Beyond Samuel Moyn's Countermajoritarian Difficulty as a Model of Global Judicial Review

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ABSTRACT

This Article responds to Samuel Moyn's critique of judicial review and his endorsement of judicial modesty as an alternative. By invoking the countermajoritarian difficulty, Moyn argues that judicial overreach has become an unwelcome global phenomenon that should be reexamined and curbed. I reject Moyn's claim that this kind of judicial modesty should define the role of courts for all time. By applying the countermajoritarian difficulty beyond its United States origins, Moyn assumes it is an unproblematic baseline against which to measure the role of courts globally. Moyn's vision says nothing about when it would be appropriate for courts to rule against legislative majorities. This view of judicial modesty is defied in constitutions such as those of South Africa and Kenya, which explicitly provide for their manner of interpretation and empower courts to "develop" the law. In the often revolutionary conditions of new African democracies, the functions expected of judicial review have a significant role both in constituting the new order as well as in disabling the continuation of the old order.

TABLE OF CONTENTS

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I. INTRODUCTION

This Article responds to Samuel Moyn's sweeping critique of judicial review and his endorsement of judicial modesty as an alternative approach to judicial review. Moyn argues that judicial overreach has become an unwelcome global phenomenon that should be reexamined and curbed.[1] Moyn argues legislatures are the ideal forums for the types of decisions he objects to courts making.[2] To explain this view of judicial review, he invokes the countermajoritarian difficulty to account for the limits of judicial review.[3] In doing so, he endorses Justice Felix Frankfurter's notion of judicial modesty as an ideal alternative to what he considers judicial overreach.[4]

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1. *See generally* Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 VAND. J. TRANSNAT'L L. 1135 (2019). This response is based on version six of Moyn's paper as revised on May 25, 2019, arguing that "no one can doubt that the juristocratic wave of our time has been part of an empowerment of legal elites in a global project that has reached self-evident limits. And, in Frankfurter's own United States, where the syndrome was born and from which it was exported, the advancement of liberal causes under countermajoritarian auspices, however effective for a time, has long since been reversed into reactionary judicial activism. Indeed, many anticipate that a rerun of the progressive campaign against a judiciary enforcing a tyranny of the minority—including in the name of rights, as in the so-called First Amendment Lochnerism of recent cases—will be in the offing sooner or later. In this light, it is ironic that Beth Simmons has defended the democratic uses of human rights, while also viewing not just legislation but judicial enforcement as their prized mechanism." *Id.* at 1158–59.

2. *Id.* at 1144 (endorsing Frankfurter's normative commitment to democracy because it "was not that there are no rights, whether human or constitutional, but that no one other than the people under organized systems of majority rule can politically decide how they figure–at least when the majority has some reason or other for its policy, besides a desire to violate minority rights.").

3. *Id.* at 1137 (arguing that "[w]hat if the greatest risk is not that majorities will trample the rights of minorities, but that minorities will continue to rule over majorities? If so, then it is all-important to focus first of all on how to counteract this risk, including insofar as concern for rights becomes a pretext for avoiding its realities.").

4. *Id.* at 1158–59 (noting that "no one can doubt that the juristocratic wave of our time has been part of an empowerment of legal elites in a global project that has reached self-evident limits." Moyn further notes that "in Frankfurter's own United States, where the syndrome was born and from which it was exported, the advancement

This Article's response has two major claims. First, that by adopting the historically contingent countermajoritarian difficulty as his point of reference, Moyn inaccurately poses an insoluble dilemma between judicial review and democracy that he then resolves in favor of democracy and against judicial review. Second, setting aside the assumption that courts can be agents of structural reform, Moyn ignores the utility of courts to litigants. His critique of judicial overreach ignores how litigants use litigation to amplify their nonjudicial strategies in achieving their goals. The rest of the Article is organized as follows. Part II briefly examines Moyn's major claims, especially insofar as they are relevant to this Article's response. Part III addresses this Article's first major response to Moyn—that his use of the countermajoritarian difficulty as his point of reference for critiquing judicial review is a historically contingent US framework that may not account for how to think about judicial review outside the United States. In Part IV, this Article shows that Moyn does not account for the utility that litigants see in courts and the many other pressure points that these litigants simultaneously engage. It uses examples from South Africa and the East African Court of Justice to illustrate this point.

II. MOYN'S ARGUMENTS

In his Article, "*On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*," Samuel Moyn places the countermajoritarian difficulty at the center of his analysis.[5] He argues that notwithstanding the warnings of Felix Frankfurter, the "risks of judicial enforcement of rights" have conquered "the whole world."[6] According to Moyn, the whole world is now in an age of "juristocracy."[7] He defines that to mean the tendency "for judges to take responsibility for expanding and redefining statutory human rights, outrunning

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of liberal causes under counter-majoritarian auspices, however effective for a time, has long since been reversed into reactionary judicial activism.").

5. *See id.* at 1140 (arguing that "the Article takes up the countermajoritarian rights philosopher Ronald Dworkin's critique of Learned Hand—the judge for whom Dworkin clerked as a young man, not to mention Frankfurter's friend and kindred spirit. In doing so, the goal is to reflect on the profound change in liberal attitudes towards rights and democracy that has supervened since Frankfurter struggled for majority rule, and to suggest that this change now seems a faulty mistake."); *see also id.* at 1149 (arguing that "it is difficult to quarrel with Frankfurter's worry that countermajoritarian rights enforcement, like all but the weakest forms of undemocratic intervention, will expectably lead to the contestable empowerment of the wrong minorities.").

6. *Id.* at 1158.

7. *Id.*

popular legitimation and stoking backlash."[8] He argues that while this American export of judicial activism for a time served liberal causes, it "has long since reversed into reactionary judicial activism, with more to come."[9] For Moyn, the backlash against rights may very well deprive the people "the opportunity to learn from their mistakes under liberal democracy before it was too late."[10] Moyn argues that

> Democrats need not turn their backs on rights, but they do need to overcome the mistake of relying on the princes of law's empire (as Dworkin famously called judges) and human rights activists (who sometimes assign themselves an analogous role) as the preeminent guardians of rights. In a democracy, that role falls to the people, ruling themselves.[11]

Moyn warns his reader against the "risks of embracing elite control on democratic life," particularly how judicial activism could serve as an end run to "popular self-rule."[12] For Moyn, activist judicial review promotes elite rule by human rights lawyers and movements and their politics, in a way that risks displacing and disempowering majority preferences or self-rule.[13] Faraway judges, Moyn argues, appeal to fellow elites who fail to connect with majority interests.[14] Nongovernmental organizations (NGOs), he argues, have displaced trade unions and socialist parties, and NGOs, he also charges, have avoided "party politics and legislative participation . . . in part to convincingly assume the guise of political neutrality."[15]

To avoid these dangers of elite rule, Moyn argues for "principled arguments for . . . reconciling democracy and rights [in] a more openly instrumental and strategic approach."[16] Human rights interests, he argues,

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8. *Id.*
9. *Id.* at 1158–59.
10. *Id.* at 1159.
11. *Id.* at 1140. In this respect, Moyn sounds very much like Felix Frankfurter's majority opinion in *Gobitis* (the flag salute case) where he argued that "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence . . . . [T]o the legislature no less than to courts is committed the guardianship of deeply cherished liberties." Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597–98, 600 (1940). Elsewhere, Felix Frankfurter argued that "it is not the business of [the] Court to pronounce policy [and that] [i]t must observe a fastidious regard for limitations on its own power [that] precludes [it from] giving effect to its own notions of what is wise or politic." Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).
12. *See* Moyn, *supra* note 1 at 1160.
13. *Id.*
14. *Id.* at 1161.
15. *Id.*
16. *Id.* at 1162–63.

> need[] to be reconceptualized in the name of, and therefore as a part of, majority interests, partly but not only to build coalitions that can win. A vast reorientation of the human rights enterprise beckons so that, whatever the defensible autonomy of cause groups, human rights are in the end not a "cause" apart from democracy but figure within electoral alternative and programmatic debate in the contests for majority support.[17]

He does not, however, develop what he means by a more openly instrumental and strategic approach—except perhaps his suggestion that electoral politics is preferable to pursuing judicial solutions.[18]

Another solution to the countermajoritarian difficulty raised by the use of courts that Moyn argues in favor of, is paying more attention to international economic law or what he says are examples of supranational governance interference with self-government.[19] Yet, Moyn does not give the reader specific examples of the types of supranational governance interferences with self-government he is concerned about or he envisages individuals ought to pay more attention to—nor does he acknowledge the many ways in which human rights movements around the world challenge supranational economic governance.[20]

III. THE UTILITY OF THE COUNTERMAJORITARIAN DIFFICULTY

This Article's central objection to Moyn is his use of the countermajoritarian difficulty as the central theoretical insight that he uses to prescribe a global model of judicial review—both for national and international courts.[21] His goal is to persuade the reader to agree with "Frankfurter's spectacular vision of how to make democratic rule consistent with human rights."[22] This Article acknowledges that there may be legitimate problems with movements that only use courts rather than democratic institutions to promote their interests. In other words, this Article's disagreement with Moyn is not that courts on their

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17. *Id.* at 1164.

18. *Id*. at 1154 (arguing that Justice Frankfurter "cast extraordinary doubt on countermajoritarian enforcement of constitutional rights when majorities were not prepared to grant them, essentially on the Frankfurterian ground that such action came inseparably with the tyranny of the minority, and the Thayerian ground that it ruined democratic learning and vitality. As a result, counter-majoritarian action ought to be prevented from devolving into Platonic guardianship.").

19. *Id.* at 1165.

20. *Id*. at 1158 (arguing that the "global tendency has been for judges to take responsibility for expanding and redefining statutory human rights, often outrunning popular legitimation and stoking backlash.").

21. *Id*.

22. *Id.* at 1142.

own can enact massive social transformations.[23] Instead, as this Article will explain further below, Moyn overstates the dangers of judicial review based on a view of the role of courts closely tied to the very particular experience of the United States. In addition, his proposed alternative of relocating political and rights struggles away from courts to building coalitions that can present electoral alternatives to win majorities, as superior to the use of courts,[24] fetishizes the utility of majoritarian politics and fails to recognize that courts could play an important fallback role when majorities run roughshod over minorities.

The countermajoritarian difficulty is a compelling framework in the United States, in large part because as adherents of James Bradley Thayer's theory of judicial restraint like Justice Frankfurter and Moyn argue, the text of the U.S. Constitution is silent on whether or not judicial review is available.[25] Following Thayer, skeptics of judicial review, like Alexander Bickel, have long argued that it was "a deviant institution in American democracy."[26] For these skeptics of judicial review, the only way to protect democracy was to prevent laws and governance from being placed in the hands of judges, who would employ their whims and personal beliefs.[27] In this view, judicial review

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23. *See* Tom Gerald Daly, *Author Interview: The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, IACL-AIDC BLOG (Feb. 21, 2018), https://blog-iacl-aidc.org/just-published/2018/5/20/just-published-the-alchemists-questioning-our-faith-in-courts-as-democracy-builders [https://perma.cc/6SLT-SYJZ] (archived Sept. 3, 2019) (arguing that "we seriously need to re-think the tendency to load courts with an impossible burden to transform the state and engage in governance. This approach is undemocratic, in the sense that it diminishes the potential for representative organs of government and the people to build their own capacity to act within the democratic system. It is unrealistic, in expecting all courts to be capable of adjudication that combines high technical quality, political nous, and strategic insight. It is also unfair to courts themselves, as the higher the expectations we place on them, the more we are virtually setting them up to fail."); *see also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (raising concerns about the rise of judicial supremacy reflected in cases like Bush v. Gore, 531 U.S. 98 (2000) that confirmed Justice Frankfurter's concerns about the limits of judicial supremacy).

24. *See* Moyn, *supra* note 1 at 1166.

25. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129, 131–32 (1893); *see also* STEPHEN E. GOTTLIEB, UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS 248 (New York Univ. Press 2016) (arguing that the "[c]onstitution says nothing about restraint. The theory of restraint is based, instead, on the consequences of activism, on the risks to the [Supreme] Court and to popular constitutionalism."). *But see* Geoffrey R. Stone, *Selective Judicial Activism*, 89 TEX. L. REV. 1423, 1429 (2011) (arguing that the framers of the U.S. Constitution anticipated judicial review); THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining that the role of courts was to protect the rights granted to citizens in the Constitution).

26. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183–98 (Yale Univ. Press, 2d ed. 1986) (advocating that the U.S. Supreme Court adopt passive virtues by declining to decide certain cases).

27. *See* Thayer, *supra* note 25, at 138–40.

was only permissible where legislation was unconstitutional beyond reasonable doubt.[28] This skepticism of judicial review embedded in Bickel's countermajoritarian difficulty in turn "set the terms of the contemporary debate over judicial review in the United States."[29] Yet, as understood today, judicial review is part of the antidemocratic checks and balances like the electoral college, the Senate, and staggered terms for senators.[30] In short, judicial review is no more antimajoritarian than any of these checks and balances.[31]

Moyn's extension of the countermajoritarian difficulty as a framework for understanding judicial review in the twenty-first century, especially outside of the United States, assumes this framework can provide insights anywhere in the world. Yet, the countermajoritarian difficulty is a historically contingent intellectual tradition that arose in the very specific context of the United States and that held center-stage from the late 1930s to 1950s.[32] This skepticism of judicial review among New Dealers to the *Lochner* court's excesses, can, as alluded to above, be traced even further back to the influential ideas of James Bradley Thayer[33] that Felix Frankfurter endorsed when he arrived as a student at Harvard Law School.[34] Like

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28. *See id.* at 150–52; *see also* Sanford Byron Gabin, *Judicial Review, James Bradley Thayer, and the Reasonable Doubt Test*, 3 HASTINGS CONST. L.Q. 961, 1014 (1976). *But see* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1420–21 (2018) (arguing for the legitimacy of judicial review and its necessity to allow the court to adapt to an ever-changing world).

29. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term-Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989) (discussing the acceptance among constitutional scholars of Bickel's definition of the countermajoritarian difficulty).

30. *See* U.S. CONST. art. I, § 3 (indicating that Senators were originally to be appointed by their state legislatures).

31. I thank Barry Sullivan for pointing this out to me. According to Alexander Hamilton, "The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." THE FEDERALIST No. 62 (Alexander Hamilton); *see also* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1148 (2012) ("If we ignore the evidence of a proslavery Constitution, we are not likely to inquire into the important present ramifications of the proslavery Constitution."); Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1083 (2018) ("One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners.").

32. Moyn, *supra* note 1, at 1144 (arguing that "1943 was as much a landmark date as 1937 before it, for since that time the traditions of counter-majoritarian jurisprudence for both liberals and conservative have been robust.").

33. *See generally* Thayer, *supra* note 25, at 130–31 (arguing that the grounds upon which judges partake in judicial review are insufficient to justify its practice).

34. *See* FELIX FRANKFURTER & HARLAN B. PHILIPS, FELIX FRANKFURTER REMINISCES 299–301 (1960) (noting that Thayer's 1893 essay was "the great guide for

Thayer, Frankfurter believed in legislators taking their legislative duties seriously to avoid enacting unconstitutional laws and the public taking their role more seriously in interpreting the Constitution.[35] If these two prerequisites of a democratic political process that he believed in were met, then it was not necessary to rely on courts to invalidate badly drafted legislation.[36] In short, Frankfurter "believed that people trumped legislatures, and legislatures trumped courts. He viewed public opinion and elections, not Supreme Court litigation, as the surest paths to constitutional change."[37]

Therefore, to more fully understand the claims of the countermajoritarian difficulty, it is important to consider the concerns that catapulted countermajoritarian difficulty as a central concern of constitutional theorists from many decades ago—and on some accounts more than a century ago. Understanding what accounted for the rise of the countermajoritarian difficulty is key to understanding the preferred vision of judicial review that Moyn advocates.

Further, this Article finds problematic the idea underlying the countermajoritarian difficulty,[38] that courts and legislatures are

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judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.").

35. According to Thayer, the "judiciary today, in dealing with acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off [their] acts wherever it is possible to do [so]. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility." JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES & FELIX FRANKFURTER, JOHN MARSHALL 88 (Philip Kurland ed., 1967); *see also* Thayer, *supra* note 25, at 150 (arguing in favor of legislative supremacy on the basis that legislatures were the most democratic branch of government).

36. *See* Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 350, 368 (2013) (arguing that "Frankfurter advocated judicial restraint because he wanted to reduce reliance on courts to solve the nation's problems and to increase reliance on the democratic political process. He believed that the democratic political process was a more enduring, effective, and legitimate method of protecting civil liberties and producing constitutional change.").

37. *See id.* at 366–67.

38. As Moyn puts it in his paper, "it is certainly the case in law that the people is empowered to rule itself just as individuals are given rights, so the central matter is *who should decide* how to reconcile conflicts between them—majorities themselves, or someone else." Moyn, *supra* note 1, at 1143. Moyn tells us that Frankfurter worried that "the wrong minorities [would] tyrannize majorities." *Id.* at 1146. In this logic, democracy loses if courts assert their authority beyond the plain language of the law since the law on this account embodies majority preferences. One scholar has argued that "[o]ne can characterize the division between the Frankfurter and the Black/Douglas views in several ways—restraint versus activism, process versus results, and even Yale versus Harvard, for both Frankfurter and Douglas started down their respective jurisprudential paths during the academic stages of their careers." Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 186 (1991). Barry Friedman also argued that the disagreement between two contending schools of thought, "Legal Process and process theory–also was a struggle between two of the nation's leading legal institutions: Yale and Harvard. Legal Process and judicial restraint was Harvard's chief position, while Yale represented Realism, compatible with the activism of the Warren Court." Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian*

locked up in a zero-sum struggle. This idea presupposes with judicial review, individuals are presented with two starkly opposed choices—either to have judicial supremacy under which the courts have the final word, or to have majoritarian rule. In this account of the countermajoritarian difficulty advanced by Moyn, courts should not reverse or nullify laws a current legislative majority produced, because to do so would contravene the will of such a majority. Moyn argues that the kind of judicial modesty invited by the countermajoritarian difficulty should define the role of courts for all time.[39] In the next Part, this Article addresses this objection to Moyn's argument by emphasizing the historical contingency of the countermajoritarian difficulty.

A. *The Historical Contingency of the Countermajoritarian Difficulty*

This subpart will explain a little more of what is meant by saying that the countermajoritarian difficulty is a historically contingent framework. This is important because Moyn's application of this framework beyond the United States as a "timeless problem grounded in immutable truths"[40] is at the center of the Article's objections. Coined by Alexander Bickel,[41] who clerked for Justice Frankfurter on the Supreme Court, some constitutional theorists in the United States take the countermajoritarian difficulty as their starting point.[42] By reviving the relevance of the countermajoritarian difficulty from an era already past, Moyn bases his argument on why unelected judges should be constrained.[43] The populist backlash against courts around the world in the last couple of years of the twenty-first century is the opening that Moyn capitalizes on by returning to the countermajoritarian difficulty and then seeking to globalize it as the

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Difficulty, 112 YALE L.J. 153, 231 (2002). In other words, debates about the merits of the counter-majoritarian difficulty were characterized by debates among an elite group of elite, white, law professors and judges primarily in the marbled halls of Cambridge, MA and New Haven, CT. *Id.*

39. *See* Moyn, *supra* note 1, at 1138.

40. Friedman, *supra* note 38, at 156 (arguing that "the countermajoritarian difficulty that obsesses the legal academy is not some timeless problem grounded in immutable truths.").

41. *See* BICKEL, *supra* note 26, at 16 (arguing that in our democratic system, the "root difficulty is that judicial review is a counter-majoritarian force" within it).

42. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 711 (1995); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 9 (1989).

43. *See* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 749–50 (1992) (arguing that "under the guise of policing the boundaries between branches and protecting individual freedom, the judges might advance their own interests–their 'ambitions,' in Madison's terms–and thereby infringe everyone else's freedom," through judicial activism).

lens through which to understand the pushback against courts.[44] It is notable that the contemporary unpopularity of judges in some countries in this era of populism coincides with hostility towards judges who were viewed as aristocratic and elitist in the early years of the United States.[45] These populists invoke the power of the electorate over that of courts. Moyn does not predicate his argument on the rise of populism, but his claim, like that of Frankfurter, that "legislatures are [the] ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,"[46] has a striking resonance with populist critiques of courts.[47]

More significantly, this Article argues that the countermajoritarian difficulty should not become the lens through which to understand the relationship between democracy and judicial review for the rest of the world for all time, as Moyn argues.[48] For example, it is not at all clear how the countermajoritarian difficulty as Moyn advances can be reconciled with the protection of individual and minority rights from infringement.[49] This is particularly important because for Bickel, whose arguments Moyn closely follows, judicial review cannot be reconciled with majority governance.[50] This Article

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44. For analysis of the populist backlash against courts, *see generally* WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 1–28 (Oxford Univ. Press 2019); David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GERMAN L.J. 245, 245–62 (2019).

45. *See* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 86, 96–97 (National Conference of Judicial Councils 1944) (explaining post-colonial aristocracy and general hostility toward lawyers and judges).

46. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 649 (Frankfurter, J., dissenting) (quoting Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

47. *See generally* SADURSKI, *supra* note 44; Prendergast, *supra* note 44.

48. *See* Croley, *supra* note 42, at 749 (summarizing three shortcomings of the countermajoritarian difficulty as follows: "First, legislative outcomes are not majoritarian—legislative outcomes do not truly manifest majoritarian will—and consequently judicial review does not upset decisions made by a majority. Alternatively, judicial review is itself inherently majoritarian, and consequently judicial review does not upset majoritarian sentiment. Or finally, judicial review is subject to majoritarian review anyway, and thus there is little point in worrying about whether judicial review is majoritarian; the majority gets the final say in any case."); *see also id.* at 749–53 (arguing that there is no good response by adherents of the counter-majoritarian difficulty to this third shortcoming).

49. Indeed, as Erwin Chemerinsky has argued, all "judicial review involves unelected judges invalidating the actions of electorally accountable officials. This means that attackers of judicial review must either argue for the elimination of all judicial review or abandon the major premise of their argument [that "all decisions in a democracy must be subject to control by electorally accountable institutions and individuals"]. I contend . . . that no theory can reconcile judicial review with majority rule . . . all judicial review is antimajoritarian, so that it is hypocritical and disingenuous to single out any particular method and criticize it for being antidemocratic . . . ." ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 11–12 (Praeger 1987).

50. According to Bickel, when "the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [on] behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually

views this question differently than both Bickel and Moyn. For example, even though there are many examples of judicial overreach and populist backlash against courts around the world,[51] there are also instances of judicial empowerment as well.[52] Further, political backlash against courts, including international ones, has not always been as successful, as has been the case in Poland in the recent past.[53] The reasons why backlash against courts is being witnessed around the world go well beyond their overreaching in the sense of Bickel's countermajoritarian difficulty.[54] As this Article argues below, while there are limits to what courts can do to directly achieve social transformation, courts are an important partner and catalyst when activists and litigants use them as part of a multidimensional strategy of seeking change.[55] Filing cases is a particularly important strategy for litigants and activists who have little power and ability to attain their objectives through direct political means.[56] Filing a case in court helps these litigants and activists publicize their cause, galvanize their supporters, and haul governments before judges so that they can account for their conduct.[57] In short, there is no single story about judicial review.

By applying this difficulty well beyond its specific United States origins, Moyn presupposes that it is a lens through which individuals can understand democratization processes and the role of courts anywhere, indeed, everywhere—whether the courts are domestic or international.[58] This Article will return to the challenges of exporting the countermajoritarian difficulty in Part III.

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happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic." BICKEL, *supra* note 26, at 16–17.

51. *See, e.g.*, Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293–96, 326–28 (2016) (examining three different types of outcomes arising from backlash against international courts).

52. *See, e.g.*, JAMES T. GATHII, THE CONTESTED EMPOWERMENT OF KENYA'S JUDICIARY 2010-2015: A HISTORICAL INSTITUTIONAL ANALYSIS 1 (2016) [hereinafter GATHII, KENYA'S JUDICIARY].

53. S*ee* Alter, Gathii & Helfer, *supra* note 51.

54. *See* BICKEL, *supra* note 26.

55. *See generally* JAMES T. GATHII, REASSESSING THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS (forthcoming 2020) [hereinafter GATHII, AFRICA'S INTERNATIONAL COURTS].

56. *See id.*

57. *See id.*; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that courts exist to limit the legislature and the executive as part of the acknowledged American system of checks and balances in government); THE FEDERALIST NO. 47 (James Madison) (describing the necessity of checks and balances).

58. *See* Moyn, *supra* note 1, at 1158 (noting that "no one can doubt that the juristocratic wave of our time has been part of an empowerment of legal elites in a global project that has reached self-evident limits.").

The countermajoritarian difficulty has pitted progressives and conservatives against each other in the United States for several decades.[59] Conservative judicial activism in the *Lochner* era in the 1920s and 1930s struck down state and federal laws that regulated working conditions and minimum wages because the Supreme Court held they violated the freedom to enter into contracts.[60] The *Lochner* era court also struck down laws that restricted the freedom to manufacture and the freedom to sell goods and services.[61] For the *Lochner* era court, freedom was "the general rule, and restraint the exception [and] the legislative authority to abridge [could] be justified only by exceptional circumstances."[62] Progressives have criticized *Lochnerism* for its conservative judicial activism in favor of free markets and limited government.[63] In the *Lochner* era, from 1887 to 1937, legislatures were progressive in terms of passing legislation to protect individual rights in the quickly industrializing economy.[64] For example, legislatures passed legislation to protect the health of workers from the vagaries of the marketplace by limiting working hours in the newly industrializing country.[65] This legislation limiting employer decisions was based on human rights grounds. The effect of this legislation limited the ability of employers to make as much money as possible. When the Supreme Court struck down these laws, as it did when it struck down limits on working hours per day in *Lochner*, it was arguably blocking progressive reform.[66]

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59. *See id.* at 1141 (arguing that the Supreme Court's decision in *Lochner* to allow the "inherent rights belonging to everyone" to trump those of the legislative majority resonated for decades); *see also* Lochner v. New York, 198 U.S. 45, 61 (1905).

60. *See Lochner*, 198 U.S. at 61 (holding that "[s]tatutes . . . limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed.").

61. *See* Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1331, 1325–26 (2019) (discussing the *Lochner*-era court's anti-free market decisions and the economic ramifications of those cases).

62. Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923) (holding that "while there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable.").

63. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (arguing that Lochner's primary problem was that the Supreme Court treated the market ordering under the common law as "natural" rather than a legal construct. Proceeding from that premise, the Supreme Court treated any governmental action departing from the common law baseline as "unnatural" and therefore illegitimate).

64. The *Lochner*-era came to an end with the Supreme Court's decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overturning an earlier *Lochner*-era case, Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923)).

65. Sohoni, *supra* note 61, at 1330.

66. *See generally* Lochner v. New York, 198 U.S. 45 (1905).

The Warren court from the early 1950s to the early 1970s by contrast engaged in liberal judicial activism.[67] The Warren court protected the interests of historically underrepresented minorities, such as African Americans, dissenters, women, and persons accused of crimes, who were disregarded by the governing majority.[68] It also used its authority to limit governing majorities to perpetuate political power, entrench the *status quo*, or stifle its critics.[69]

As one commentator noted in the heyday of the Warren court, "[a]ccusations of too-much-Court-power . . . reversed polarity . . . in the [1930s] it was the liberals who cursed the court for killing progressive legislation . . . Today it is, by and large, conservative elements who accuse the Court of usurping power and upsetting the federal balance."[70]

Another shift, towards conservative judicial activism, began in the early 1990s after a series of appointments of conservative justices.[71]

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67. *See* Morton J. Horwitz, *The Warren Court And The Pursuit Of Justice*, 50 WASH. & LEE L. REV. 5, 9 (1993) (arguing that the Warren Court was characterized by inaugurating two ideals—that idea of a living constitution that justified decisions like Brown v. Bd. of Educ., and a rights revolution. Horowitz argued that the Warren Court "revived the revolutionary spirit of rights discourse after it had been debased in the protection of slavery and, arguably, in the protection of property. But the rights idea was an eighteenth century newtonian idea. A static conception of self-evident truths, endowed by a creator as inalienable, as there for all time, as unchanging. The living constitution idea, by contrast, regarded constitutions as changing and changeable depending on the circumstances. Both of these ideas coexisted in the Warren Court and they continue to coexist uncomfortably today.").

68. *See id.* (arguing that "[t]he Warren Court was the first Court in American history that really identified with those who are down and out-the people who received the raw deal, those who are the outsiders, the marginal, the stigmatized. It was the first sympathetic treatment that blacks received from the Supreme Court, with the arguable exception of the decade after the passage of the Fourteenth Amendment in 1868. Moreover, not only blacks but other minorities—religious minorities, political dissenters, illegitimates, poor people, prisoners and accused criminals received sympathetic treatment.").

69. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (noting that "there may be narrower scope for operation of the presumption of constitutionality when legislation . . . 'discriminates against discrete and insular minorities' in circumstances in which it is reasonable to infer that prejudice, intolerance, or indifference might seriously have curtailed 'the operation of those political processes ordinarily to be relied upon to protect minorities.'"); *see also* Stone, *supra* note 25, at 1424.

70. Fred Rodell, *Warren Court Stands Its Ground*, N.Y. TIMES MAG., Sept. 27, 1964, at 120–21.

71. *See* Stone, *supra* note 25, at 1427–28 (noting that "[b]y 1993, after twelve consecutive Republican appointments, the average voting record of the five most conservative Justices (Thomas, Rehnquist, Scalia, O'Connor, and Kennedy) was .798, and the swing Justice, Anthony Kennedy, had a voting record of .695. Thus, the Court majority was roughly as conservative in 1993 as it had been liberal in 1968. Even more striking, by 1993 the 'liberals' on the Court were almost as conservative as the 'conservatives' on the Court in 1968.").

Under the control of these conservative appointees, the Supreme Court held as unconstitutional

> affirmative action programs, gun control regulations, limitations on the authority of corporations to spend at will in the political process, restrictions on commercial advertising, laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation, federal legislation regulating guns, age discrimination, the environment, and violence against women, and policies of the State of Florida relating to the outcome of the 2000 presidential election.[72]

Some scholars have begun to piece together how President Trump's blueprint for government resonates with some of the core themes and values of *Lochner* era jurisprudence. [73] Moyn interprets the conservative agenda to put a fifth reliably conservative justice on the U.S. Supreme Court in 2018 as having been prompted by the desire of liberals to use courts to push through their agenda.[74] Quite clearly, Moyn's analysis throughout the paper is primarily built on the experience of the United States.[75]

It is difficult to transpose this specific history largely predicated on the propriety of judicial review in the United States beyond its borders as a lens for understanding the proper role of courts everywhere. It is quite clear, at least in the United States, when conservatives engaged in judicial activism, progressives cried foul and vice versa.[76] Further, this Article is not persuaded by Moyn's argument that Felix Frankfurter's judicial modesty offers an alternative vision to conservative and liberal judicial activism. What is clear though, is that Moyn has provocatively invited the reader to critically evaluate the strengths and weaknesses of activist judicial review, whether liberal or conservative, and to consider whether there are alternatives between these two polar options that he presents. Part III considers those alternatives.

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72. Stone, *supra* note 25, at 1429 (discussing the "unmistakably activist decisions" of the conservative Justices of the 1990s).

73. *See, e.g.*, Sohoni, *supra* note 61, at 1358–59 (*Lochner*-era motifs in the Trump administration include: curtailment of the individual mandate in Obama care; shielding employers from providing insurance coverage for contraception; expanding options for school choice; shielding domestic workers from foreign competition; and crackdowns on immigrants including for accessing public resources).

74. *See* Moyn, *supra* note 1, at 1140.

75. *See id.*

76. *See* Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 149–50 (2004) ("When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well. Over the last century or more there have been two general positions taken about judicial review: that it is a blight in a democratic system that must be curtailed, and that it is a valued part of U.S. government essential to the protection of constitutional liberty…Progressives at the turn of the twenty-first century are echoing criticisms offered by progressives one hundred years earlier, though progressives took a more positive position toward judicial review during the Warren Court.").

B. *Judicial Restraint/Modesty as Judicial Abdication*

From this Article's vantage point, the vision of judicial modesty that Moyn argues in favor of amounts to judicial abdication to enforce rights in practice. The limitations of this restrainist approach to judicial review in favor of enforcing rights was captured by Justice Robert Jackson's majority decision in *Barnette*, a decision that overturned that court's *Gobitis* decision, where he argued that

> [The] very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[77]

This view of the role of the court stands at odds with Justice Felix Frankfurter's view of keeping courts away from politics that underlay his *Gobitis* decision. This alternative view, in which courts have a role to protect rights under certain circumstances, is also associated with Justice Stone's lone dissent in *Gobitis* as it is with *Carolene Products* footnote 4.[78] In *Gobitis*, Jehovah's Witness school children were expelled for refusing to salute the American flag.[79] They argued that saluting the flag was inconsistent with their First and Fourteenth Amendment rights.[80] Writing for an 8-1 majority, Justice Frankfurter argued that the Supreme Court could not substitute itself for the school district that had expelled the school children.[81] According to

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77. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); *see* Rebecca Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531, 570 (1998) (arguing that the view of democracy embodied in the U.S. Constitution is one in which "the people did not establish primarily a utility-maximizing constitution, but rather a tyranny-minimizing role.").

78. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601–04 (1940) (Stone, J., dissenting) ("[T]he state seeks to coerce these children to express a sentiment which . . . violates their deepest religious convictions. The very essence of the liberty . . . is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that the presumption of constitutionality may be narrower "when legislation appears on its face to be within a specific prohibition of the Constitution"); *see also* Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 176–79 (2004) (noting that *Carolene Products* footnote four can be seen as an effort to protect minority groups from failures in the pluralistic process).

79. *Gobitis*, 310 U.S. 586 at 591.

80. *Id.* at 593.

81. *Id.* at 598 (arguing that to "so hold would, in effect, make us the school board for the country. That authority has not been given to this Court, nor should we assume it.").

Frankfurter, the school district's requirement that school children salute the flag was justified as a means of promoting national unity. [82]

As already noted in Part I above, Frankfurter makes a fair point about why courts should not substitute themselves for legislatures. The problem posed by Justice Frankfurter's adherence to his vision of judicial modesty is that it presupposes that judicial review rests on making a choice between the role of courts in protecting rights in the *Carolene Products* footnote 4 tradition, on the one hand, *versus* the countermajoritarian dilemma on the other hand.[83] Yet, perhaps it is best to think of the stakes as a choice between the positive and negative sides of the *Carolene Products* footnote 4 tradition and the countermajoritarian difficulty. Seen this way, judicial review is a question about which of these choices to make and when to make them. From that vantage point, while Frankfurter's judicial modesty and Bickel's passive virtues including prudential thinking were right on point, they failed to take into account when and if courts should intervene. They did not contemplate situations in which judicial action overruling legislative decisions may have been necessary.[84] Ronald Dworkin made this point when he argued that the

> constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.[85]

To illustrate when it would be appropriate for courts to reverse legislative judgments in a way that would be impermissible under Frankfurter's vision of judicial modesty, this Article examines the *Barnette* decision that raised the same issue as *Gobitis* a few years

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82. *See id.* at 600 (holding that the US government may use the education system to instill American values despite conflicts with religious beliefs).

83. For an example of an argument in favor of courts actively protecting rights inconsistently with many of the adherents of the counter-majoritarian difficulty, *see* Alpheus Mason, THE SUPREME COURT: PALLADIUM OF FREEDOM 171–78 (Univ. of Michigan Press 1962).

84. I thank Stephen Gottlieb for these insights and for pointing me to James Wilson at the 1787 Constitutional Convention on July 21, 1787 who argued that "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." James Wilson, Penn. Delegate Constitutional Convention of 1787 (July 21, 1787). That phrase "so unconstitutional" suggests judgment and discretion. Wilson was one of the first members of the U.S. Supreme Court. *Id.* This quote suggests that courts have discretion to decide when to overturn or not to overturn legislative judgments for unconstitutionality in a way that the counter-majoritarian commitments of Bickel and Frankfurter did not.

85. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 132–33 (Harv. Univ. Press 1977); *see also* Snyder, *supra* note 36, at 414–15 (arguing that Frankfurter preferred to rely on popular, democratic processes to protect the civil liberties and rights of all citizens, and so relied on judicial modesty to prevent courts from protecting or creating rights that would be better protected in the long term by the legislative branch).

earlier. Public opinion supported the expulsion of Jehovah's Witness children and the persecution of Jehovah's Witnesses after the *Gobitis* opinion in part because the public misunderstood *Gobitis* to have decided that Jehovah's Witnesses were traitors.[86] By the time that Justice Robert Jackson was appointed to the court, some of the justices had already acknowledged in memoranda accompanying cases brought by Jehovah's Witnesses that they were wrong to have decided against the Witnesses in *Gobitis*.[87] However, Felix Frankfurter remained unpersuaded that the court could come to the aid of the Witnesses, a persecuted religious minority.[88] Thus, although both Justice Jackson and Justice Frankfurter developed their views on the role of courts in an era when progressives were critical of the conservative judicial activism of the *Lochner* era, they had different views about the role of courts particularly in a time of war or national emergency. It is, therefore, perhaps best to understand Frankfurter's views as a justice of the Supreme Court on the basis that he "relied far more heavily upon arguments grounded in respect for minority viewpoints and states' rights than in countermajoritarian criticism."[89]

Learned Hand, another friend of Frankfurter, who served on the Second Circuit, exemplifies how judicial restraint translates into judicial abstention. For Learned Hand, *Brown v. Board of Education*, or the segregation cases as he referred to *Brown* and its companion cases, was an example of how the Supreme Court reversed the "legislative judgment" of the states "by its own appraisal" of the values at stake.[90] Hand argued against the legal fundamentalism adopted by the Supreme Court in the *Lochner* era that treated the Bill of Rights as "real legal prohibitions."[91] To overcome this fundamentalism, Hand argued that the directions of the Bill of Rights should be understood as admonitions to forbearance.[92]

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86. *See* Shawn Frances Peters, *Prelude to Barnette: The Jehovah's Witnesses and the Supreme Court*, 81 ST. JOHN'S L. REV. 758, 762 (2007) (noting that US citizens thought the Supreme Court had labeled Jehovah's Witnesses as traitors).

87. *See id.* at 763–64.

88. *See id.*; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 664–65 (1943) (Frankfurter, J., dissenting).

89. Friedman, *supra* note 38, at 175.

90. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 54 (Harv. Univ. Press 1958).

91. *Id.*

92. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 263 (Oxford Univ. Press 1992) (noting that Hand believed he could only check legal fundamentalism by undermining "the law-like character of constitutional prohibitions.").

Herbert Wechsler, another judicial restrainist, argued that *Brown* could not be explained on neutral principles.[93] According to Wechsler, "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"[94]

Now consider this approach to judicial review for a further moment. Would the United States really be in a better place if Frankfurter's theory of judicial restraint had prevailed, and he had been able to carry the court with him in *Brown* on that theory? If Moyn can answer that question convincingly, then his endorsement of Frankfurter's approach to judicial review particularly on matters relating to human rights would be more persuasive.

There is further reason to be skeptical of Frankfurter's view of judicial restraint. From its vantage point, it meant that in *Gobitis*, Frankfurter argued that religious convictions could not be protected when they conflicted with national unity.[95] In his words, it was "essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[96] National unity for Frankfurter was the most important value at stake in *Gobitis* and, as such, the freedom of speech under which the *Gobitis* children sought protection for their religious beliefs was secondary.[97] Again, it is best to cite Frankfurter here.[98] According to him,

> [t]o stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.[99]

Felix Frankfurter had not changed his view of the role of the court when the same issue arose in the *Barnette* case a few years after the *Gobitis* decision. In his lone dissent in *Barnette*, he argued that "this Court's only and very narrow function is to determine whether within

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93. *See* HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 47 (Harv. Univ. Press 1961) (acknowledging that Wechsler had yet to reconcile denying association to one group of individuals and forcing association on another group of individuals).

94. *Id.*

95. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940) (stating that society should be able to use the educational system to foster patriotism, regardless of "lesser differences and difficulties").

96. *Id.*

97. *See id.* (holding that educational institutions could compel students to salute the American flag).

98. *Id.* at 598–99.

99. *Id.*

the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."[100]

Frankfurter's *Gobitis* opinion and *Barnette* dissent put too much faith in the democratic process. They failed to recognize, and indeed resisted embracing judicial review to protect the individual liberties of minority groups at a time when other justices were doing so.[101] Moyn urges the reader of his Article to overlook the reasons why Frankfurter lost the majority on the court.[102] Yet, the reasons for Frankfurter's reluctance to recognize the abandonment of judicial restraint on individual liberties on the court is relevant for assessing why he lost the majority on the court in *Gobitis* and related cases in which the court was invited to review legislative choices argued to be in conflict with certain rights.

Ultimately, the question that Felix Frankfurter's commitment to judicial restraint raises is why he voted to end school segregation in *Brown*. This is a fair question because he firmly believed that courts should not interfere with majority decisions reflected in legislative mandates upon which school segregation was established in states like Kansas.[103] I will to return to this point below. This judicial modesty was also at play in Frankfurter's opinions in reapportionment cases.[104]

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100. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 649 (1943) (showing that Frankfurter's commitment to judicial restraint with regard to individual rights as the proper role for courts came from his admiration of Justices like Holmes who had adopted it in their own time on the Court).

101. *See* Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 195, 195 (1991) (arguing that "the tragedy of Mr. Justice Frankfurter was that he became a prisoner of an idea—judicial restraint—and failed to distinguish between the regulation of economic and property rights and limitations upon individual liberties"); *see also* Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496, 508 (1976) (arguing that Frankfurter did also protect civil liberties). *But see* Snyder, *supra* note 36, at 380 (citations omitted) (arguing that in this same period, Frankfurter voted "to uphold the criminal convictions of Communists and the constitutionality of the Smith Act in Dennis and to revoke the citizenship of a Communist in Schneiderman. He displayed a willingness to balance away their rights because of his belief in departmentalism and the broad scope of congressional and executive power.").

102. Moyn, *supra* note 1, at 1142.

103. *See* Barry Sullivan, *Democratic Conditions*, LOY. U. CHI. L.J. (forthcoming 2019) ("Sometimes the voting cases, the malapportionment cases in particular, are praised on the ground that they took care of a problem that legislatures had refused to do anything about. That is true, but it is a dangerously incomplete account. There are many things legislatures 'haven't done anything about' that should be left in precisely that condition. A more complete account of the voting cases is that they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obviously vested interest in the status quo.") (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (Harv. Univ. Press rev. ed. 1980)).

104. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding that the Court should not declare provisions of Illinois law governing Congressional districts because establishing Congressional districts is a political activity).

Thus, in *Colegrove v. Green*,[105] he argued that the Supreme Court did not have jurisdiction over "political cases," because to do so was to enter into a "political thicket."[106]

When the Supreme Court overruled *Colegrove* in *Baker v. Carr*, Frankfurter dissented, arguing as he did in *Colegrove*[107] that the Supreme Court had, by accepting jurisdiction, decided that it was now in the business of devising "what should constitute the proper composition of the legislatures of the fifty States."[108] As Frankfurter argued in *Colegrove*, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[109] This view exemplifies how far Frankfurter was willing to advance his commitment to the democratic process when courts were invited to decide cases he believed belonged to the legislature.[110] His prediction that, by taking this case, a judicial nightmare that would be difficult for the court to emerge from would occur,[111] did not materialize. In *Baker*, he argued that "[f]rom its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies."[112] Notwithstanding Frankfurter's concerns that it would result in a nightmare, *Baker* had "broad approval by the American public."[113] The public popularity of the reapportionment cases undermined the view of those committed to the fixed view of the countermajoritarian difficulty to the effect that "legislative bodies were reflecting popular will, and that courts were not."[114]

From this perspective, Frankfurter's judicial restraint in reapportionment cases, therefore, amounted to judicial abdication. By abstaining from interfering with legislative choices, he was in effect deciding for the party that had somehow already won in the legislature. His failure to see courts as having a role to play in protecting rights, even in such clear cases where minority voters had been disenfranchised, was, even if only in retrospect, a failure of his vision for the role of a court as a guardian of the Constitution, a role some of

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105. *See id*.
106. *Id.* at 556.
107. *See id*. at 553.
108. Baker v. Carr, 369 U.S. 186, 269 (1962) (Frankfurter, J., dissenting).
109. *Colegrove*, 328 U.S. at 553.
110. *See Baker*, 369 U.S. at 297 (arguing that Baker v. Carr was not an equal protection case, but rather like Colegrove v. Green "a Guarantee Clause claim masquerading under a different label.").
111. Urofsky, *supra* note 101, at 207 (arguing that Frankfurter's "prophecies of a judicial nightmare [in Baker v Carr] never materialized, and although the entrenched state legislators fought to prevent reapportionment, once it happened and a majority population controlled a majority of legislative seats, all opposition ceased.").
112. *Baker*, 369 U.S. at 280 (Frankfurter, J., dissenting).
113. Friedman, *supra* note 40, at 206.
114. *Id.* at 221.

the framers had anticipated.[115] Frankfurter did indeed acknowledge that his views were those of "an old-fashioned liberal's view of government and law." [116] He had real difficulties in declaring segregation unconstitutional.[117] Should individuals in the twenty-first century adopt the views of such a self-styled, old-fashioned liberal for the whole world? In other words, should judicial review be "*conditional* on the *public's willingness to accept*"[118] what courts rule?[119]

To reflect on Frankfurter's concerns about the risks of judicial review, it is worthwhile to briefly contemplate the stakes involved. Was Frankfurter, like Bickel, concerned that getting the public's willingness to obey the Supreme Court's desegregation decree required judicial modesty? It seems that he had difficulty believing that segregation in public schools in *Brown* was constitutional and the only way he could conclude as a policy matter that segregation was unacceptable is if there was a unanimous decision of the court. Another way to read his difficulty, is to assume that he believed to put life in the *Brown* decision, the court needed unanimity so that it could be seen to have decisively overruled *Plessy v. Ferguson*. Yet, one has to wonder whether Frankfurter's concerns about original intent that arguably put *Brown* off for reargument for a year were motivated by his

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115. *See* Stone, *supra* note 25, at 1429; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority . . . . This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."); THE FEDERALIST NO. 51 (James Madison) (describing overreaching legislatures, interfering with the proper function of the judiciary and to trample on minority rights).

116. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 237 (1955).

117. JEFFREY D. HOCKETT, A STORM OVER THIS COURT: LAW, POLITICS, AND SUPREME COURT DECISION MAKING IN BROWN V. BOARD OF EDUCATION 82–83 (Univ. of Virginia Press 2013).

118. *Id.* at 60.

119. *See id.* at 64, 76. (reporting that "Justice William Douglas recorded Frankfurter as stating that 'he has read all of [the] history [of the Fourteenth Amendment] and he can't say it meant to abolish segregation.' In conclusion, Frankfurter asked, 'What justifies us in saying that what *was* equal in 1868 is not equal now[?]' He confessed that he could not say that 'this Court has long misread the Const[itution]' in permitting segregation, that 'it's unconstitutional to treat a negro differently than a white.' Unlike Reed, however, he did not suggest that he would vote to sustain the constitutionality of segregation. Instead, he found it '*highly desirable*' that the Court 'put all [of] the cases down for reargument.'"). Notably, Frankfurter relied on a memo from his clerk, Alexander Bickel to the effect that the history of the Fourteenth Amendment was inclusive outlawed segregation.

prudence of making sure that the court's decision accorded to majority will.[120] Did Frankfurter fear that without unanimity in *Brown*, the country would be roiled in unfortunate turmoil, a fear he had expressed in *Baker v. Carr* as we saw above? From the vantage point of this Article, these are not the types of prudential concerns that judges should take into account in deciding issues on which there are deep political divisions, particularly where rights of disenfranchised minorities are at stake.

In short, Moyn seems to be inviting us to adopt Justice Frankfurter's judicial posture when courts are invited to decide cases that are politically divisive and highly contested. If that is so, Moyn seems to be suggesting that we should remember Frankfurter for advocating for a court order in *Brown* that would not have required a drastic and instant end to segregation, as reflected by Frankfurter's very determined efforts to reconcile his views of the role of the court with the primary issue in question in *Brown*.[121] Or perhaps Moyn is saying that we should identify with Frankfurter's unease at coming to a quick conclusion "on a legal issue [that] was inextricably bound up with deep feeling on sharply conflicting social and political issues"?[122]

Ultimately, framing the role of the courts as a choice between respect for legislative majorities and judicial activism that upsets legislative majorities, as Moyn endorsing Frankfurter does,[123] misses a more basic question: Under what circumstances is judicial review warranted? In the election area, where politicians have high incentives to distort the process in their favor and against others, respect for legislative majorities entrenches such distortions. Such distortions have negative consequences on minorities when courts fail to overturn legislative choices that entrench majorities.[124] Therefore, it mattered

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120. *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 35–41 (1979) (identifying competing explanations why the *Brown* opinion was put off by a year in addition to Frankfurter's desire for unanimity and clarification of the meaning of the Fourteenth Amendment. These reasons included the fact that Chief Justice Vinson died before the Court had reached a conclusion in the case).

121. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 602 (2004) (noting that Frankfurter's desire for an order than was not drastic, instant and universal).

122. *Id.* at 686.

123. *See* HART ELY, *supra* note 103, at 4, 135 (trying to reconcile the two when he argues that the Supreme Court can assure majority governance while protecting minority rights); *see also* Snyder, *supra* note 36, at 368 (noting that, by contrast, Frankfurter "was uncomfortable with the Court initiating social or political change and preferred that the Court follow or act in concert with the executive or legislative branches.").

124. *See generally* Shelby Cty. v. Holder, 570 U.S. 529 (2013) (striking down a provision in the Voting Rights Act that forced counties to obtain preclearance to change voting procedures because the formula Congress uses to determine which counties required preclearance is based on 40-year-old facts and Congress did not update the formula when it extended the Act in 2006).

for disenfranchised minorities when the Supreme Court beat back malapportionment and other election manipulation from about 1937 to 2013, until the Roberts court decided it had no role to play in supervising partisan gerrymandering claims, even when those seeking relief were disenfranchised racial minorities.[125]

It is plausible to argue that Frankfurter underestimated the role of the Supreme Court as a guardian of civil liberties by foregrounding what he called the "explosive psychological and political attitudes" that the *Brown* case raised.[126] Contrary to such skepticism of the role of courts as guardians of civil liberties, the declaration of segregated schools in *Brown* as unconstitutional fueled the momentum for desegregation in travel, employment, and housing, achieved through the courts and Congress as well.[127] The *Brown* decision laid the groundwork for challenging desegregation in public accommodations like waiting rooms, pools, and beaches, which were not equally funded or maintained as those used by whites.[128] It helped lead to legislation, such as the Voting Rights Act of 1965.[129]

As Mark Graber has argued, "the American experience with mandatory flag salutes and segregation illustrates [that] the Supreme Court tends to nationalize issues, forcing local proponents of restrictive policies to forge broader, more national, majorities in order to make

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125. *See id.* (holding a provision of the Voting Rights Act that required certain states and counties to obtain preclearance from federal authorities before changing voting procedures unconstitutional); *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100 (2013) ("*Shelby County* thus closes the chapter on the most important and most successful of the civil rights laws from the 1960s); GOTTLIEB, *supra* note 25, at 202 (arguing that with *Shelby*, the Supreme Court has "largely closed the legal chapter of the civil rights movement with respect to minorities"). *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115 (2018); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018).

126. *See* KLUGER, *supra* note 121, at 687 (noting that Frankfurter struggled with the political and sociological aspects of segregation cases). *But see* Michael Klarman, *How Brown Changed Race Relations, The Blacklash Thesis*, 81 J. AM. HIST. 81, 85–91 (1994) (expressing skepticism about the direct impact of the *Brown* decision).

127. Charles J. Ogletree, Jr., *From* Brown *to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 514–18 (2004) (highlighting the importance of mobilizing the African-American community, especially Black lawyers in the fight against segregation in all areas).

128. Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1526–28 (2005) (noting that racial isolation is harmful even in affluent black communities).

129. *See id.* at 1519–21 (arguing that *Brown* must have stigmatized desegregation at large if Congress is passing laws against it).

their constitutional vision the law of the land."[130] Frankfurter's opinion in *Gobitis* and his dissent in *Barnette* sought to nationalize as the law of the land the restrictions imposed by state legislatures punishing students who failed to salute the flag, notwithstanding their well-held religious conviction that to do so was heretical. Moyn's sweeping endorsement of Frankfurter's judicial modesty similarly fails to contemplate a role for the courts in protecting civil liberties. For Frankfurter to protect the Jehovah's Witness children in *Gobitis* would have constituted a form of "deviant" judicial review.[131] *Barnette*, for Frankfurter, was therefore exactly the kind of deviant judicial review he disapproved. Like those committed to the countermajoritarian difficulty, such as Alexander Bickel, Frankfurter made "exaggerated and ultimately unconvincing" arguments about the undemocratic nature of judicial review.[132]

Finally, adherents of the countermajoritarian difficulty sometimes "fail to recognize that much of what constitutional courts do is invalidate the work of administrative or police officials, whose decisions can only dubiously be called 'majoritarian.'"[133]

IV. DOES THE COUNTERMAJORITARIAN DIFFICULTY HELP US UNDERSTAND JUDICIAL REVIEW OUTSIDE THE UNITED STATES?

Moyn's Article uses the countermajoritarian difficulty beyond the United States in his brief review of national courts in other jurisdictions and of some international courts.[134] By globalizing the countermajoritarian difficulty, Moyn exports one of its central and very problematic assumptions: that since representative bodies are democratically elected, they are legitimate, and further judicial review of the laws enacted by such bodies is countermajoritarian.[135] As is clear from the earlier part of this Article, the countermajoritarian difficulty is a historically contingent United States intellectual tradition. Even taking into account the features such as the electoral college, the

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130. Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 32 (2007).

131. BICKEL, *supra* note 26, at 18.

132. Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 537 (1976) (noting that Bickel conceded "that American government was not 'majoritarian'").

133. Friedman, *supra* note 40, at 175.

134. *See generally* Moyn, *supra* note 1, at 1139–40 (arguing that human rights advocates should pursue majoritarian strategies rather than countermajoritarian ones).

135. I will bracket for the moment whether or not the counter-majoritarian difficulty accurately describes the nature of democracy in the United States. This is highly contested among constitutional theorists. *See* GOTTLIEB, *supra* note 25, at 238–61 for a persuasive account of how democracy is part of the U.S. Constitution and of American values and that it should have a large place in American law that is not based on a counter-majoritarian understanding.

Senate, and staggered terms for senators, it becomes quite clear that the countermajoritarian difficulty is an incomplete account of how democratic institutions in the United States are designed.[136] Some of these institutions, such as the electoral college, the Senate, and their staggered terms, were designed to be countermajoritarian.[137] Moyn does not acknowledge these countermajoritarian features. He also says little about the limitations of the countermajoritarian framework and some of the criticisms leveled against it that has led generations of scholars since then to free themselves from its "rhetorical grasp."[138] In particular, the countermajoritarian difficulty is "court obsessed."[139] As Barry Friedman further argues, the countermajoritarian difficulty is often a jumping-off point for constitutional theorists "to justify present-day political preferences in light of an inherited intellectual tradition."[140]

In much of the rest of the world, there has been no fixation in academic debates or judicial opinions over judicial activism and restraint in the same way that there has been in the United States now for close a century.[141] Indeed, as Tom Ginsburg has argued, scholars of American constitutionalism focus "almost exclusively on normative issues of judicial legitimacy rather than positive issues of judicial power."[142] In his view issues of judicial legitimacy "may be less important in contexts where there is a clear constitutional moment and

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136. Walter Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 17–19 (Doug Greenberg et al. eds., 1993) (noting that the authority to interpret the U.S. Constitution is shared among the branches of government).

137. PATRICE HIGONNET, SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM 85–90 (Harv. Univ. Press 1988) (noting that in Federalist Paper No. 62, James Madison argued that the staggered terms of the Senate were intended to achieve national stability and international respectability).

138. *See* Friedman, *supra* note 40, at 156–57 (citing academics who argue that as an empirical matter judicial review does not generally trump majoritarian preferences and that courts are more likely to declare legislation unconstitutional when the dominant national coalition is unwilling or unable to settle some public dispute); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 45–61 (1993) (exploring three instances in which the model posed by the countermajoritarian difficulty did not offer adequate insight into judicial decision-making).

139. *See* Friedman, *supra* note 40, at 158.

140. *Id*. at 158; *see also* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014 (1984) (arguing that "[t]he countermajoritarian difficulty proclaimed in The Least Dangerous Branch achieved its ascendancy over the modern legal mind by expressing an opinion that, after two full generations, had become the prevailing wisdom in both scholarly reflection and legal practice.").

141. *See* Ayse Zarakol, *Is Judicialization Good for Democracy? A Comparative Discussion*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 77 (Giorgi Areshidze et al. eds., 2016).

142. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 16 (Cambridge Univ. Press 2003).

a designated court whose only role is to safeguard the constitution."[143] Rather than focusing on issues of judicial legitimacy, such as those tied to the countermajoritarian difficulty, examples outside the United States prompt individuals to think about why politicians and constitution makers seek judicial review in the first place.[144] This is an important question because as Moyn following Frankfurter and scores of scholars have argued—judicial review is undemocratic.[145] In other words, if individuals only focused on the supply but not demand side of judicial review, such a focus may reveal dimensions of judicial review that are not visible given the almost exclusive focus of American constitutionalism on normative issues of judicial review centered around unending and insoluble debates of the countermajoritarian difficulty.[146]

This Article's view is that individuals should dethrone, or at least radically temper down, the countermajoritarian difficulty as the point of reference for understanding the role of national and international courts outside the United States, and particularly those in developing countries[147] One advantage of abandoning this framework is that it gets rid of the "insoluble tension"[148] embodied in the zero-sum choice between judicial restraint and judicial activism. More importantly, the countermajoritarian difficulty is premised on denying legitimacy to judicial review in a democratic system. Understanding judicial review, especially in newly democratizing countries, ought not to begin on the basis of assumptions that question its very legitimacy. In addition, courts operating outside the United States have their own distinctive legal and political contexts that uniquely account for the type of judicial review they exercise.[149] In short, it is foolhardy to always view

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143. *Id.*

144. *See id.* at 15–19 (noting that the United States may not be a proper benchmark for analyzing judicial review and arguing that one is likely to see more active judicial review in countries with more diffused politics, and much less so in countries where a dominant disciplined political party holds power).

145. *Id.* at 16; Moyn, *supra* note 1, at 1151.

146. *See* Ackerman, *supra* note 140, at 1016 ("Increasingly dissatisfied with his effort to rationalize judicial review in *The Least Dangerous Branch*, Bickel's search was cut short by premature death before he could find an answer with which he might rest content. And in the decade since his death, we have been inundated with new answers to Bickel's question. Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.").

147. *See* KAREN ALTER & LARRY HELFER, TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE 274 (Ruth Mackenzie ed., 2017) (noting that non-European international courts "deploy strategies that diverge from those of the European tribunals in response to the distinctive legal and political contexts that these emerging courts face.").

148. *See* Friedman, *supra* note 40, at 247 (noting that mid-century scholars supported the Warren Court's results but were critical of its methods).

149. *See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 149–53 (1998) (making the case for the unique role of judges in South Africa after the end of apartheid is to "'promote and fulfill' through one's

the countermajoritarian difficulty that has characterized how judicial review is understood in the United States for more than a century as the lens through which to study judicial review everywhere in the world in the twenty-first century.[150] This is particularly important given that the concerns of the countermajoritarian difficulty today coincide with the policies driving the populist backlash against judicial review around the world.[151] This Article's criticism of the countermajoritarian difficulty recognizes the institutional limits of courts as social engineers for achieving large-scale social change. A major argument made in this Article is that the countermajoritarian difficulty overestimates the illegitimacy of judicial review in a democracy.

This Article will use the example of South Africa and the East African Court of Justice to illustrate the foregoing claims.

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professional work the 'democratic values of human dignity, equality and freedom,' and to work to 'establish a society based on democratic values, social justice and fundamental human rights.'" He further argues that that vision of judicial review is justified by the "South African Constitution, in sharp contrast to the classical liberal documents, is *social*, *redistributive*, *caring*, *positive*, at least partly *horizontal*, *participatory*, *multicultural*, and *self-conscious* about its historical setting and transformative role and mission.").

150. *See* GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55 (manuscript at Introduction) (arguing that compliance and effectiveness should be the sole basis that scholars should use to assess the performance of Africa's international courts).

151. *See, e.g.*, SADURSKI, *supra* note 44, at 19.

In South Africa[152] (and Kenya as well),[153] unlike in the United States, judicial review is expressly provided for in the Constitution.[154] As a result, the legitimacy of judicial review takes a completely different posture from that of the contemporary United States.[155] The text of the U.S. Constitution does not explicitly recognize judicial review in the same way the South African and Kenyan constitutions do.[156] Thus, the question of the legitimacy of judicial review does not arise in the same way it has in light of the countermajoritarian

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152. S. AFR. CONST., 1996. Article 8(3) of the 1996 Constitution of South Africa provides that when "in order to give effect to a right in the Bill, [a court] must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and . . . may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1)." Article 38 provides that individuals have "the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." Article 39 provides, that when "interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." That Article further provides in subparagraph 2 that when "interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." *Id.*; *see also* art. 172 (providing that "(1) When deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including—(i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.").

153. CONSTITUTION arts. 20(3)–(4), 23(1), 159(2)(e), 165(4)(d) (2010) (Kenya). Article 165(3)(d) of Kenya's Constitution provides that the High Court has jurisdiction to hear any matter relating to *any question* with respect to interpretation of the Constitution "including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating . . . to the constitutional relationship between the levels of government." (emphasis added). Further, Article 23(1) of the 2010 Kenya Constitution authorizes the High Court with the power to enforce and uphold the Bill of Rights. Article 159(2)(e) of the Constitution of Kenya (2010) provides that in exercising judicial authority, court shall be guided by the promotion and protection of the purpose and principles of the Constitution. Article 10 of the Constitution contains a list of national and principles that includes the rule of law, human rights, democracy and good governance. Article 20(3) provides that in applying the Bill of Rights, courts shall "develop the law to the extent that it does not give effect to a right or fundamental freedom," and second, to "adopt the interpretation that most favours the enforcement of a right or fundamental freedom." Article 20(4)(a) provides that in exercising their judicial function, courts shall promote the "values that underlie an open and democratic society based on human dignity, equality, equity and freedom." Article 20(4)(b) obliges courts to the "spirit, purport and objects of the Bill of Rights."

154. CONSTITUTION art. 165(4)(d) (2010) (Kenya); S. AFR. CONST., 1996.

155. *See* BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 371–74 (Harv. Univ. Press 2019) (noting that revolutionary constitutionalism is also associated with the early Republic in the United States).

156. *See generally* U.S. CONST.

difficulty that has characterized debates on judicial review in the United States. In countries like Kenya and South Africa, new constitutions have sought to reconstitute old orders that fell away and that continue to persist—apartheid in the case of South Africa and authoritarian governance in the case of Kenya.[157] For example, in the first case before the South African Constitutional Court after the end of apartheid, the South African Constitutional Court noted that what "the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting . . . 'future.'"[158] In contexts like these, what one sees is a form of revolutionary or transformative constitutionalism through which a radical transformation of the polity is sought in the constitution.[159] In this context, judicial review in these revolutionary contexts is regarded as having a special role both in constituting the new order as well as in disabling the continuation of the old order.[160]

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157. *See* Willy Mutunga, Chair, S. Afr. Inst. For Policy and Research, Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution: Preliminary Remarks at the Lameck Goma Annual Lecture 3, 7 (July 27, 2017), http://saipar.org/wp-content/uploads/2017/09/Paper-by-Mutunga.pdf [https://perma.cc/VYB4-96VU] (archived Sept. 3, 2019) ("That oppressive constitutional outlook was dismantled in 2010, with the emergence of a democratic constitutional order following a referendum many years after the first political opening in 1992. At the heart of it, the making of the Kenyan 2010 Constitution is a story of ordinary citizens striving and succeeding to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 54 years of independence.").

158. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 153 (S. Afr.) (quoting S. AFR. CONST., 1996).

159. *See* Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 INT'L J. CONST. L. 1, 173–200 (2017) (defining revolutionary constitutionalism as "using the constitution-making process to attempt to institutionalize and bring to a successful conclusion a political revolution"); *see also* Klare, *supra* note 149, at 150 (defining transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.").

160. *See* Justice Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351, 357 (2006) (noting that South African courts have a role in changing the law to "bring it in line with the rights and values for which the Constitution stands"); Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 42–48 (1994) (discussing how courts can read the Bill of Rights in a way that builds a culture of justification); *see also* Justice Albie Sachs, *Judicial Review in Constitutional Systems*, YALE L. SCH. (Oct. 5, 2013), https://law.yale.edu/yls-today/yale-law-school-videos/judicial-review-constitutional-systems [https://perma.cc/5NZM-EEBK] (archived Sept. 3, 2019) (contrasting the role of judicial review in South Africa from that of the commonwealth and European models of judicial review).

The constitutionalization of judicial review raises an important question: Why is judicial review constitutionally provided? In other words, why was it not left out of the text of the constitution, as is the case in the United States?

This Article's examples of South Africa and Kenya will also show that the use of judicial review by nonstate actors is often one venue among other venues through which actors engage in multidimensional struggles to advance their causes. Because of the types of functions expected of judicial review under the revolutionary conditions of these new democracies, scholars inordinately focus on judicial review while losing sight of the larger picture of struggles of which courts are only one venue.[161] In other words, courts are not the sole or even the most important venue for advancing the causes pursued by litigants in these courts.

A. *The Constitutionalization of Judicial Review in South Africa*

After decades of oppression, discrimination, and a denial of human rights under apartheid, the South African Constitution of 1996 provided for judicial review.[162] The premise for making judicial review available was to make it possible for courts to play an important role in enforcing the values of the post-apartheid Constitution as well as its Bill of Rights.[163] The South African Constitution also established the principle of constitutional supremacy,[164] a radical departure from the principle of parliamentary sovereignty that prevailed before.[165] This recognition of constitutional supremacy together with judicial review demonstrates that the design of the South African Constitution is not founded on the basis of an insoluble dichotomy between democracy and judicial review. [166] Under constitutional supremacy, there is no

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161. *See generally* GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55 (manuscript at Introduction).

162. *See* S. AFR. CONST., *supra* note 152 and accompanying text.

163. *See id.*

164. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.) (noting that the "issues raised in the present case . . . concern the powers of Parliament and how it is required to function under the Constitution . . . . Constitutional control over such matters goes to the root of democratic order . . . . It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme.").

165. Section 165(2) of the 1996 South African Constitution provides that: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." S. AFR. CONST., 1996, § 165(2). Section 165(5) further provides that "an order or decision issued by the court binds all persons to whom and organs of state to which it applies." *Id.*

166. In fact, some of the early authoritative scholarship on the South African Constitution was not centered on the judiciary, but rather the entire structure of the Constitution. *See, e.g.*, HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS (2010); STU WOOLMAN, THE SELFLESS CONSTITUTION: EXPERIMENTALISM AND FLOURISHING AS FOUNDATIONS OF SOUTH AFRICA'S BASIC LAW

advance assumption that parliamentary sovereignty makes judicial review a particular difficulty.[167]

There is further support for the view that democracy and judicial review are conceptualized as reinforcing rather than opposing values. Section 39 of the South African Constitution, provides that courts must adopt an interpretative strategy that upholds the "values that underlie an open and democratic society."[168] Section 39(2) provides that the court must "promote the spirit, purport and objects of the Bill of Rights."[169]

This is not to suggest that there are no limits to what courts can do to directly achieve social, economic, and political transformation. Clearly courts have institutional limits and the South African Constitution is not exceptional in this regard.[170] The point is that courts are an important partner and catalyst when activists and litigants use them as part of multidimensional strategy of seeking such change.[171] Take the example of the litigation on access to essential

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(2013). For an essay critical of court centered scholarship and that ignores other actors in the South African constitutional experience, *see* Richard Calland, *Chimera or real – how robust is South Africa's post-1994 Constitutional order?*, N.Y. L. SCH. (Nov. 10, 2014), http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Calland.pdf [https://perma.cc/TVB3-7RKQ] (archived Sept. 24, 2019).

167. In South Africa, constitutional supremacy was designed in part to upstage parliamentary sovereignty. For an analysis of this, *see* Heinz Klug, *Challenging Constitutionalism in Post-Apartheid South Africa*, *in* 1 CONSTITUTIONAL STUDIES 41–58 (Univ. of Wisconsin 2016).

168. S. AFR. CONST., 1996, §39(a); *see also* Dikgang Moseneke, The balance between robust constitutionalism and the democratic process, Seabrook Chambers Public Lecture, Univ. of Melbourne Law Sch. 17 (June 16, 2016) (arguing that "Democracy should no longer be understood as a political community governed by the principle of parliamentary sovereignty, but rather one governed by the principle of constitutional supremacy.").

169. S. AFR. CONST., 1996, §39(2). The 2010 Kenyan Constitution follows a similar path in this respect. *See generally* GATHII, KENYA'S JUDICIARY, *supra* note 52.

170. The classic statement of these limits by the South African Constitutional Court is in *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.) ("Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious."); *see also* Kate O'Regan, *Helen Suzman Memorial Lecture*, Johannesburg (Nov. 22, 2011) (transcript available at https://constitutionallyspeaking.co.za/justice-kate-oregans-helen-suzman-memorial-lecture/) [https://perma.cc/Z262-QRPW] (archived Sept. 4, 2019) (opining that courts are not suitable venues for policy determinations and advocating for judicial modesty). For a critical view of the *Soobramoney* decision, *see* James T. Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261, 287–89 (2002) (arguing that the court placed resource constraints ahead of the historical context of discrimination against blacks in South Africa in arriving at its decision).

171. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 947 (2011) (envisioning a multidimensional framework to effect change).

medicines in South Africa in the *Treatment Action Campaign (TAC) v. Ministry of Health*.[172]

TAC is a nongovernmental organization in South Africa that works on issues of access to essential medicines for those with HIV and AIDs in South Africa, a country with one of the highest incidents of these diseases.[173] TAC's strategies included direct action as well as teaching South Africans about the biomedical workings of HIV and AIDS of antiretroviral drugs (ARVs) as well as their side effects.[174] These teach-ins were done in workshops in schools, churches, union halls, and workplaces.[175] Its purpose was to educate and to empower those dealing with the pandemic with community and clinic-based ARV treatment.[176] Quite clearly, TAC was operating in many places and not merely filing suit in court.[177]

To achieve its goals, TAC initially unsuccessfully lobbied the Ministry of Health to provide nationwide access to nevirapine, a drug for pregnant mothers to prevent infecting their newborn babies with HIV and AIDS.[178] It also failed to persuade the ministry and the government to invoke the emergency provisions that would trigger exemptions from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO). [179] The South African government assumed a denialist posture—to the effect that HIV and AIDS were caused by many factors and not by a virus.[180] The government declined to roll out a nationwide effective treatment for preventing mother to child transmission outside a few pilot sites.[181]

TAC did not give up. Instead, it engaged in a multifaceted campaign to force the government's hand that included the media, public discourse and debate, demonstrations, protests, posters, and occupation of government offices.[182] TAC's founder, Zachie Achmat, confronted the minister of health on a live television show in which he argued that there were rising and needless deaths of the poor that could have been treated if the government made drugs available to them. [183] Achmat and TAC used their experience from the anti-

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172. *See, e.g.*, William Forbath et al., *Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign*, *in* STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 51, 67 (Lucie E. White & Jeremy Perelman eds., Stan. Univ. Press 2011).

173. *Id.*

174. *Id*. at 53.

175. *Id*.

176. *Id*. at 54–55.

177. *Id*. at 53.

178. *Id.* at 59–60.

179. *Id*. at 57.

180. *Id*.

181. *Id*. at 62.

182. *Id*. at 60–61.

183. *Id*. at 60.

apartheid struggle in their new struggle for access to affordable anti-retrovirals.[184] They also combined their activism with ACT-UP, a group in the United States that had experience lobbying for access to essential medicines inside and outside of courts.[185]

TAC also sued the Ministry of Health based on the South African Constitutional guarantee of the right to health.[186] TAC claimed that the government had unreasonably refused to extend access to the nevirapine drug.[187] The South African Constitutional Court held that the government had impaired the right to health care by refusing to rollout access to nevirapine on a nationwide basis.[188] The suit against the government did not displace the TAC's other strategies, including collaborating with sympathetic government officials.[189] Even though the court rejected its argument that social and economic rights had a substantive minimum core, it nevertheless held the government had an obligation to reasonably provide access to social and economic rights progressively and within available resources.[190]

A lot of academic analysis of the TAC litigation primarily focuses on whether or not newer constitutions should protect social and economic rights or on the detailed and abstract points of law raised in litigation before these courts.[191] These analyses however miss the bigger picture about how best to understand court struggles. The TAC litigation shows that it is inaccurate to assume that courts alone are sufficient to open up policymaking processes to fashion and implement robust and democratic programs of social provision of social goods, such as essential medicines.[192] As William Forbarth and Zachie Achmat have argued:

> Judicial vindication brings little change in actual social provision and tends to legitimate ongoing deprivations . . . but . . . there are often ways to use litigation to help bring about substantial change by putting litigation into the service of political and social strategies outside the courts.[193]

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184. *Id.* at 61.
185. *Id*. at 79.
186. *Id*. at 62.
187. *Id*.
188. *Id*.
189. *Id*. at 70–72.
190. *Id.* at 66.
191. *See* Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993) (arguing that Eastern European Constitutions should include both civil and economic liberties); *see also* SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (Malcolm Langford et al. eds., 2010).
192. *See* Forbath et al., *supra* note 172, at 52.
193. *Id.* at 55.

In other words, TAC used litigation in the service of many-sided strategies rather than as the primary object of its campaign for nevirapine.[194] From this perspective, litigation is only one of several ways of achieving the moral authority and political leverage to move the needle towards policies that favor the poor.[195] The TAC litigation was part of a larger decentralized, grassroots empowerment model that linked the local and global planes of the antipoverty and social rights advocacy. It also involved serious sustained engagement with national policy making, state institutions, or national political organizations, as William Forbath and Zachie Achmat convincingly show.[196]

TAC's broad campaign, including the litigation, was connected to its campaign against strong pharmaceutical patent protection that the South African government argued prevented it from breaking patents to allow for affordable medicines to those who could not afford it.[197] When global pharmaceutical companies sued the South African government arguing that its proposed legislation allowing patents to be broken was illegal, TAC and other groups held mass street protests. [198] Act-Up, a United States-based group, protested with placards on the AIDS pandemic behind Al Gore when he announced his bid for the presidency as a strategy of galvanizing support in the United States in favor of TAC's campaign against global pharmaceutical companies.[199] Ultimately, those companies withdrew their suit against the South African government.[200] Because of the broad public support for access to essential medicines in South Africa, the South African government in an unprecedented move refused to sign a free trade agreement with the United States that would have provided for higher pharmaceutical patent protections than it was willing to accept.[201]

After close to a decade of reviewing its patent legislation in a campaign that TAC played a central role in, the South African cabinet in May 2018 approved a new patent policy that was more in keeping with the interests of indigent South Africans who could not afford expensive HIV and AIDS drugs.[202] Further, South Africa has been a

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194. *Id.* at 56.

195. *Id.*

196. *Id.* at 52.

197. *Id.* at 57.

198. James T. Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy*, 7 J. GENDER, RACE, & JUST. 267, 290 (2003).

199. *Id.* at 290–91.

200. James T. Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties*, 15 HARV. J.L. TECH. 292, 313 (2002).

201. James T. Gathii, *The NeoLiberal Turn in Regional Trade Agreements*, 86 WASH. U. L. REV. 421, 469–70 (2011).

202. *See New Laws Needed Now To Save Lives*, TREATMENT ACTION CAMPAIGN (May 31, 2018), https://tac.org.za/news/new-laws-needed-now-to-save-lives/ [https://perma.cc/C28B-BETA] (archived Sep. 4, 2019).

leader in reviewing its investment regulatory regime as well as its investment treaties to make it more consistent with its own interests and priorities.[203] By examining the litigation brought by TAC for access to AIDS drugs in its broader and larger context, it becomes clear that arguments about the use of courts and the challenges they raise in terms of countermajoritarianism or overlegalization or overjudicialization miss how to understand such cases.

A final example to buttress the foregoing point is appropriate. Scholars have begun to recognize that court-centered accounts of shutting down democratic decision-making fail to take into account "how ordinary politics can produce escalating forms of conflict."[204] Thus Linda Greenhouse and Reva Siegal argue that accounts that trace conflict over abortion to the U.S. Supreme Court's decision in *Roe v. Wade*[205] fail to understand that the genesis over the abortion conflict predates that decision.[206] These authors show how social movements, the Catholic Church and Republican party strategists in their competition for voters "supplies an independent institutional basis for conflict over abortion."[207] This additional example of how a conflict was previously understood as arising because of adjudication as a result of which democratic politics was repressed, offers further support against the court-centered narrative that Moyn offers in making the case against judicial review. In many respects, focusing on the political struggles that eventually led to controversial judicial decisions like *Roe* shows how conflicts that eventually get judicialized have already been escalated elsewhere and that courts are but one institution through which actors involved in a conflict seek to advance their causes.

B. *Understanding the Role of International Courts in Newly Democratizing Countries*

Recent and forthcoming work has urged for understanding the workings of African international courts as a new and increasingly important venue for waging political, social, and legal struggles.[208] Since many African countries have weak democratic institutions, and African international courts provide an additional venue—among a

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203. *See generally* Republic of South Africa Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* (June 25, 2009), http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626 trade-bilateralpolicy.pdf [https://perma.cc/5RNW-F686] (archived Sept. 24, 2019).

204. Linda Greenhouse & Reva B. Siegal, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2034, 2076 (2011).

205. Roe v. Wade, 410 U.S. 113 (1973).

206. Greenhouse & Siegal, *supra* note 204, at 2030–31.

207. *Id.* at 2031.

208. GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55.

variety of options at the domestic level—through which citizens can wage their political, social, and legal struggles.[209] Often unable to reform interpretations and understandings of their rights within their domestic legal systems, these activists are increasingly turning to Africa's international courts.[210] As such, many of these activists and litigants are not engaged in one-off struggles confined to litigation in African international courts, as is assumed in scholarship on the crisis of human rights courts.[211] Examining the cases before Africa's international courts using the one dimensional lens of their lack of democratic legitimacy because they are at least one step removed from national politics does not square with how these litigants use these courts.[212] For these litigants, litigation in African international courts is but one strategy of contesting their governments that is part of a broader set of strategies in a variety of venues.[213]

To understand the role of international courts from the foregoing perspective, one has to pay attention to human rights case law from a bottom-up approach that examines the motivations and strategies of the litigators and activists who bring these cases instead of focusing on abstract ideas about their work. By focusing on the role of these nonstate actors and the value they attach to ideals like human rights in their litigation before international courts, rather than from the perspective of governments, it is possible to see how the cases filed in these courts are part of a broader strategy of spreading human rights consciousness and advocating for social, political, and legal change. For example, activists and opposition political parties use these courts to promote new norms and ideas about rights, but also to undermine justifications of authoritarian rule inconsistent with the observance of and respect for rights.[214]

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209. This is because there are limits to what courts can do to directly achieve social transformation, but yet, courts are an important partner and catalyst when activists and litigants use them as part of a multi-dimensional strategy to seek such change. *See* NeJaime, *supra* note 171, at 947; Forbath et al., *supra* note 172. Notably, litigants and activists using sub-regional courts often have little power and ability to attain their objectives through direct political means. For a view on this in another context, *see* R.C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287, 287–307 (1968).

210. GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55.

211. *Id.*

212. For an example of scholarship reviewing the democratic legitimacy of international law and courts, *see* Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 533–62 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 907–31 (2004).

213. GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55.

214. In fact, African scholars have recognized the importance of indirect impact forms of international law norms. *See* CENTER FOR HUMAN RIGHTS, IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN SELECTED AFRICAN STATES 9 (2012) (defining indirect influence to include awareness and use by civil society, national human rights institutions reference to the Women's Protocol in law school curricular and academic writings); Frans Viljoen & Lirette Louw, *State Compliance with the*

When litigants and activists file cases before international courts in Africa, they succeed in advancing their causes in a number of ways. This is because when a government defends a case in an international court, it is often required to provide information about the contested legal question, such as where and why a detainee without trial is detained, which in turn allows challengers to engage in a robust contestation of the government's case, both inside and outside the courtroom.[215] The importance of litigation providing information to litigants in political settings where governance is not transparent is a significant benefit that would unlikely be realized without such litigation.[216] Such an outcome is evident when a critic of the repressive Rwandese government was released from a custodial sentence imposed by a domestic court following a protracted case in the African Court on Human and Peoples' Rights.[217]

This Article will directly respond to an idea underlying Moyn's Article—that the type of human rights litigation found in Africa's international courts is countermajoritarian. To do so, this Article will discuss the *Katabazi* case from Uganda in the East African Court of Justice, one of Africa's international courts.[218]

The case arose following the arrest of several individuals who had just been granted bail by the Ugandan High Court within the precincts of that court.[219] These arrests were carried out on November 16, 2005, by a paramilitary group of the Ugandan government.[220] The arrests were described as "the worst attack on judicial independence through the siege of the High Court."[221] Not only did the paramilitary men

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Recommendations of the African Commission on Human and Peoples' Rights 1994-2004, 101 AM. J. INT'L L. 1, 1 (2007) (notably indirect impact is defined by Viljoen and Louw as incremental change occurring over time).

215. That was the case in *Rugumba v. Sec. Gen. of the EAC & Attorney General of Rwanda*, Ref. No 8 of 2010, Ruling (EACJ, 1st Inst. Div., 2011) (Tanz.) (where as a result of the filing of the case, the whereabouts of a detained individual were first disclosed by the government of Rwanda).

216. GATHII, AFRICA'S INTERNATIONAL COURTS, *supra* note 55.

217. *Ingabire Victoire Umuhoza v. The Republic of Rwanda*, No. 003/2014, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Nov. 24, 2017), http://www.african-court.org/en/images/Cases/Judgment/003-2014-Ingabire%20Victoire%20Umuhoza%20V%20Rwanda%20-%20Judgement% 2024%20November%202017.pdf [https://perma.cc/5NV3-J44X] (archived Sept. 4, 2019). For further analysis, *see* James T. Gathii & Jacquelene Mwangi, *The African Court on Human and Peoples' Rights as a Legal Opportunity Structure*, *in* REASSESSING THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS (forthcoming 2020).

218. *See* James Katabazi et al. v. Sec'y Gen. of the E. African Cmty. & Att'y Gen. of the Republic of Uganda, 1 (EACJ Nov. 2007), http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf [https://perma.cc/9MST-3WAU] (archived Sept. 4, 2019).

219. *Id*. at 1.

220. KITUO CHA KATIBA, EASTERN AFRICA CENTRE FOR CONSTITUTIONAL DEVELOPMENT, FIVE YEAR STRATEGIC PLAN 2011–2016 10 (2011).

221. *Id.*

interfere with the preparation of the bail papers, they also took the men before a military general court-martial, where they were charged with unlawful possession of firearms and terrorism under the same facts that had supported the previous charges for which they had been granted bail.[222] The Ugandan Constitutional Court, on petition from the Uganda Law Society, declared the detentions unconstitutional and ordered the individuals released from detention.[223]

The Ugandan government failed to comply with that decision, and a complaint was thereafter filed in one of Africa's international courts, the East African Court of Justice.[224] The complainants challenged their rearrest, military charges, and detention as inconsistent with the provisions of the Treaty for the Establishment of the East African Community.[225] They argued that this conduct, together with the refusal by the Ugandan government to comply with the bail order, constituted an infringement of their human rights under that treaty.[226]

One of the questions that the East African Court of Justice had to consider before deciding the case was whether it had jurisdiction over human rights cases.[227] That was an important question because the relevant provision of the treaty provided that jurisdiction over human rights cases would be granted to the East African Court of Justice at a future date.[228] Such an extension of jurisdiction had not happened.[229] This absence of an explicit jurisdictional basis to decide human rights cases corresponds to the absence of an explicit textual provision in the U.S. Constitution authorizing judicial review. As we saw above, this absence of an explicit constitutional basis for judicial review has been a major source of the illegitimacy of judicial review from adherents of the countermajoritarian difficulty who prescribe judicial modesty. Instead of construing its jurisdiction to strictly conform to this treaty

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222. James Katabazi et al. v. Sec'y Gen. of the E. African Cmty. & Att'y Gen. of the Republic of Uganda, 2 (EACJ Nov. 2007), http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf [https://perma.cc/9MST-3WAU] (archived Sept. 4, 2019).

223. *Id.*

224. *Id.* at 2–3.

225. *Id.* at 3.

226. *Id.*

227. *Id.* at 14 ("Does this court have jurisdiction to deal with human rights issues?").

228. Treaty for the Establishment of the East African Court of Justice, art. 27(2), Aug. 20, 2007 ("The Court shall have such other original, appellate, human rights jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction.").

229. James Katabazi et al. v. Sec'y Gen. of the E. African Cmty. & Att'y Gen. of the Republic of Uganda, 15 (EACJ Nov. 2007), http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf [https://perma.cc/9MST-3WAU] (archived Sept. 4, 2019) (The court noted that it was "very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.").

provision consistently with adherence to judicial modesty in the Justice Frankfurter tradition, the East African Court of Justice dismissed this jurisdictional challenge and held it had a responsibility not to "abdicate from exercising its jurisdiction . . . merely because the reference includes allegation[s] of human rights violation[s]."[230] Referring to other provisions of the relevant treaty that embodied human rights, the court held that it had an obligation to "provide a check on the exercise of the responsibility . . . to protect the rule of law," and that Uganda's conduct constituted "an unacceptable and dangerous precedent, which would undermine the rule of law."[231] The *Katabazi* case established a new cause of action for challenging violations of human rights of EAC member states. This in turn opened the door to a stream of human rights cases before the East African Court of Justice.[232]

For scholars like Moyn who argue human rights is in crisis, the East African Court of Justice's assumption of jurisdiction over human rights cases in the absence of an explicit basis for doing so is problematic.[233] If Moyn's countermajoritarian difficulty is applied, the *Katabazi* decisions in both the Ugandan Constitutional Court and the East African Court of Justice would not have been possible. After all, the ruling party in Uganda that has been in power since the mid-1980s has won every national election with a very high majority of seats in Parliament.[234] These judicial decisions against the ruling party in Uganda would therefore be countermajoritarian from the perspective advocated by Moyn. Such an argument would miss the point.

Analyzing these cases from the assumptions embedded in the countermajoritarian difficulty would legitimize the authoritarian governance of regimes like the one in Uganda. Further, proceeding from assumptions like the countermajoritarian difficulty overlooks the strategies of litigants such as those in the TAC case in South Africa

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230. *Id.* at 16.

231. *Id.* at 22–23.

232. *See* James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 254–59 (2013) [hereinafter Gathii, *Mission Creep*].

233. *See* Ally Possi, *Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice*, 15 AFR. HUM. RTS. L.J. 192, 203 (2015) (arguing that "despite the existing limitations to adjudicate human rights disputes, it is undeniable that the EACJ has adopted some kind of judicial activism when adjudicating cases with human rights allegations. In such circumstances, it is likely to provoke controversy among member states. It can also be propounded that the continuing politicization of the EACJ's human rights jurisdiction may have been caused by the Court's activism.").

234. *See generally* JAMES T. GATHII, *International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, *in* REASSESSING THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS (forthcoming 2020).

and those in the Ugandan *Katabazi* case. These litigants were not using courts in isolation, but rather they were engaged in multiple strategies including street protests, working with allies in parliament, writing editorials in the media, as well as appealing to like-minded groups to advance their causes.[235] In addition to filing the case in the East African Court of Justice, the *Katabazi* litigants had a parallel case in the Ugandan Constitutional Court in which they had already prevailed.[236] By filing the case in the East African Court of Justice, the strategy forced the Ugandan government to defend the litigation in a forum it did not control.[237] The case in the East African Court of Justice helped the *Katabazi* plaintiffs keep the repressive conduct of the Ugandan government in the spotlight for a prolonged period of time as the government engaged in figuring out how best to respond to the issues the cases raised both inside and outside the courtroom.[238] Such a multipronged strategy lended credibility and legitimacy to the cause(s) the litigants were pursuing. In addition, the cases helped them to communicate and advance their agenda of social, political, or legal change with other Ugandans.[239] International courts therefore give litigants a new mechanism of political expression that is disruptive of ordinary democratic politics based at the national level.

Cases like the *Katabazi* case when decided by an international court are sometimes regarded as negative examples of judicial activism. Such a perspective fails to acknowledge how these international courts, just as national courts, are invited "to interpret highly abstract . . . clauses invoking equality, liberty, freedom of speech, property or due process."[240] In the *Katabazi* case, the court was invited to establish whether or not the rearrests, detention, and military trials of individuals who had already been granted bail by the High Court of Uganda was consistent with the fundamental principle of the rule of law in the Treaty for the Establishment of the East African Community. It is precisely the kind of elaborate arguments of policy that courts engage in when trying to figure out which concern should prevail over others in a particular case that makes going to court for litigants and activists very attractive. Thus, it is appropriate when the occasion calls for it to dethrone the view of courts as an institution that authoritatively protects clearly defined rights. Instead, it may be best on those occasions to see the role of these courts as the litigants who use them—as one venue among others that these actors use to achieve their goals.

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235. *See* Gathii, *Mission Creep*, *supra* note 232.
236. *Id.* at 254–55.
237. *Id.* at 255.
238. *Id.*
239. *Id.*
240. Kumm, *supra* note 212, at 925.

V. CONCLUSION

Constitutions written in light of the experiences of the twentieth century, such as apartheid and fascism, are based on the principle of constitutional supremacy.[241] That means that a majority cannot amend normative commitments, such as fundamental rights and freedoms, and when they do those whose rights have been violated can go to courts for judicial relief. By contrast, the relationship between judicial review and democracy that Moyn offers us is predicated on the two being opposed to each other. This view of the relationship between judicial review and democracy has been shaped by the specific historiography of the United States. This Article has argued that there are alternative and more compelling accounts of the relationship between judicial review and democracy developed in the crucible of anticolonial and antifascist struggles.[242] This Article has offered accounts from South Africa to illustrate how judicial review was designed to counter the legacy of apartheid. In so doing, this Article has argued that it is important to allow for plural accounts not only of human rights but also of judicial review, and the relationship these normative values have with democracy.[243] From the perspective offered in this Article, "[a]ccounts which treat human rights as a single coherent discourse or a clear canonical set of international legal texts inevitably oversimplify the immeasurable complicated interactions among innumerable historical agents that contribute to the various commitments that people call human rights."[244]

Those that work on critical approaches in international law, such as Third World Approaches to International Law (TWAIL), are all too familiar with hegemonic discourses, including those of international human rights law.[245] Such hegemonic discourses that are prescribed for the entire world, even when they have arisen in very contingent historical circumstances, cannot advance the causes of human rights.[246]

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241. Moseneke, *supra* note 168, at 15–16.

242. Joseph R. Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third* World, 40 HUM. RTS. Q. 735, 737 (2018); *see also* Zarakol, *supra* note 141, at 77 (noting the historical contingency of scholarship on the relationship between democracy and judicial review that does not examine the experiences of non-Western societies).

243. Slaughter, *supra* note 242, at 737.

244. *Id.*

245. *See, e.g.*, James T. Gathii, *The Agenda of Third World Approaches to International Law (TWAIL), in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (forthcoming 2019).

246. Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 209 (2001) (arguing that "human rights should be based not just on American or European legal traditions but also on other cultural milieus,"

This Article has argued that the countermajoritarian difficulty is a peculiarly American understanding of the relationship between democracy and judicial review. Further, this very particular understanding of this relationship does not have at its center a normative commitment to values such as human rights. Rather, at its center, it has a commitment to democracy defined as majority rule. Under this understanding, elections and legislatures are the preferred modes of resolving and settling democratic questions. In a constitutional democracy by contrast and as envisaged in this Article, it is presupposed that through a bill of rights, the people have provided "precautions or pre-commitments against their own imperfections or harmful future desires and bind themselves to their initial agreement on the basic rules and rights that specify their sovereignty."[247] To ensure this, they empower courts to police those precautions and precommitments. As such, this Article has argued that Moyn's prescription of the countermajoritarian difficulty and judicial modesty based on his understanding of Justice Frankfurter is not only historically bound up with the specific history of the United States, but that it is also insufficiently attentive to the normative commitment to the need for judicial review to guard against majoritarian legislative excesses that violate the rights of others, especially minorities. This very United States-specific understanding of this relationship that presupposes an insoluble tension between judicial review and democracy, cannot and should not be exported globally unproblematically. Barry Sullivan has recently convincingly shown that far from adopting Justice Frankfurter's noninterventionist judicial philosophy to protect the democratic process from majorities hostile to voting minorities, the U.S. Supreme Court "has not only declined to intervene when overreaching majorities have used their authority to set electoral rules entrenching their own dominance, the Court also has invalidated legislation on those rare occasions when the political process has actually produced democracy-enforcing legislation."[248] In other words, if Justice Frankfurter's view of judicial modesty was problematic because for him disenfranchised electoral minorities had to go back to the electoral majorities that had

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such as indigenous, non-European traditions of Asia, Africa, the Pacific, and the Americas); *see also* Makau wa Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L. 591 (1996).

247. Ran Hirschl, *Preserving Hegemony? Assessing the Political Origins of the EU Constitution*, 3 INT'L J. CONST. L. 269, 273 (2005).

248. Sullivan, *supra* note 103 (manuscript at 27–28) (arguing that the U.S. Supreme Court's reluctance to protect disenfranchised minorities exemplifies how the imperfections of democracy in the US); *see also* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that presupposing a well-functioning democracy and rights respecting legislatures unlimited by judicial review must be rejected). John Hart Ely's representation reinforcing justification of judicial review to ensure democracy is operating well is preferable. *See* HART ELY, *supra* note 103.

disenfranchised them for relief, the current Supreme Court seeks to completely disentangle itself from overseeing the electoral process when disenfranchised voters approach it for relief.[249] Thus even in the United States, reviving Justice Frankfurter's judicial modesty would not provide relief for disenfranchised majorities.

These narrow understandings of judicial review are inconsistent with the role judicial review is designed to serve in countries that have adopted transformative constitutions like South Africa and Kenya. In these countries, there is a central commitment to ensuring that majorities do not run roughshod over minorities and that when majorities do so those that suffered harms can go to courts for relief. In countries like these, therefore, paying attention to the specific reasons why judicial review is adopted is an important first step in understanding its nature and function.[250]

Further, analysis like Moyn's that exclusively focuses on judicial review makes invisible the ways in which actors use courts and other sites of contestation that they are simultaneously engaging in with their interlocutors inside and outside of government. In other words, beyond protecting democracy, litigants go to courts as one among many forums to advance their causes. By prescribing a single historically contingent model of judicial review for national and international courts, Moyn forecloses the plurality that characterizes how judicial review works in different parts of the world as well as how different actors use it. For these reasons and all the reasons advanced in this Article, his effort to simplify and universalize his preferred theory of how individuals should understand the relationship between democracy and judicial review does not withstand critical scrutiny and should be rejected.

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249. *See* Sullivan, *supra* note 103.

250. For the case that historical experiences such as apartheid in South Africa informed the particular nature of the Constitution, *see* Moseneke, *supra* note 168, at 11 (arguing that "Under apartheid, parliament enjoyed supremacy and no Constitution or bill of rights provided any fetter on its legislative powers. Oppressive laws passed by parliament could, for the most part, not be challenged in the courts. The apartheid regime was sustained by lack of accountability and the construct of parliamentary sovereignty.").