might be regarded as a developing style of constitutional development.

173 See Bruce Ackerman, *supra* note 32; See also Jack M. Balkin and Reva B. Siegel, “Introduction,” in JACK M. BALKIN AND REVA B. SIEGEL Eds., *THE CONSTITUTION IN 2020* 6 (2009)(noting that “in a democratic society, courts best perform their institutional role as partners in a larger dialogue: They respond to popular visions of the Constitution’s values and help to translate these values into law”).


asserts that “treating dignity as a foundational value of a human right order may give it greater weight than if it were treated merely as an enumerated right.”

3. Judicial Constitutionalization of the Rule of Law

In this process, courts and judges may incorporate values that extend the rule of law into constitutional norms. For example, proportionality has not been enumerated in many constitutions, but, through the process of constitutionalization, it has been treated as a criterion for the perfection of the rule of law, and it is today a foundational element of global constitutionalism. At the same time, not all constitutions create democratic orders, but they do create legal orders. Without a doubt, this legal order should be embedded into constitutional norms, so that it is capable of taming the democratic order. This is why Jeremy Waldron emphasizes that the central requirement of the rule of law is that democratically elected power holders exercise their power within a constraining framework.

Accordingly, the judicial constitutionalization of democracy is likely to give rise to twin incidental effects and consequently help strike a dynamic balance between constitutionalism and democracy: on the one hand, changing and upgraded democratic values enter the hierarchy of constitutional values and enrich the content of constitutionalism; on the other hand, temporal and passionate democratic activities are constantly tamed by the enriched constitutionalism.

V. SUITABILITY: JUDICIAL REVIEW IS SUITABLE FOR BALANCING FUNCTION

Theoretically, an objective moderator or arbiter in a game should not be a participant. Regrettfully, there is no such transcendent actor in the framework of modern constitutional democracies, but this article argues that judicial review is relatively suitable for such a role in a constitutional democracy. That judicial review
is suitable for striking the dynamic balance between constitutionalism and democracy can be justified based on three dimensions -- institutional suitability, functional suitability, and empirical suitability.

A. Institutional Suitability: Structural Balance and Judicial Duty

Two arguments are calculated for vindicating the fact that judicial review embraces an institutional suitability in maintaining the equilibrium of constitutionalism and democracy: argument from structural balance and argument from judicial duty.

1. Structural Balance

Like any system, constitutional democracies require a structural balance. There is a widely accepted rationale that this balance depends on two structural principles, that is, the separation of powers and checks and balances. Theoretically, some maxims proposed by James Madison in *The Federalist Papers* have become common justifications of constitutional democracy among commentators, such as “ambition must be made to counteract ambition,” “the great difficulty lies in…oblige it (government) to control itself,” and “the necessity of auxiliary precautions.”

Practically, the goal of obliging a democratic government to control itself must be tackled through a practical scheme in which certain effective auxiliary precautions are established. In such a scheme, the idea that “ambition must be made to counteract ambition” is manifested by making each official and each institution dependent on other officials and other institutions. The executive and legislative branches are both equipped, however, with tools for satisfying their ambitions -- the former has swords and honors, the latter holds both the purse strings and the power to make rules. How can the judiciary carry out its ambitions to counteract the ambitions of other branches and ultimately sustain the structural balance of the overall government? The most popular and widely accepted answer is the power of judicial review. By

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181 In *The Federalist Papers* No. 51, James Madison argued that, “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government…If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” See JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, *THE FEDERALIST PAPERS* 319-20 (1987) (Penguin Books edition).


183 See William R. Casto, *If Men Were Angels*, 35 HARV. J. OF LAW & PUB. POL’Y 663, 666 (2012) (claiming that “an important part of the judiciary’s participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review”); RONALD DWORIN, JUSTICE FOR HEDGEHOGS 484, n.9 (2011) (depicting that
wielding this power, the judiciary has both the force and will\textsuperscript{184} to check the other branches and directly execute its balancing function in the process.

Courts and judges can also adopt an indirect approach to achieving the same result by disclosing the misconduct of other powerful branches, and consequently encourage the public to check such misbehavior through its votes or by voicing criticism in the media. When courts contribute cheap and correct information to the public,\textsuperscript{185} they substantially play a role of “fire alarm,” “monitor,” or “coordinator”\textsuperscript{186} to help people check the power of the government.

2. Judicial Duty

The second argument for judicial review’s suitability for maintaining a systemic balance in a constitutional democracy is based on judicial duty. Conventional wisdom says that in a constitutional state, the legislative branch creates the law, the executive branch enforces the law, and the judicial branch interprets the law.\textsuperscript{187} Therefore, within this framework of power allocation, the judiciary is inherently granted the power to expound on the law. This viewpoint is generally accurate but not quite to the point, because the core task of the judiciary is essentially to resolve conflicts between parties by means of the legal process.

Under this core power theory, each branch of the government holds some powers that other branches cannot take away. The power to try a case, for example, is a power exclusive to the judicial branch. In the process of dispute resolution, courts and judges must apply the law to the case before them, and judges have a duty to expound the laws\textsuperscript{188} so as to correctly apply them. If the law that judges are going to apply is at odds with the Constitution, then judges have a duty to hold the law unconstitutional. As such, judicial review is both a judicial power and a judicial duty.\textsuperscript{189} Under the core powers of the judiciary, another basic task of constitutional judges is to resolve intra-constitutional conflict\textsuperscript{190} and related clashes between systems. In other words, to keep a balance between systems in a constitutional democracy is, at the very least, a

\textsuperscript{184} In \textit{The Federalist Papers} No. 78, Hamilton noted that judiciary has neither force nor will. \textit{See} JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, \textit{THE FEDERALIST PAPERS} 437 (1987).

\textsuperscript{185} David S. Law, \textit{ supra} note 37, at 723-24.

\textsuperscript{186} David S. Law, \textit{id.}; Daryl Levinson, \textit{ supra} note 4, at 739.


\textsuperscript{188} As Alexander Hamilton put, “the interpretation of the laws is the proper and peculiar province of the courts.” \textit{See} JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, \textit{THE FEDERALIST PAPERS} 439 (1987).

\textsuperscript{189} Philip Hamburger asserts that “duty was the foundation on which judges found the strength to hold government acts unlawful.” \textit{See} Philip Hamburger, \textit{A Tale of Two Paradigms: Judicial Review and Judicial Duty}, 78 GEO. WASH. L. REV. 1162, 1171 (2010); \textit{See also} A. Christoph Bryant, \textit{ supra} note 175, at 698.

\textsuperscript{190} Alec Stone Sweet and Jud Mathews, \textit{Proportionality Balancing and Global Constitutionalism}, \textit{ supra} note 2, at 88.
part of the judiciary’s duty through the exercise of judicial review.

B. Functional Suitability: Relative Objectivity of Judicial Review

Objectivity is another key attribute of a moderator or arbiter. In terms of maintaining a systemic balance, courts, by exercising the power of judicial review, possess a relative objectivity in contrast with political branches. As such, they are functionally suitable for enforcing the balance.

1. The Factors That Give Rise to Relative Objectivity

There are two main factors that contribute to the relative objectivity of the judiciary and ultimately strengthen the suitability of courts and judges for striking the systemic balance. The first factor is “the least dangerous branch effect.” Under the “least dangerous branch” thesis proposed by Hamilton, “the judiciary is beyond comparison the weakest of the three departments of power.” Courts and judges not only are unable to destroy the balance between systems, they cannot help but to try their best to keep the balance in order to maintain the judiciary’s institutional status.

The second factor is “judicial insulation from political passion.” It is well known that most justices of constitutional courts worldwide are appointed through certain processes but not directly elected by the public, and some of them, such as the justices of the U.S. States Supreme Court, enjoy life tenures. The goal of this institutional designation is to keep judges insulated from political pressure when they decide cases. But when courts hand down their rulings, judges are still required to justify their reasoning in each case by writing opinions that are ultimately open to the public.

Accordingly, the Court’s power, according to David M. O’Brien’s comments, rests with: (1) its duty to give authoritative meaning to the Constitution; (2) the persuasive forces of reason; (3) its institutional prestige; (4) the cooperation of other political institutions; and (5) ultimately public opinion. In practice, though some critics disagree, courts and judges must make an effort to maintain the relative objectivity of the judiciary so that they are capable of sustaining their legitimacy in checking other powerful branches.

2. Courts Are Functionally Suitable for the Balancing Function

The Constitution serves many functions, as does the institution of judicial review. Actually, based on the above mentioned concept of relative objectivity, the

192 See STEPHEN BREYER, supra note 81, at 215.
194 For instance, Nelson Lund strictly criticizes that once the justices are confirmed, “they instantly become big shots, treated almost as gods within the legal profession and as A-list celebrities by everyone else… they now promote their books on television,” and that Justices have the ambition to be influential. Nelson Lund, supra note 182, at 50, 52.
judiciary may play some roles that are conducive to maintaining the systemic balance of a constitutional democracy. Among others, for instance, it can act against parts of the political system while at the same time collaborating with other parts by exercising the power of judicial review. The judiciary can also more effectively referee the conflict between legislative and executive policy, perform monitoring and coordinating functions in public politics, act as a gatekeeper in corporate and securities litigation, patrol constitutional boundaries, act as a democratic protector and the guardian of constitutional order, and serve as essential sprockets in the twin wheels of constitutionalism and democracy. Generally speaking, courts and judges are functionally suitable for keeping a systemic balance in a constitutional democracy.

C. Empirical Suitability: The Judiciary Enjoys Stable Support and Trust

Reliability is a vital attribute of a moderator or arbiter. Judicial reliability is usually demonstrated by political support and public trust.

1. The Judiciary Gains Empirical Political Support

Since the judiciary is the least dangerous branch in a constitutional democracy, the legitimacy of the Court’s role as a coordinator in balancing the system must be recognized and buttressed by political branches. That is to say, the Court’s decisions will not prevail unless they obtain support from political branches. Let us take a look at American cases.

As David M. O’Brien observed, American presidents generally yield to the Court in major confrontations. For example, Dwight D. Eisenhower (1890-1969) initially regarded the decision of Brown (1954) as “a hot potato handed to him by the judiciary” and complained that “it was impossible to expect complete and instant reversal of conduct by mere decision of the Supreme Court.” Nevertheless, he

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197 William R. Casto, supra note 183, at 670.
198 David S. Law, supra note 37, at 723.
200 Stephen Breyer, supra note 95.
201 Corey Bretschneider, supra note 174, at 521; Miguel Schor, supra note 3, at 265.
202 Miguel Schor, supra note 3, at 266.
203 Donald P. Kommers, supra note 86.
204 See Mark Tushnet, “Two Paths, One Result”: A (Heavily Qualified) Defense of Consensus Constitutionalism, 89 TEXAS L. REV. 354, 167-68 (2010); Daryl Levinson, supra note 4, at 744 (arguing that the judiciary can impose constitutional constraints on powerful political actors only if these actors support the judiciary).
205 See David M. O’Brien, supra note 193, at 355.
206 Id.
207 Id., at 356.
eventually dispatched federal troops to enforce the decision in 1957.208 This meant that the political branch, which held swords and honors, was ultimately willing to comply with the decisions made by the least dangerous branch.

The second case is Albert Gore, a former vice president and the candidate of the Democratic Party in the 2000 U.S. presidential election. When the Court handed down its highly controversial decision in Bush v. Gore,209 the Democratic Party candidate, who won the popular vote by more than 500,000 votes, announced that “now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it.”210 According to Justice Stephen Breyer, the political support of the judiciary can be considered a kind of national treasure.211 On the whole, and based on the American experience, the Court has gained the diffuse support from other political branches by exercising its power of judicial review.212 This institutional prestige seems to empower the judiciary to empirically make a “political Ulysses bind himself to the constitutional mast.”213

2. The Judiciary Enjoys Empirical Public Trust

In a democratic regime, institutional legitimacy derives from the consent and support of the governed.214 Thus, public support or public trust is usually regarded as precious capital for the institution of judicial review. Admittedly, judges may sometimes err215 or hand down heatedly contested and unpopular rulings, but the general institutional trust of the judiciary still outweighs the vitriol that can be generated by specific cases.216

Gallup polls provide empirical support to this argument, showing that Americans generally trust the role of the judiciary. As seen in Table 2, the percent of Americans who had either a “fair amount” or a “great deal” of confidence in the judiciary ranged from a low of 63% in 1976 and 2011 to a high of 80% in 1999. That is to say, more than three-fifths of Americans trust the role of the judiciary. Undoubtedly, this stable political support and diffuse public trust make courts and judges empirically suitable for sustaining a balance in a constitutional democracy.

212 See Daryl Levinson, supra note 4, at 738.
213 See Daryl Levinson, supra note 4, at 658 (arguing that constitutionalism is usually analogized to Ulysses binding himself to the mast in order to avoid the fatal temptation the sirens’ song presents); András Sajó, supra note 78, at 7-8.
215 Timothy Sandefur, supra note 142, at 344.
Table 2: Public Trust in Judicial Branch, Headed by the U.S. Supreme Court (%)\textsuperscript{217}

<table>
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<th>Year/Month</th>
<th>Great deal %</th>
<th>Fair amount %</th>
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VI. CONCLUSION

Commentators have argued for or against judicial review on the basis of many variables, as seen in Part II of this paper. But in examining the extant literature concerning the arguments on judicial review, this study found that a core case for judicial review has been ignored, leaving a significant academic gap. This core case is that the central function of judicial review, among others, is to strike a dynamic balance between constitutionalism and democracy. To make the case, this article adopted a structural and functional approach. Taking three current trends of worldwide development — the global spread of democratization, the global adoption of constitutionalism, and the global proliferation of judicial review — into consideration, the article attempted to justify the core case for judicial review on the basis of necessity, feasibility, and suitability.

First, in terms of necessity, this article found that a constitutional democracy is a hybrid system in which the force against fear — constitutionalism — and the force of

hope — democracy — uneasily co-exist in a changing world. However, these two subsystems share a nexus consisting of enforcing the rule of law and protecting human rights, and strengthening the nexus is conducive to keeping a dynamic balance in the overall system. In practice, judicial review plays a crucial role in enforcing the rule of law and in protecting human rights, and thus consolidates the nexus between constitutionalism and democracy. As such, judicial review serves as essential sprockets in the twin wheels of constitutionalism and democracy.

Second, in terms of feasibility, this article argues that it is feasible for judicial review to achieve this balancing function, because it is equipped with certain useful tools. This article calls these tools a “two-layer judicial balancing mechanism.” The first layer consists of judicially enforcing the rule of law through pluralistic methods; the courts maintain the systemic balance between constitutionalism and democracy by applying proportionality analysis, equilibrium adjustment, structural balancing, and many other approaches. The second-layer is the judicial constitutionalization of democracy. Based on the widely accepted concept of justiciability, courts are able to enforce the judicial constitutionalization of procedural democracy, substantive democracy, and the rule of law, and generate a double effect: on the one hand, changing and upgraded democratic values enter the hierarchy of constitutional values and enrich the content of constitutionalism; on the other hand, temporal and passionate democratic activities are constantly tamed by the enriched constitutionalism. Both help strike a dynamic balance between constitutionalism and democracy.

Third, in terms of suitability, this article tries to prove that judicial review is suitable for playing a role in striking a dynamic balance between constitutionalism and democracy. This suitability can be justified through three concepts: (1) institutional suitability, where judicial review is institutionally designed to maintain the structural balance of a constitutional democracy, and thus it is a judicial duty; (2) functional suitability, where the institution of judicial review is appropriate for executing the balancing function because it is relatively objective; and (3) empirical suitability, where the courts enjoy both political support and public trust, at least in America, and are empirically suitable for this balancing task.

Notably, the argument this article has made mainly relies on the American experience, and the American judiciary is relatively robust. In other words, an independent judiciary is a necessary, though not sufficient, condition for bolstering the core case for judicial review. If this condition is met, it is plausible to believe that by wielding the power of judicial review, courts and judges are convincingly capable of striking a dynamic balance between constitutionalism and democracy.