Article

An Overlooked Case for Judicial Review: Striking a Dynamic Balance between Constitutionalism and Democracy

Wen-Cheng Chen* **& Min-Ta Chuang****

ABSTRACT

Is judicial review a deus ex machina institution? Commentators disagree on the legitimacy of judicial review in a constitutional democracy. Many scholars who argue for (or against) judicial review have based their claims on democracy or democratic theory, while other scholars have founded their positive (or negative) arguments on constitutionalism or constitutional theory. Taking three current trends of worldwide development--the global spread of democratization, the global adoption of constitutionalism, and the global proliferation of judicial review- as background, this paper firstly poses a key question that what is the role of judicial review within a constitutional democracy amid these three rising global trends? Second, based on a general assessment of the literature, this article demonstrates that most scholars neglect the role of judicial review may play in a modern

DOI：10.3966/181263242017091202004

* Professor, Graduate Institute of Political Science and the Department of East Asian Studies, National Taiwan Normal University; Ph.D. of National Taiwan Normal University; Email: wjchen278599@gmail.com.

** Assistant professor, Department of Urban Industrial Management and Marketing, University of Taipei; Ph.D. of National Taiwan Normal University; Email: chuangminta@gmail.com.

The original version of this paper was presented at *The 2012 Annual Meetings of the Law and Society Association* (LSA), Honolulu, Hawaii, U.S.A., and it is one of the research results arising from the first author's 2010-2012 project-*The Trend of Constitutional Scholarship in America: An Analysis on the Debate of the Legitimacy of Judicial Review* (NSC 99-2410-H-003-058-MY2)-which was funded by National Science Commission, Republic of China. We are grateful to reviewers for their insightful comments and to the editors of NTU Law Review for their editorial assistance.

constitutional democracy from the perspectives of structural and functional analysis. And thus extant literature has a gap. Third, in order to fill this gap, this article, relying on a structural and functional approach, embarks on justifying the role of judicial review in striking a dynamic balance between constitutionalism and democracy. At structural level, it tries to illuminate the constitutional democracy as a structural framework consisting of two main systems-constitutionalism and democracy. Functionally analyzing, the justification will be made on the bases of three major pillars: necessity, feasibility, and suitability. Accordingly, judicial review might be plausibly regarded as a necessary, feasible, and suitable institution for maintaining a proper balance between constitutionalism and democracy in modern democracies.

Keywords: *Judicial Review, Constitutionalism, Democracy, Dynamic Balance, Constitutionalization, Necessity, Feasibility, Suitability*

CONTENTS

I. INTRODUCTION

Most people recognize that we live in an era of globalization, and that many things, if not all, are likely to be globalized. As the engine of globalization keeps churning, for good or ill, three worldwide development trends--the global spread of democratization,[1] the global adoption of constitutionalism,[2] and the global proliferation of judicial review[3]--have

1. According to Freedom House, the number of democratic states has expanded from 40 in 1974, the year the third wave of democratization began, to 125 in 2016. Arch Puddington & Tyler Roylance, *The Freedom House Survey for 2015: Anxious Dictators, Wavering Democrats*, 27 J. DEMOCRACY 86, 95 (2016); Doh Chull Shin, a political scientist, affirmed that "as a set of political ideals as well as political practices, democracy has finally reached every corner of the globe, including the Middle East and North Africa, the two regions known as the most inhospitable to it." DOH CHULL SHIN, CONFUCIANISM AND DEMOCRATIZATION IN EAST ASIA 1 (2012). What is more, three Arab autocracies, *i.e*., Tunisia, Egypt, and Libya, fell in 2011. This democratization trend will continue to prevail and spread to East Asian countries, such as Singapore, Malaysia, and even China. *See* Larry Diamond, *China and East Asian Democracy: The Coming Wave*, 23 J. DEMOCRACY 5, 5-13 (2012).

2. David Law and Mila Versteeg argued that "success breeds imitation, and constitutionalism is no exception," and the global adoption of constitutionalism has become a common phenomenon around the globe, *see* David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1166-71, 1173 (2011). This article uses the term "global adoption of constitutionalism" as referring to the global adoption of a written constitution and the principles of classical constitutionalism, such as limiting government powers, protecting human rights, and adhering to the rule of law. This term is a sub-concept of the umbrella concept of "global constitutionalism." For the time being, "global constitutionalism" is still a contested concept, which may encompass: (1) the global adoption of a written constitution; (2) a single global constitution used to govern a world government; (3) global judicial dialogue; (4) the global adoption of judicial review; and (5) the global trend of constitutional interpretation methods, such as proportionality analysis (PA). *See id*.; Fredrick J. Lee, Note, *Global Institutional Choice*, 85 N.Y.U. L. REV. 328, 328-57 (2010); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 523-77 (2011); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 90 (2003) [hereinafter GINSBURG, JUDICIAL REVIEW]; Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-88 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2010) [hereinafter Ginsburg, *Global Spread*]; Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 797-875 (2011) [hereinafter Mathews & Sweet, *All Things in Proportion*]; John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 899-978 (2011); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNA'L L. 72, 73-165 (2008) [hereinafter Sweet & Mathews, *Proportionality Balancing*]; Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUROPEAN L.J. 158, 158-85 (2010). For further analysis, *see* Wen Cheng Chen & Shirley Chi Chu, *Taking Global Constitutionalism Seriously: A Framework for Discourse*, 11 NAT'L TAIWAN U. L. REV. 383, 383-427 (2016).

3. Scholars have showed this trend. Tom Ginsburg, for instance, found that as three waves of democratization developed, the global spread of judicial review also underwent three waves: (1)1789-1945, from American enforcement of the Constitution to the end of World War II; (2) 1945-1989, from the end of World War II to the collapse of communism; (3) from 1989 onwards. As of 2008, 158 out of 191 constitutional systems had adopted some formal provision for constitutional review, *see* GINSBURG, JUDICIAL REVIEW, *id*. at 90-91; Ginsburg, *Global Spread*, *id*. at 82-88. In 2007, out of 193 independent states, 164 had some form of judicial review, *see* Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1, 4-5 (2007). Another study on global constitutionalism demonstrated that only 35% of countries had either de jure or de facto judicial review in 1946, but 87% had it in 2006, *see* Law & Versteeg, *id*. at 1199; Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 261-64 (2008) (arguing that

become increasingly evident. Examining the spread of these trends, one finds a growing number of constitutional democracies worldwide that limit the government powers by erecting constitutionalism on the one hand, empower their government by establishing democratic mechanisms on the other hand, and make their democracy work with an institution of judicial review.

Commentators disagree on the legitimacy of judicial review in a constitutional democracy. Even in the concept's birthplace, the United States of America, judicial review has been regarded by many critics as a *deus ex machina*[4] institution. There are other scholars in the country, however, who extol and defend this institution. Generally speaking, many commentators who argue for (or against) judicial review have based their claims on democracy or democratic theory, while other scholars have founded their positive (or negative) arguments on constitutionalism or constitutional theory. *What is the role of judicial review within a constitutional democracy amid these three rising global trends?* The answer varies widely in extant literature, but based on a general assessment of the literature, this article finds that most scholars, both opponents and proponents, have overlooked a significant case for judicial review-- that the vital role of judicial review in a constitutional democracy, *inter alia*, is to strike a dynamic balance between constitutionalism and democracy.

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

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

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

Notably, although most of the academic works we discuss here are

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the world underwent a global transformation concerning the prevalence of judicial review, and the Second World War was a watershed).

4. In Latin sense, *deus ex machina* means "god out of machine." It refers to "abrupt," "inextricable," or "incompatible" in the context of this article. This phrase was also employed by Levinson to evaluate institutional stability. *See* Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 682 (2011).

thematically based on American experience, we would rather consider them as the constellation of a paradigm than as an American exceptionalism. There are at least two reasons for us to think this way: First, in the study of judicial review, there are two prevailing and competing paradigms that have reigned since 1945--German concentrated system and American diffuse system. A paradigm, according to Thomas S. Kuhn, "stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community."[5] As a paradigm, American debates over the role of judicial review in a constitutional democracy are more advanced and delicate than that of German paradigm. Second, American exceptionalism might be just an illusion while taking notice of American modern experiences. As William A. Galston's current observation shows, "American exceptionalism is a sturdy if contested trope of cultural analysis. But large shifts in U.S. Politics since the end of World War II have been anything but exceptional. Rather, the United States has moved in tandem with other western democracies."[6] Owing to this convergence, and the advanced characteristics of American experience, American paradigm is best regarded as a vanguard (but not exceptionalism). Accordingly, this paradigm is more desirable as far as inquiring the role of judicial review is concerned.

A. *Overview: Literature on the Judicial Review Debate*

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

1. *Power-Acquisition Arguments*

The arguments of this model are concerned with two main questions regarding the power of judicial review institution, including: (1) Does the Constitution really grant courts a mandate to have the power of judicial review? (2) Are unelected justices qualified to wield the power of judicial review? Most American commentators answer the first question in the negative, because "the text of the Constitution . . . nowhere mentions the power of judicial review."[7] Simply put, they say American judicial review

5. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 175 (3d ed. 1996).

6. William A. Galston, *The 2016 U.S. Election: The Populist Moment*, 28 J. DEMOCRACY 21, 21 (2017).

7. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 241 (1994).

embraces an atextual nature.[8] Conversely, there are proponents who strongly defend the constitutional foundation on the basis of "the supremacy clause,"[9] the text, history and structure of the Constitution.[10]

The second question involves whether unelected federal judges can legitimately exercise the power of judicial review. Opponents use democratic theories[11] to challenge the legitimacy of unelected justices, arguing that unelected judges are unaccountable to the people. Critics also express concern over the tendency of judicial appointments to be used as tools of party patronage and cronyism.[12] In contrast, proponents of judicial review consistently back the legitimacy of unelected judges in two ways: by demonstrating the merits of judicial appointment and highlighting the flaws of judicial election. Those who defend judicial review contend that unelected judges possess technical proficiency and have the opportunity, the incentive and the ability to interpret the Constitution prudently.[13] Furthermore, because unelected judges are insulated from momentary political pressures,[14] they are able to act as impartial arbiters of political disputes and protect democracy,[15] minority rights,[16] and values that people care about.[17] These judicial review

8. *See* Michael Halley, C*onstitutional Interpretation and Judicial Review: A Case of the Tail Wagging the Dog*, 108 MICH. L. REV. FIRST IMPRESSIONS 58, 59-60 (2010); Eugene M. Van Loan III, *Judicial Review and Its Limits*, Part I (Legitimacy), 47 N.H.B. J. 52, 53-54 (2006).

9. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2 (1959); Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 321-22 (2003); U.S. CONST. art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

10. Clark, *id*.; Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887-982 (2003) [hereinafter Prakash & Yoo, *The Origins*]; Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO.WASH. L. REV. 354, 354-80 (2003) [hereinafter Prakash & Yoo, *Questions for the Critics*]; Mary Sarah Bilder, *Why We Have Judicial Review*, 116 YALE L.J. POCKET PART 215, 216 (2007); William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218, 218 (2007).

11. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 273-77 (2008); Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 676 (2009).

12. *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063, 1140 (2010); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 632 (2009).

13. Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 354-55 (1994).

14. *Id*.; Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception*?, 99 MICH. L. REV. 1279, 1295 (2001); Howard Gillman, *Judicial Independence through the Lens of Bush v. Gore: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 257 (2003); Scott M. Noveck, *Is Judicial Review Compatible with Democracy?*, 6 CARDOZO PUB. L., POL'Y & ETHICS J. 401, 411 (2008).

15. Dorf, *id*. at 1296, 1297; Noveck, *id*.

16. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 7 (1980); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 567 (2001).

proponents also rely on empirical data to plausibly prove that judicial elections are self-defeating arrangements in which the disadvantages outweigh the advantages. They argue that judicial elections undermine the functions of state courts to enforce the rule of law,[18] generate favoritism and bias,[19] result in more corruption than judicial appointments,[20] and thus tarnish the judicial integrity of courts, compromising procedural fairness and infringing on litigants' rights.[21]

2. *Power-Exercise Arguments*

The second type of argument may be described as the "power-exercise model," or "democracy-based model." The arguments under this model can be classified under three subtypes: *process-based* arguments, *substance-based* arguments, and *synthetic* arguments.

Process-based arguments focus on whether the institution of judicial review is consistent with procedural principles of democracy, especially the principle of majority rule. Skeptics, inspired by Alexander M. Bickel's concept of "countermajoritarian difficulty,"[22] assert that the institution of judicial review does not square with majority rule--a critical procedural principle of democracy. By this inference, judicial review is illegitimate, and its countermajoritarian difficulty is real and insoluble. Jeremy Waldron, for example, relying on process-related reasons, contends that[23] judicial review is not a proper institution for settling the disagreements about rights which

17. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 73-74 (2001).

18. *See* Shugerman, *supra* note 12, at 1064; Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, 112 (2008).

19. *See* Pozen, *supra* note 11, at 290-93; McLucas, *supra* note 11, at 685-87.

20. According to an empirical study, summarized in the following table, elected judges are more corrupt than appointed judges.

	States judges removed or convicted		Bribes accepted by state judges	
	Appointed judges	Elected judges	Appointed judges	Elected judges
number	5	34	14	2,700
percent	15%	85%	0.5%	99.5%

See Stratos Pahis, Notes, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1922-23 (2009).

21. McLucas, *supra* note 11, at 684.

22. Bickel proclaimed that the root difficulty is that judicial review is a counter-majoritarian force in the American constitutional system. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

23. Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1346, 1360, 1387-88, 1406 (2006); *see also* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 336, 340, 343, 345 (2009) (arguing that a legislature is a particular kind of lawmaking institution based on four pillars: it is publicly dedicated to making and changing law; it has large numbers, i.e., hundreds of individuals; it bears diverse opinions, knowledge, experience, and interests; and it has representation); Jeremy Waldron, *A Majority in the Lifeboat*, 90 BOS. U. L. REV. 1043, 1055 (2010).

generally exist in democracies, though the practice of judicial review may be appropriate in some circumstances. Because there is no justification for assuming that courts have better capacity than legislatures in protecting rights, Waldron claims that a society ought to settle the inevitable disagreements about rights by means of the mechanism of majority decision. In other words, these disagreements should be left to the democratic process of legislative institutions.

On the opposite side, a number of scholars, such as Harry H. Wellington,[24] Barry Friedman,[25] Christopher L. Eisgruber,[26] and Frederick Schauer,[27] reject the idea that there is a countermajoritarian difficulty with judicial review and describe the countermajoritarian difficulty as a fallacious, overstated, and misguided problem. It is especially noteworthy that most process-based arguments in favor of judicial review recognize that judicial review potentially entails countermajoritarian difficulty, but they defend the legitimacy of judicial review by justifying it as being compatible with democracy at a procedural level. Robert A. Dahl's "supporting ruling regime theory,"[28] John H. Ely's "representation-reinforcing theory,"[29] Michael J. Perry's "promoting deliberative politics theory,"[30] Lee Epstein et al.'s "supporting majority preference theory,"[31] and Eylon & Harel's "facilitating participation right theory"[32] all make arguments along these lines.

Substance-based arguments also recognize that judicial review has a

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24. *See* Harry H. Wellington, *Foreword*, *in* THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, *supra* note 22, at ix, xi-xii.

25. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 582-668 (1993).

26. EISGRUBER, *supra* note 17, at 50, 62, 77-78.

27. Frederick Schauer, *The Court's Agenda–And the Nation's*, 120 HARV. L. REV. 4, 53 (2006).

28. Dahl, *supra* note 16, at 570, 581 (Dahl's thesis of "supporting ruling regime" rests on an empirical analysis of unconstitutional laws. It suggests that "the policy views dominant on the Court are never for logout of line with the policy views dominant among the lawmaking majority of the United States." Also, "the main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition." Thus, the power of judicial review is not at odds with the principle of majority rule).

29. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105, 135 (1980). (opining that the power of judicial review, by "clearing the channels of political change" and "facilitating the representation of minorities," is compatible with democracy).

30. MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 159-60 (1988) (arguing that judicial review is consistent with democracy by facilitating deliberative politics).

31. Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 583-611 (2001) (To some extent, Lee Epstein et al.'s "supporting majority preference theory" confirmed Dahl's "ruling regime thesis." They found that "the Justices deviate from their personal preferences when those preferences are not shared by the members of the ruling regime," and "adjust their decisions in anticipation of the potential responses of the other branches of government." Under this explanation, judicial review would not run afoul of the principle of majority rule).

32. Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 1021-22 (2006) (contending that the right to judicial review is a right to a hearing, and that judicial review, by rendering a right to a hearing, is able to further the values of participatory democracy).

problem of countermajoritarian difficulty. They assume, however, that judicial review is legitimate because it comports with some substantive values in a democratic regime. The salient arguments falling into this category include Alexander M. Bickel's "enduring values theory,"[33] Bruce Ackerman's "democracy preservationist theory" or "constitutional moment theory,"[34] Jesse H. Choper's "protecting human rights theory,"[35] Ronald Dworkin's "maintaining constitutional principles theory" and "partnership democracy theory,"[36] William N. Eskridge's "theory of pluralism-facilitating judicial review,"[37] Richard H. Fallon's "theory of morally better

33. BICKEL, *supra* note 22, at 16, 18, 24-26 (Although Alexander M. Bickel coined the term "countermajoritarian difficulty" and characterized judicial review as a deviant system in American democracy, his ultimate goal was to reconcile judicial review with democracy, especially with majority rule; Bickel claimed that democratic governments should serve not simply the immediate material needs of their people but also certain enduring values, and that courts should be the appropriate pronouncer and guardian of such values, because courts have capacities and advantages that legislatures and executives do not possess. In this case, if courts adhere to passive virtues, the power of judicial review will substantively promote the legitimacy of whole government, and hence will not be at odds with majority rule.)

34. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051 (1984); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461 (1989) [hereinafter Ackerman, *Constitutional Politics*]; 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7, 267, 288-89 (1991). Ackerman grounded his "democracy preservationist theory" or "constitutional moment theory" on the dual nature of American politics, that is, normal politics and constitutional politics. The decisions are made by government in the normal politics; by contrast, the decisions are made by "We the People" in constitutional politics. Significantly, the degree to which constitutional politics enjoys legitimacy is superior to that of normal politics. Under these circumstances, when the Court incorporates the mobilized will of the people into constitutional interpretation by judicial review, it actually acts as a democracy preservationist, and hence stays in tune with democracy. Ackerman eloquently announced that "the democratic task of the Supreme Court is to interpret the Constitution of the United States."

35. CHOPER, *supra* note 16, at 7, 60, 64, 68. Choper adopted a rights-based argument in defending the legitimacy of judicial review. First, he asserted that democracy is not equivalent to pure majoritarianism, and that basic human rights are the essential values of a democratic society. Second, Choper argued that the power of judicial review is granted to guard against governmental infringement of human rights secured by the Constitution, especially the rights of minorities. As a result, Choper concluded that the Court's role as final constitutional arbiter is conducive to promote the precepts of democracy.

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

37. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293, 1294-95 (2005). Eskridge's theory rests on the notion that pluralist democracy is dynamic and fragile, that the polity shall encourage existing

outcomes,"[38] David N. Law's "theory of guarding people's interests"[39] and others.

There are also some commentators who have embarked on the task of reconciling judicial review with democracy from a synthetic perspective. Synthetic arguments take account of both process-based and substance-based models. In this category, there are two eminent arguments to the best of our knowledge--Samuel Freeman's "theory of social and historical circumstances,"[40] and Cass R. Sunstein's "judicial minimalism."[41]

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groups and emerging groups to participate in the marketplace of politics, and that if groups drop out of or never drop into the democratic system, it will not be favorable to democracy. Therefore, if the results of judicial review do not aim to insulate groups from democratic politics, or even strengthen the participatory chances of groups, then the institution of judicial review will remain in line with democracy. *See also* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 396-98 (2007).

38. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1700, 1709, 1713-16, 1718, 1720, 1726-28 (2008). Fallon adopted a results-based reason to justify the legitimacy of judicial review. He plausibly asserted that because judicial review may produce morally better results, such as rectifying the errors of rights underenforcement, helping to minimize fundamental rights violations, protecting the constitutive norms of political democracy, and promoting the overall moral quality of political decisions, it is relatively beneficial to a democratic society. Fallon concluded that "a constitutional democracy with a well-designed system of judicial review would produce a morally better pattern of outcomes than a political democracy without judicial review."

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

40. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 327, 354, 361-62, 365-67 (1991). Samuel Freeman emphasized that majority rule is not the best means to protect all citizens in a democracy from infringement, meaning that "whether judicial review is needed to maintain the requirements of a democratic constitution is then dependent on social and historical circumstances." Freeman argued that people should not single out a feature of democratic constitutions (such as majority rule, political accountability, or equal participation) and criticize judicial review as being undemocratic because it does not meet the demands of the particular standard. Generally speaking, judicial review will correspond with democracy if it is able to protect basic human rights, promote clear democratic procedures, cultivate a shared sense of justice and public good, promote public discussion and legislative deliberation, and compensate for legislative failures.

41. Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 6, 10, 13, 15, 20 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10, 11, 77 (1999). In broad sense, Sunstein's "judicial minimalism" consists of two parts--"procedural minimalism" and "substantive minimalism." *See* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1464-66, 1522 (2000). That is why this article attributes it to a synthetic model. Pragmatically, "procedural minimalism" is manifested by the two principles of "narrow rather than wide" and "shallow rather than deep." The former principle means that judges "decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so." In other words, "minimalists try to decide cases rather than to set down broad rules." The latter principle means that judges "generally try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements." Second, as far as "substantive minimalism" is concerned, it means that courts

3. *Power-Validity Arguments*

The arguments under this model can be expressed through two questions: First, is the judicial branch granted the exclusive authority to interpret the Constitution? Second, does judicial interpretation of the Constitution have a final and binding effect? These two questions constitute the elements of judicial supremacy.[42] This model has three subtypes: arguments for judicial supremacy, arguments against judicial supremacy and for popular supremacy, and eclectic arguments.

(a) Arguments for Judicial Supremacy

In the American context, the best-known argument for judicial supremacy was made by the U.S. Supreme Court. In the ruling on *Marbury v. Madison*, which was handed down in 1803, Chief Justice John Marshall wrote that "it is, emphatically, the province and duty of the judicial department, to say what the law is."[43] Subsequently, the Court reiterated its exclusive and final authority in the cases of *Cooper v. Aaron*[44] in 1958 and *Baker v. Carr*[45] in 1962.

Commentators have traditionally defended the notion of judicial supremacy based on the principles of the separation of powers and checks and balances. Since the 1990s, scholars have advanced additional theoretical foundations in support of the concept. For instance, Alexander and Shauer argued it from the perspective of preconstitutional norm and settlement,[46]

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pay deference to the decisions of political branches unless the decisions involve infringing basic human rights or hollowing the core values of the Constitution. If judicial actions rely on "procedural minimalism" and "substantive minimalism," then the power of judicial review will not run afoul of democracy.

42. *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1608 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (stating that judicial supremacy involves three elements: judicial interpretative authority, finality of judicial decisions, and binding effect of judicial decisions). *See also* Saikrishna B. Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1550 (2005) (which says judicial supremacy consists of two elements--interpretative supremacy and judgment supremacy).

43. Marbury v. Madison, 5 U.S. 137, 177 (1803). But Paulsen argued that "Marshall does not claim that the power to interpret law is exclusively assigned to the judiciary," *see* Paulsen, *supra* note 7, at 242-43.

44. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (announcing that "the federal judiciary is the supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system").

45. Baker v. Carr, 369 U.S. 186, 211 (1962) (declaring that the Supreme Court was the "ultimate interpreter of the Constitution").

46. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 459-60, 465, 473, 476-77 (2000). Alexander and Schauer defended judicial supremacy on grounds of a preconstitutional norm and the settlement of

Keith E. Whittington defended it on the basis of political foundations,[47] and Tom Donnelly argued it using the angle of political culture.[48] Generally speaking, most Americans accept judicial supremacy, a fact confirmed by some prominent commentators, such as Larry Kramer,[49] Dawn E. Johnsen,[50] and others.[51]

(b) Arguments for Popular Supremacy

Conversely, some commentators resist judicial supremacy and advance the concept of popular sovereignty--the notion that democracy means people's self-government. These "arguments for popular supremacy" assert that people themselves should be the masters or the final arbiters of the constitutional meaning and represent the antitheses to the arguments for

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contested issues. First, they see a preconstitutional norm as "acceptance as social fact," contending that "the Constitution's authority ultimately rests not on facts about the past, but on the Constitution's acceptance as authoritative in the present," and that "a constitution's status as *the* constitution is dependent upon its (empirical) acceptance by a polity as their constitution." In other words, judicial supremacy will become legitimate if American society at large accepts it. Second, Alexander and Schauer considered the settlement of contested issues as a crucial component of constitutionalism, and then they argued that this goal can be achieved only by designating an authoritative interpreter whose interpretations bind all others. They concluded that the Supreme Court can best serve this role.

47. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 9, 288, 289 (2007). Whittington's "argument from political foundations" was rested on American political reality. It was premised on the statement that "judicial supremacy is only meaningful if other powerful political actors acquiesce to that declaration." Whittington portrayed the reality that the characteristics of American constitutional structure, such as federalism, separation of powers, and the party system, will encourage presidents to support the courts because recognizing and bolstering judicial supremacy can benefit incumbent presidents and party leaders. In sum, the real reason for judicial supremacy in America is that courts enjoy robust political foundations.

48. *See* Tom Donnelly, *Popular Constitutionalism, Civil Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 962, 979, 984 (2009). Donnelly argued for judicial supremacy by probing into American political culture. He found that most textbooks on civic education in public schools shape the Court as a remedy institution and the final interpreter of the Constitution. Most textbooks also cited the celebrated dictum of Justice Jackson that "we are not final because we are infallible, but we are infallible only because we are final." (Brown v. Allen, 344 U.S. 443, 540 (1953)) Put simply, what American public schools present about the Court is that is an authoritative and mostly just institution, laying a foundation for building the political culture supportive of judicial supremacy. Donnelly admitted that "today, the People have acquiesced to judicial supremacy," *see* Donnelly, *id*. at 962.

49. Kramer confessed that "it seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy--indeed, they assume it as a matter of course." *See* Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4, 6-7 (2001).

50. Johnsen recognized that "judicial supremacy is unquestionably the dominant view in United States law, politics and society, including among lawyers, who study, teach, and practice law almost entirely from the perspective of judicial doctrine." *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 106 (2004).

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

judicial supremacy. Mark Tushnet's "populist constitutionalism, or abolition of judicial review"[52] and Larry Kramer's "popular constitutionalism"[53] fall within this category. It is worth noting that Larry Kramer's argument has attracted many supporters and critics[54] and has shaped a new trend in the debate over judicial review.

(c) Arguments from Eclectic Stances

There are still some other scholars who reject judicial supremacy but do not oppose judicial review; their arguments can be positioned between "arguments for judicial supremacy" and "arguments for popular supremacy."

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

53. *See* Kramer, *supra* note 49, at 27-28; Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 959 (2004); KRAMER, *supra* note 42, at 25-27, 208, 248. In the first place, Kramer grounded his popular constitutionalism on the notion that "the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law." Second, he developed his argument based on the American history of popular constitutionalism, arguing that from the colonial era to the 18th century, the central means for constitution making were the right to vote, the right to petition, the right of free speech, pamphleteering, and mobbing. Significantly, these were launched by the public. Accordingly, the liberal Kramer, setting the conservative Rehnquist Court as his target, claimed that the public should be the final arbiter of the Constitution's meaning. Without a doubt, Kramer's "popular constitutionalism" has become the most provocative argument among American constitutional academics since the outset of the 21st century.

54. Some examples are prominent, *e. g*., Clark, *supra* note 9; Prakash & Yoo, *The Origins*, *supra* note 10; Prakash & Yoo, *Questions for the Critics*, *supra* note 10; Donnelly, *supra* note 48; Pettys, *supra* note 51; Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381, 381-86 (2003); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2596-2636 (2003); Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1027-43 (2004); Prakash & Yoo, *supra* note 42, at 1539-66; Alexander & Solum, *supra* note 42; Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 923-51 (2006); Frank I. Michelman, *Unenumerated Rights under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 121-53 (2006); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 719-805 (2006); Sarah Harding, *Kramer's Popular Constitutionalism: A Quick Normative Assessment*, 81 CHI.-KENT L. REV. 1117, 1117-26 (2006); Reva B. Siegel, *Dead or Alive: Originalism as popular Constitutionalism Heller*, 122 HARV. L. REV. 191, 191-245 (2008); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1837-71 (2009); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 157-201 (2012); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 159-94 (2012).

Put another way, they neither accept the notion of judicial supremacy nor embrace popular supremacy without reservation. Three eclectic arguments are prominent: departmentalism, democratic constitutionalism, and living constitutionalism.

"Departmentalism" is premised on the concept that the authority of constitutional interpretation is shared by the three branches of government.[55] Under this logic, no single branch of government has exclusive interpretative authority or can offer interpretations that are binding on other branches. Those who might be classified as departmentalists include Michael Stokes Paulsen,[56] Dawn E. Johnsen,[57] George Thomas,[58] and others.

"Democratic constitutionalism" is proffered by Robert Post and Reva Siegel. Relying on the interplay between judge-made constitutional law and democratic politics,[59] Post and Siegel emphasize that the meaning of the Constitution is embedded in the interplay or struggle between judge-made constitutional law and democratic politics in American history, and it has been shaped by norm contestations.[60] Such contestations are demonstrated by two facts: Americans have historically mobilized for and against judicial efforts to enforce the Constitution, and in the meantime, courts have exercised their professional legal reasoning to resist and at times respond to the popular claims on the Constitution.[61] In a nutshell, democratic constitutionalism affirms the role of mobilized citizens and representative government and also the role of courts in interpreting the Constitution.[62]

Jack M. Balkin's "living constitutionalism" refers to a "process of

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55. *See* Alexander & Solum, *supra* note 42, at 1609-15 (dividing arguments for departmentalism into two types: "divided departmentalism" and "overlapping departmentalism").

56. *See* Paulsen, *supra* note 7, at 241, 344. Relying on departmentalism, or what he called a "model of coordinate review," Paulsen concluded that "the model of coordinate review highlights the *legitimacy* of the inter-branch contest over the proper interpretation of the Constitution and laws of the United States."

57. *See* Johnsen, *supra* note 50, at 147 (claiming that "efforts at increasing the quality, accountability, and legitimacy in the public's eye of political branch interpretation would better safeguard individual liberty and equality, as well as the fundamental features of the constitutional structure, than would dependence on one branch (namely, the Court) that has not consistently been at the forefront of the protection of individual rights").

58. GEORGE THOMAS, THE MADISONIAN CONSTITUTION 3, 9-11, 169 (2008) (rejecting both judicial supremacy and popular sovereignty as mechanisms for making the Constitution authoritatively binding, and arguing that the constitutional conflict between branches of government may indeed be a virtue in sustaining the Constitution).

59. *See* Post & Siegel, *supra* note 37, at 395.

60. According to Post and Siegel, norm contestation is a pathway for seeking to transform the values that underlie judicial interpretations of the Constitution. The backlash toward judicial interpretation from the public and representative government is best considered as a norm contestation. *See id*. at 381, 382-83.

61. *Id*. at 375.

62. *Id*. at 379. According to Robert Post and Reva Siegel, democratic constitutionalism neither seeks to take the Constitution away from courts, nor adopts a juricentric stance.

permissible constitutional construction,"[63] in which the three branches of government rather than the Court alone coordinate responses to the popular will by building institutions of government and enforcing and applying the constitutional text and its underlying principles.[64] According to this argument, the Court's interpretation of the constitution is just one dimension of the system of constitutional construction.

B. *Comment: A Vital Case for Judicial Review Overlooked*

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

Convincingly speaking, the fact that judicial review has spread globally would compromise the vehemence generated by critics of judicial review. But that does not mean that the existence of judicial review is self-evident in all aspects and that those who support judicial review no longer need to offer any other plausible justifications for the institution. In particular, judicial review cannot be said to have "triumphed." Instead, proponents of judicial review should not shy away from further enhancing the legitimacy of judicial review in modern constitutional democracies. Because judicial review is an institution with an inherently fragile character, that is, the Court has neither "sword" nor "purse" for enforcing its own decisions.

After reexamining the above-mentioned arguments, especially those supportive of judicial review, this study found that most debaters, whether on the "pro" or "con" side, based their rationales on democracy or democratic theory, illustrated especially by those who engage in power-exercise arguments. Many other scholars founded their arguments, positive or negative, on constitutionalism or constitutional theory, and this reality is mainly exemplified by those who engage in power-acquisition arguments and power-validity arguments.

Comprehensively observing, the voluminous works we have epitomized above manifest a fact that they, both pros and cons, focus on the related issues regarding the power of judicial review, including acquisition,

63. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009) [hereinafter Balkin, *Framework Originalism*]; *see also* Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 815-77 (2012).

64. Balkin, *Framework Originalism*, *id*. at 550.

legitimacy, and validity. However, they neglect the role of judicial review may play in a modern constitutional democracy from the perspectives of structural and functional analysis. In other words, a significant role of judicial review in striking a dynamic balance between constitutionalism and democracy has been overlooked by conventional wisdom.

Here lies a literature gap. This article tries to fill this gap by justifying that the central balancing role judicial review plays in a constitutional democracy can be affirmed from the perspectives of structural and functional analysis. At structural level, this article tries to illuminate the constitutional democracy as a structural framework consisting of two main systems--constitutionalism and democracy (as figure 1 and figure 2 show). Functionally analyzing, the justification about the role of judicial review in striking a dynamic balance between constitutionalism and democracy will be made on the bases of three major pillars: necessity, feasibility, and suitability. This article will explore them respectively in Part III, IV, and V.

III. NECESSITY: BALANCING UNEASY FORCES NEEDS JUDICIAL REVIEW

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

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

Constitutional democracy is a popular system that most countries in the world have adopted to guide their political and daily lives. Because it consists of two potentially incompatible components--constitutionalism and democracy--some critics ridicule the term "constitutional democracy" as an oxymoron.[65] As this article will show below, it is appropriate to regard it as a grand system in which two subsystems co-exist or in which two forces jostle against each other.

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

Throughout history, the fact that constitutionalism has preceded democracy[66] may evidence that people tend to harbor a deep and constant

65. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 728 (2010).

66. Allan C. Hutchinson & Joel I. Colón-Ríos, *What's Democracy Got to Do with It? A Critique of Liberal Constitutionalism* 4 (Comp. Res. L. & Pol. Econ., CLPE Research Paper No. 29/2007,

fear of government power before they push to express their aspirations by empowering a democratic representative government.

Based on the idea of ridding the people of fear of an arbitrary government[67] and thus protecting human rights, constitutionalists have devoted themselves to seeking to curb government powers by deploying various tethering mechanisms, such as a rigid constitution, the separation of powers, checks and balances, constitutional supremacy, and so forth. In this sense, constitutionalism is about the rule of the constitution. Subsequently, liberal constitutionalists had no alternative but to recognize that government is a necessary evil, because government's actions are conducive to maintaining social order and economic welfare under certain circumstances. By balancing the loss against the gain, constitutionalists accept the necessity of government power but employ laws, institutions, and norms to circumscribe that power.[68] In other words, they adopt the rule of law as the essential means to protect human rights by limiting government powers.

To sum up, constitutionalism at its core is a power-constraining system in which people, hoping to eliminate the constant fear of arbitrary government, try to protect their own rights based on the rule of law. In this scenario, constitutionalism is a force against fear in practical and empirical perspectives. As such, constitutionalism is basically characterized as a constraining system comprised of three elements--limiting government power, enforcing the rule of law, and protecting human rights.[69] The former two serve as the means of constitutionalism and protecting human rights serves as an end. This idea parallels Adrian Vermeule's observation that constitutionalism is a system of systems.[70]

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

Admittedly, many scholars recognize that there is no widely accepted definition of democracy. According to conventional wisdom in the social sciences, the original and minimal sense of democracy is commonly

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2007).

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

68. James Grimmelmann, *Sealand, Havenco, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 480-81 (2012).

69. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

70. Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 15 (2009).

regarded as "rule by the people"[71] or "self-rule,"[72] or "a form of government in which the people rule"[73] or "people govern themselves."[74]

Like constitutionalism, democracy can be seen as a system. By comparison, however, democracy at its core is an empowering system in which people empower government through certain procedures, and, in the name of self-rule, pursue their aspirations, namely substantive goals. Under this scenario, democracy may be considered as a force of hope from both practical and empirical perspectives. Furthermore, because the rule of law is among the essential pillars upon which any high-quality democracy rests,[75] and because both democratic procedures and substantive goals are effectively secured through the rule of law--thus preventing self-rule from turning into self-destruction[76]--democratic theorists embrace the rule of law as a central element of democracy.

Table 1: Dimensions of Democracy

Procedural dimension of democracy (means)	Protective dimension of democracy (means)	Substantive dimension of democracy (ends)
Equal participation Majority rule Representative governance Deliberative discourse	The rule of law	Human rights Minority rights Enduring values Pluralistic tolerance

Source: authors

To date, democracy at its most basic level is characterized as a self-governing system consisting of three dimensions[77]--a "procedural"

71. ANDREW HEYWOOD, KEY CONCEPTS IN POLITICS 125 (2000).

72. Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 LAW & PHIL. 353, 353 (2003).

73. GEORG SØRENSEN, DEMOCRACY AND DEMOCRATIZATION: PROCESSES AND PROSPECTS IN A CHANGING WORLD 3 (3d ed. 2008).

74. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 145 (2006).

75. Guillermo O'Donnell, *Why the Rule of Law Matters*, *in* ASSESSING THE QUALITY OF DEMOCRACY 3, 3 (Larry Diamond & Leonardo Morlino eds., 2005).

76. Dieter Grimm, *Levels of the Rules of Law on the Possibility of Exporting a Western Achievement*, 1 EUROPEAN-ASIAN J.L. & GOVERNANCE 5, 12 (2011).

77. There is plenty of social science literature elaborating on democracy. This article draws from some of it to provide a brief summary. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U.C. L. REV. 689, 701-02 (1995); Pierre Manent, *Modern Democracy as a System of Separations*, 14 J. DEMOCRACY 114, 114 (2003); Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1275 (2009); CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 68-83 (2007); ELY, *supra* note 29, at 7; BICKEL, *supra* note 22, at 58; Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 43 (2004); O'Donnell, *supra* note 75, at 7-8; Wen Cheng Chen, *Constitutional Patriotism as an Identity: A Study on the Feasible Approach toward Taiwan's Democratic Consolidation*, EUROPEAN-ASIAN J.L. & GOVERNANCE (SPECIAL ISSUE) 16, 18 (2011).

dimension, a "substantive" dimension, and a "protective" dimension. Broadly speaking, the "procedural dimension of democracy" entails four procedural principles--equal participation, majority rule, representative governance, and deliberative discourse; the "substantive dimension of democracy" consists of four goals--human rights, minority rights, enduring values, and pluralistic tolerance; and the "protective dimension of democracy" embraces a core principle, that is, the rule of law (Table 1). As a whole, the "procedural dimension of democracy" and "protective dimension of democracy" serve as the means of democracy, and the "substantive dimension of democracy" serves as an end. As with constitutionalism, democracy is a system of systems.

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

This leads to an obvious question: what is the real relationship between constitutionalism and democracy? To date, neither social scientists nor politicians have been able to proffer a satisfactory answer. Some contend that constitutionalism and democracy stand in an "insoluble tension,"[78] while other scholars claim that these two are not antithetical systems, but rather mutually presuppose each other.[79] Admittedly, as noted earlier, the fact that constitutionalism precedes democracy convinces us that the modern system of democracy is built into constitutionalism.[80] As history has evolved, constitutionalism and democracy, which respectively represent people's fears and hopes, have blended into a hybrid system that is called "constitutional democracy."

Accordingly, most people can plausibly agree that constitutionalism and democracy, each playing the role of a subsystem, co-exist uneasily in a hybrid system, because fear and hope are ambivalent while power-constraining and empowerment are to some extent contradictory. Moreover, the world is in a state of constant flux[81] and has changed in incalculable ways;[82] both constitutionalism and democracy are susceptible to such transient upheavals. In other words, constitutionalism and democracy blend in a hybrid system of constitutional democracy and co-exist in a

78. *See* Wouter G. Werner, *Democracy, Constitutionalism and the Question of Authority*, 39 RECHTSFILOSOFIE & RECHTSTHEORIE 267, 267 (2010); Frost & Lindquist, *supra* note 65, at 729 (claiming that constitutionalism may be viewed as the antithesis of democracy).

79. ZURN, *supra* note 77, at 1-2 (arguing that there are three options for understanding the relationship between constitutionalism and democracy: equivalent, antithetical, and mutually presuppositional). *See id*. at 104.

80. ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 8 (1999).

81. Todd Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 HARV. J.L. & PUB. POL'Y 195, 196 (2012).

82. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

dynamic state. Consequently, based on the need for stability and the systemic need for stability with balance,[83] the most compelling and inescapable responsibility of a constitutional democracy is to strike a sustainable balance between constitutionalism and democracy.

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

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

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

Based on the argument above, the overall framework of modern constitutional democracies might be structured as a grand system (Figure 1) consisting of two main subsystems--constitutionalism and democracy--that each comprises certain components. Delving into this structural framework of modern constitutional democracies, it is quickly apparent that there is a distinct nexus between constitutionalism and democracy. This nexus, as Figure 1 and Figure 2 indicate, clearly manifests two elements shared by constitutionalism and democracy--the rule of law and human rights protection. Relying on this nexus, the claim[84] that there is an irreconcilable tension between constitutionalism and democracy seems to be vulnerable to criticism.

As such, the relationship between constitutionalism and democracy would, and should, be comprehensively understood from two dimensions. On the one hand, they coexist in tension in a grand system in which a number of ostensibly contradictory forces--the forces of fear and forces of hope; power-constraint and empowerment; and the rule of the constitution and the rule of the people--are all intertwined. On the other hand, they

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

84. Werner, *supra* note 78.

connect with each other through an interdependent nexus in which they share both a means (the rule of law) and an end (human rights protection). From a structural perspective, reinforcing this interdependent nexus is essential to maintaining the systemic balance of a constitutional democracy.

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

How should this interdependent nexus be reinforced? That is, how can the rule of law be enforced to serve the end of protecting human rights? Because human rights protection rests on securing the rule of law, and the rule of law is built on the cornerstone of an efficient and effective judicial system,[85] judicially enforcing the rule of law and thus protecting human rights lies at the heart of enhancing the nexus and thus balancing constitutionalism and democracy.

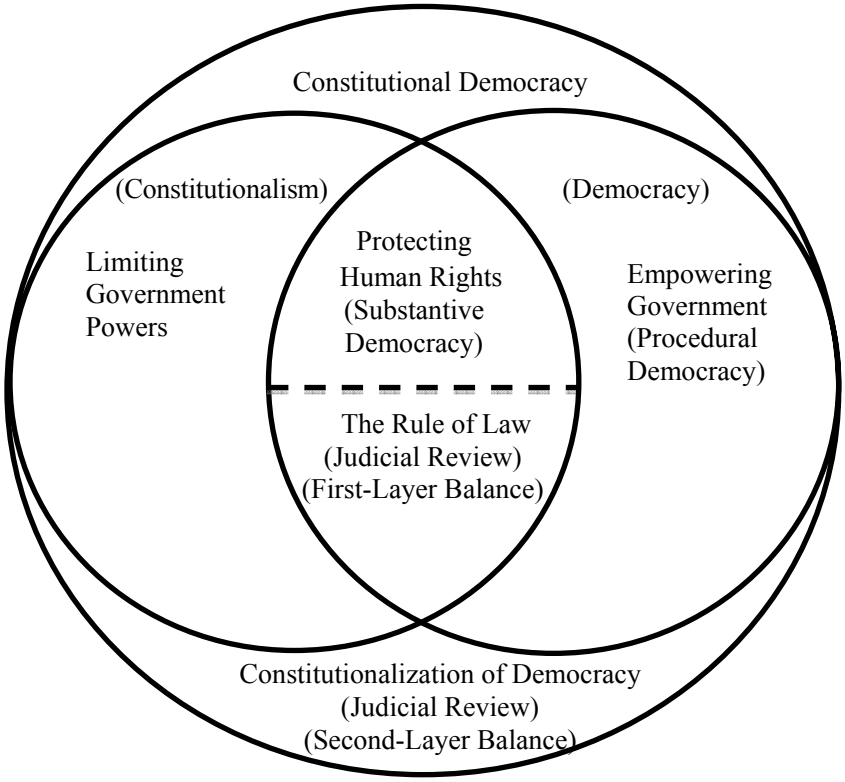

Figure 1: Balancing Constitutionalism and Democracy via Judicial Review

Source: authors

85. Stephen Golub, *The Rule of Law at the UN Peacebuilding Commission: A Social Development Approach*, 20 CAMBRIDGE REV. INT'L AFF. 47, 54 (2007).

Then, a further question arises. What is the relationship between the rule of law and judicial review? Conventional wisdom and current research have confirmed that the institution of judicial review is necessary, if not sufficient, for the enforcement of the rule of law. For instance, Dieter Grimm, a former justice of the German Constitutional Court, contends that "all experience teaches us, the rule of law is on shaky ground without judicial review."[86] Ittai Bar-Siman-Tov makes a plausible argument through a syllogism as follows:[87] First, the rule of law requires that all government actions are bound by laws. Second, judicial review is necessary, or at least extremely important, to keeping a disinterested eye on government actions; therefore, third, judicial review is central to the rule of law.

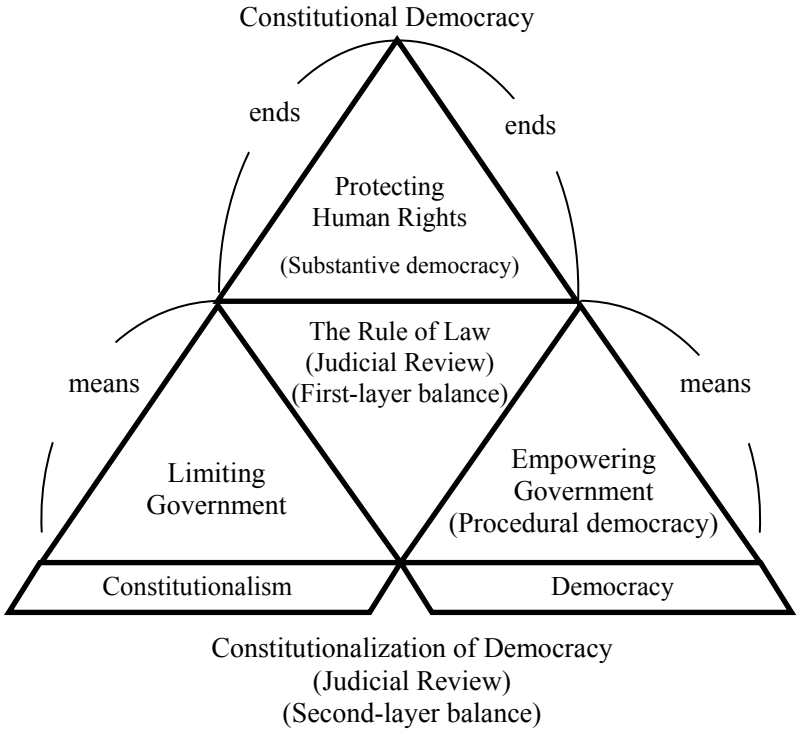

Figure 2: Balancing Constitutionalism and Democracy via Judicial Review

Source: authors

In a nutshell, judicial review plays a crucial role both in enforcing the rule of law and in protecting human rights, and thus consolidates the nexus

86. Grimm, *supra* note 76, at 12.

87. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1940 (2011).

between constitutionalism and democracy. Analogically speaking, judicial review serves as essential sprockets in the twin wheels of constitutionalism and democracy[88] in constitutional democracies. Under these conditions, constitutionalism and democracy might be viewed as compatible tools for achieving the same basic task (human rights protection); they complement each other at systematic and functional levels (Figure 2). Accordingly, judicial review actually plays a necessary and vital role in striking a dynamic balance between constitutionalism and democracy.

IV. FEASIBILITY: JUDICIAL REVIEW IS ARMED WITH BALANCING TOOLS

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

A. *Judicially Feasible Balancing: A Two-Layer Mechanism*

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

1. *The First-Layer Balancing Mechanism*

The first-layer balancing mechanism is concerned with judicially enforcing the rule of law via pluralistic methods. As this paper discussed in Part III, because the enforcement of the rule of law by the judiciary and its subsequent human rights protection structurally lie at the heart of enhancing

88. Donald P. Kommers, *American Courts and Democracy: A Comparative Perspective*, *in* THE JUDICIAL BRANCH 200, 200 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

the nexus of constitutionalism and democracy, the rule of law (and protecting human rights) in fact becomes the consensus, or at least a *modus vivendi*,[89] of theorists of constitutionalism and democracy. Although many commentators contend that the rule of law is a complex, or an essentially contested, concept,[90] four aspects of the rule of law are taken seriously as the foundation of modern constitutional democracies. The four aspects are:[91] (1) *procedural aspect*: includes democratic legislation, rule by law, formal legality, and the subjecting of all state actions to the law; (2) *substantive aspect*: includes rule of good law, the guarantee of social justice, and the safeguarding of fundamental values; (3) *jurisprudential aspect*: laws must be enacted in accordance with some principles that are proffered by pundits, such as generality, publicity, clarity, consistency, feasibility, stability, prospectivity, and congruence; (4) *protective aspect*: establishing an independent judiciary with the power of judicial review to enforce the rule of law.

Because judicial review does matter in securing the rule of law, it is obviously critical to explore the way that the rule of law is enforced via the judiciary in practice. Adopting the first-layer balancing mechanism, courts or justices can achieve their balancing function by flexibly employing well-developed or newer pluralistic methods, including proportionality analysis (or proportionality review), equilibrium adjustment, structural balancing, risk analysis, cost-benefit analysis, interest balancing, rights-enlargement and remedy-implementation, the incorporation of values, structural interpretation, and so forth.[92] The adoption of the first-layer balancing mechanism is capable of attaining three goals that will lead to the systemic balance of constitutional democracies. The first goal is to maintain the balance between limiting government powers and protecting human

89. The significance of the rule of law, even if no standard of its content has been recognized, is accepted worldwide. For instance, at the United Nations World Summit in 2005, member States unanimously recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels." Some other influential organizations have endorsed the rule of law, such as the World Bank, the World Social Forum, and the American Bar Association (ABA). The ABA in particular contends that "the rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today." *See* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 332 (2008); Petea Dobner, *More Law, Less Democracy? Democracy and Transnational Constitutionalism*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 141, 142 (Petra Dobner & Martin Loughlin eds., 2010).

90. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7 (1997); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 10 (2008); Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. ON RULE L. 48, 49 (2010).

91. The essentials of this view are derived from the following works: (1) AHARON BARAK, THE JUDGE IN A DEMOCRACY 53-56 (2006); (2) Bedner, *id*. at 56-72; (3) David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller's Canons*, 2 HAGUE J. ON RULE L. 29, 31(2010); (4) Bar-Siman-Tov, *supra* note 87, at 1932; (5) Fallon, *id*. at 8.

92. This article is going to discuss the application of these methods by courts in part IV-B.

rights within the bounds of constitutionalism, which is a subsystem of a constitutional democracy. The second goal is to maintain equilibrium between procedural democracy and substantive democracy within the confines of democracy, which is also a subsystem of a constitutional democracy. The third goal is to strike a balance between constitutionalism and democracy by continuously strengthening their nexus--the rule of law and human rights protection. Notably, achieving the third goal is closely linked to the former two.

2. *The Second-Layer Balancing Mechanism*

At its core, the second-layer balancing mechanism is concerned with the judicial constitutionalization of democracy and perhaps with a need for the judicialization of politics. Broadly defined, the judicial constitutionalization of democracy refers to a judicially enforced process of subjecting the exercise of all types of political power, democratic political activities, and even intractable political controversies, to the discipline of constitutional procedures and norms.[93] The judicialization of politics is characterized as either an expansion of judicial authority over public affairs[94] or a reliance on the judiciary to resolve core moral predicaments, public policy issues and political conflicts.[95] Both the judicial constitutionalization of democracy and the judicialization of politics embody to some extent Alexis De Tocqueville's observation years ago that the American experience involves a spontaneous or inevitable transformation of political questions into legal ones.[96]

Generally speaking, both the judicial constitutionalization of democracy and the judicialization of politics subject democracy to constitutional norms or tame democracy through constitutionalism. In this scenario, democracy represents a centrifugal force, and constitutionalism is tantamount to a centripetal force, with the two forces reaching a basic equilibrium through judicial patrol of constitutional boundaries.[97] As such, democracy will not

93. Martin Loughlin, *What Is Constitutionalisation*?, *in* THE TWILIGHT OF CONSTITUTIONALISM?, *supra* note 89, at 47, 47.

94. Tom Ginsburg, *Judicialization of Administrative Governance: Causes, Consequences and Limits*, 3 NAT'L TAIWAN U. L. REV. 1, 3 (2008); John A. Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 41 (2002).

95. Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 2, at 119, 119.

96. What de Tocqueville emphasized is that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1994) (1835).

97. Stephen Breyer claims that the Court's core job in a constitutional democracy is to patrol on the constitutional boundaries. *See* BREYER, *supra* note 83, at 3, 215; Stephen Breyer, *Making Our*

run off its constitutional trajectory, and constitutional democracy can constantly function even in a state of a changing balance.

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

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

1. *Balancing Subsystems within Constitutionalism*

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

(a) Proportionality Analysis

Proportionality analysis (PA) was initially established to regulate the conflict between police power and individual freedom in Germany.[98] In 1965, the German Federal Constitutional Court (GFCC) recognized PA's constitutional status and declared in 1968 that PA is a "transcendent standard for all state action" binding all public authorities.[99] With the evolution of constitutional theory and practice, PA has been recognized as an overarching principle of constitutional adjudication.[100] In a theoretical sense, judges around the world have ranked PA as a fundamental as well as a constitutional principle.[101] In practice, proportionality analysis has become a cornerstone of jurisprudence across Europe and in Canada, South Africa, Israel, New Zealand, the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the Appellate Body of the World Trade Organization.[102] Functionally, proportionality analysis is usually used for

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Democracy Work: The Yale Lectures, 120 YALE L.J. 1999, 2000 (2011).

98. Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 98.

99. *Id*. at 110.

100. *Id*. at 74. For further discussion, *see* Chen & Chu, *supra* note 2, at 391-93.

101. Mathews & Sweet, *All Things in Proportion*, *supra* note 2, at 799.

102. *Id*.; Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 75; Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20 CAM. REV. INT'L AFF. 71, 71-77 (2007) [hereinafter Andenas & Zleptnig, *Proportionality and Balancing*]; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 371-423 (2007) [hereinafter Andenas & Zleptnig, *Proportionality: WTO Law*]; Harbo, *supra* note 2, at 158-59.

resolving a conflict between two competing rights claims or between a rights provision and a legitimate government interest.[103] To date, proportionality analysis has emerged as a best practice standard[104] in sustaining the balance between government power and human rights.

As far as the application of PA is concerned, especially for cases involving a conflict between a rights provision and a government action, three tests must be undertaken, one at a time:[105] (a) *suitability test*: this requires that there must be a suitable, rational or appropriate relationship between the means adopted and ends pursued. In this test, government has the burden of proof to demonstrate the relationship; (b) *necessity test*: this is called a "least-restrictive-means" (LRM) test. LRM tests require that the means chosen by the government do the minimum harm to individuals or a community. Simply put, the government should adopt a measure, *inter alia,* that is the least restrictive option; (c) *test of proportionality in the narrow sense*: it is also called "balancing in the strict sense." In this last step, judges need to weigh whether or not the costs of a measure adopted disproportionately overweigh the benefits of an end pursued and thus impose an excessive burden on individuals or communities.

In practice, many courts around the world have employed PA in their constitutional jurisprudence. Symbolically, although the United States Supreme Court normally employs a three-tier review[106] in many cases--rational basis review, intermediate scrutiny, and strict scrutiny--it does not ignore the jurisprudential significance of PA. It has tried, for instance, to incorporate PA into its death penalty jurisprudence in sequent cases[107] over the past decade, such as *Atkins v. Virginia*[108] in 2002, *Roper v. Simmons*[109] in

103. Mathews & Sweet, *All Things in Proportion, supra* note 2, at 802; Harbo, *supra* note 2, at 158.

104. Mathews & Sweet, *All Things in Proportion, supra* note 2, at 802; Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 75.

105. Alec Stone Sweet and Jud Mathews contend that there must be an additional legitimacy test in which judges, at a preliminary stage, confirm whether the government's means at issue is constitutionally authorized. *See* Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 76; Mathews & Sweet, *All Things in Proportion*, *supra* note 2, at 802-03. Normally, however, a three-part test is enough for most cases, *see* Harbo, *supra* note 2, at 165; Andenas & Zleptnig, *Proportionality and Balancing*, *supra* note 102, at 75-76; Andenas & Zleptnig, *Proportionality: WTO Law*, *supra* note 102, at 386-89.

106. Paradigmatically, the United States Supreme Court employs a three-tier test. But Jud Mathews and Alec Stone Sweet have suggested that the American scheme of three-tier test suffers three serious pathologies, including judicial abdication, analytical incompleteness, and doctrinal instability, *see* Mathews & Sweet, *All Things in Proportion*, *supra* note 2, at 836-37.

107. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 785-89 (2009). In fact, according to a study, proportionality analysis appears from time to time in American constitutional decisions. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 292 (2005).

108. Atkins v. Va., 536 U.S. 304, 304-54 (2002) (the Court found that all people with mental retardation are constitutionally exempt from capital punishment based on their diagnosis); *see* Winick, *id*. at 786.

2005, *Kennedy v. Louisiana*[110] in 2008, and *Graham v. Florida*[111] in 2010. Accordingly, the United States Supreme Court recognized that "the concept of proportionality is central"[112] to death penalty cases.

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

(b) Equilibrium Adjustment

Police power is an essential government power. It inherently reflects the twofold nature of government powers: a government's actions may contribute to social order and help protect human life, but they can also threaten human rights and individual liberties. Simply put, government power has always represented both hope and fear,[113] and police power is no exception.

Equilibrium adjustment might be seen as a judicial tool for maintaining the balance of the Fourth Amendment of the United States Constitution[114] in a changing world. Courts adjust legal restrictions in response to changing technology and social practice for the purpose of balancing police power and individual rights. According to Oris S. Kerr, the mechanism of equilibrium adjustment has been deployed by the Supreme Court.[115] When changing social conditions have made it harder for the government to obtain evidence,

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109. Roper v. Simmons, 543 U.S. 551, 551 (2005) (in this case, the Court held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"); *see also* Winick, *supra* note 107, at 786.

110. Kennedy v. La., 554 U.S. 407, 407 (2008) (in this case, the Court held that "the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.") *see also* Winick, *supra* note 107, at 787.

111. Graham v. Fla., 130 S. Ct. 2011, 2011-59 (2010) (in this case, by considering the proportionality between the culpability of the offender and the severity of the punishment, the Court ruled that a life sentence without parole for any juvenile non-homicide offender is unconstitutional). *See* Rebecca Shepard, Note, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders*, 28 GA. ST. U. L. REV. 529, 540 (2012).

112. *Fla.*, 130 S. Ct. at 2021.

113. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 816 (2012).

114. The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures," and it provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

115. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480, 487 (2011) [hereinafter Kerr, *Equilibrium-Adjustment Theory*]; Orin S. Kerr, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 84-90 (2012) [hereinafter Kerr, *Defending Equilibrium-Adjustment*].

the Supreme Court has tended to loosen Fourth Amendment restrictions to help restore the strength of government power. But when it has been easier for the government to obtain evidence, the Supreme Court generally embraces higher protections to help restore the prior level of privacy protection. Under this scenario,[116] Fourth Amendment jurisprudence resembles a situation in which a car tries to sustain a constant speed on a mountain road, with the Supreme Court acting as the driver. It steps on the gas when the car is facing an uphill climb and eases off the accelerator when the car is heading downhill.

In practice, the Supreme Court has adopted equilibrium adjustment in several cases involving the government's use of radio beepers, thermal imaging devices, and global positioning system (GPS) devices.[117] Among radio-beeper cases, the Supreme Court found in *United States v. Knotts*[118] that the use of a beeper to follow a given car on highways did not constitute a search. But the next year, the Court adjusted its equilibrium mechanism in *United States v. Karo*[119] by holding that employing a beeper to collect information inside a home amounted to a search that required a warrant. In other words, using a beeper to monitor facts in the public sphere is constitutionally allowed but doing the same thing in a person's home is not. Likewise, in *United States v. Jones*,[120] the Court held that "the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment." Placing a physical GPS device on the defendant's car to monitor the defendant 24 hours a day constituted a "search" in the Court's mind.[121]

Obviously, if the government's use of surveillance technology, such as GPS devices, is not subject to constitutional curbs, such as the need to get a warrant, then these devices could potentially be abused and encroach significantly on individual privacy.[122] Fortunately, the Court has been able to strike a dynamic balance between government power and human rights through equilibrium adjustment.

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116. Kerr, *Equilibrium-Adjustment Theory*, *id*.

117. *Id*. at 496-501.

118. United States v. Knotts, 460 U.S. 276, 276-89 (1983).

119. United States v. Karo, 468 U.S. 705, 705-37 (1984).

120. United States v. Jones, 565 S. Ct. 945, 945 (2012).

121. A concise comment on *United States v. Jones* has been proffered by Peter Swire. *See* Peter Swire, *A Reasonableness Approach to Searches after the Jones GPS Tracking Case*, 64 STAN. L. REV. ONLINE 57, 57-62 (2012).

122. Priscilla J. Smith, Nabiha Syed, David Thaw & Albert Wong, *When Machines are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right against Unreasonable Searches*, 121 YALE L.J. ONLINE 177, 201 (2011).

(c) Structural Balancing

Structural balancing is calculated to indirectly rather than directly protect human rights through the judicial enforcement of a balance between government branches. Usually, both vertical checks and horizontal checks between government branches are rooted in a constitution. Theoretically, therefore, the structural design of government should create politically self-sustaining protections for the rights of citizens.[123] The critical point is how courts handle their structural balancing responsibilities.

In practice, in ordinary situations, courts simply enforce constitutional provisions concerning the separation of powers and checks and balances, because a constitution's structural provisions always contain rules about how, where and when institutions of government operate.[124] In times of crisis, however, courts are not always capable of fulfilling their balancing function as would normally be the case, for courts are laden with an institutional weakness--they have neither sword nor purse. In such circumstances, according to Daryl Levinson,[125] judges may shift responsibility for checking executive decision-making from the courts to Congress, or shift responsibility for checking legislative power from the courts to the president. Consequently, employing a flexible method of structural balancing, courts can maintain the overall balance of a government in a changing world, a balance that indirectly effects human rights protection.

2. *Balancing Subsystems within Democracy*

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

(a) Additional Balancing Techniques

"Balancing techniques" may be the most popular tools for courts and are particularly well-suited for carrying out judicial functions. The concept can be defined as "a normative process by which one attempts to resolve a clash between conflicting values."[126] At its core, the role of balancing is to determine the proper boundary between competing values rather than

123. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1296 (2012).

124. Adrienne Stone, *Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD J. LEGAL STUD. 1, 3 (2008).

125. Levinson, *supra* note 123, at 1289, 1302.

126. BARAK, *supra* note 91, at 166, 172-73.

eliminate the inferior value.[127] In a value-laden and pluralistic democracy, the technique of balancing has been broadly applied in cases with competing values involved.

Around the world, there have been many practical methods crafted or developed to help judges do their jobs. They are risk balancing (or risk analysis),[128] interest balancing,[129] cost-benefit analysis (CBA),[130] rights-enlargement & remedy-implementation analysis,[131] purposive interpretation or teleological interpretation,[132] arbitrary and capricious review,[133] representation-reinforcing review,[134] structural reasoning (interpretation),[135] incorporation,[136] and so forth.

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127. *Id*. at 165.

128. Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 171-255 (2012).

129. Harmon, *supra* note 113, at 769; *id*. at 182.

130. Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. & PUB. POL'Y 171, 179 (2012). One critic contends, however, that "cost-benefit analysis might incorporate intuitions rather than disciplining them," *see* Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. (SPECIAL ISSUE) 1895, 1908 (2007).

131. The rights-enlargement & remedy-implementation analysis is considered as a conventional paradigm for balancing police power and human rights. It originated in Warren Court jurisprudence. The Warren Court enlarged the Fourth Amendment right against unreasonable searches and seizures on the one hand, and implemented the remedy for the enlarged rights on the other hand. *See* Harmon, *supra* note 113, at 765-68.

132. Purposive interpretation means that the interpreter must extract the legal significance that best realizes the purpose of the constitution in order to strike a proper balance between subjective intent of the framers and objective social conditions. Put simply, judges have to discover, and then put into effect, the end of the Constitution. *See* BARAK, *supra* note 91, at 127-28; Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161, 200-01 (JEFFREY GOLDSWORTHY ed., 2007).

133. Courts use arbitrary and capricious review to ensure that executive agencies vindicate their actions with adequate reasons. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 891, 901-02 (2012).

134. Representation-reinforcing review is an approach used in constitutional interpretation. It means that constitutional provisions must be interpreted so as to reinforce the nation's system of democratic representation. *See* Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 132, at 7, 33-35; ELY, *supra* note 29; MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS 255-58 (2009).

135. Structural reasoning, or structural interpretation, is based on a concept that the Constitution is a unified structure of various values and relationships. Under this approach, every provision of the Constitution should be interpreted as being compatible with the fundamental principles of the Constitution as a whole. *See* Kommers, *supra* note 132, at 199-200; TUSHNET, *id*. at 253-55.

136. Literally, and in an American jurisprudential context, incorporation is a process of applying the provisions of the Bill of Rights to the states by interpreting the 14th Amendment's Due Process Clause as encompassing those provisions. *See Incorporation*, BLACK'S LAW DICTIONARY (3d ed. 2006); Jeffrey Goldsworthy, *Conclusions*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 132, at 321, 326.

(b) Balancing Democracy in Practice

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

In practice, based on the necessity of combining stability with balance, courts seek to maintain the systemic balance within a democracy by mastering pluralistic methods. Generally, courts broadly apply "balancing techniques" and many other tools to strike a balance between procedural democracy and substantive democracy while carrying out the rule of law. Both procedural democracy and substantive democracy are precious values embedded into the legal system, and the legal system of a given democratic regime embraces the proper balances between the different values.[137] Let us take a look at the American case.

On the side of balancing values in procedural democracy, we may check the influence of American judicial review on basic procedural principles of democracy--equal participation, majority rule, representative governance, and deliberative discourse (Table 1)--to determine whether the institution has positive effects on democracy. First, the U. S. Supreme Court has gradually expanded participatory rights of citizens by establishing principles like "one person, one vote" in *Reynolds v. Sims*.[138] Through this process, the Court has stabilized American democracy step by step.[139] Second, on the principle of majority rule, a growing literature[140] has suggested that the exercise of

137. BARAK, *supra* note 91, at 175.

138. Reynolds v. Sims, 377 U.S. 533, 533-632 (1964). The U.S. Supreme Court found that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *See id*. at 555. Significantly, the Court viewed the right to vote as special, because this right is "preservative of other basic civil and political rights." *See id*. at 562; Levinson, *supra* note 123, at 1306.

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

140. *See* Dahl, *supra* note 16, at 570, 581 (suggesting that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States," and "the main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition"); Epstein, Knight & Martin, *supra* note 31, at 583-611 (Lee Epstein et al.'s "supporting majority preference theory" confirmed Dahl's "ruling regime thesis"); Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2011) (noting that "not only do justices have reason to believe that ignoring the public may compromise public confidence in the Court, but also the Court's decisions--at least for nonsalient cases--consistently respond to changes in public opinion"). Barry Friedman argued for the thesis that the practice of judicial review is compatible with majority

American judicial review has not run afoul of majority rule, for the Supreme Court has usually remained safely within the boundaries of the will of the political majority over the course of history.[141] Third, there is still the question of whether American judicial review is capable of promoting representative governance in a democracy. By adopting a representation-reinforcing review, in *United States v. Carolene Products Co.*,[142] for example, the Court sought to facilitate the nation's system of democratic representation by reinforcing participatory channels for underrepresented people.[143] Further, the Court is one of the agents in a democratic regime, so we cannot completely deny that unelected justices are able to serve as representatives,[144] because they are appointed by presidents and confirmed by the Senate. Fourth, regarding the democratic procedure of deliberative discourse, a growing number of commentators confirm that American judicial review, by issuing hundreds of decisions with reasoned opinions, plays a role in encouraging deliberative discourse between citizens and their representatives,[145] between the Court and the people,[146] and between the judiciary and other branches.[147] From the viewpoint of comparative interest, Scott M. Noveck emphasizes that judges possess a unique institutional posture[148] and may be better suited than legislators to deliberate on certain matters of principle.[149] Based on these positive findings, we are convinced that judicial review is beneficial in balancing different democratic procedures.

On the side of substantive democracy, let us evaluate whether the

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rule and thus finds broad support, *see* Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1232-33 (2010); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 367-85 (2009).

141. *See* Levinson, *supra* note 4, at 735.

142. United States v. Carolene Prod. Co., 304 U.S. 144, 144-55 (1938).

143. ELY, *supra* note 29.

144. Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 345 (2012) (asserting that federal judges *do* represent the community, because they are chosen within the community and through a constitutional process).

145. Michael J. Perry confirms that "the courts have an important role to play in encouraging citizens and their representatives to take seriously the possibility of a deliberative politics." *See* PERRY, *supra* note 30, at 160.

146. Barry Friedman contends that judicial review provides a catalyst and method for people to understand the constitution's meaning. *See* FRIEDMAN, *supra* note 140, at 367.

147. The Court may purport to enhance the democratic process by rewarding agencies for resolving difficult legal problems via an open and deliberative process, and by punishing agencies for pursuing narrower ideological agenda in lieu of a secret, nonpublic process. *See* William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1301-02 (2009).

148. The unique institutional posture of American judges is characterized by some features: (1) they get life tenure, (2) they are insulated from momentary political pressures, (3) they face better incentives to write themselves into office, and (4) they-face better incentives to police the political process. *See* Noveck, *supra* note 14, at 419.

149. *Id*. at 430.

exercise of judicial review results in safeguarding the core substantive values of democracy. These values (Table 1) include protecting human rights, assuring minority rights, maintaining enduring values, and preserving pluralistic tolerance. First of all, it goes without saying that in practice, by handing down many decisions regarding human rights, American judicial review has effectuated a robust function of protecting various kinds of rights. This is easily demonstrated in many constitutional textbooks.[150] The rights buttressed by the Court may be briefly listed as encompassing economic rights, freedom of speech, freedom of the press, freedom of association, freedom of religion, the right to counsel and procedural guarantees, the right to freedom from cruel and unusual punishment, the right of privacy, and numerous rights that are beyond enumerating.

The second substantive value of democracy is assuring minority rights. It is well known that there are many ethnic minorities in American society, and minorities can easily be consistent losers in normal but majority-based political games. In order to protect minority rights, the U. S. Supreme Court, in the famous footnote 4 of *United States v. Carolene Products Co.*,[151] established a strict scrutiny test for reviewing government regulations concerning "discrete and insular minorities." Following that footnote, many great successes, such as *Brown v. Board of Education*,[152] "one person, one vote," and the expansion of free speech rights for political dissidents were unified[153] in protecting minority rights. Though the U. S. Supreme Court handed down historically notorious decisions like *Dred Scott v. Sandford*[154] and *Plessy v. Ferguson*,[155] it changed its views and returned to the road of protecting minority rights in *Brown*.

Third, let us look at the substantive value of maintaining enduring values that underpin democracy. Alexander M. Bickel is right when he notes the truism that democratic governments should serve not simply the immediate material needs of their people but also uphold certain enduring values, and that the Court should be the appropriate pronouncer and guardian of such values.[156] For instance, the school segregation cases that were ultimately rectified by *Brown v. Board of Education* in 1954, illustrated the

150. *E.g.*, RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW (2004); 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES (8th ed. 2011).

151. *Carolene Prod. Co.*, 304 U.S. at 152 n.4.

152. Brown v. Board of Education of Topeka, 347 U.S. 483, 483-96 (1954).

153. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1251 (2010). In fact, the view that combining the debates over judicial review legitimacy with the protection of individual and minority rights has become conventional wisdom around the world, *see* Bar-Siman-Tov, *supra* note 87, at 1926.

154. Scott v. Sandford, 60 U.S. 393, 393-633 (1857).

155. Plessy v. Ferguson, 163 U.S. 537, 537-64 (1896).

156. *See* BICKEL, *supra* note 22, at 24.

critical role the Court has played in maintaining enduring values, such as human dignity, justice, morality, and equality.

Finally, let us turn to the substantive value of democracy-preserving pluralistic tolerance. A pluralist democracy, like the United States of America, will face the institutional challenge of keeping rival groups engaged in politics, directing their efforts toward the public good, and avoiding feuds and other mutually destructive conflicts.[157] As William N. Eskridge Jr. observes and suggests,[158] American judicial review can strengthen pluralist democracy by (1) enforcing neutral rules of political engagement, such as in the case of *United States v. Lopez*,[159] (2) ameliorating cultural wars in lieu of defending freedom of religion, such as the case of *Lee v. Weisman*[160] or *Church of the Lukumi Babalu Aye v. City of Hialeah*,[161] and (3) reversing the burden of inertia for obsolete statutory policies.

The judicially enforced balance of procedural democracy and substantive democracy is also illustrated by its resolution of the potential conflict between majority rule and minority rights. Majority rule is a necessary, but not sufficient, procedure for realizing democratic ideals,[162] but it is premised on the fact that there are no permanent losers in the only game in town. Therefore, majority rule will lose its moral justification if there are discrete and insular minorities whose political views and interests are consistently less likely to prevail than that of any other group.[163] In such circumstances, minorities are entitled to be protected by certain basic rights[164] that majorities cannot take away through majority rule. As such, minority rights protection has been recognized as a substantive value of democracy. Under these conditions, the task of balancing majority rule and minority rights is crucial to democracy's stability. The American case is highly instructive. Notorious cases, such as *Scott* and *Plessy*, signify the fact that the majority's will prevailed in America for many years. Fortunately, the

157. *See* William N. Eskridge, *The Marriage Cases-Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CAL. L. REV. 1785, 1787 (2009).

158. *See* Eskridge, *supra* note 37, at 1301-10.

159. United States v. Lopez, 514 U.S. 549, 549-644 (1995).

160. Lee v. Weisman, 505 U.S. 577, 577-646 (1992).

161. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 520-80 (1993).

162. Many critics embrace the same concept. *See* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 131, 140 (2006) (arguing that the United States is certainly not a pure example of the majoritarian conception of democracy, and that majority rule is by no means always an appropriate decision-making procedure); Staszewski, *supra* note 133, at 861, 875 (claiming that policymaking in a constitutional democracy is not, and should not try to be, purely majoritarian, and that majority rule is not the true end of constitutional democracy); Sandefur, *supra* note 144, at 285 (contending that the Constitution is not a morally neutral framework for mere majority-rules decision-making).

163. Staszewski, *supra* note 133, at 863 n.57.

164. Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1038 (2010).

Court balanced that will with its famous decision in *Brown*. From then onwards, the balance has been sustained for decades by embodying certain policies beneficial to minorities, such as affirmative action. Interestingly and symbolically, as pluralism anxiety,[165] characterized by the growing diversification of minorities, has mounted in American society since the 1970s, the Court has systematically denied constitutional protection to new groups, according to a study by Kenji Yoshino.[166] It has acted this way because this pluralism anxiety could have potentially compromised collective actions that are necessary for and conducive to national development. In so doing, the Court has sought to restore the balance between majority rule and minority rights.

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

3. *Balancing Constitutionalism and Democracy*

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

In previous depictions, this article has demonstrated that judicially enforced the rule of law is the key to reinforcing the very nexus. If the courts are to continuously enhance the rule of law, and ensuing human rights protection, through the flexible application of pluralistic methods,[167] especially the adoption of structural interpretation (reasoning) and incorporation, then keeping the dynamic balance between constitutionalism and democracy is feasible in modern constitutional democracies. In describing the American experience, Barry Friedman contends that "in its evolution, judicial review actually has become the American way of mitigating the tension between government by the people and government under a Constitution."[168]

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165. According to Kenji Yoshino, the concept of "pluralism anxiety" refers to an apprehension of and about American demographic diversity. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011).

166. *Id*. at 748.

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

168. FRIEDMAN, *supra* note 140, at 367.

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

C. *Second-Layer Balancing: Judicial Constitutionalization of Democracy*

Strictly put, the judicial constitutionalization of democracy is not a brand new process, because political activities held in a liberal democracy are closely connected with constitutional norms. In the process of implementing the constitution, courts and judges find it hard to remain insulated from political issues. Initially, courts and judges are reluctant to enter into the political morass and try to dodge those cases that involve high-profile political controversies by adhering to the doctrine of political question.[169] As time goes on, however, a series of political cases come to the courts, and the doctrine of political question is loosened, with the concept of justiciability[170] gradually embraced by the courts. Admittedly, Hirschl is right to some extent when he writes that the idea that "anything and everything is justiciable appears to have become a widely accepted motto by courts worldwide."[171] In principle, based on the principle that the "constitution is justiciable,"[172] as Joseph Raz asserts, any political activity bound by the constitution should be justiciable.

As the global trend of widely accepted justiciability gains momentum, the fervor of judicialization of politics becomes more powerful.[173] In other

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169. *Carr*, 369 U.S. at 217. In this case, the U. S. Supreme Court described six criteria concerning the doctrine of political question as follows: (1) Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *See* also David H. Coar, "*It Is Emphatically the Province and Duty of the Judicial Department to Say" Who the President Is?*, 34 LOY. U. CHI. L.J. 121, 126 (2002); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 957 (2001).

170. Justiciability has been considered as a principle of constitutional interpretation; it means that a controversy or conflict is appropriate, and able to be resolved by the judiciary.

171. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 221 (2004).

172. Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 153-54 (Larry Alexander ed., 1999).

173. Ran Hirschl analyizes that juducialization of politics includes three interrelated processes:

words, judicial oversight of democracy[174] is actually inevitable in ordinary political practice. Under these constitutional moments,[175] courts and judges may have frequent opportunities to translate democratic values into constitutional norms. Synthetically, according to the main aspects of democracy identified in Table 1, the judicial constitutionalization of democracy might be realized by three processes:

1. *Judicial Constitutionalization of Procedural Democracy*

In this process, courts and judges can translate the evolving values of different democratic procedures into a system of constitutional norms. For example, majority rule is a critical procedural value, but some terribly undemocratic results, such as Nazism, Jim Crow, and South African apartheid, have been produced by democratic majorities in human history.[176] Consequently, the fundamental spirit of majority rule, designed to promote democracy, was lost. Confronting these situations, courts and judges have the chance, in lieu of striking down self-defeating legislation, to ignore undemocratic results and enshrine the real spirit of majority rule, as in the well-known case of *Brown v. Board of Education* in 1954. Likewise, courts might clear all political processes and prevent incumbent politicians from distorting the political process through actions such as gerrymandering, resulting in the value of political equality being incorporated into constitutional norms.

2. *Judicial Constitutionalization of Substantive Democracy*

Through this mechanism, courts and judges can incorporate enduring values that have not been explicitly stipulated in the Constitution. For

(1) it refers to the spread of legal discourse, jargon, rules, and procedures into the political arena and policy-making process; (2) it refers to the expansion of the courts' authority in public policy decision-making by redrawing the boundaries of state powers; (3) it refers to the reliance on courts and judges for resolving the core political conflicts that define whole polities, like judicialization of the national electoral process, national-building process, and so forth. *See* Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 723-24, 727 (2006); Hirschl, *supra* note 95, at 121-23.

174. Yasmin Dawood contends that judicial oversight of democracy has posed intractable problems for constitutional law, *see* Dawood, *supra* note 67, at 1411. However, judicial oversight of democracy might be regarded as a developing style of constitutional development.

175. *See* Ackerman, *Constitutional Politics*, *supra* note 34; *see also* JACK M. BALKIN & REVA B. SIEGEL, *The Constitution in 2020*, *in* THE CONSTITUTION IN 2020 1, 6 (Jack M. Balkin & Reva B. Siegel eds., 2009) (noting that "in a democratic society, courts best perform their institutional role as partners in a larger dialogue: They respond to popular visions of the Constitution's values and help to translate these values into law").

176. Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516, 520 (2006) (reviewing KRAMER, *supra* note 42; JEREMY WALDRON, LAW AND DISAGREEMENT (2001); EISGRUBER, *supra* note 17).

instance, although the term "human dignity" is not mentioned in the Constitution, the U.S. Supreme Court has invoked the concept of "dignity" in many opinions. The Roberts Court invoked "dignity" in 34 cases between 2005 and 2011.[177] Arthur Chaskalson is right when he asserts that "treating dignity as a foundational value of a human right order may give it greater weight than if it were treated merely as an enumerated right."[178]

3. *Judicial Constitutionalization of the Rule of Law*

In this process, courts and judges may incorporate values that extend the rule of law into constitutional norms. For example, proportionality has not been enumerated in many constitutions, but, through the process of constitutionalization, it has been treated as a criterion for the perfection of the rule of law, and it is today a foundational element of global constitutionalism.[179] At the same time, not all constitutions create democratic orders, but they do create legal orders.[180] Without a doubt, this legal order should be embedded into constitutional norms, so that it is capable of taming the democratic order. This is why Jeremy Waldron emphasizes that[181] the central requirement of the rule of law is that democratically elected power holders exercise their power within a constraining framework.

Accordingly, the judicial constitutionalization of democracy is likely to give rise to twin incidental effects and consequently help strike a dynamic balance between constitutionalism and democracy: on the one hand, changing and upgraded democratic values enter the hierarchy of constitutional values[182] and enrich the content of constitutionalism; on the other hand, temporal and passionate democratic activities are constantly

177. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 232-33 (2011); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 183-272 (2011); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 65-142 (2011). But even the concept of dignity has been considered as a positive or substantive entitlement to certain goods in many countries, it is not crystallized in American jurisprudence. According to Neomi Rao, dignity refers primarily to individual rights and agency in America. The fact that controversies concerning the Affordable Care Act become prevalent in America will be the case. *See generally* Rao, *supra* note 130, at 181; David A. Hyman, *PPACA in Theory and Practice: The Perils of Parallelism*, 97 VA. L. REV. BRIEF 83-106 (2011); Wendy Collins Perdue, *Litigating Federal Health Care Legislation and the Interstices of Procedure*, 46 U. RICH. L. REV. 691 (2012); Bradley W. Joondeph, *Beyond the Doctrine: Five Questions That Will Determine the ACA's Constitutional Fate*, 46 U. RICH. L. REV. 763-80 (2012); A. Christoph Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695 (2012).

178. Arthur Chaskalson, *Human Dignity as a Constitutional Value*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 133, 135 (David Kretzmer & Eckart Klein eds., 2002).

179. Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 77, 104, 161.

180. Sandefur, *supra* note 144, at 342.

181. Waldron, *supra* note 90, at 6.

182. Mark Tushnet claims that constitutionalism requires some kind of hierarchy of values. *See* Mark Tushnet, *Progressive Constitutionalism: What Is "It"?*, 72 OHIO ST. L.J. 1073, 1076 (2011).

tamed by the enriched constitutionalism.

V. SUITABILITY: JUDICIAL REVIEW IS SUITABLE FOR BALANCING FUNCTION

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

A. *Institutional Suitability: Structural Balance and Judicial Duty*

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

1. *Structural Balance*

Like any system, constitutional democracies require a structural balance. There is a widely accepted rationale that this balance depends on two structural principles, that is, the separation of powers and checks and balances. Theoretically, some maxims proposed by James Madison in *The Federalist Papers*[183] have become common justifications of constitutional democracy among commentators, such as "ambition must be made to counteract ambition," "the great difficulty lies in . . . oblige it (government) to control itself," and "the necessity of auxiliary precautions."

Practically, the goal of obliging a democratic government to control itself must be tackled through a practical scheme in which certain effective auxiliary precautions are established. In such a scheme, the idea that "ambition must be made to counteract ambition" is manifested by making each official and each institution dependent on other officials and other

183. In *The Federalist Papers* No. 51, James Madison argued that, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." *See* James Madison, *The Federalist No.51*, *in* THE FEDERALIST PAPERS 318, 319-20 (Isaac Kramnick ed., 1987).

institutions.[184] The executive and legislative branches are both equipped, however, with tools for satisfying their ambitions–the former has swords and honors, the latter holds both the purse strings and the power to make rules. How can the judiciary carry out its ambitions to counteract the ambitions of other branches and ultimately sustain the structural balance of the overall government? The most popular and widely accepted answer is the power of judicial review.[185] By wielding this power, the judiciary has both the force and will[186] to check the other branches and directly execute its balancing function in the process.

Courts and judges can also adopt an indirect approach to achieving the same result by disclosing the misconduct of other powerful branches, and consequently encourage the public to check such misbehavior through its votes or by voicing criticism in the media. When courts contribute cheap and correct information to the public,[187] they substantially play a role of "fire alarm," "monitor," or "coordinator"[188] to help people check the power of the government.

2. *Judicial Duty*

The second argument for judicial review's suitability for maintaining a systemic balance in a constitutional democracy is based on judicial duty. Conventional wisdom says that in a constitutional state, the legislative branch creates the law, the executive branch enforces the law, and the judicial branch interprets the law.[189] Therefore, within this framework of power allocation, the judiciary is inherently granted the power to expound on the law. This viewpoint is generally accurate but not quite to the point, because the core task of the judiciary is essentially to resolve conflicts between parties by means of the legal process.

Under this core power theory, each branch of the government holds some powers that other branches cannot take away. The power to try a case, for example, is a power exclusive to the judicial branch. In the process of

184. Nelson Lund, *Judicial Independence, Judicial Virtue, and the Political Economy of the Constitution*, 35 HARV. J.L. & PUB. POL'Y 47, 47 (2012).

185. *See* William R. Casto, *If Men Were Angels*, 35 HARV. J.L. & PUB. POL'Y 663, 666 (2012) (claiming that "an important part of the judiciary's participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review"); DWORKIN, *supra* note 36, at 484 n.9 (depicting that "judicial review is an available option for checking legislative and executive decisions").

186. In *The Federalist Papers* No. 78, Hamilton noted that judiciary has neither force nor will. *See* Alexander Hamilton, *The Federalist No.78*, *in* THE FEDERALIST PAPERS, *supra* note 183, at 436, 437.

187. Law, *supra* note 39, at 723-24.

188. *Id*.; Levinson, *supra* note 4, at 739.

189. Michael Blasie, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 593-94 (2011).

dispute resolution, courts and judges must apply the law to the case before them, and judges have a duty to expound the laws[190] so as to correctly apply them. If the law that judges are going to apply is at odds with the Constitution, then judges have a duty to hold the law unconstitutional. As such, judicial review is both a judicial power and a judicial duty.[191] Under the core powers of the judiciary, another basic task of constitutional judges is to resolve intra-constitutional conflict[192] and related clashes between systems. In other words, to keep a balance between systems in a constitutional democracy is, at the very least, a part of the judiciary's duty through the exercise of judicial review.

B. *Functional Suitability: Relative Objectivity of Judicial Review*

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

1. *The Factors That Give Rise to Relative Objectivity*

There are two main factors that contribute to the relative objectivity of the judiciary and ultimately strengthen the suitability of courts and judges for striking the systemic balance. The first factor is "the least dangerous branch effect." Under the "least dangerous branch" thesis proposed by Hamilton, "the judiciary is beyond comparison the weakest of the three departments of power."[193] Courts and judges not only are unable to destroy the balance between systems; they cannot help but to try their best to keep the balance in order to maintain the judiciary's institutional status.

The second factor is "judicial insulation from political passion." It is well known that most justices of constitutional courts worldwide are appointed through certain processes but not directly elected by the public, and some of them, such as the justices of the U.S. States Supreme Court, enjoy life tenures. The goal of this institutional designation is to keep judges insulated from political pressure when they decide cases.[194] But when courts hand down their rulings, judges are still required to justify their reasoning in

190. As Alexander Hamilton put, "the interpretation of the laws is the proper and peculiar province of the courts." *See* Hamilton, *supra* note 186, at 439.

191. Philip Hamburger asserts that "duty was the foundation on which judges found the strength to hold government acts unlawful," *see* Philip Hamburger, *A Tale of Two Paradigms: Judicial Review and Judicial Duty*, 78 GEO. WASH. L. REV. 1162, 1171 (2010). *See also* Bryant, *supra* note 177, at 698.

192. Sweet & Mathews, *Proportionality Balancing*, *supra* note 2, at 88.

193. *See* Hamilton, *supra* note 186, at 437.

194. *See* BREYER, *supra* note 83, at 215.

each case by writing opinions that are ultimately open to the public.

Accordingly, the Court's power, according to David M. O'Brien's comments,[195] rests with: (1) its duty to give authoritative meaning to the Constitution; (2) the persuasive forces of reason; (3) its institutional prestige; (4) the cooperation of other political institutions; and (5) ultimately public opinion. In practice, though some critics disagree,[196] courts and judges must make an effort to maintain the relative objectivity of the judiciary so that they are capable of sustaining their legitimacy in checking other powerful branches.

2. *Courts Are Functionally Suitable for the Balancing Function*

The Constitution serves many functions,[197] as does the institution of judicial review. Actually, based on the above mentioned concept of relative objectivity, the judiciary may play some roles that are conducive to maintaining the systemic balance of a constitutional democracy. Among others, for instance, it can act against parts of the political system while at the same time collaborating with other parts by exercising the power of judicial review.[198] The judiciary can also more effectively referee the conflict between legislative and executive policy,[199] perform monitoring and coordinating functions in public politics,[200] act as a gatekeeper in corporate and securities litigation,[201] patrol constitutional boundaries,[202] act as a democratic protector[203] and the guardian of constitutional order,[204] and serve as essential sprockets in the twin wheels of constitutionalism and democracy.[205] Generally speaking, courts and judges are functionally suitable for keeping a systemic balance in a constitutional democracy.

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195. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 358 (7th ed. 2005).

196. For instance, Nelson Lund strictly criticizes that once the justices are confirmed, "they instantly become big shots, treated almost as gods within the legal profession and as A-list celebrities by everyone else . . . they now promote their books on television," and that Justices have the ambition to be influential. Lund, *supra* note 184, at 50, 52.

197. *See* Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, *supra* note 175, at 25, 25-26.

198. *See* Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 117, 117-37 (Ronald Kahn & Ken I. Kersch eds., 2006).

199. Casto, *supra* note 185, at 670.

200. Law, *supra* note 39, at 723.

201. Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 414 (2011).

202. Breyer, *supra* note 97.

203. Brettschneider, *supra* note 176, at 521; Schor, *supra* note 3, at 265.

204. Schor, *supra* note 3, at 266.

205. Kommers, *supra* note 88.

VI. CONCLUSION

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

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

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

Third, in terms of suitability, this article tries to prove that judicial

review is suitable for playing a role in striking a dynamic balance between constitutionalism and democracy. This suitability can be justified through two concepts: (1) institutional suitability, where judicial review is institutionally designed to maintain the structural balance of a constitutional democracy, and thus it is a judicial duty; and (2) functional suitability, where the institution of judicial review is appropriate for executing the balancing function because it is relatively objective.

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

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一個遺落的論理：司法審查維持憲政主義與民主政治的動態平衡

陳文政、莊旻達

摘　要

司法違憲審查是一種突兀的制度嗎？論者對於憲政民主體制中司法違憲審查制度的正當性，所持見解常存有歧異。許多支持或反對論者以民主政治或民主理論為論證基礎，另外一些支持或反對論者則以憲政主義或憲政理論為論證基礎。本文首先以全球三大趨勢——憲政主義、民主政治、司法違憲審查制度——為背景，點出問題意識：司法違憲審查制度在憲政民主體制的角色為何？其次，從詳細的文獻分析凸顯現存文獻對上述重要問題的探究有所不足：即欠缺從憲政民主體制的結構與功能面向來探究司法違憲審查制度的重要角色。接著，為填補此一不足，本文採取結構與功能研究途徑，在結構層次上論證當代憲政民主乃是含蓋憲政主義與民主政治的結構體系；在功能分析上，分別從必要性、可行性、適當性等三個基礎，來詳細論證：司法違憲審查制度的重要角色在於維持憲政主義與民主政治的動態平衡。依此論證，司法違憲審查可視為是當代憲政民主體制中，用以維持憲政主義與民主政治動態平衡的必要、可行且適當的制度。

關鍵詞： 司法違憲審查、憲政主義、民主政治、動態平衡、憲制化、必要性、可行性、適當性