RESPONSE

Democracy and Disenchantment

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During the latter half of the Trump presidency, as it became increasingly clear that the Supreme Court would remain solidly conservative for the foreseeable future, Samuel Moyn and Ryan Doerfler declared war. In popular and scholarly venues, they have steadily built a case for curtailing the power of the nation's highest court. Their arguments have been both pragmatic and principled. They have underlined, for instance, the risks the Roberts Court poses to progressive goals such as addressing climate change[1] and granting student debt relief.[2] More broadly, they object to a "supra-democratic court exercising its current, expansive legislative veto."[3] For Doerfler and Moyn, the choice is between juristocracy and democracy and they know where they stand: reforming the Supreme Court, and in

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1. Samuel Moyn & Aaron Belkin, *The Roberts Court Would Likely Strike Down Climate Change Legislation*, TAKE BACK THE COURT (Sept. 2019), https://static1.squarespace.com/static/60383088576eb25a150fab7f/t/6049332cd733411f1654d27d/1618527381533/Supreme%2BCourt%2BWill%2BOverturn%2BClimate%2BLegislation.pdf [https://perma.cc/H6AS-PY4J].

2. Ryan D. Doerfler, *Executive Orders and Smart Lawyers Won't Save Us*, JACOBIN (Dec. 1, 2019), https://jacobinmag.com/2019/12/executive-orders-supreme-court-law-college-debt [https://perma.cc/3CKV-UEHE].

3. Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power [https://perma.cc/C7B2-YZ4Q].

particular disempowering it, is necessary for the future of American democracy.[4]

The Ghost of John Hart Ely is Doerfler and Moyn's latest salvo against American judicial review.[5] This time, however, their strategy is different. Instead of directly critiquing the Supreme Court's power, they target the ideology that undergirds it. In particular, they identify the work of John Hart Ely as responsible for animating continued liberal belief that a powerful Supreme Court is both necessary and desirable for democracy. Ely famously justified judicial review on two grounds: it was necessary for protecting political minorities against systemic bias and ensuring a competitive political process by "clearing the channels of political change."[6] While scholars have closely scrutinized Ely's proceduralism in the decades that followed *Democracy and Distrust*'s[7] publication, Moyn and Doerfler contend that his real influence—indeed his "ghost"—lives on through the "two empirical conjectures he makes that mainstream liberals share."[8] Even if Ely's theory has fallen out of fashion, liberal confidence in the Court has endured because contemporary thinkers continue to hold on to Ely's assumptions.

Ely's twin premises concern the "comparative institutional advantage[s]" of courts in protecting minorities and policing the political process.[9] The first, on which judicial defense of minorities rests, is that "government officials on their own are more attentive to the interests of minorities than are ordinary citizens."[10] From this it follows that "insulation from majoritarian pressures makes judges more reliable than elected officials in attending to minoritarian interests."[11] Ely's second assumption underwrites his faith in judges ministering the "law of democracy."[12] This assumption holds that judges are "comparatively disinterested in electoral outcomes because of life tenure and so can be relied upon to select electoral rules more fairly" than elected officials who "have an obvious interest in choosing rules that are to their advantage."[13]

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4. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

5. Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV 769 (2022).

6. JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980) (explaining the Warren Court's jurisprudence as concerned with both goals).

7. *Id.*

8. Doerfler & Moyn, *supra* note 5, at 770–71.

9. *Id.* at 772.

10. *Id.* at 773.

11. *Id.*

12. *Id.*

13. *Id.*

Since both claims are empirical, they can be falsified. *The Ghost of John Hart Ely* is an extended exercise in showing why Ely's assumptions are "uncertain at best" and "dubious at worst."[14] Against the first conjecture, Doerfler and Moyn advance historical and institutional reasons why the Court is not comparatively better than Congress in protecting minorities. From the Waite Court's neutering of the Civil Rights Act of 1875[15] to the Roberts' Court's steady dismemberment of the Voting Rights Act[16] to broader judicial "apprehension" in recognizing and enforcing positive rights,[17] they argue that the Court is more likely to be an opponent of vulnerable minorities than their defender. In response to the second conjecture—the alleged superiority of judges in administering the law of democracy—Doerfler and Moyn make two moves. First, they note that "as a conjecture about judicial behavior . . . Ely's theory fails" since judges have shown themselves to be nearly as ideological as their counterparts in the political branches.[18] Second, and more ambitiously, they claim that "since what counts as a fair and undistorted electoral process is *itself* a central ideological or political question, we should not be surprised that judges have been unable to transcend factional interests."[19] Both because of personnel (ideological judges) and substance (the contours of democracy itself are political), Doerfler and Moyn conclude that Ely's second premise fails and judicial review in the law of democracy is as fraught and flawed as it is anywhere else.

In this Response, I examine Doerfler and Moyn's critique of Ely's second conjecture: that judges, by virtue of their disinterestedness, are better positioned to protect democracy than the political branches. I focus on this part of their argument for two reasons. First, skepticism about courts' capacity and willingness to protect minorities is longstanding.[20] Their critique here is less novel than their diagnosis of

14. *Id.* at 774.

15. The Civil Rights Cases, 109 U.S. 3 (1883).

16. *See, e.g.*, Shelby County v. Holder, 570 U.S. 744 (2013) (holding the preclearance formula of § 4 of the Voting Rights Act unconstitutional); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (instituting a new and more stringent test for vote denials claims under § 2 of the Voting Rights Act).

17. Doerfler & Moyn, *supra* note 5, at 795.

18. *Id.* at 800.

19. *Id.* (emphasis in original).

20. This skepticism takes many forms. For instance, one can question whether the Warren Court, rather than on the ground political organizing, drove progressive change during the Civil Rights movement. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). Others have pointed to the significant constraints the Supreme Court faces in effectuating lasting change. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed. 2008). And more still point to the vexed relationship between rights and remedies. Daryl J. Levinson, *Rights Essentialism and*

the underlying theoretical problem, namely Ely's first conjecture. Second, if Doerfler and Moyn are right about Ely's second premise being wrong—and I think they are—then there are important consequences for the law of democracy. A core operating assumption for election law is the idea that judges are the one branch citizens can rely on to protect the political process from corrosive self-dealing. Once that assumption is gone, the institutional priorities and aspirations of the field have to correspondingly change. This Response both explores nature and aftermath of Doerfler and Moyn's exorcism. Only by taking stock how they have vanquished Ely's ghost can we decide where those committed to a fair and equal political process should go next in a disenchanted world.

I proceed as follows. I first survey the extent of Doerfler and Moyn's victory. I show how the problem of judicial ideology in the law of democracy runs even deeper than their insightful discussion illustrates. It is not merely that the Supreme Court has decided cases in ways that systematically benefit one political party. Rather it has done so without directly overruling any important precedents or repudiating any democratic principles. Conservative Justices have relied on a variety of tools, each putatively neutral or ostensibly democratic, in corroding the democratic process. I then consider the limits of Doerfler and Moyn's prescriptive argument for letting the political process police itself. As I see it, the ultimate result of their argument is indeterminacy about outcomes: we simply do not have a good way to tell whether mass politics or a congenial Supreme Court is more likely to produce outcomes consistent with democracy. Given that uncertainty, the case for mass politics sounds in procedural values rather than consequential ones.

I. JUDICIAL CRAFT & PARTISAN ADVANTAGE

In making the first step of their argument—namely that judges are driven by ideological, rather than institutional self-interest—Doerfler and Moyn draw on prior work by Daryl Levinson and Richard Pildes. Levinson and Pildes have persuasively argued that the Madisonian separation of powers relied on an inflated and antiquated

Remedial Equilibration, 99 COLUM. L. REV. 857 (1999). And the most sophisticated recent historical scholarship paints a far more complex picture between courts, social movements, and the political branches than a straightforward endorsement of judicial virtue would allow. *See, e.g.*, KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972 (2016); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

view of institutional self-interest.[21] Instead, the rise of ideologically cohesive and distinct parties has led to a much different set of dynamics. During unified government, the branches cooperate with little mutual oversight or checking. When there is divided government, we get something much closer to Madison's vision but for a very different reason: partisan conflict.

Doerfler and Moyn suggest that something similar is going on with judges, including when they decide election law cases. Ely predicts that judges "with their offices and (to some extent) authority constitutionally guaranteed, have no direct stake in electoral outcomes and so can determine the conditions of contestation more fairly."[22] Yet, why is it, as Nick Stephanopoulos has observed, that the Robert Court's "intrusions into, and its abstentions from, the political process" have consistently "benefit[ed] the Republican Party, whose presidents appointed a majority of the sitting Justices"?[23] The answer, Doerfler and Moyn argue, is simple: judges are ideological just like elected officials. That is, they "care less about accumulating power than its being exercised toward particular ends."[24]

Suppose Doerfler and Moyn are right and that judges are basically as ideological as their more transparently political counterparts.[25] What, aside from life tenure, lets them get away with it? A complete answer would have to be expansive, covering everything from political apathy and the obstacles to popular mobilization to elite resistance to meaningful Court reform.[26] One important element of such a response, however, is the plasticity of legal reasoning itself. On this (crude) view, when a judge decides a case with ideological consequences, they can often craft legal justifications that are ostensibly plausible and secure victory for "their side." In the law of democracy, where important cases have obvious partisan stakes, the combination of judicial creativity and the neutral and apolitical appearance of legal reasoning is especially helpful in obscuring partisan motives and clothing decisions with legitimacy.

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21. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338 (2006).

22. Doerfler & Moyn, *supra* note 5, at 34.

23. Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 178 (2019).

24. Doerfler & Moyn, *supra* note 5, at 803.

25. Given the consistent partisan tilt of the past decade of election law cases and the nearly total break from a half century of precedent, it is hard to disagree with them.

26. *See, e.g.*, Ryan D. Doerfler, *Why Progressives in Congress Should Ignore Biden's Supreme Court Commission*, WASH. POST (May 20, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/05/20/supreme-court-commission-pointless [https://perma.cc/6F4G-E2AK].

Such a story could be told about the Roberts Court's election law decisions over the past decade. In dismantling the Voting Rights Act—the crowning achievement of the Civil Rights movement and the most important statute in election law—and refusing to address partisan gerrymandering, the Roberts Court has drawn eclectically from different doctrines and methods to achieve anti-democratic ends. This Response focuses on four examples: federalism, statutory interpretation, justiciability, and remedies. None of these tools—which range from structural principles (like federalism) to methods of legal analysis (such as statutory interpretation)—has a necessary partisan bent or is merely ideological. But they are sufficiently protean that judges *can* deploy them to restrict democracy without disavowing or even mentioning democratic values at all. The following examples, then, are meant to illustrate how practices internal to judging can enable and smooth the erosion of majoritarian democracy.

A. Federalism

Begin with *Shelby County v. Holder*.[27] The conservative majority of the Court held Section 4 of the Voting Rights Act[28] ("VRA") unconstitutional because it violated the "equal sovereignty" of states and the constitutional value of federalism under the Tenth Amendment and Article IV.[29] By striking down Section 4's preclearance formula, the Court effectively neutered Section 5's preclearance regime that placed selected jurisdictions under federal supervision. According to the majority opinion, when the Voting Rights Act was first enacted, the sweeping federal power behind Section 4 was necessary given the realities of Jim Crow.[30] "Nearly 50 years later," Chief Justice Roberts continued, "things have changed dramatically."[31] These supposed changes compelled the Court to restore the constitutional value of federalism.

For our purposes, the historical bona fides of "equal sovereignty" doctrine matter less than the very fact that it was available and conceivable at all for the ideologically-minded judge.[32] *Shelby County* is remarkable, in light of Doerfler and Moyn's critique of Ely, because it is powerful evidence of how courts can undermine democracy while

27. 570 U.S. 529 (2013).

28. The Voting Rights Act of 1965 § 4, 52 U.S.C. § 10101.

29. *Shelby County*, 570 U.S at 535.

30. *Id.* at 552.

31. *Id.* at 547.

32. And there are good reasons to question the doctrine's historical grounds. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1211 (2016).

invoking democratic principles at the same time. After all, federalism is a *democratic* principle, just a different one from the values of equality and participation that animate the Fourteenth and Fifteenth Amendments. Framed in this way, conservative litigants and the Roberts Court were able to plausibly frame the case as a battle between competing democratic values. In many constitutional cases, especially those involving competing rights claims, this sort of framing is potentially helpful since it can improve judicial candor and lower the political temperature by creating opportunities for compromise.[33] In *Shelby County*, however, the existence of competing and highly malleable constitutional values was one among many factors that allowed the Roberts Court to turn what had been a constitutional non-starter—dismantling the Voting Rights Act—into a conservative triumph.

B. Statutory Interpretation

Next, consider *Brnovich v. Democratic National Committee*, a case concerning a different provision of the Voting Rights Act.[34] In the wake of *Shelby County* and the death of preclearance, voting rights lawyers had turned to Section 2 of the VRA to challenge restrictive voting laws. In *Brnovich*, the Court considered the legal test for Section 2 vote denial claims.[35] Writing for the majority, Justice Alito identified a new and "impossible" set of guideposts for plaintiffs.[36] These guideposts included the size of the burden imposed by a challenged voting rule, how much the voting rule departs from standard practices in 1982 (the year Section 2 was amended), the absolute size of the disparate impact, the opportunities afforded by a state's voting rules as a whole, and the strength of state interests in the voting rule.[37] In dissent, Justice Kagan critiqued the majority's creative statutory interpretation, charging them with living in a "law-free zone" and insisting that reading the statute "fairly" meant "read[ing] it broadly."[38]

Insofar as Ely's second conjecture is concerned, *Brnovich* is more than a case about dueling interpretations of a statute. It is an example of how the broad language and vaulting ambitions of voting rights

33. *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

34. 141 S. Ct. 2321 (2021).

35. *Id.* at 2331.

36. *See* Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion is Even Worse Than It Seems,* SLATE (July 8, 2021, 10:16 AM), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html [https://perma.cc/J9DY-TLHF].

37. Brnovich, 141 S. Ct. at 2338–40.

38. 141 S. Ct. 2321, 2363–64 (2021) (Kagan, J., dissenting).

legislation remains at the mercy of a powerful Court. When the Court's ideological composition is different, it will fashion functional tests that empower plaintiffs when there are real harms.[39] A different Court, in particular one that might foresee the partisan benefits of a weakened Section 2, will craft a much more stringent from the same statute. *Brnovich*, when refracted through Doerfler and Moyn's work, is a lesson of how statutory interpretation is both the terrain for and a tool of judicial politics.

C. Justiciability

If the Roberts Court has reminded us of one thing, however, it is that judicial intervention is not the only way courts can score partisan wins. Depending on the context, judicial abstention can be just as effective. The clearest example is partisan gerrymandering. In *Rucho v. Common Cause*, the Roberts Court held that partisan gerrymandering claims were nonjusticiable under the Equal Protection Clause and the First Amendment.[40] For the Roberts Court, partisan gerrymandering was fundamentally a political question since it required the Court to decide what a "fair" political baseline was.[41] The lack of a "judicially manageable standard" and the supposed risks to judicial legitimacy intervention posed required the Court to recede from the field entirely.[42] Justice Kagan's dissent, of course, challenged both claims, pointing to the test administered by the district court and the dangers of partisan entrenchment if the judiciary abstained.[43] But for now, and for the foreseeable future, federal courts will condone partisan gerrymanders.

Rucho represents yet another resourceful use of judicial discretion with predictable partisan consequences. While gerrymandering has historically been a bipartisan exercise, recently Republicans have reaped greater gains.[44] Moreover, the legal question—the search for a judicially manageable standard for "fairness"—had not changed since the Court's decision in *Davis v. Bandemer*.[45] In fact, it remained constant over the intervening decades as liberal and conservative Justices jostled in prior cases over the dangers of partisan gerrymandering, the need for judicial intervention,

39. Thornburg v. Gingles, 478 U.S. 30 (1986).

40. 139 S. Ct. 2484 (2019).

41. *Id*. at 2501.

42. *Id*. at 2499–500.

43. *Id*. at 2509.

44. *How Republicans Use Redistricting to their Advantage*, DEMOCRACY DOCKET (May 4, 2021), https://www.democracydocket.com/news/how-republicans-use-redistricting-to-their-advantage [https://perma.cc/66MT-NZ2M].

45. 478 U.S. 109 (1986).

and the relevant legal test.[46] The only real shift from *Bandemer* to *Rucho* was the consolidation of a firmly conservative Court. And the proximate trigger was the retirement of Justice Anthony Kennedy and his replacement by Justice Brett Kavanaugh. In this sense, *Rucho* is a natural experiment in judicial politics. Holding the legal question and positions fixed, only the replacement of a more liberal justice with a more conservative one changed the law.

D. Remedies

Finally, the development of remedial doctrines in election law, in particular the so-called "*Purcell* principle,"[47] is a final example of a flexible and ostensibly reasonable standard applied with a partisan skew. The "*Purcell* principle" is a remedial rule that first appeared in the Court's shadow docket in the mid-2000s.[48] It stands for the idea that "courts should not issue orders which change election rules in the period just before the election."[49] Taken on its own, the Purcell principle is sensible. Elections are vital but complex affairs, require careful administration, and depend on regularity and stability for their legitimacy. Taken together, these factors suggest courts should be cautious in ordering changes close to an election and risking widespread confusion. Yet as the leadup to the 2020 election showed, federal courts, including the Supreme Court, routinely intervened to stop changes that would have expanded voter access during an unprecedented pandemic.[50] Moreover, the principle's contours have "remain[ed] remarkably opaque" despite its growing prominence.[51] Even among legal rules, the *Purcell* principle remains especially flexible.

If we assume, along with Doerfler and Moyn, that judges are ideological, it is no surprise that the *Purcell* principle is used for partisan gain. A recent decision by the Supreme Court suggests as much. In yet another shadow docket case, the Supreme Court granted the State of Alabama a stay against a district court injunction to redraw its congressional district lines before the "imminent 2022" elections.[52] The district court had ruled for the plaintiffs after finding that

46. *See, e.g.*, Vieth v. Jubilerer, 541 U.S. 267 (2004); Gill v. Whitford, 138 S. Ct. 1916 (2018).

47. Purcell v. Gonzalez, 549 U.S. 1 (2006).

48. Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U.L. REV. 427, 428 (2016).

49. *Id.*

50. Ed Kilgore, *Once Again, Supreme Court Won't Help Make It Easier to Vote During COVID*, N.Y. MAG.: INTELLIGENCER (Oct. 6, 2020), https://nymag.com/intelligencer/2020/10/supreme-court-stops-judge-from-liberalizing-voting-by-mail.html [https://perma.cc/UM8M-54VL].

51. Nicholas Stephanopoulos, *Freeing* Purcell *from the Shadows*, TAKE CARE (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows [https://perma.cc/S2KP-9TVU].

52. Merrill v. Milligan, 142 S. Ct. 879 (2022) (Thomas, J., in chambers).

Alabama's map diluted minority votes and violated Section 2 of the VRA.[53] In his concurrence, Justice Kavanaugh emphasized the importance of the *Purcell* principle. He observed that "[r]unning elections statewide is extraordinarily complicated and difficult" and that the "District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion."[54] Given that the *Purcell* principle now "reflects a bedrock tenet of election law,"[55] "even a . . . relaxed version . . . would not permit the District Court's late-breaking injunction."[56] Justice Kagan, once again in dissent, countered Kavanaugh's reasoning, pointing to the depth of the factual record, the period of time left before the election, and relatively short turnaround for redistricting.[57]

Yet *Merrill* represented another election law victory for a conservative government under the Roberts Court. Like with partisan gerrymandering, this win came through judicial inaction and again involved the use of a discretionary tool even less developed than the political question doctrine. In its wake, plaintiffs have virtually no clarity about when it is "too late" to challenge a questionable electoral map. And if Doerfler and Moyn are right, then that is entirely consistent with the nature of our ideological judiciary. Election law cases are no more exceptional than any other type of decision and judges with clear partisan aims have a wide array of tools at their disposal to secure political gains for their party.

II. BANISHING THE JUDICIARY?

So far, I have only deepened Doerfler and Moyn's critique of election law exceptionalism, showing how ostensibly neutral doctrinal tools can help secure consistent partisan victories. In this Part, I turn from extending their thesis to exploring its limits. Their arguments have two parts: the first critical, the second prescriptive. Their critical aim—showing that Ely's election law exceptionalism rests on untenable assumptions about judicial neutrality—is compelling. As I argue in this section, however, their prescriptive argument—that we abandon judicial review in favor of "legislative empowerment" as a "popular

53. Singleton v. Merrill, 2022 WL 265001 (N.D. Ala. 2022), *sub nom* Merrill v. Milligan, 142 S. Ct. 879 (Thomas, J., in chambers).

54. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

55. *Id.* The strange career of the *Purcell* Principle has seen it emerge from the shadow docket and, in the span of fifteen years, become a seemingly foundational part of election law.

56. *Id.* at 881.

57. *Id.* at 883 (Kagan, J., dissenting).

check on the sort of entrenchment with which Ely's followers are concerned"—requires some qualification.[58] For it does not follow that just because judges are equally as ideological as their counterparts in the political branches, that we abandon judicial review wholesale for legislation. There might be a narrow but important set of problems for which judicial review might be comparatively better (though in an absolute sense still suboptimal) than legislation at protecting the political process. Instead, these exceptions highlight the potential costs of Doerfler and Moyn's results-oriented critique of judicial review.

Their approach, on further inspection, requires us to be issue-specific and strategic about when to empower the judiciary and when to turn to the legislature. Their critique of Ely ultimately results indeterminacy about outcomes: we simply do not have a good way to tell whether mass politics or a congenial Supreme Court is more likely to produce outcomes consistent with democracy. Given that uncertainty, the case for mass politics sounds in procedural values rather than consequential ones.

To begin with, consider decisions which Doerfler and Moyn suggest "provide reason to think" that judges are worse than legislatures in administering democracy.[59] For instance, they cite *Kurzon v. Democratic National Committee*,[60] in which a Senator Bernie Sanders supporter mounted a constitutional challenge against the Democratic Party's superdelegate system. The District Court's prompt dismissal of the suit and its reliance on Supreme Court precedent that protected party control over nomination procedures,[61] the authors argue, is evidence of ideological consensus between incumbents and the judges they help nominate. When elected and party officials are in agreement, the authors continue, the Court routinely protects the "elite consensus" from political challenges.[62]

Suppose Doerfler and Moyn are right that the Court consistently upholds an elite consensus against popular reform movements. It's then worth asking what exactly the authors have proven. For the relevant point they are trying to make is that we should trust legislatures over courts in protecting the democratic process. Yet, the authors have only provided evidence that courts can often be as complicit in defending elite control of the political process as elected and party officials are. And the positive evidence the authors provide in arguing for the

58. Doerfler & Moyn, *supra* note 5, at 775.
59. *Id.* at 812.
60. 197 F. Supp. 3d 638 (S.D.N.Y. 2016).
61. N.Y. State Bd. of Elections v. Torres, 552 U.S. 196 (2008).
62. Doerfler & Moyn, *supra* note 5, at 818.

superiority of elected officials is the fact Democratic Party "officials ultimately relented"[63] in the face of Sanders's substantial support and substantially reduced the power of superdelegates. In fairness to Doerfler and Moyn, they note that this evidence is "merely suggestive" that "*political* challenge[s]" are "*better* suited . . . to settle questions of what democracy requires."[64] This is because elected officials are more responsive to popular pressure than courts are.

Popular success in reducing the power of superdelegates is perhaps Doerfler & Moyn's strongest *positive* example of the comparative superiority of the political process policing itself. Yet even the authors acknowledge the limitations of this case. Not only is the episode "merely suggestive,"[65] it is hard to rest a *systematic* argument for the comparative superiority of elected officials on this sole example. For one thing, procedures were in place—the primary system in particular—that made Sanders's popularity possible to begin with. Without those procedures, incumbents and party elites might have staved off insurgents. Even here, Doerfler and Moyn could respond by pointing out that primaries themselves grew out of popular political movements and organizing. And the authors would indeed be right, but further argument would be necessary to show that over the long term, the arc of the political process bends towards democracy. This is all to say that Doerfler and Moyn's positive case depends on both an empirical premise—the enduring responsiveness of the political branches—and a normative one—responsiveness as a distinctly democratic value. Both of these premises, especially the second one, might be defensible, but they require a sustained defense for Doerfler and Moyn's outcome-based approach to be successful.

The uncertain status of the authors' strategy is most clear in their treatment of apportionment. Importantly, their approach is entirely critical: showing that judges are, by definition, ideological in deciding these cases. It is here that we start to get some slippage in their argument, both definitionally and empirically. First, ideological shifts from meaning "partisan" to "normative." This is an important change since it weakens in this context their otherwise comprehensive critique of Ely. Showing that judges are consistently voting in partisan ways in election law cases directly undercuts election law exceptionalism. By contrast, telling us that "asking ideological questions necessitates receiving ideological answers" is less remarkable. Of course, many questions of constitutional law require

63. Id. at 819.

64. *Id.* (emphasis in original).

65 *Id.*

judges to make normative valuations and there are plenty of reasons to be skeptical that courts should be the ones to make that decision. But such a critique would be part and parcel of a broader assault on judicial review. If that is the case, and given Doerfler and Moyn's broader project there is reason to suspect that it is, then that should be clearer.

Next, it would also mean that their charge of ideology in election law is less novel and forceful. If they had shown that judges are ideological in policing the judicial process because they are partisan, then that would be a deathblow for Elyians, since it would mean that judges actually sustain the very problems they were meant to solve. Instead, Doerfler and Moyn's critique of Ely in the reapportionment cases recycles a familiar argument: Elyian process theory still cannot escape some judicial selection of values.[66] This line of attack, however, comes with a cost because it conflates all forms of value-based judicial decisionmaking as the same. I am less persuaded by this critique because it does not seem especially controversial for judges to decide that gerrymandered maps that entrench one party-rule and lock out electoral majorities deny citizens political equality. Doerfler and Moyn might disagree, but that would not be because they take issue with the underlying value—majority rule as an expression of political equality. Instead, their problem is with judges making these normative decisions at all. Put simply, there is little that is distinctively controversial about the values at stake in reapportionment that render them especially inapt for adjudication. If anything, vindicating majority rule might be one of the few places where courts could intervene with some confidence that they are promoting democracy, however thinly defined, rather than undermining it.

There is, however, a further and more important wrinkle with the reapportionment example. Not only does it ground an old and crude critique of Elyian process theory, it possibly cuts against the authors' positive argument that the political process is better suited to remedy its defects than ideological judges. For the problem reapportionment poses for those seeking to remedy it through politics is that those very channels are unavailable. And even if we agree with Doerfler and Moyn generally that politics is the best cure for politics, it is hard to imagine persuading the legislators in *Baker v. Carr*[67] and *Reynolds v. Sims*[68] to redraw maps that would put many of them out of their jobs. Instead, the plaintiffs turned to the courts because a liberal Court presented

66. *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063 (1980).

67. 369 U.S. 186 (1962).

68. 377 U.S. 533 (1964).

their best chance at structural reform. Here, Doerfler and Moyn might respond by pointing us away from the judiciary to the political process, and in particular ballot initiatives, as an alternate path to reform. But this would run straight into the issue Justice Kagan identified in her dissent in *Rucho*: "Fewer than half the States offer voters an opportunity to put initiatives to direct vote."[69] Put simply, plaintiffs who turned to the Roberts Court in *Rucho* almost certainly did not do so with the optimism of their forbears with the Warren Court, but they did so out of a lack of options. Rather than being proof of unwarranted faith in judges, we can read *Rucho* and similar cases as acts of democratic despair, where skeptical judges still represent the best of an otherwise hopeless lot.

Reapportionment does not suggest restored optimism about judicial review. If anything, it provokes some pessimism about democracy's ability to sustain itself given the risks of institutional path dependence. Instead, the fact that there remain situations where the courts (even if by a slim margin) represent the best custodians of the political process highlights the twin risks of Moyn and Doerfler's outcome based strategy: it turns entirely on empirics and relies on some undefined theory of democracy. For Doerfler and Moyn's constructive argument—that we should trust politics over the courts in election law—to succeed, it simply has to be the case that the former *is* better on average than the latter. And even there, as the reapportionment process shows, institutional advantage can vary across issue space.

Similarly, Doerfler and Moyn's argument for the primacy of politics over courts requires an antecedent theory of democracy for it to work. Such a theory can be as minimal as brute majoritarianism,[70] but it has to provide some criteria by which comparative institutional assessments can be made; these standards make it possible to assess which institution—courts or the political branches—further advances democracy. On its own, this is not a serious problem for Doerfler and Moyn's argument. At no point do they suggest that they enjoy the "view from nowhere," without normative commitments of their own or an implicit theory of democracy.

But the necessity of a democratic theory still suggests two things. First, some normative granularity matters. Although it is beyond the scope of this Response, we can identify different dimensions of the representative process and consider the normative values we

69. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

70. Though it need not be. *See, e.g.*, Niko Kolodny, *Rule Over None I: What Justifies Democracy?*, 42 PHIL. & PUB. AFFAIRS 195 (2014); Niko Kolodny, *Rule Over None II: What Justifies Democracy?*, 42 PHIL. & PUB. AFFAIRS 287 (2014); Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFFAIRS 337 (2014).

should aspire for in each realm. For instance, reapportionment is fundamentally an issue of political aggregation, and we might think that some fidelity to how groups actually cluster in politics should matter. Second, the uncertain status of Doerfler and Moyn's constructive claim points away from an outcome-oriented approach back to Jeremy Waldron's procedural approach,[71] a strategy the former two squarely bracket early on in their article.[72] Put simply, if we cannot be confident that the political process will regularly correct its own democratic deficits better than courts can, then we should defend the former on procedural grounds. On this view—which again requires further development—turning to politics to sustain democracy is procedurally sounder than relying on courts, because the process itself vindicates the values it is meant to serve. In a world where we cannot be sure of outcomes, practicing democracy becomes an end in itself.

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The Ghost of Ely is a serious accomplishment. The Article exposes and dismantles core assumptions of liberal constitutional theory. It makes election law exceptionalism a much less plausible position. To accomplish all this within a single article is, to put it lightly, impressive. Even where its constructive claims come up short, they provide new directions for research. Like all great critical work, it clears the ground of conceptual detritus for future ideas to bloom. For that we owe Doerfler and Moyn our collective gratitude.

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[71] Jeremy Waldron, *The Core of the Case Against Judicial Review,* 115 Yale L.J. 1346, 1373 (2006).

72. Doerfler & Moyn, *supra* note 5, at 773–74.