

The Legal Contribution to Democratic Disaffection

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Abstract: Law and legal processes may not be the primary drivers of anti-political sentiment, but it would be mistaken to say they do not contribute to it. This article provides an initial theoretical basis for how law may impact democratic disaffection. First, the paper explores what democratic disaffection is, and why the law has been marginalized in the study of disaffection. Next, different relationships between law and democratic disaffection are analyzed: (1) law and courts contributing to disaffection; (2) law and courts working to counter disaffection; and (3) law and courts doing both. The paper goes on to examine the idea of ‘democratic distancing’ within the law, focusing on the following elements: the expansion of court policymaking authority, the implementation and expansion of written constitutions and bills of rights, the proliferation of regional and supra-national courts, and the lack of citizen involvement in burgeoning constitutional adjudication.

Keywords: law and politics, democracy, disaffection, distancing, constitutionalism, judicial review, judgment

I. Introduction

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

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

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

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

Given the influence of these antiquated views of the judiciary in relation to constitutional government, one may be forgiven for thinking the problems facing contemporary democracy rest entirely on the failings of politics or the disengagement of citizens, but that story is an incomplete one. Although most of the literature on democratic disaffection focuses on one or both of these subgroups,⁴ understanding the puzzle brought about by disaffection should not stop there. A more complete picture of what democracies are going through is required. And if this is going to be provided, then we must acknowledge and accept that there have been dramatic changes to the legal realm over the past century in many democracies, and that these changes have likely influenced democratic disaffection, perhaps even significantly. Indeed, many such changes have been central to the function and operation of democracy and call into question not only the fundamental nature of where power lies, but also the proper roles of various constitutional actors. As many democracies struggle to overcome populist or

¹ THE FEDERALIST NO. 78.

² MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1899) 156.

³ FRANK VIBERT, *THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS* (2007) 191 (‘In practice, the authority of the judiciary is more powerful than Hamilton allowed and the judiciary can act as a threat to other and lesser jurisdictions. It can also act in collusion with the other branches’.); *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986).

⁴ Some prominent foundational works I draw upon throughout the piece are: JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995); SUSAN J. PHARR & ROBERT D. PUTNAM (EDS), *DISAFFECTED DEMOCRACIES: WHAT’S TROUBLING THE TRILATERAL COUNTRIES?* (2000); RUSSELL J. DALTON, *DEMOCRATIC CHALLENGES, DEMOCRATIC CHOICES: THE EROSION OF POLITICAL SUPPORT IN ADVANCED INDUSTRIAL DEMOCRACIES* (2004); COLIN HAY, *WHY WE HATE POLITICS* (2007); MATTHEW FLINDERS, *DEFENDING POLITICS: WHY DEMOCRACY MATTERS IN THE TWENTY-FIRST CENTURY* (2012); PIPPA NORRIS, *DEMOCRATIC DEFICIT: CRITICAL CITIZENS REVISITED* (2012); PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* (2013); Roberto Stefan Foia & Yascha Mounk, *The Democratic Disconnect* 27(3) *J. OF DEMOCRACY* 5 (2016).

authoritarian tendencies, these questions regarding the evolution of the legal realm have only become more pronounced.

This paper, primarily focused on common law jurisdictions, discusses the relationship between law and democratic disaffection. Its main contention is that the judiciary's contribution to democratic disaffection has been downplayed and even ignored throughout the years, and that recent legal developments may have had very real effects on democratic disaffection. Law is, after all, in the unique position of being able to 'check' various actions of the political realm. In performing these functions law usually functions quite admirably. But sometimes law drifts beyond its checking function, undermining and potentially damaging the political realm.

This article proceeds in three main parts. Part 2 describes the origins and definitions of democratic disaffection and questions why the law may have been marginalized when studying the phenomenon. Part 3 explores the different possible relationships between law, politics, and democratic disaffection, looking at both how courts may contribute to but also counter disaffection. Part 4 articulates some of the democratic distancing measures the law has engaged in over the past few decades, and questions whether such distancing may be stopped. The article concludes by suggesting that law should acknowledge and accept its impact on democratic disaffection, and that it should do more to ennoble the political realm.

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

II. What is democratic disaffection?

Democratic disaffection goes by a number of different labels and incorporates a variety of elements. It is also known as democratic disillusionment,⁵ democratic disengagement,⁶ political disengagement,⁷ political alienation,⁸ anti-politics,⁹ and democratic drift,¹⁰ among other labels.¹¹ Generally, two main elements comprise the phenomenon. First, democratic

⁵ Robert Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment With Democracy* NEW YORK TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/15/opinion/across-the-globe-a-growing-disillusionment-with-democracy.html>.

⁶ PAUL HOWE, *CITIZENS ADRIFT: THE DEMOCRATIC DISENGAGEMENT OF YOUNG CANADIANS* (2011).

⁷ Elise Uberoi & Neil Johnston, *Political disengagement in the UK: who is disengaged?* HOUSE OF COMMONS LIBRARY (Briefing Paper) (Feb. 25, 2021), <https://researchbriefings.files.parliament.uk/documents/CBP-7501/CBP-7501.pdf>.

⁸ Ada W. Finifter, *Dimensions of Political Alienation* 64(2) AM. POL. SCI. REV. 389 (1970).

⁹ PAUL FAWCETT, MATTHEW FLINDERS, COLIN HAY, & MATTHEW WOOD (EDS), *ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE* (2017).

¹⁰ MATTHEW FLINDERS, *DEMOCRATIC DRIFT: MAJORITARIAN MODIFICATION AND DEMOCRATIC ANOMIE IN THE UNITED KINGDOM* (2009).

¹¹ Some other labels may be: democratic indifference, political disenchantment, and political apathy.

disaffection refers to the fact that confidence in government and democratic institutions—and democracy more generally—has been slowly decreasing from a comparative perspective.¹² This research often focuses on the contemporary lack of faith or trust that citizens currently possess in politicians, politics, and the political process. The second major element is the disengagement with formal democratic structures that citizens have shown throughout the world (e.g., lower levels of voter turnout, decreasing enrolment in political parties, etc).¹³ Early studies of disaffection mostly used attitudinal surveys identifying citizen views towards various aspects of democracy and their levels of trust in government.¹⁴ The citizen engagement element, and the steady decrease of political participation throughout the years, came further down the line, and have been tracked as these post-World War II trends developed.¹⁵

Democratic disaffection can be distinguished from other forms of recent scholarship, such as democratic decay, democratic backsliding or constitutional rot.¹⁶ These fascinating emerging areas of study are mostly focused on contemporary threats to democratic states, such as increasing authoritarian and populist governments and the wider challenges to liberal democracy more generally. However, studies regarding democratic disaffection go back over half a century, focusing primarily on the attitudes that citizens have towards government and their corresponding democratic engagement. Democratic decay takes disaffection into consideration, but is often more focused on the erosion to the mechanisms or principles of constitutional democracy (e.g., threats to the rule of law or judicial independence), than it is to how and why citizens have become disenchanting with democracy. Thus, while these domains are certainly not unrelated, democratic disaffection research stretches back further and also has a slightly different focus in terms of the interaction between law and democracy.

But contemporary democratic disaffection encapsulates more than decreasing political participation and confidence in elected institutions. A third, perhaps more ominous and wide-ranging, component to democratic disaffection resides in a general anti-political sentiment towards politics, democracy, and the political realm.¹⁷ It stems from the idea that politics is not beneficial, but harmful. Many contemporary citizens do not just have negative views of politics and the political realm, but openly loathe or ‘hate’ them.¹⁸ And the sentiment appears to be unrelenting. Indeed, the very idea of ‘politics’ has become a ‘dirty word’ for many, synonymous ‘with notions of duplicity, corruption, dogmatism, inefficiency, undue interference in essentially private matters, and a lack of transparency in decision making.’¹⁹ Although cynical views of politics and politicians have been present throughout history, of late the Madisonian fears of unenlightened statesmen and the dangers of passion and self-interest have gone into overdrive. Attacking politics and vilifying elected leaders has become ‘a national blood sport’ in many jurisdictions.²⁰ And if much anti-political sentiment boils down to whether people are optimistic or pessimistic about the human condition, then it seems

¹² See, e.g., DALTON, *supra* note 4 at chp 2; PHARR & PUTNAM, *supra* note 4 at chp 1; HAY, *supra* note 4 at chp 1.

¹³ See, e.g., MAIR, *supra* note 4 at chp 1.

¹⁴ Arthur H. Miller, *Political Issues and Trust in Government* 68(3) AM. POL. SCI. REV. 951 (1974).

¹⁵ DALTON, *supra* note 4, chp 2.

¹⁶ This goes by a variety of other names. See, e.g., Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field* 11 HAGUE J. RULE L. 9 (2019); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot* 77(1) Md. L. Rev. 147 (2017).

¹⁷ FAWCETT, ET AL., *supra* note 9.

¹⁸ See E.J. DIONNE, *WHY AMERICANS HATE POLITICS* (2004).

¹⁹ HAY, *supra* note 4 at 1, 4.

²⁰ FLINDERS, *supra* note 4 at 27.

contemporary democracies have been ‘overcome with pessimism.’²¹ This is no small problem. Considerations about human nature readily connect to the structure and operation of states, including how power is distributed and what types of checks and balances should be put on the political process. These considerations also connect to how much power citizens may hold, how involved they are in decision-making, and ultimately, how responsive governments are to citizen views.

Profound shifts in the trust and confidence citizens possess in elected officials have occurred since the mid-20th century. For example, in 1958 around 70% of American citizens thought that government officials were honest, care about people, and try to do what is right.²² These numbers held steady until the mid-1960s—close to two decades after the end of World War II—when they began to decline.²³ The contemporary picture regarding trust and confidence in public officials is drastically different, almost disturbingly so. Today, around 60% of Americans possess little or no trust in the federal government to handle international or domestic problems.²⁴ As recently as 1997 this figure only stood at 30%, meaning it has doubled in just over two decades.²⁵ Trust in the individual branches (executive, legislative, and judicial) has also declined, with the legislative figures being the most staggering.²⁶ In 1972 only three percent of survey respondents had no trust or confidence *at all* in Congress; this figure now sits at 25%.²⁷ Additionally, the decreases seen in trust and faith in government are not limited to any specific social groups, and tend to cut across all demographic and geographic characteristics.²⁸ Thus, the problem of democratic disaffection cannot be limited to merely one jurisdiction or one particular social group.

Although scholars have produced a wealth of empirical data on democratic disaffection, explanations for the phenomenon vary significantly. Some theories point to political events such as scandals, wars, and other contentious incidents affecting citizen perception of elected officials. After all, in the late 1960s issues such as Watergate, the Vietnam War, and struggles over civil rights led to ‘shocks’ within the system.²⁹ Thus, attitudes towards government were widely perceived as responses to particular events or societal tumult, and the potential failure of the political realm to remedy these. However as noted above findings in relation to citizen trust in government and disengagement have not just come from America, but have also been found in many long-established democracies.³⁰ And they have not been tied merely to the

²¹ HAY, *supra* note 4 at 9-10.

²² DALTON, *supra* note 4 at 26. *See also* PHARR & PUTNAM, *supra* note 4 at 8-10.

²³ *Ibid* at 25-26.

²⁴ Gallup, *Trust in Government*, <https://news.gallup.com/poll/5392/trust-government.aspx>.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ DALTON, *supra* note 4 at 80-81; PHARR & PUTNAM even note that country specific explanations are somewhat limited, as it is unlikely that ‘so many independent democracies just happened to encounter rough water or careless captains simultaneously’ (*supra* note 4 at 22). However, researchers have examined such demographic and geographical differences at various times, and seen subtle differences. *See* Finifter, *supra* note 8 above. For a more recent account, *see* Michael Kenny & Davide Luca, *The urban-rural polarisation of political disenchantment: an investigation of social and political attitudes in 30 European countries* 14 CAM. J. REG. ECON. SOC’Y 565 (2021).

²⁹ GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS* (2009) 177.

³⁰ MICHAEL J. CROZIER, SAMUEL P. HUNTINGTON & JOJI WATANUKI, *THE CRISIS OF DEMOCRACY: REPORT ON THE GOVERNABILITY OF DEMOCRACIES TO THE TRILATERAL COMMISSION* (1975).

spectacular events of the 1960s and 1970s. Citizen disengagement around the world has been a noticeable and sustained long-term trend.³¹

Most explanations for increasing levels of disaffection place blame on the failures of politics. For example, an influential 1970s article on the phenomenon in the American context concluded that, ‘the widespread discontent prevalent in the U.S. today arises, in part, out of dissatisfaction with the policy alternatives that have been offered as solutions to contemporary problems.’³² This conclusion places significant emphasis on the failures of politics and the political realm to resolve contemporary challenges. It seems that some things never change. A recent international report on worldwide democratic disaffection lays the underlying problem on failures of the political realm, stating:

[T]he most likely explanation is that democratically elected governments have not been seen to succeed in addressing some of the major challenges of our era, including economic coordination in the eurozone, the management of refugee flows, and providing a credible response to the threat of global climate change. The best means of restoring democratic legitimacy would be for this to change.³³

A host of complementary theories seek to explain why democratic disaffection has taken hold around the world. Some point to an increasing expectations gap between what is promised by politicians and then heightened in the media, from what can actually be achieved in practice.³⁴ Others point to less deferential and increasingly critical citizens who may have more education and increasingly sophisticated understandings of democracy.³⁵ Another theory regarding disengagement argues that lowering the voting age has produced long-term negative effects on political engagement.³⁶ Beyond this, authors have recognized increasing levels of indifference to politics and democracy,³⁷ and the effects of depoliticization at the national or global level.³⁸

Researchers have also found that feelings of powerlessness among the general public have intensified, and that some believe they have been shut out of the political process.³⁹ Many citizens ‘feel as if no one is listening to them anymore,’⁴⁰ and they are ‘less hopeful that anything they do might influence public policy.’⁴¹ According to a recent UK study, close to half of respondents believe they have no influence on national policymaking.⁴² This finding chimes with those who point to depoliticization as one of the main factors influencing disaffection. Mair notes that ordinary citizens have gone from being ‘semi-sovereign’ to essentially ‘non-sovereign,’ as democracy has been ‘steadily stripped of its popular

³¹ See note 12 above.

³² Miller, *supra* note 14 at 970.

³³ R.S. Foa, A. Klassen, M. Slade, A. Rand and R. Collins, *The Global Satisfaction with Democracy Report 2020*, Bennett Institute: Centre for the Future of Democracy (2020).

³⁴ Miller, *supra* note 14 at 972; FLINDERS, *supra* note 4 at 36.

³⁵ PIPPA NORRIS (ED), *CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNMENT* (1999).

³⁶ MARK N. FRANKLIN, *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL PARTICIPATION IN ESTABLISHED DEMOCRACIES SINCE 1945* (2004).

³⁷ MAIR, *supra* note 4.

³⁸ HAY, *supra* note 4.

³⁹ For one of the original studies on this, see Finifter, *supra* note 8.

⁴⁰ Regarding the latter, see: HIBBING & THEISS-MORSE, *supra* n 4 at 10.

⁴¹ Foa & Mounk, *supra* note 4 at 7.

⁴² Hansard Society, *Audit of Political Engagement 16* (2019), <https://www.hansardsociety.org.uk/publications/reports/audit-of-political-engagement-16>.

component.’⁴³ For democracies, which rest on the power of citizens to influence government, these findings are highly problematic.

A. Why has the law been marginalized in the study of disaffection?

When it comes to diagnosing democratic disaffection commentators rarely focus on the contribution of the legal realm. Indeed, when law has been mentioned as a factor in disaffection, this attention has only been fleeting.⁴⁴ But even if one does not believe that ‘law is politics carried on by other means,’⁴⁵ the lack of attention in relation to law’s contribution to disaffection seems especially odd. This may be down to the fact that frequently this ‘intimate relationship is treated as no more than the chance meeting of two disparate disciplines.’⁴⁶ And yet, this view is increasingly difficult to reconcile today. The study of law and democracy remains a booming if not illustrious field for contemporary scholars, and is awash with texts on law and politics,⁴⁷ law and democracy,⁴⁸ democratic and constitutional theory,⁴⁹ theories of jurisprudence,⁵⁰ and law and society,⁵¹ to name a few relevant subjects. But even with this abundance of literature, a significant part of democratic disaffection’s story appears to be left out. Admittedly, part of this may be down to methodological considerations.

When examining democratic disaffection much of the analysis has gone into demand-side factors, or as Hay characterizes them: ‘changes in the responsiveness to, and desire for, such goods by their potential consumers.’⁵² Demand-side analyses mostly focus on citizen engagement (or lack thereof) and put significant weight on the idea that citizens themselves may be to blame for a lack of engagement (e.g., political party membership, voting turnout levels, etc.).

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

Another reason may come down to law’s relatively positive results on attitudinal surveys. As noted above, one of the elements relevant to disaffection is the decreasing faith or trust in

⁴³ MAIR, *supra* note 4 at 2.

⁴⁴ Anthony King, *Distrust of Government: Explaining American Exceptionalism*, in PHARR & PUTNAM (EDS), *supra* note 4 at 83-85.

⁴⁵ J.A.G. Griffith, *The Study of Law & Politics* 1(1) J. LEG. STUDIES 3 (1995).

⁴⁶ *Ibid*, p 3.

⁴⁷ *See, e.g.*, GREGORY A. CALDEIRA, RD KELEMEN & KEITH E. WHITTINGTON, *THE OXFORD HANDBOOK OF LAW & POLITICS* (2008).

⁴⁸ *See, e.g.*, TOM CAMPBELL & ADRIENNE STONE, *LAW AND DEMOCRACY* (2003).

⁴⁹ *See, e.g.*, GARY JACOBSON & MIGUEL SCHOR, *COMPARATIVE CONSTITUTIONAL THEORY* (2018).

⁵⁰ *See, e.g.*, H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983).

⁵¹ *See, e.g.*, AUSTIN SARAT & PATRICIA EWICK, *THE HANDBOOK OF LAW AND SOCIETY* (2015).

⁵² HAY, *supra* note 4 at 39; *see also* John Boswell, et al, *State of the field: What can political ethnography tell us about anti-politics and democratic disaffection?* (2019) 58(1) EU. J. OF POL. RESEARCH 56, 57-58.

the elected branches. But judiciaries—or in some cases apex courts—have at times bucked this trend. In some jurisdictions trust in judges or apex courts outweighs trust in elected officials or the elected branches. For example, in Ipsos MORI’s latest Veracity Index, 84 per cent of UK citizens trusted judges, while only 16 per cent trusted Government Ministers, and 15 per cent trusted politicians generally.⁵³ These findings come during an era of supposed government ‘hostility’ towards the judiciary, and not long after a trio of UK judges were branded as ‘Enemies of the People’ in the media after a major Brexit-related decision. In America, there is a less drastic but similar picture: trust in the judiciary has exceeded trust in the elected branches since the early 1970s.⁵⁴ In fact, when assessing the functioning and operation of democracy and state operation, law and legal institutions may often be at the periphery of citizens’ concerns. Focus group research has found that compared to Congress and the Presidency, US citizens do not frequently think about the Supreme Court and its justices.⁵⁵ This was even true when the researchers prompted participants to discuss the Court in relation to other governmental branches. This led Hibbing and Theiss-Morse to note,

The Supreme Court may hold a hallowed place in the institutional structure, but most people do not perceive it as playing a major role in the day-to-day decisions of the political system... This is all to the good as far as public support for the Court is concerned.⁵⁶

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

But the picture is not all rosy when looking at legal institutions on survey data, and this is especially true when the focus moves away from judges or particular apex courts. Recent data from the OECD on trust in governmental institutions shows that judicial systems are only trusted by an average of 56% of citizens; slightly better than national governments (45%), but lower compared to education systems (67%), health care systems (69%), and local police (77%).⁵⁷ A large scale study focused on the trilateral democracies found that confidence in legal systems decreased from the 1980s to the 1990s, and that these decreases aligned with other public institutions.⁵⁸ Cracks can also be seen on the domestic front in various jurisdictions. Close to one in five people in a 2013 survey said that courts did not treat people equally within the UK.⁵⁹ Additionally, Hibbing and Theiss-Morse have found that a majority of people believe the US Supreme Court is involved in too many issues, and that many citizens admit to having been upset about Court decisions.⁶⁰ Researchers focused on the sub-national level have also

⁵³ ‘Ipsos MORI Veracity Index 2020’ Ipsos MORI (November 26, 2020), <https://www.ipsos.com/ipsos-mori/en-uk/ipsos-mori-veracity-index-2020-trust-in-professions>.

⁵⁴ Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down* GALLUP (20 September 2017), <https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx>. Although, this survey differed from the Ipsos MORI one above. This Gallup survey was based on institutional trust, whereas the Ipsos MORI one was based on trust in certain professions, not institutions.

⁵⁵ HIBBING & THEISS-MORSE, *supra* note 4 at 88-89.

⁵⁶ *Ibid*, p 92.

⁵⁷ OECD, ‘Trust in Government’ (2019), <https://www.oecd.org/gov/trust-in-government.htm>.

⁵⁸ Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture, or Performance?*, in PHARR & PUTNAM, *supra* note 4 at 55.

⁵⁹ S. Butt & R. Fitzgerald, *Democracy in British Social Attitudes Survey* (31st ed)(2013) 1, 14.

⁶⁰ HIBBING & THEISS-MORSE, *supra* note 4 at 47.

found that confidence in state courts is often lower compared to state executives.⁶¹ This less flattering picture of the judiciary and legal systems more generally calls into question why law and legal process have commonly been left out of studies on democratic disaffection.

Finally, given the judiciary’s role as in independent interpreter of law, mediator of conflicts, and potential ‘check’ on the political branches, there may be an implicit assumption that anything the law does is at least *attempting* to ennoble the political realm. Judges do, after all, endeavor to provide an independent perspective to the resolution of disputes, and often this perspective can be helpful for democracies. This ‘checking’ rather than ‘leading’ or ‘governing’ function that the judiciary traditionally engages in may be another reason why the legal realm has not been subject to scrutiny as regards democratic disaffection. As one study puts it, ‘confidence in courts partly stems from an expectation that courts are an important part of a democratic system and that they mostly function properly.’⁶² This may also be the reason why when the legal realm is mentioned in the same breath as democratic disaffection, it is almost always mentioned as a way to ‘protect’ or ‘defend’ democratic institutions, rather than a possible contributing source of democratic disaffection itself.⁶³ There are exceptions to this, but these voices are few and far between.⁶⁴ However, the attractive idea that anything the law does is attempting to ennoble politics should not be taken at face value. In fact, for reasons articulated below, this notion should be discarded. The law certainly does possess the potential to ennoble the political realm and help resolve intractable or sophisticated societal problems. However, because it is so highly trusted by citizens, and because it operates on principles such as judicial independence and the rule of law, it also possesses the potential to influence—as well as harm—the political realm.

Although the demand-side does not appear to suit the legal realm in relation to democratic disaffection, that may not be true for the supply-side. As Hay identifies, ‘virtually no consideration’ has been given to supply-side factors of disaffection, such as: ‘changes in the substantive content of the “goods” that politics offers to political “consumers,” and changes in the capacity of national-level governments to deliver genuine political choice to voters.’⁶⁵ Law’s contribution to political disaffection could certainly be one such supply-side factor; something that possesses the ability to change the substantive content of goods on offer, and also to impact the capacity of national-level governments. This is true not just for constitutional issues, which are increasingly policed by judiciaries and apex courts, but also for other areas of domestic policy, in which popular influence and control has noticeably decreased. Indeed, many contemporary democracies explicitly place constitutions and constitutional law above popular control, and popular elements within states have become increasingly downgraded with respect to constitutional elements.⁶⁶ These constitutional trends complement what is happening in other areas of public policy, where there is a clear and obvious trend to

⁶¹ Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government* 60(4) POL. RES. Q. 707, 718 (2007).

⁶² Aylin Aydin Çakır & Eser Şekercioğlu, *Public confidence in the judiciary: the interaction between political awareness and level of democracy* (2016) 23(4) DEMOCRATIZATION 634, 635.

⁶³ SILVERSTEIN, *supra* note 29 at 177.

⁶⁴ See, e.g., MAIR, *supra* note 4; SILVERSTEIN, *supra* note 29; see also JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* (2014).

⁶⁵ HAY, *supra* note 4 at 55.

⁶⁶ MAIR, *supra* note 4 at 10.

‘depoliticize’ public policy by ‘displacing responsibility for policy making and/or implementation to independent public bodies.’⁶⁷

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

III. The relationship(s) between law, politics, and democratic disaffection

As views from Montesquieu and the American founders demonstrate, law and courts were thought of differently over two centuries ago. The judiciary was not conceived of as a powerful state entity that could wield extensive influence over the political branches, and thus significantly impact the operation of democracy. Indeed, Montesquieu described court power in relation to the other branches as ‘next to nothing,’⁶⁸ a view that feels odd and out of place today. And although contemporary powers of the judiciary are still at times downplayed or characterized as fragile, it would be very difficult to say that these early views of judicial power have withstood the test of time. Courts are now major constitutional players, in some jurisdictions actively involved in the direction and governance of the state, and in other jurisdictions the leading adjudicator of rights, liberties, and constitutions.⁶⁹

The middle of the twentieth century is key to understanding the connection between law and democratic disaffection, as this period is around when researchers began finding noticeable declines in trust and confidence in government.⁷⁰ The era seems to have brought about a different type of relationship between law and politics: one that was more antagonistic, and predicated on the taming or subordination of the other. This new relationship also coincides with a significant period of growth in law and legal mechanisms more generally, such as: the number of written constitutions, the constitutionalization of rights, and the expansion of judicial review throughout the world.⁷¹ While quite a lot of work has been done on the growth of these legal mechanisms, less is known about how the increasingly antagonistic relationship between law and politics evolved during this period, including the similarities between the economic and legal views of constitutionalism. Some have termed this development ‘constitutional economics,’ or ‘looking at political institutions through the lens of economics.’⁷² Below I discuss these similarities in more detail, and then focus on possible ways

⁶⁷ HAY, *supra* note 4 at 57; MARK TUSHNET, *THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* (2021).

⁶⁸ MONTESQUIEU, *supra* note 2 at 156.

⁶⁹ ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007).

⁷⁰ DALTON, *supra* note 4 above at chp 1 & 2.

⁷¹ On the rise of constitutionalism more generally, see, Bruce Ackerman, *The Rise of World Constitutionalism* 83(4) VA. L. REV. 771 (1997). On the worldwide growth of judicial power see, e.g., C. NEAL TATE & TORBJORN VALLINDER (EDS), *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995). On the rise of written constitutions, see BRIAN CHRISTOPHER JONES, *CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS* (2020); see also a visual timeline here: Comparative Constitutions Project, *Data Visualizations (New Constitutions)*, <https://comparativeconstitutionsproject.org/ccp-visualizations/>.

⁷² VIBERT, *supra* note 3 at 78-79. From a UK perspective, see: TONY PROSSER, *THE ECONOMIC CONSTITUTION* (2014).

that law and courts have contributed to disaffection, may counter disaffection, and could perhaps do both at the same time.

In the middle of the 20th century—as citizen views on trust and confidence in government were changing—a bold new theory called Public Choice was gaining steam. It went on to have a profound impact on the development of liberal democracies.⁷³ In short, it painted an extremely unflattering picture of politics and the political realm. The theory is based around the idea that politicians are rational self-interested actors, and even though they are elected public officials, they will act not in the public interest but in their own best interests. Ultimately, they will ‘behave in ways that are costly to citizens,’⁷⁴ and cannot be trusted to carry out the general will—either of their constituents or of the people more generally. The theory also contains an exceptionally negative view of the public, who it views as self-interested, largely ignorant when it comes to politics and the political realm, and unable to effectively monitor government.⁷⁵ But that hardly covers everything. A gloomy view of civil servant bureaucrats manifests as well, viewing them as captured by special interests and mostly focused on maximizing departmental budgets. And to top it all off, because politicians, the public, and civil servants cannot be trusted, the theory advocates using a small set of technocrat guardians to oversee certain areas, such as fiscal policy, to ensure that decisions are made in the public interest. Its central authors and advocates went on to win Nobel Prizes⁷⁶ and write celebrated books,⁷⁷ and its influence continues well into the 21st century.

At the heart of public choice theory is a deeply cynical view of the political realm: politicians and legislatures are not to be trusted, especially when it comes to important decisions in an election year. These views align with some prominent legal philosophy of the mid-20th century. For example, in 1964 Shklar recognized that, ‘politics is regarded not only as something apart from law, but as *inferior* to law. Law aims at justice, while politics looks only to expediency.’⁷⁸ The book goes on to equate the political realm with an uncontrollable child.⁷⁹ Shklar’s focus on expediency demonstrates clear similarities with public choice: politics and politicians are opportunistic, self-interested actors that cannot be trusted. Some viewed this newfound skepticism of politics as healthy, suggesting that at the time there was too much deference to authority and trust placed in political leaders.⁸⁰ And because politicians could not be trusted to make major decisions without thinking about their own best interests, the remedy for public choice theorists was to ‘depoliticize’ policy choices in a whole range of areas. Only through depoliticization could certain essential elements be protected.

⁷³ Public choice theory was not the only major economic theory to influence the trajectory of the political realm. Following this was the ‘political overload thesis,’ the ‘bureaucratic overload thesis,’ ‘new public management theory,’ and ‘rational expectations.’ All these offshoots share a common view of politics and the political realm: without adequate supervision, politicians and other actors in the political realm will make self-interested decisions, and ultimately threaten the viability of the state.

⁷⁴ Jane S. Shaw, *Public Choice Theory* (2001) The Concise Encyclopedia of Economics, Library of Economics and Liberty, <https://www.econlib.org/library/Enc1/PublicChoiceTheory.html>.

⁷⁵ *Ibid*; see also William F. Shughart II, *Public Choice*, Library of Economics and Liberty, <https://www.econlib.org/library/Enc/PublicChoice.html>.

⁷⁶ For example, JAMES M. BUCHANAN, *THE CALCULUS OF CONSENT* (1962), which won the Nobel Prize in Economic Sciences in 1986.

⁷⁷ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

⁷⁸ JUDITH N. SHKLAR, *LEGALISM* (1964) 111 (my emphasis).

⁷⁹ *Ibid* (‘The former [law] is neutral and objective, the latter [politics] the uncontrolled child of competing interests and ideologies’).

⁸⁰ MAIR, *supra* note 4 at 133.

The idea of depoliticization has been common in many areas of government, as elements are often taken out of the governmental context and given to other public or quasi-public bodies.⁸¹ As Roberts describes, the approach to depoliticization is usually two-pronged. Firstly, those advocating reform usually begin with ‘an expression of deep skepticism about the merits of conventional methods of democratic governance.’⁸² This skepticism often focuses around politics and politicians being unstable, short-sighted and selfish, which leads them to make ill-advised decisions. Secondly, depoliticization must impose some type of formal constraints on elected officials. Indeed, it involves ‘removing certain subjects from the realm of everyday politics,’ and the method by which this is done is primarily, if not exclusively, through legal instruments.⁸³ Implementation of these depoliticization measures in recent decades has allowed for the creation or furthering of a plethora of arms-length bodies that are disconnected from the political realm, but which touch on people’s daily lives, including those that: provide essential services (e.g., Bank of England), are responsible for assessing risk (e.g., Food Standards Agency), straddle the boundaries between public and private (e.g., Financial Conduct Authority), and determine if powers are being used appropriately (e.g., Pensions Ombudsman).⁸⁴

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

[L]iberal constitutions are crafted to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, unaccountability, instability, *and the ignorance and stupidity of politicians*.⁸⁵

Present-day citizens are myopic; they have little self-control, are sadly undisciplined, and are always prone to sacrifice enduring principles to short-term pleasures and benefits.⁸⁶

Although the author of this work was not writing from a public choice perspective, he undoubtedly employs similar justifications. Holmes criticizes the public for its ‘inability to subject public officials to ongoing scrutiny.’⁸⁷ He goes onto talk about ‘irrational desire,’ ‘unconstrained passions,’ and an ‘the unrestrained capacity to satisfy immediate or given desires.’⁸⁸ But that is not all. The author notes that constitutionalism has been developed to ‘free people from the effects of debilitating passion,’⁸⁹ and that deliberative democracy ‘compensates for the disabling inflexibilities and obsessions of spontaneous thinking.’⁹⁰

⁸¹ VIBERT, *supra* note 3; HAY, *supra* note 4 at 82.

⁸² ALASDAIR ROBERTS, *THE LOGIC OF DISCIPLINE: GLOBAL CAPITALISM AND THE ARCHITECTURE OF GOVERNMENT* (2010) 4.

⁸³ *Ibid.*, at 5.

⁸⁴ VIBERT, *supra* note 3 at 20-30.

⁸⁵ STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1997) 6 (my emphasis).

⁸⁶ *Ibid.*, at 135.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at 267-68.

⁸⁹ *Ibid.*, at 273.

⁹⁰ *Ibid.*, at 273.

Holmes’ writing presents quite the image: citizens running mad with debilitating passion, disabling obsessions, and unrestrained desire.

This extreme depiction of the political realm is nothing new. Politics is often viewed as ‘dangerous and potentially destructive,’ and that it needs to be ‘tamed’ and placed within certain legal bounds.⁹¹ Legal academics encourage the perception that politics is ‘ruled by the passions, which can run wild’, while law speaks the ‘cool language of reason and logic.’⁹² And because the political realm cannot be trusted, depoliticizing measures have been implemented in many jurisdictions. On one level, written constitutions and bills of rights were used to decrease the stakes of politics. The implementation of constitutional supremacy, which has replaced parliamentary sovereignty in many jurisdictions throughout the world, was one such method. The depoliticization strategy was best articulated by Jutta Limbach, who stated that ‘the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator.’⁹³ This, like implementation of other distancing, was entirely purposeful, and is articulated in more detail below.

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

A. Law and courts contributing to disaffection

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

i. The courts as viable or ‘better’ alternative

In some ways the courts have been presented as a viable or better alternative to politics and the political realm, and they have done this in three primary ways: in their potential to hold the government accountable, in acting as a venue for furthering policy goals, and in presenting themselves as a form of ‘anti-politics.’ These may contribute to democratic disaffection because if the courts are perceived as a better alternative to making policy and also to constraining political actors, then the political realm may be increasingly viewed as insufficient or even obsolete at some of its primary functions. Thus, less time and effort may be placed on fostering a healthy, sustainable, and vibrant political domain, and more time and effort will be placed on strategic litigation and other judicial concerns.

Theories of democracy focus on elections as the primary component of democratic accountability: if representatives want to get re-elected, they need to pass laws and govern in a way that secures citizen trust and confidence. But in between elections, there is vigorous debate

⁹¹ MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* (2000) 223.

⁹² See the examples provided by: ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005) 12-13.

⁹³ Jutta Limbach, *The Concept of Supremacy of the Constitution* 64(1) *MODERN L. REV.* 1 (2001) (emphasis in original).

over how best to hold governments accountable.⁹⁴ Almost every governmental system provides some role for the courts to check the power of the executive, which often connects to upholding the rule of law. But questions remain as to how effective court-centered accountability mechanisms are compared to other mechanisms, and also to what degree the courts should undertake this role. An over-reliance on legal measures for accountability can water-down or even strip away political accountability measures. This is especially true when there are viable political accountability mechanisms available that could produce similar or just as effective results, and yet the courts still intervene. Ultimately, if courts alone are perceived as doing an effective job of holding governments to account, then there may be less incentive for citizens to contact their representatives, become a member of a political party, participate in a public protest, or even visit the ballot box at the next election.

Another way that courts can contribute democratic disaffection is through presenting themselves as viable alternatives to the normal political process. Here courts may allow citizens to further policy-related goals through litigation, rather than through the more typical political process. Indeed, it is no secret that ‘[p]olitical losers and political minorities turn to the independent, that is, unelected and unaccountable, judiciary in the hopes of persuading judges of claims that fail to command a majority in the legislature.’⁹⁵ Even the courts have acknowledged this at times,⁹⁶ and this may also be why we have seen the law not quell, but perpetuate the culture wars.⁹⁷ In his excellent study of how law can shape, constrain, save, and kill politics, Silverstein acknowledges this has taken place in a variety of areas in the US context, but perhaps mostly notably in relation to poverty and abortion.⁹⁸ In fact, going down the litigation route may also be a more efficient or effective means of changing or developing policy,⁹⁹ as the slower-moving political realm relies on mobilization and political support.

If citizens can advance policy goals by effectively bypassing the political process for a legal one, then the incentives to participate in democracy are certainly weakened, perhaps considerably so.

Finally, courts can even present themselves as a form of ‘anti-politics,’ which may be considered more respectable to those disenchanted with the political realm. The idea that courts are ‘non-majoritarian’ or apolitical may be highly attractive to citizens, especially those that view politics with disdain or associate it with corruption, misdeed, self-interest, or other negative features, as is often highlighted in constitutional economics. For these citizens, the legal realm may be a more respectable and desirable path. Rather than a focus on expediency, there is a focus on the fundamental. Rather than having to use traditional political tools to change minds and influence public opinion on a large scale, there is a focus on quality and strength of argument.

⁹⁴ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

⁹⁵ Amanda Hollis-Brusky, *An Activists Court* in ZACHARY COURSER, ERIC HELLAND, KENNETH P. MILLER, *PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER* (2018) 82. Of course, some advocate this element as inherent to constitutional government. Ginsburg notes that, ‘By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain’ (TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003) 25).

⁹⁶ See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (‘Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts’).

⁹⁷ Christopher McCrudden, *Transnational Culture Wars* (2015) INT. J. CONST. L. 434.

⁹⁸ SILVERSTEIN, *supra* note 29 at chp 4.

⁹⁹ *Ibid*, at 21-25.

Appealing to something detached from the ‘politics of the day’ will always be attractive to citizens, especially if these appeals can be focused on ‘higher’ fundamental values or principles. But there are major questions regarding whether courts can be viewed as a form of anti-politics. At their heart, courts are undoubtedly majoritarian institutions, just on a much smaller scale than the legislature.¹⁰⁰ And whether they are ‘apolitical’, and more concerned with the fundamental, is certainly up for debate.

ii. The overly critical court

Given that the new relationship between law and politics forged in the twentieth century was predicated on the taming or subordination of politics through law, it may be unsurprising that in some instances courts have been overly critical of the elected branches. These instances of harsh criticism may lead to increased disaffection among the general public. After all, any heightened skepticism of politics by the judiciary may produce ‘ripple effects...in the public’s trust of the democratic process.’¹⁰¹ And if these ripple effects are significant enough, they could influence citizen perception of the elected branches.

One common criticism courts engage in is complaining about the drafting or preparation of legislation, which can make the work of legislators appear messy, incompetent, or downright lazy. A notorious example from the UK is Justice Harmon in *Davy v Leeds Corporation*,¹⁰² who laments the ‘monstrous legislative morass’ judges had to examine in this particular case. Similarly, in a 2010 UKSC judgment, Lord Judge found it ‘outrageous’ that ‘elementary principles of justice’ were buried in a ‘legislative morass.’¹⁰³ But the problem crosses boundaries. Even the late Ruth Bader Ginsburg had complaints about legislation, noting: ‘Detecting the will of the legislature, however, time and again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes. Bad law breeds unnecessarily hard cases.’¹⁰⁴ These complaints, even if primarily circulated among lawyers, could breed disaffection.

Other criticisms carry more constitutional bite. When attempting to determine the constitutionality of a statute, courts may point to an unsatisfactory legislative record. Colker and Brudney note the US Supreme Court did this in a number of cases at the turn of the century, ‘convey[ing] the message that Congress is suspect in the powers it exercises and the manner in which it exercises them.’¹⁰⁵ In one notable case, *City of Boerne*,¹⁰⁶ the Court struck down a provision of a statute that was passed unanimously in the House and flew through the Senate by a vote of 97-3. Scholars have noted that the Court’s approach in *Boerne* and similar cases have attempted to ‘subordinate the primary function of legislatures,’¹⁰⁷ and essentially turn Congress into a lower court it could ridicule.¹⁰⁸ The Court did this again in 2013 when striking

¹⁰⁰ On the US Supreme Court, this amounts to a ‘rule of five’ (HJ POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008)(‘A five-justice majority on the Court, the strong Rule of Five asserts, can do anything, at least in deciding constitutional law cases.’))

¹⁰¹ Hollis-Brusky, *supra* note 74 at 86.

¹⁰² [1964] 1 WLR 1218, 1224.

¹⁰³ R (Noone) v. Governor of HMP Drake Hall [2010] UKSC 30, [87].

¹⁰⁴ Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee* 100 HARV. L. REV. 1417 (1987).

¹⁰⁵ Ruth Colker & James J Brudney, *Dissing Congress* 100 MICH. L. REV. 80, 98 (2001).

¹⁰⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁰⁷ Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique* 111 YALE L.J. 1707, 1711 (2002).

¹⁰⁸ Colker & Brudney, *supra* note 84 at 83, 144.

down a reauthorization of the Voting Rights Act 1965. Justices noted that ‘Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act,’ but that it ‘did not use the record it compiled to shape a coverage formula grounded in current conditions.’¹⁰⁹ It further noted the Congressional re-enactment was based on ‘40-year-old facts having no logical relation to the present day.’¹¹⁰ These are extraordinary statements to make for a statute that was re-authorized by large Congressional majorities in 2006.

Instances of courts intentionally embarrassing the elected branches in their judgments has also occurred. I have recently explored this from a common law perspective, focusing on the US, UK, and Canada.¹¹¹ Although some form of moderate embarrassment is built into the judicial review process—given the public nature of adjudication—I contend that in some instances courts have transitioned from unintentionally to intentionally embarrassing the elected branches. For instance, recent judgments from the UK have compared government policy to that seen in totalitarian regimes,¹¹² have accused governments of acting in a ‘clandestine’ manner,¹¹³ and have accused governments of incompetence in relation to basic constitutional architecture.¹¹⁴ These unnecessary statements allow the courts to portray the elected branches in an extremely harsh light,¹¹⁵ and could negatively impact how the public view their elected officials.

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

iii. The court as domineering constitutional authority

Since the new relationship between law and politics was forged in the mid-twentieth century, courts have been much more bullish about their central role in constitutional adjudication. As Robin West notes, oftentimes the point of law—and especially constitutional law—is to ‘stop the political animal dead in his tracks.’¹¹⁶ Beyond this, law can be used as a ‘battering ram’ that not merely takes the ‘wind out of the political sails,’ but effectively kills politics.¹¹⁷ No

¹⁰⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹¹⁰ *Ibid.*

¹¹¹ (forthcoming) Brian Christopher Jones, *Judicial Review and Embarrassment* PUB. L (April 2022).

¹¹² *The Christian Institute and Others v. Lord Advocate* [2016] UKSC 51 at [73]. Lady Hale said:

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

¹¹³ *Cherry v. Prime Minister* [2019] CSIH 49 at [54]. The Scottish Inner House of the Court of session said that in requesting the prorogation of Parliament the Prime Minister had acted in a ‘clandestine manner’.

¹¹⁴ *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [85]. The UK High Court noted that the Government’s case was Court considered the Government’s case ‘flawed’ at even a ‘basic level.’

¹¹⁵ In the article I develop three different types of portrayals that the courts use to embarrass the elected branches: constitutional newbies, constitutional fools, and constitutional villains (Jones, *supra* note 111 above).

¹¹⁶ Robin West, *Ennobling Politics* in H. JEFFERSON POWELL & JAMES BOYD WHITE (EDS), *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* (2009) 59.

¹¹⁷ SILVERSTEIN, *supra* note 29 at 268-69.

doubt this is how some lawyers, judges, and legal academics view their roles: as agents who can provide a substitute for the passionate, rancorous, and often brutal political realm.

In the mid-twentieth century courts around the globe began asserting their role as ultimate constitutional adjudicators in a more forceful fashion.¹¹⁸ I have previously documented instances of this in relation to a number of jurisdictions, where courts have asserted themselves as the ultimate authority when determining constitutionality, upholding constitutional principles, or indeed protecting the constitution more generally.¹¹⁹ Under these bold pronouncements any view of constitutionality outside of the Court’s assessment may be viewed as amateurish, naïve, or unsophisticated. For example, in 2013 the Canadian Supreme Court noted that it cannot ‘be barred by *mere statutes* from issuing a declaration on a fundamental constitutional matter.’¹²⁰ The US Supreme Court has repeatedly asserted their dominant role as ‘supreme in the exposition of the law of the Constitution’.¹²¹ And the Australian Supreme Court has at times flaunted its authority, declaring that no other institution possesses ‘the power and the will’ to protect the Constitution.¹²² In relation to constitutional matters, these views clearly attempt to make politics and the political realm subservient to law.

Whether it has been prominently intervening in the electoral process,¹²³ second-guessing decisions historically left to the Executive,¹²⁴ or rejecting validly passed constitutional amendments,¹²⁵ it is obvious the courts in many jurisdictions are far from ‘next to nothing’. In fact, they have asserted themselves as domineering constitutional authority.

B. *Law and courts working to counter disaffection*

Two primary ways in which courts may counter disaffection are: (i) by helping uphold collective societal values and principles such as justice, the rule of law, and democracy, among other things; and (ii) by acting as an alternative or backstop venue for advancing political agendas or for resolving controversial societal issues. I explore both of these aspects below.

i. *The courts as upholders of collective societal values and principles*

Perhaps the most decisive way that the courts work to counter democratic disaffection is by helping uphold collective societal values and principles such as justice, equality, the rule of law, and other ideals, such as democracy. After all, the collective values and principles present in societies should also be seen and furthered within the courts. These values and principles may be inscribed in statutes or written constitutions, found in the customs or traditions of politics and law (e.g., such as the procedures of a legislative body or in the common law), or be commonly advocated by citizens. Similar to the other governmental branches, the courts have a role to play in upholding and defending these values. Some may even say that the courts institutionally lead on some of these, such as administering justice and protecting the rule of

¹¹⁸ TATE & VALLINDER (EDS), *supra* note 71.

¹¹⁹ JONES, *supra* note 71 at 148-153. Examples here came from the United States, Israel, Australia, and Canada.

¹²⁰ *Manitoba Métis Federation Inc v. Canada* [2013] 1 SCR 623, 683 (my emphasis).

¹²¹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹²² *NSW v. Commonwealth* (2006) 229 CLR 1, para 210.

¹²³ *Bush v. Gore*, 531 U.S. 98 (2000).

¹²⁴ *R (on the application of Miller) v. Prime Minister* [2019] UKSC 41; *Cherry & Others v Advocate General for Scotland* [2019] UKSC 41.

¹²⁵ For more on this, see Richard Albert, *Constitutional Amendment and Dismemberment* (2018) 43(1) *YALE J. INT’L L.* 1 (2018).

law. Undoubtedly, some citizens may be drawn to particular values and principles over others, and may even believe that courts uphold certain values better than the elected branches.

If the courts do an adequate job of protecting these collective values, or even protect certain values better than the political realm, then they may counter democratic disaffection, even if they do not explicitly address this as an outcome.

At times courts have even signaled positivity towards politics and the political process and upheld democratic innovations that bring citizens closer to self-government. Scholars have noted that the US Supreme Court under Earl Warren was ‘optimistic about the possibility of politics,’¹²⁶ and demonstrated trust in Congress by upholding major pieces of legislation such as the Civil Rights Act 1964 and the Voting Rights Act 1965. Before this, America’s highest court also allowed controversial democratic innovations to take shape that are now recognized as essential democratic mechanisms. In 1912 the Court upheld the use of state referendums as a valid form of law-making.¹²⁷ Eventually twenty-four US states passed some form of citizen referendum process, and they are widely used today.¹²⁸ Upholding this constitutional innovation was undoubtedly important, as scholars have demonstrated that referendums can lead to increased political knowledge and engagement among citizens,¹²⁹ which may thwart democratic disaffection.

There is no doubt that upholding these cherished societal standards comes with significant difficulties. Scholars have found that the operation of the legal system may entrench inequalities¹³⁰ or continually favor ‘repeat players’ in the courtroom.¹³¹ But the protection of cherished societal values does not just happen through the elected branches or the democratic process. It also happens in the courts. Indeed, judiciaries may lead when it comes to particular values, such as justice and the rule of law, and they also have a role to play in the public perceptions of politics and the political process. Upholding these precious values may counter democratic disaffection.

ii. The courts as alternative or backstop venue for advancing political agendas or resolving controversial societal issues

Although this item was listed above as potentially furthering disaffection, it is also possible that this element could counter democratic disaffection. Indeed, as democratic disaffection has increased throughout the years, it seems only natural that citizens pursued alternative venues to the political arena. Politics can be frustrating, slow, and messy, and it is inevitable that citizens may occasionally get disenchanted with the political process. Nowadays, citizens often have another place they can turn. Courts in many jurisdictions have undoubtedly become an alternative or backstop venue for advancing political agendas or resolving controversial societal issues. In the American context, it is readily acknowledged that if citizens ‘cannot win at the ballot box they will try to win in the courtroom.’¹³² Of course, not all jurisdictions subscribe to this level of court intervention. However, as the judicialization of politics has

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

¹²⁷ *Pacific States Telephone and Telegraph Company v Oregon*, 223 U.S. 118 (1912).

¹²⁸ KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* (2009) 50.

¹²⁹ MATT QVORTRUP, *THE REFERENDUM & OTHER ESSAYS ON CONSTITUTIONAL POLITICS* (2019) 91.

¹³⁰ Mark Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change* 9(1) L. & SOC’Y REV. 95.

¹³¹ DONALD BLACK, *THE BEHAVIOR OF LAW* (1976).

¹³² Martin Shapiro, *The United States* in TATE & VALLINDER (EDS), *supra* note 71 at 63.

grown around the world an increasing amount of decisions that were made in the political realm are now made in the legal realm.

The transition to increased judicialization has happened for a variety of reasons, some of which may counter democratic disaffection. As noted above, some citizens may prefer courts to the political arena, in part because judiciaries are beyond the reach of political parties and electoral politics. Additionally, resolution of disputes may be more efficient and straightforward in the legal realm, and may not require as much time and effort as a political campaign does. It may also be the case that courts have been increasingly courted or invited by the elected branches to resolve disputes, either through statutory or through other means.¹³³ Indeed, some legal and political science literature notes that the elected branches have been hesitant to make decisions on controversial issues or have even increasingly pushed controversial issues to the judiciary.¹³⁴ This is the flip-side of judicialization: it is not just that courts have been expanding their jurisdictions through judicial review, but also that the political branches have been actively sending more disputes to the judiciary for resolution. Some citizens may be happy to see disputes settled somewhere, even if it does not occur through ordinary politics or the political process. Finally, increased judicial intervention may be associated with attempting to alleviate the significant failings or breakdowns in the political realm.¹³⁵ But determining what qualifies as a ‘failing’ or ‘breakdown’ is difficult, and may be highly dependent on one’s political perspective.

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

C. Law and courts both contributing to and countering disaffection

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

i. The unique constitutional position of judicial review, both as countermajoritarian—but also essential—to any working democracy

As the opening paragraph to this article states, law and legal processes possess the potential to complement politics and the political realm, leading to extremely useful and insightful revelations; but they also possess the potential to damage it. There is no getting around the fact that the role of judges and the operation of judicial review contain anti-democratic or countermajoritarian characteristics. But these anti-democratic or countermajoritarian

¹³³ See section IV(A) below.

¹³⁴ See KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2009).

¹³⁵ This seemed to be Ely’s focus in developing a theory of judicial review. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

characteristics also provide democracies a unique perspective, which can and often does positively affect state operation.

In most states judges are unelected actors that are provided an independent status and function within the state. This detachment from the executive and legislative branches is purposeful, as judges are intentionally not subject to mechanisms of democratic accountability.¹³⁶ The judicial role carries a number of functions, such as: interpreting constitutions, statutes, and regulations; determining lawful or unlawful behavior, and providing other checks on the elected branches. Many of these—such as the interpretation of legal texts—are essential to how democracies operate, and can help democracies protect vulnerable citizens, safeguard human rights, or indeed make the elected branches think twice about implementing particular policies. In fact, many people believe that judicial review should act as a braking mechanism to the developments in the political realm, and consider this countermajoritarian function as essential to its operation.¹³⁷

But judicial review also contains elements that may hinder democracy, such as: second-guessing difficult decisions made by elected and accountable law-makers; constraining future actions of governments; or even allowing for increased criticism of national governments. Although to some degree all of these may benefit the operation of democracy in some ways, there is little doubt that too much second-guessing, too much fettering, and too much criticism of government will have detrimental effects. Also, while some consider the braking function of judicial review as essential to state operation, most of the evidence points to judicial review developing alongside public opinion, rather than counter to it.¹³⁸ The fact that judicial review often mirrors public opinion raises significant questions as to its use and overall influence.

Thus, the unique position of judges and judicial review provides for opportunities to both contribute to and also counter democratic disaffection.

ii. Mixed judicial records on protecting democracy and democratic principles

Records demonstrate that judges have both furthered democratic principles and at times also hindered the fruits of democracy.

Examining the judicial record of the US Supreme Court displays both these realizations. The Warren Court's treatment of democracy is often held up as positively reinforcing

¹³⁶ Of course, that does not mean that judges possess no accountability measures. Most judicial decisions are subject to appeal and that judges are also subject to various conduct and complaint procedures. However, there is a purposeful lack of democratic accountability measures. *See, e.g.*, Brian Christopher Jones, *The Widely Ignored and Underdeveloped Problem with Judicial Power* UK CONST. L. ASSOC. BLOG (25 February 2020), <https://ukconstitutionallaw.org/2020/02/25/brian-christopher-jones-the-widely-ignored-and-underdeveloped-problem-with-judicial-power/>. The major exception to this is the large amount of US state judges that are elected (see Brennan Center, *Judicial Selection: Significant Figures* (4 October 2021), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>).

¹³⁷ For discussion on this, see Bojan Bugarcic, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps"* 11 HAGUE J. RULE OF LAW 447 (2019).

¹³⁸ *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2010); FRANCES M. ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* (2018), p 46 ('The historical and comparative evidence shows that courts seldom stray far from the preferences of elected governments, and when they do, it is usually in the direction of public opinion rather than away from it. This makes them unreliable checks on majority hostility to minorities. Democracies do better than nondemocracies at protecting minority rights, and courts do not improve what democracies do. Working with electoral incentives might not always solve the problem, but it seems clear that nothing else will.');

David A. Strauss, *The Modernizing Mission of Judicial Review* (2009) 76(2) U. CHI. L. REV. 859 (2009).

democratic principles.¹³⁹ This is especially true with the major ‘one person, one vote’ rulings, which have been championed by scholars as some of the best rulings ever by the Supreme Court.¹⁴⁰ *Baker v. Carr* allowed challenges to legislative redistricting, deeming issues such as gerrymandering justiciable before the courts.¹⁴¹ *Reynolds v. Sims*¹⁴² and *Wesberry v. Sanders*¹⁴³ furthered the development of ‘one person, one vote’ jurisprudence at the state and federal levels, respectively. Perhaps these rulings helped foster increased trust in the political realm or a deeper commitment to democracy.¹⁴⁴ But SCOTUS has also delivered judgments that could have done the opposite, significantly harming the political realm. *Bush v. Gore* stopped a state-wide recount for Presidential ballots, essentially handing the presidency to a candidate that did not receive the most national votes.¹⁴⁵ Additionally, much of the Court’s campaign finance jurisprudence—such as *Buckley*,¹⁴⁶ *Citizens United*,¹⁴⁷ and *McCutcheon*¹⁴⁸—have major implications for the political realm, and also run contrary to public opinion.¹⁴⁹

More recent SCOTUS decisions on gerrymandering,¹⁵⁰ voter ID laws,¹⁵¹ the Voting Rights Act,¹⁵² and voter roll purges¹⁵³ appear to have limited, not expanded, the franchise, and may further hinder the democratic process. Perhaps the most damning assessments of these decisions has come not from the media or the elected branches, but from the justices themselves. For example, in *Bush v. Gore*, Justice Stevens delivered a severe indictment of the decision, noting that, ‘Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.’¹⁵⁴ This is reminiscent of a fiery dissent from Lord Aikten during World War II, where he declared that the attitude of some UK judges was ‘more executive minded than the executive.’¹⁵⁵ Both *Bush v. Gore* and *Liversage v. Anderson* have been evaluated by contemporary academics as highly problematic,¹⁵⁶ and evidence that the judiciary may at times get things worryingly wrong.

¹³⁹ See Karlan, *supra* note 105 at 4 (‘The animating impulse behind many of the Warren Court’s major decisions was a commitment to civic inclusion and democratic decisionmaking’).

¹⁴⁰ *The Best Supreme Court Decisions Since 1960* TIME MAGAZINE (October 6, 2015), <https://time.com/4055934/best-supreme-court-decisions/>.

¹⁴¹ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁴² *Reynolds v. Sims*, 377 U.S. 533 (1964)

¹⁴³ *Wesberry v. Sanders*, 376 U.S. 1 (1964)

¹⁴⁴ Of course, it is acknowledged that subsequent rulings have essentially overruled these cases: *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *Rucho v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

¹⁴⁵ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁴⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁴⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

¹⁴⁸ *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).

¹⁴⁹ Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence* PEW RESEARCH CENTER (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>.

¹⁵⁰ *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *Rucho v. Common Cause*, No. 18-422, 588 U.S. ____ (2019)

¹⁵¹ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

¹⁵² *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹⁵³ *Husted v. A. Philip Randolph Institute*, No. 16-980, 584 U.S. ____ (2018).

¹⁵⁴ *Bush v. Gore*, *supra* note 124 at 128-29 (Stevens J, dissenting).

¹⁵⁵ *Liversidge v. Anderson* [1941] UKHL 1 (Aitken J, dissenting).

¹⁵⁶ See, e.g., *The Worst Supreme Court Decisions Since 1960* TIME MAGAZINE (October 6, 2015), <https://time.com/4056051/worst-supreme-court-decisions/>.

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

iii. The boundaries of judicial involvement with politics are fraught with disagreement

Finally, the boundaries of judicial involvement with politics are fraught with disagreement. This continues to be one of the most contentious areas of constitutional theory, as any bright lines regarding this are frequently blurred.¹⁵⁷ The recent Brexit litigation in the UK, *Miller I*¹⁵⁸ and *Miller II/Cherry*,¹⁵⁹ both embody the potential benefits and risks that the courts take if they intervene in politics or the political process.

The prominent *Miller I* Brexit judgment ruled that Article 50 could not be triggered by the Government without parliamentary authority (i.e., an Act of Parliament). The decision both upheld parliamentary sovereignty—something highly valued by Brexit supporters—but also expanded the Supreme Court’s jurisdiction in relation to prerogative powers.¹⁶⁰ Even if the Court was merely trying to ensure that the proper constitutional procedures were followed in Britain’s EU exit, the decision provided the perception that the judiciary was willing to slow down or potentially even halt Brexit.¹⁶¹ This perception led to the belief in some quarters that individuals were using the courts as an alternative or backstop venue for resolving Brexit, rather than handling this through more direct political channels. At the time Lord Reed, who dissented in the case and who subsequently became Supreme Court President, said that: ‘It is important for courts to understand that the legalization of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary’.¹⁶²

The *Cherry/Miller II* case provided even more intense debate about the appropriate role of judicial intervention. In August 2019 newly implemented Prime Minister Boris Johnson prorogued Parliament for five weeks, fueling views that he wanted to leave the EU without a negotiated trade deal. While there were mixed opinions in the lower courts regarding whether prorogation was a justiciable issue,¹⁶³ a unanimous UK Supreme Court eventually ruled that prorogation was justiciable and also that it was unlawful, thus recalling Parliament and embarrassing the Government.¹⁶⁴ The Court justified their decision as upholding the constitutional principles of parliamentary sovereignty and political accountability,¹⁶⁵ and that

¹⁵⁷ Perhaps the most famous is that put forward in *Baker v. Carr*, 369 U.S. 186 (1962) regarding the ‘political question doctrine’.

¹⁵⁸ *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.

¹⁵⁹ *R (Miller) v. Prime Minister / Cherry & Others v. Prime Minister* [2019] UKSC 41.

¹⁶⁰ John Finnis, ‘Brexit and the Balance of Our Constitution’ Judicial Power Project (December 2, 2016), <https://policyexchange.org.uk/judicial-power-project-john-finnis-on-brexit-and-the-balance-of-our-constitution/>.

¹⁶¹ After all, Westminster Parliamentarians at the time were firmly against Brexit. Famously, after the Divisional Court ruling in the case, three judges were branded ‘enemies of the people’ by the Daily Mail newspaper (James Slack, *Enemies of the people: Fury over “out of touch” judges who have ‘declared war on democracy’ by defying 17.4m Brexit voters and who could trigger constitutional crisis* DAILY MAIL (November 3, 2016), <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>).

¹⁶² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [240].

¹⁶³ *Cherry v Prime Minister*, [2019] CSOH 7; *Cherry v Prime Minister*, [2019] CSIH 49; *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB).

¹⁶⁴ See Jones, *supra* note 111.

¹⁶⁵ Interestingly, ‘parliamentary accountability’ had not previously been recognized by the court as a major constitutional principle.

the judgment was within the court’s traditional purview of policing the prerogative, rather than an incursion into parliamentary matters. This provoked powerful rebuttals from a number of scholars, arguing that the courts had effectively attempted to legalize politics.¹⁶⁶ While the UKSC judgment divided many, the 80-seat majority won by the Conservative Party in the general election just a couple months afterward demonstrates that the courts perhaps should have taken Lord Reed’s advice in *Miller I* regarding judicial restraint.

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

IV. The law’s democratic distancing

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

One of the most significant constitutional developments over the past century has been the purposeful and incremental implementation of what I shall term ‘democratic distancing.’ Democratic distancing in the legal realm shares similar characteristics to the depoliticization that has taken place more widely. Generally, it is the implementation of inherently legal mechanisms that take features of democracy either further away—or potentially off the table—from political resolution. States have consciously inserted mechanisms to separate themselves from the potential negative effects or so-called ‘downsides’ of democracy. On a one-off basis, these instances can seem innocuous, legitimate, and even much needed within societies. Yet when analyzed collectively they demonstrate a significant amount of change to the political realm and to the operation of democracy more generally. Indeed, it seems undeniable that ‘the net effect of having so many decisions that affect the fabric of daily life being taken outside traditional democratic channels is that modern democracies now seem very far from providing popular government.’¹⁶⁷

These distancing measures are important when assessing democratic disaffection for two reasons in particular. First, if popular or political control is decreased then ultimately citizens have less control over these mechanisms, which may lead to further political alienation and feelings of powerlessness.¹⁶⁸ Citizens already feel a sense of displacement within many democracies, and further decreasing popular control mechanisms seems antithetical to

¹⁶⁶ See, e.g., John Finnis, *The unconstitutionality of the Supreme Court’s prorogation judgment* POLICY EXCHANGE (September 28, 2019), <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>; T Endicott, *Making constitutional principles into law* 136 LAW Q. REV. 175 (2020); Stephen Tierney, *Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision* POLICY EXCHANGE (September 30, 2019).

¹⁶⁷ VIBERT, *supra* note 3 at 9.

¹⁶⁸ As noted in Part 2 above, citizen powerlessness has been highlighted by some of the democratic disaffection literature. See, e.g., HIBBING & THEISS-MORSE, *supra* n 4 at 10; Foa & Mounk, *supra* note 4 at 7; Hansard Society, *Audit of Political Engagement 16* (2019), <https://www.hansardsociety.org.uk/publications/reports/audit-of-political-engagement-16>.

remedying this situation. Second, democratic distancing measures provide the impression that politics—or indeed the citizenry—does not deserve these powers or has been irresponsible in using them. No doubt the political realm has made mistakes, but whether or not these mistakes are serious enough to strip representatives or citizens of powers is up for debate.¹⁶⁹ Thus, while the legal realm may argue that increased court powers only rarely prevent the government from doing what it wants, that argument misses the point: it is the *perception* that politics and the political realm are unfit to possess these powers that matters, and which ultimately affects democratic disaffection.

Some of these incremental distancing steps are explored more below.

A. *Judicial policymaking capacity: a one-way street*

Although the courts have not been at the forefront of championing distancing measures, it would be a mistake to say that they have never done so. Accounts of courts lobbying to significantly expand their jurisdictions,¹⁷⁰ and also pushing for stronger codification on certain issues (e.g., human rights),¹⁷¹ have been well documented over the past century.

While descriptions of judicial policymaking expansion often emphasize that the courts have been handed newly fashioned powers directly from the legislature, these accounts tend to downplay the role of judiciaries, or senior judges, in helping make these changes come about. Take the Judiciary Act 1925, which allowed the US Supreme Court to fully take control of its docket by amending certiorari jurisdiction.¹⁷² Before this the Court's docket was largely made up of mandatory cases that it must hear if it came through the correct channels in the lower courts. Amending certiorari allowed it to pick and choose its own cases, and take a larger role as 'a prominent national policymaker.'¹⁷³ This, as one author put it, represented a 'quantum leap' forward regarding how the Court set its agenda.¹⁷⁴ William Howard Taft, former US President and then Chief Justice of the Supreme Court, energetically lobbied for the change to take place. In fact, a panel of Supreme Court Justices helped write the Bill that was presented in the Senate, and Taft's lobbying for the 1925 Bill possessed one central aim: 'to increase the policymaking capacity of the federal judiciary, and of the Supreme Court in particular.'¹⁷⁵ Buchman adds:

Taft sought to give the Court full control over its docket not only to reduce the Court's workload, but also to transform the Court's fundamental purpose within the federal judicial hierarchy. Instead of serving primarily as the federal court of last resort, charged with correcting lower courts' errors and vindicating the rights of particular litigants, the Court

¹⁶⁹ As Robert Dahl once said:

'[T]he risk of mistake exists in all regimes in the real world...the opportunity to make mistakes is an opportunity to learn. Just as we reject paternalism in individual decisions, because it prevents the developments of our moral capacities, so too we should reject guardianship in public affairs, because it will stunt the development of the moral capacities of an entire people' (ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 78-79 (1989)).

¹⁷⁰ See, e.g., Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925* 24(1) *JUST. SYS. J.* 1 (2003).

¹⁷¹ Anthony Lester, *The Magnetism of the Human Rights Act 1998* 33 *VIC. U. WELL. L. REV.* 477, 482 (2002).

¹⁷² Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925* 42(1) *HARV. L. REV.* 1 (1928).

¹⁷³ Buchman, *supra* note 170.

¹⁷⁴ *Ibid.*, at 2.

¹⁷⁵ *Ibid.*, at 10.

would become a tribunal whose significance would rest in its power to rule on issues of great legal or political significance to the public at-large, to supervise the federal judicial hierarchy, and to ensure uniformity throughout the system.¹⁷⁶

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

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

As a sitting Appeal Court judge, Lord Scarman gave the 1974 Hamlyn Lectures,¹⁷⁷ which presented ‘a full and cogent case’ for domesticating the ECHR.¹⁷⁸ Scarman’s lectures were a major intervention, and in 1976 the Labour Party published *A Charter of Human Rights*, which advocated incorporating the ECHR into domestic Law—the first time the Party had officially done so.¹⁷⁹ In 1985, just before he retired from being a Lord of Appeal in Ordinary (at the time, the UK’s highest Court), Lord Scarman introduced a Bill in the House of Lords to domesticate the ECHR.¹⁸⁰ The measure ended up passing the Lords, but it fell in the Commons. Lord Scarman, however, was not the only judge advocating for incorporation of the HRA.¹⁸¹

In 2002 Lord Lester revealed that senior judges supported his 1994 Private Members’ Bill to incorporate the ECHR and even gave him advice on how a future version should be drafted, noting the Bill should not allow the judiciary to strike down Acts of Parliament.¹⁸² Additionally, in a celebrated maiden speech as Lord Chief Justice in 1996, Lord Bingham—who served on the UK’s highest court from 2000-2008—also stressed the need for domestication of the ECHR, noting ‘the convention is not part of our domestic law,’ and the ‘courts have no powers to enforce convention rights directly.’¹⁸³ Further, a number of academic articles by senior judges around this time argued for the incorporation of the ECHR or other fundamental aspects into the UK constitution.¹⁸⁴ Thus, although it would be incorrect to say that senior members of the judiciary were ‘leading’ the charge for domestication of the ECHR, it would also be incorrect to say that they sat idly by to see what transpired, or that the judiciary was merely ‘handed’ these powers from Parliament. After all, prominent senior judges were advising on the drafting of Bills, making prominent public speeches, and writing in law review articles for the

¹⁷⁶ *Ibid*, at 10.

¹⁷⁷ Hamlyn Lectures: ‘English Law: the New Dimension’ (1974).

¹⁷⁸ STEPHEN SEDLEY, *LAW AND THE WHIRLIGIG OF TIME* (2018), 209. *See also*, FRANCESCA KLUG, *VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS* (2000) 153.

¹⁷⁹ KLUG, *supra* note 178 at 156.

¹⁸⁰ SEDLEY, *supra* note 178 at 208.

¹⁸¹ Indeed, Lord Scarman did not just stop at promoting a human rights charter. In 1992 he advocated that Britain should have a written constitution. Lord Scarman, *Why Britain needs a Written Constitution*, (The Fourth Sovereignty Lecture, London, Charter 88 Trust Publications 1992) reprinted in 19 COMMONWEALTH L. BULLT’N 317 (1993)).

¹⁸² Lester, *supra* note 171 at 482. He identifies these judges as the following: Lord Taylor of Gosforth, Lord Browne-Wilkinson, and the [then] Lord Chief Justice, Lord Woolf of Barnes.

¹⁸³ Lord Bingham, House of Lords (July 3, 1996), Hansard, Column 1465.

¹⁸⁴ DANNY NICOL, *EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS* (2001) 237-38.

incorporation of something that would undoubtedly expand their power and increase their policymaking capacity.

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

B. *The implementation and expansion of written constitutions and bills of rights*

The world currently has more written constitutions than ever; longer and more detailed constitutions than ever; more articulation of rights (civil, social, cultural, and economic) than ever; and wider enforcement by constitutional courts than ever.¹⁸⁵ And yet, as this post-World War II explosion of constitutional writtenness has come about,¹⁸⁶ democratic disaffection throughout the world has increased significantly. In addition to the effects of constitutional expansion, questions about the efficacy of bills of rights continue to arise, with some authors demonstrating that the articulation of rights provisions does not automatically lead to enhanced protection of enumerated rights.¹⁸⁷ These developments beg the question: has the constitutional pendulum swung too far in favor of law and legal processes, and away from politics and political resolution?

In some sense written constitutions have always had a contentious relationship with democracy.¹⁸⁸ Even the authors of the American Constitution, the document which allegedly ushered in the idea of ‘We the People,’ celebrated the fact that the people had no formal share in government.¹⁸⁹ And it is no secret that constitutional designers past and present attempt to protect the state from the passions of the political realm.¹⁹⁰ This is not to say that written constitutions are inherently anti-democratic in nature, but to acknowledge that many features of written constitutions, and the idea of constitutionalism more generally, are in tension with democracy and always have been.

Post-World War II developments enhanced these tensions. The further implementation of written constitutions around the world and the widespread adoption of constitutional supremacy was performed not merely ‘to tie policy to law,’ but to also ‘subordinate it to law.’¹⁹¹ The subordination of policy (i.e., politics, legislation, etc.) appears to be one of the main goals of contemporary constitutionalism, with law (i.e., constitutions, rights, fundamental values, etc.) moving into a superior position above politics and the political realm. Whatever effects on democratic government these arrangements may allegedly provide (e.g., enhanced protection

¹⁸⁵ On the increasing length and detail of written constitutions, see Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* in ANDRAS SAJO & RENATA UITZ (EDS), *THE CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS* (2010).

¹⁸⁶ Comparative Constitutions Project, *Data Visualizations (New Constitutions)*, <https://comparativeconstitutionsproject.org/ccp-visualizations/>.

¹⁸⁷ ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* (2020).

¹⁸⁸ ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2003); ALLAN C. HUTCHINSON, *DEMOCRACY AND CONSTITUTIONS: PUTTING CITIZENS FIRST* (2021) chp. 3.

¹⁸⁹ See, e.g., George Thomas, *The Madisonian Constitution, Political Dysfunction, and Polarized Politics* in ZACHARY COURSER, ERIC HELLAND & KENNETH P. MILLER, *PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER* (2018).

¹⁹⁰ Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy* 39(2) OXF. J. LEG. ST. 435, 452 (‘The ambition and ambiguity of modern constitutional documents is remarkable. Drafted in the name of the people, they are presented as instruments of settlement, whilst incorporating multiple techniques of evasion’).

¹⁹¹ Limbach, *supra* note 93 at 7.

of rights, better scrutiny of government policy, more reasoned decision-making processes in government, etc.), it is unavoidable that the power of the democratic vote, and indeed the power of those with the closest connection to the people—representatives—are decreased.¹⁹²

Of course, some may quibble with constitutions and bills of rights being listed as elements of democratic distancing, especially given that many of these documents begin with ‘We the People.’ But the idea of citizens being the ‘ultimate authority’ has always been problematic.¹⁹³ As I have argued elsewhere,¹⁹⁴ contemporary ‘We the People’ constitutions actually do not provide increased powers to citizens, and they intentionally devalue politics and the political process by lowering the status of legislators and statutes.¹⁹⁵ There is little doubt that implementation of these devices has changed the way that decisions on constitutional government operates from a more political structure to a more legal structure, without guaranteeing positive social change will take place or that better decisions will be made.¹⁹⁶ Nowadays, it is not uncommon to find unamendable eternity clauses in constitutions;¹⁹⁷ and if these are not present in the written constitution, judges may feel the need to determine for themselves which parts of the constitution are ‘unamendable.’¹⁹⁸ Further, explicit statements that judicial rulings are final and incontestable by the political realm are common and expected nowadays, and it is also not uncommon for apex courts to reject constitutional amendments that have gone through proper amendment procedures.¹⁹⁹ These developments provide a strange juxtaposition to those advocating contemporary ‘We the People’ constitutions, and who still champion citizens as the ultimate authority.

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

C. *Judicial regionalism and supra-national jurisdictions*

The expansion of regional and supra-national courts contained noble origins: they would serve as recognized tribunals that could handle the most serious and difficult cases the world confronted. But the development of some of these courts has drifted far from these virtuous beginnings. The establishment of regional and supra-national courts has provided a structure

¹⁹² JONES, *supra* note 71 at chp 4.

¹⁹³ Indeed, this may very well be a fiction. *See, e.g.*, EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988)

¹⁹⁴ JONES, *supra* note 71 at chp 4.

¹⁹⁵ Limbach, *supra* note 93 at 1 (‘the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator’).

¹⁹⁶ The classic text in relation to the futility of law and courts to bring about social change remains: GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed)(2008). In relation to Canada’s experience, for example, see: Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* 61(1) CAN. BAR REV. 30 (1983).

¹⁹⁷ The German Basic Law has a number of these. For example, art. 79(3) states, ‘Amendments to this Basic Law affecting the division of the Federation into Lander, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’

¹⁹⁸ This is often referred to as the ‘basic structure doctrine.’ As regards judges feeling the need to do this themselves, this recently happened in Kenya. *See: David NDII & Others v Attorney General* (2021) Petition No. E282 of 2020.

¹⁹⁹ Regarding courts rejecting constitutional amendments, see: YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017) and RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (2019).

whereby ordinary decisions taken by national political actors are being questioned or second-guessed by judges far removed from domestic politics. As evidenced by court caseloads, the dockets of regional and supra-national courts are not merely focused on the most significant human rights abuses or the most grievous breaches of law. Additionally, some regional and supra-national structures have strengthened their commitment to legal-only procedures and solutions, while spurning political processes and resolutions. As these courts have come into being and evolved, democratic disaffection has evolved alongside them.

One of the most significant examples of court development traversing into the political arena comes from the European Court of Human Rights (ECtHR).²⁰⁰ Originally conceived as a venue that would focus on major breaches of human rights from around Europe, the court has developed into what some now consider the ‘Supreme European Court,’²⁰¹ and one of the world’s most ‘influential and effective’ institutions.²⁰² Growth of the Court’s docket has been nothing short of staggering. From 1960-1975, the Court delivered 18 judgments in total, or just over 1 judgment per year. This rose to about 14 per year from 1976-1985. From 1990-99, the Court delivered 809 judgments, or about 81 per year. But from 2000-2014, the Court delivered 16,740 judgments, or 1,116 per year.²⁰³ The most recent statistics suggest the Court delivers close to 2,000 judgments per year.²⁰⁴ While the ECtHR possesses honorable intentions, its current operation appears quite far from what members originally signed up for, and its continued operation could be displacing, not improving, national politics.

The ECHR’s enforcement mechanisms have also transformed since its establishment. Originally, the Council of Europe contained a Human Rights Commission that served as the Court’s gatekeeper. The main focus during this time was to find friendly settlements ‘on the basis of respect for human rights.’²⁰⁵ The 11th and 14th Protocols significantly changed the enforcement of the Convention into a highly legal exercise. They eliminated the Human Rights Commission and instituted a full-time Court that sat in a number of forms. States were also obligated to accept the Court’s compulsory jurisdiction, which was previously voluntary.²⁰⁶ These changes fully legalized Europe’s operation of human rights protection, thus eliminating its most significant political elements.

Scholars believe that the Court has profoundly, even ‘radically,’ affected some of its member states.²⁰⁷ If this is the case, then some major issues linger, such as how these courts are affecting the perception and operation of democracy around the world. Although the goals

²⁰⁰ The court explicitly adjudicates on whether certain changes are ‘necessary in a democratic society,’ where a political perspective may not just prove valuable, but essential.

²⁰¹ Mikael R. Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics* 32(1) LAW & SOC. INQ. 137 (2007).

²⁰² JANNEKE GERRARDS, *GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2019) 1. However, the effectiveness of the ECtHR is also up for debate, as scholars have noted that non-execution of the court’s judgments is a distinct problem. *See, e.g.,* Fiona de Londras & Kanstantsin, *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights* 66 INT. COMP. L. Q. 467 (2017).

²⁰³ Court statistics taken from: Mikael R. Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash* 79 LAW & CONT. PROB. 141 (2016).

²⁰⁴ European Court of Human Rights, ‘General Statistics’ (2020), https://www.echr.coe.int/Documents/Stats_annual_2020_ENG.pdf.

²⁰⁵ Former Art. 28 ECHR. Cited in BERNADETTE RAINEY, ELIZABETH WICKS, & CLARE OVEY, JACOBS, WHITE, AND OVEY: *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (7TH ED)(2017) 9.

²⁰⁶ Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems* in HELEN KELLER, *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (2008) 679.

²⁰⁷ *Ibid.*, at 677.

of regional or supra-national courts may be honorable—to increase human rights protection among member states—the fact that increased human rights enforcement has not led to increased satisfaction with the operation of democratic government remains highly problematic. Indeed, it seems increasing rights adjudication may not be bringing citizens together, but tearing them apart.²⁰⁸ For example, the UK currently has less than 0.2% of the pending cases before the ECtHR, and has also had significantly less violations than in years past.²⁰⁹ But many rights advocates still decry the lack of an elusive ‘human rights culture’ within the UK,²¹⁰ and some even assert the UK is ‘abandoning human rights.’²¹¹ Ultimately, if over seventy years of Council of Europe membership and two plus decades of domestic human rights enforcement has not yet created the ‘new and better relationship between the Government and the people’ that was desired upon passage of the HRA 1998,²¹² then one wonders whether it will ever do so. For all the ECHR’s successes, a strong argument could be made that since its implementation an increasingly tenuous and distrustful relationship between government and the people has been cultivated.

D. *Citizens’ lack of a role in burgeoning constitutional adjudication*

On 11 July 1789 Thomas Jefferson wrote to Thomas Paine that he considered trial by jury ‘the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.’²¹³ Almost two centuries later in the UK context, Lord Devlin called trial by jury ‘more than one wheel of the constitution: it is the lamp that shows that freedom lives.’²¹⁴ And yet presently any form of trial by jury in relation to constitutional adjudication is non-existent. There is no anchor, nor lamp.

Citizens’ role in constitutional adjudication begins and ends with an individual or interest group bringing a case to court. And courts—especially apex courts—operate on majoritarian voting procedures.²¹⁵ As constitutional adjudication has grown in strength and volume throughout the world—and even as constitutional cases have become increasingly political in nature and more explicitly focused on democracy—no role for citizen participation has been

²⁰⁸ This claim has recently been made at the domestic level. *See, e.g.*, JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021); *see also*, LOUIS MICHAEL SEIDMAN, *FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM* (2021) (‘[T]he Constitution encourages Americans to formulate ordinary political disputes in terms of “rights” that are absolute and nonnegotiable. The tendency exacerbates political tension and obstructs authentic dialogue that actually has the potential to persuade participants. It is driving the country toward irreparable fissure.’)

²⁰⁹ Joint Committee on Human Rights, ‘Responding to Human Rights Judgments’ (2020) 10.

²¹⁰ In fact, this point was made by the JCHR itself: Joint Committee on Human Rights, ‘Enforcing Human Rights’ (2018), HC 669, HL Paper 171, pp 39-45.

²¹¹ Kate Hodal, ‘UK’s “headlong rush into abandoning human rights” rebuked by Amnesty’ *GUARDIAN* (April 7, 2021), <https://www.theguardian.com/global-development/2021/apr/07/uks-headlong-rush-into-abandoning-human-rights-rebuked-by-amnesty>.

²¹² JONATHAN COOPER & ADRIAN MARSHALL-WILLIAMS, *LEGISLATING FOR HUMAN RIGHTS: THE PARLIAMENTARY DEBATES ON THE HUMAN RIGHTS BILL* (2000) 3.

²¹³ National Archives, ‘Letter from Thomas Jefferson to Thomas Paine, July 11, 1789,’ <https://founders.archives.gov/documents/Jefferson/01-15-02-0259>.

²¹⁴ PATRICK DEVLIN, *TRIAL BY JURY* (1966) 164.

²¹⁵ JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* (2016). *See especially* Chapter 10: Five to Four: Why Do Bare Majorities Rule on Courts?; Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?* 123(6) *YALE L.J.* 1692 (2014).

identified or allowed.²¹⁶ Adjudicative processes for constitutional, administrative, and human rights issues remain entirely judge led. This is true both at the national level and also the supra-national level, as identified in the section above. But, given the slumping levels of civic participation worldwide, should there not at least be attempts to insert the public more into constitutional adjudication?

The situation in relation to constitutional adjudication sits in marked contrast to the development of other areas of law, such as criminal, where citizen participation has been highly valued in legal systems throughout the world. As Levinson points out, trial by jury ‘meant that “We the People” would have yet another check on potentially unscrupulous or overreaching prosecutors.’²¹⁷ Why should the same principle not apply to apex court judges, especially those that openly invite political issues to be resolved in the courtroom? The way the constitutional adjudication is currently set up in many countries, the people have little say on what issues should remain in the political realm and what issues should be pushed to the legal realm. Some may argue that constitutional amendment provides this role, but this idea is seriously flawed. Having to employ constitutional amendment procedures to reverse a decision by an apex court seems an overly dramatic hurdle that may discourage citizens from participating in constitutional politics, not least because of the excessively high barriers to amendment, but also because the apex court may just eventually reject it (even if the amendment passes).

As constitutional adjudication has grown by leaps and bounds over the past few decades providing judiciaries immense powers within many constitutional democracies, no enhanced role for the people has developed within it. But if constitutional adjudication is going to remain an essential feature of constitutional government going forward, then finding a suitable role for the people—be that through jury trials or some other mechanism—is essential.²¹⁸

E. *Can democratic distancing be stopped?*

The allure of distancing is powerful, and for many its aims are completely legitimate: democracies must be protected from the debilitating whims of the electorate or from the passion of politics more generally. But how much distancing can take place before democracy becomes ineffective or potentially even obsolete, and has the balance swung too far in one direction? Continually shifting governmental decision-making outside of popular control to depoliticized non-majoritarian institutions may have opened up ‘a space that lends itself readily to exploitation by populist parties of both the right and the left.’²¹⁹ This begs the question as to whether there is a point where democratic distancing becomes no longer useful, but even harmful.

One of the interesting things that Roberts points out in his logic of discipline study is that all the entities that were removed from the democratic sphere (e.g., central banking, fiscal rules,

²¹⁶ Regarding the rise of judicial review throughout the world, see: STEVEN GOW CALABRESI, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW, VOLUME 1: THE G-20 COMMON LAW COUNTRIES AND ISRAEL* (2021); STEVEN GOW CALABRESI, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW, VOLUME 2 THE G-20 CIVIL LAW COUNTRIES* (2021).

²¹⁷ SANFORD LEVINSON, *AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY* (2015) 316.

²¹⁸ Loughlin, *supra* note 190 at 453 (‘Remedies must be considered that take seriously the need to reinvigorate democratic aspirations...A more balanced appraisal might therefore enquire into the evident deficiencies of the workings of many counter-democratic institutions and take seriously a conception of democracy as a social and cultural practice rather than a mere mechanism for choosing leaders’).

²¹⁹ MAIR, *supra* note 4 at 137.

port authority, etc.) eventually had to adopt political strategies in order to survive.²²⁰ Thus, although they were supposedly removed or detached from politics, they all ended up either working closely with politics and politicians, or adopting overtly political strategies into their operations. This should come as no surprise to legal scholars. As courts have grown in power and stature since WWII, and as many political issues have been turned into legal or constitutional issues, judiciaries around the world have adopted overtly political strategies. For example, many scholars in the American context justify the overwhelming power of the Supreme Court by saying that it rarely departs from the views of the general public.²²¹ Toeing this line provides the Court a sense of legitimacy; but it also displays that the Court is unable to go against political opinion or it risks its legitimacy and institutional position. Such strategies also abound in the international court context. Scholars have demonstrated that regional human rights courts are strategic in the way they deliver their judgments, often thinking about things such as when judgments will cause less controversy, or when an issue has faded from the political radar.²²² Thus, when push comes to shove regarding many of these non-political or newly independent entities, what we often see is overtly political methods being adopted or some type of explicit or benign alignment with the political class. Some may say that this demonstrates the influence of the political realm has been sustained. Conversely, it may also make one question why these items were removed from the political realm to begin with.

Another interesting parallel between the depoliticizing measures in the economic realm and the democratic distancing provided by the legal realm has been the lack of evidence that these changes have improved performance. As Hay notes, ‘[t]here is no statistically significant correlation between the granting of independence and improved anti-inflationary performance.’²²³ This is similar to what has been found in the legal realm regarding the expansion and protection of rights, which have become highly judicialized in recent years. There seems to be no solid or consistent evidence that the move from the political to the judicial realm has increased protections.²²⁴ In fact, some scholars have been highly critical of the over-focus on human rights, noting that ‘politics has become obsessed with the protection of human rights to the detriment of any focus on human responsibilities across a range of dimensions (e.g., to the planet, to other species, or to future generations).’²²⁵

Although law has not led the charge in terms of democratic distancing, it has adopted and applied—and therefore furthered—similar depoliticization measures that have arisen within other realms, such as economics. And beyond this, law has also embraced something more sinister: a depiction of the public realm that takes an extremely depressing view of human nature. It views ordinary individuals and the politicians that represent them as dangerous: either they are entirely self-interested and neglect their public duties, or they are debilitated by passions that need to be tamed. And if these people are not acting in self-interest or overcome with emotion, then they are portrayed as ignorant and stupid.²²⁶ This view of the political realm is inaccurate and unacceptable. As Bernard Crick once wrote,

²²⁰ ROBERTS, *supra* note 82 at 13-17.

²²¹ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2010); William Mishler & Reginald S. Sheehan, *The Supreme Court as Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions* 87(1) AM. POL. SCI. REV. 87 (1993).

²²² Madsen, *supra* note 203.

²²³ HAY, *supra* note 4 at 117.

²²⁴ CHILTON & VERSTEEG, *supra* note 187.

²²⁵ FLINDERS, *supra* note 4 at 132.

²²⁶ HOLMES, *supra* note 64.

To renounce or destroy politics is to destroy the very thing which gives order to the pluralism and variety of civilized society, the thing which enables us to enjoy variety without suffering either anarchy or the tyranny of single truths.²²⁷

Even a cursory look at judicial operation from a comparative perspective demonstrates that, ‘if there were otherwise any doubt...the law is applied by human beings some of whom suffer from all the prejudices, vanities and irrationalities common to our species.’²²⁸ Ultimately, attempting to renounce the political realm or depoliticize issues because of the supposed dangers present in the political realm does not remove those dangers; it simply camouflages them.

V. Accepting law’s role in democratic disaffection

Acknowledging that law and legal processes have contributed to democratic disaffection does not absolve the political realm of its pathologies and mistakes, and nor does it condemn the legal realm’s contributions to upholding and furthering democracy and democratic practices. But accepting that law is intimately connected to the political realm, and that its outputs can and do affect not just the practicalities or procedures of the elected branches, but also the attitudes and feelings citizens possess towards these branches is something that legal professionals (i.e., judges, lawyers, law professors, etc.) must recognize. Law and legal processes may not be the primary drivers of anti-political sentiment, but it would be mistaken to say they do not contribute to it.

Investigations into the rise of democratic disaffection have produced fascinating insights into the evolution and operation of democracy. The phenomenon is certainly complex, and it seems increasingly clear that ‘there is unlikely to be a single explanation for the declines’ in participation seen around the world.²²⁹ As one prominent scholar has noted, ‘we have to look elsewhere for plausible explanations.’²³⁰ Unfortunate as it may be for some to acknowledge, law and legal processes are likely part of democratic disaffection’s story. Although law can uphold and enhance democracy and democratic practices, it may also damage and undermine the political realm in various ways. Democratic distancing by judiciaries and the increasing subordination of politics to law have produced very real effects. As Mair points out, some already identify and advocate for democracy under the following formula: *NGOs (non-governmental organizations) + judges = democracy*.²³¹ The public vote—and the political realm more generally—is nowhere to be found in this bleak blueprint. Perhaps this view corresponds to the ‘post-electoral era’ that Ginsberg and Shefter described before the turn of the century.²³² But if ‘having governments that pay attention is the aim and constant effort of

²²⁷ BERNARD CRICK, IN DEFENCE OF POLITICS 4TH ED (1993) 26.

²²⁸ DAVID PANNICK, I HAVE TO MOVE MY CAR: TALES OF UNPERSUASIVE ADVOCATES AND INJUDICIOUS JUDGES (2008) 4.

²²⁹ DALTON, *supra* note 4 at 78.

²³⁰ Newton and Norris, *supra* note 58 at 250.

²³¹ MAIR, *supra* note 4 at 11.

²³² BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA (1990).

democracy,’²³³ then too much displacement will make this much-needed attention increasingly unlikely.

Compared to the views of early theorists, the judiciary’s trajectory within constitutional government has been nothing short of remarkable. Today judicial power around the world is far from ‘next to nothing.’ Indeed, the power of judgment has proven to be a resilient if not extraordinary institutional quality that rivals or even supersedes force or will, and that can highly influence and affect the political realm. This has been especially true in recent decades, as constitutional supremacy has tried—and in many cases succeeded—to subordinate politics and the political realm. Law and courts have displayed some of the same pathologies found elsewhere. Just as economists worked to ‘depoliticize’ the public realm and establish economic theocracies based on technocrat guardians,²³⁴ so too has law and the legal realm risked asserting its place above politics, as the more principled, more thoughtful, and less chaotic realm. Additionally, just as technocrat guardians were asserted as the main players in the economic realm, so called ‘constitutional guardians’ (i.e., constitutional and supreme court judges) have been implemented in the legal realm, tasked with wide powers to police the entire constitutional state.²³⁵ Far from helping solve the intractable problems located in the political realm, these developments have merely led to the displacement of politics and further distancing of citizens from the idea of self-government.

Given the inseparable relationship between law and politics—including their intimate connection to the operation of government—both realms should be attempting to ennoble, not displace, one other. After all, ‘diverse groups hold together, firstly, because they have a common interest in sheer survival and, secondly, because they practice politics – not because they agree about “fundamentals,” or some such concept too vague, too personal, or too divine ever to do the job of politics for it.’²³⁶ There is little doubt that, at this point in history, the political realm needs ennobling more than ever, and certainly more than the legal realm. Attempting to further subordinate politics to law or further depoliticizing governmental decision-making will not end constitutional tumult. Indeed, this ‘widening gap between rulers and ruled has facilitated the often strident populist challenge’ increasingly present in many democracies.²³⁷

Law and democracy can coexist without never-ending battles for supremacy and the subordination of the other realm. But that assumes that we still want to live in democracies.²³⁸ And if we do, then it seems clear that now—perhaps more than any time in history—politics needs ennobling, not simply degradation.

²³³ ROBERT TOMBS, *THIS SOVEREIGN ISLE: BRITAIN IN AND OUT OF EUROPE* (2021) 151.

²³⁴ ROBERTS, *supra* note 82.

²³⁵ JONES, *supra* note 71 at chp 7.

²³⁶ CRICK, *supra* note 227 at 24.

²³⁷ MAIR, *supra* note 4 at 19.

²³⁸ *The Global State of Democracy Report 2021*, IDEA, <https://www.idea.int/gsod/> (‘The number of countries moving in an authoritarian direction in 2020 outnumbered those going in a democratic direction’) 1; Noam Lupu, Luke Plutowski & Elizabeth J. Zechmeister, *Would Americans ever support a coup? 40 percent now say yes* WASHINGTON POST (Jan. 6, 2022), <https://www.washingtonpost.com/politics/2022/01/06/us-coup-republican-support/>; Hansard Society, *supra* note 42 above (54% of those surveyed in the 2019 Audit said that Britain needs ‘a strong leader who is willing to break the rules’).