Judicial Independence and Transformative Constitutionalism: Squaring the Circle of Legitimacy[1]

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I. Introduction

Courts in the United Kingdom and the United States face a crisis of democratic legitimacy. In both jurisdictions, political actors are looking askance at recent and prospective judicial interventions in the policy process and are engaged in, or considering making, changes to the constitutional balance to reduce the power of unelected judges. At the time of writing, the United Kingdom is still engaged in the complex process of withdrawal from the European Union. The status of the 1998 Human Rights Act, which incorporates the European Convention on Human Rights into British domestic law and effectively handed a new power of judicial review to the British courts, is part of the ongoing exit negotiations. This follows well-publicised clashes between the government and the UK Supreme Court in the run-up to the Brexit deadline of 31 October 2019, which culminated in the court declaring that the British Prime Minister, Boris Johnson, had acted illegally in proroguing parliament. The 2019 Conservative Party manifesto suggested that wide-ranging reform was on the government's agenda, promising 'We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government', and 'We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that

[1] I am grateful to Denis Galligan and Ezequiel González-Ocantos for very helpful comments on a draft of this article.

it is not abused to conduct politics by another means or to create needless delays.'[2] The politicisation of the courts in the United States is, of course, nothing new, but popular interest in the composition and powers of the Supreme Court, and the US judiciary more broadly, has reached fever pitch during the Trump presidency, following the confirmation of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. The prospect of a long-term conservative majority on the Supreme Court bench has meant the resurrection of debates over court expansion and jurisdiction stripping.[3] In both states, it is fair to say that either the independence of the judiciary from other branches of government or the scope of judicial power is under real threat.

Whether this is a good or a bad thing is, of course, open to debate. It is clear that courts sometimes act as significant actors in contemporary politics, effecting outcomes that executives and legislatures are seemingly unwilling or unable to bring about, despite their lack of a direct electoral mandate. Yet for every *Roe v Wade* there is a *Dred Scott v Stanford*. In many times and many places, courts have proven to be unreliable guardians of either individual rights or the common good: sometimes protecting powerful elite interests, at other times folding in the face of hostile public opinion. Those who have sought to defend a strong judiciary have therefore typically faced two powerful objections: what gives the court the right to overrule the public in deciding matters of political consequence? And why would we think they would be likely to make good decisions in any case? This chapter argues that both questions can be addressed by forging a politically salient role for the courts grounded in active public support for and participation in the constitutional process. It first outlines an account of what is termed the 'judicial trilemma', whereby there appears to be an inherent trade-off between three desirable features of courts in democracies, relating to the scope of their powers, their independence from other political actors and their democratic legitimacy. It suggests that this apparent trilemma can be resolved through a revised understanding of democratic legitimacy, whereby a democratic public is both actively involved in forging and supporting the constitutional order which affords courts the responsibility for

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[2] 'Get Brexit Done: Unleash Britain's Potential', *The Conservative and Unionist Party Manifesto 2019*, 48.

[3] For discussion, see RD Doerfler and S Moyn, 'Making the Supreme Court Safe for Democracy', *New Republic*, 13 October 2020.

upholding individual rights. It denies that such 'second-order' legitimacy can be found in either the United States or the United Kingdom at present, but argues that a model for such an approach can be found in the ideal of 'transformative constitutionalism' pioneered in post-apartheid South Africa.

II. The Judicial Trilemma

Jean-Jacques Rousseau begins *The Social Contract* with a famous observation of the state of humanity in civil society: 'Man is born free; and everywhere he is in chains.' He sets his work a specific challenge, 'What can make it legitimate? That question I think I can answer.'[4] All democratic institutions must face this challenge: why should they get to tell other people what to do, when they draw up, enact, and enforce coercive law, and why should those affected do what they say? Such questions of legitimacy are particularly difficult for courts to answer. Although there are undoubtedly many problems with the real-world processes which lead to legislatures and executives wielding political power, both are typically rooted in some form of direct election. When this is not true, as in cases such as the UK House of Lords, a hybrid of political appointment and hereditary privilege, the institutions in question are generally limited in relation to other political actors, such as directly elected assemblies or chief executives, who can point to their own democratic mandate and so cast themselves as executors of the will of the people. For the most part, judges and courts have no such grounding of their political authority. Yet in some times and places they have exercised a great deal of power: sometimes in the place of, and sometimes in opposition to, other political actors with more obvious sources of legitimacy.

There is variation between different polities as to the degree of power that courts are able to exercise and the extent to which they are, in practice, able to operate independently of other political institutions. Common law systems have tended to be more open to the propriety of some form of judicial review of legislation than civil law systems, although there is clearly an important difference between a polity such as the United States, where the principle of the separation of

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[4] J-J Rousseau, 'The Social Contract' in *The Social Contract and Discourses*, ed GDH Cole (London, Dent, 1913) 1.1, 5.

powers is a key feature of the constitutional order and where the power of judicial review was institutionalised following the 1803 Supreme Court ruling in *Marbury v Madison*, and the United Kingdom, which has historically affirmed the legislative supremacy of parliament and where judicial review has been primarily confined to the administrative acts of officials and public bodies within the law. Recent years, however, have seen British courts exceeding these traditional limits and acting in a way that has more directly challenged the decision-making powers of both government and parliament, not least on account of the incorporation of the rights of the European Convention on Human Rights into domestic law by the Human Rights Act 1998. This reflects a general trend in many jurisdictions around the world to entrench the rights of their citizens in formalised bills of rights, in both domestic and international contexts – a development that Charles Epp famously labelled 'the rights revolution'.[5] Such developments enhance the power of the judiciary because it falls to judges to hear claims from individuals that their rights have been infringed; this in turn can afford the courts a considerable degree of latitude as to how these rights should be interpreted. In some cases, interest groups have deliberately sought to cast their political agendas in terms of rights to bring them within the purview of the courts and challenge majoritarian decisions. In other cases, democratically elected political institutions have been ready, even eager, to let the courts decide on particular issues. This can take place for a number of reasons, ranging from the unwillingness of popularly elected politicians to take stands on certain controversial issues, to a recognition that, in an age where there is widespread disillusion with other governmental institutions, courts in many countries have retained a degree of public trust, and so can legitimate unpopular policy outcomes

Judicial power in democracies, then, seemingly gives rise to what might be termed the *judicial trilemma*. There seems to many (though not to all) to be good reasons for courts to satisfy three distinct desiderata; yet all three cannot be achieved simultaneously. Or so it would appear. These might be summarised as follows:

(1) Scope: courts should be able to wield some significant degree of political power.

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[5] CR Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, University of Chicago Press, 1998).

(2) Independence: courts should be willing and able to act in a counter-majoritarian fashion to uphold individual rights.
(3) Legitimacy: courts should not act in a way that undermines the democratic character of the polity.

Quite what it means for a given desideratum to be met in a given context will depend on the nature of the polity in question, but also on one's background theory of constitutional democracy. The 'significant degree' of political power in (1), for example, could be satisfied by a range of different models of judicial review of legislative and/or executive action, whereby courts are able to overrule other political actors in order better to protect individual rights. Courts need not necessarily possess the constitutional ability to act in a quasi-legislative manner by effectively passing their own legislation, requiring that certain policy outcomes be brought about, but they must at least be able to check the activities of other political institutions, typically by reference to some national or international schedule of rights. It may well be thought that to be meaningful, such power should not simply concern scrutiny of the administrative activities of the executive within the law, important though this is, but should extend to at least some degree of assessment of the compatibility of legislation with the rights of citizens, whether this is prior to or following the passage of law. The independence of the judiciary under (2) must be understood not purely in de jure but in de facto terms: it is not enough for the courts to have the formal power to overrule other political actors if they are not realistically able to do so in practice. While one does witness substantial anticipation of possible judicial challenges in the formulation of legislation in some countries, one would expect to see some degree of genuine frustration of the intentions of other political institutions by the courts on at least some occasions in circumstances where (2) is realised.

The most complicated of these desiderata is the third, owing to the contested nature of democratic legitimacy. Legitimacy is an extensively debated concept, but the basic idea here is that the outputs of the political process should stand in the right kind of relation to the will of the people if they are to possess authority, and not simply represent coercion imposed by brute force.[6] It does not follow straightforwardly from this that the judiciary must be subservient to the legislature, or even to the apparent wishes of the majority. One vision of the historical constitutional order of England, for

[6] The theoretical literature on legitimacy is extensive, but see particularly AJ Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge, Cambridge University Press, 2001).

example, see courts as institutions that are justified not primarily in terms of their contribution to democracy (not least because they were established long before democracy was plausibly imaginable), but to broader ideas of the common good, understood in terms of the protection, welfare and advancement of all: an idea that finds support in the recent *Miller* judgment.[7] But simply advancing, or seeking to advance, the common good is not sufficient to satisfy (3). It is true that the courts have long coexisted with other political institutions, but contemporary elected elements of the British government possess a claim to democratic authority that surpasses their historical antecedents, given the more recent development of full-blown representative democracy, most particularly following the passage of the Representation of the People Acts 1918 and 1928. If judicial actions are to be legitimate and not merely coercive, on this view, they must have some characteristic which confers authority upon them with reference to the rule of the people.

So far so good, but this idea of democratic authorisation is itself open to more than one interpretation. The most straightforward is to equate it with following the preferences of the majority. To do so would be to open up an obvious tension between desiderata (2) and (3), and so suggest that there are occasions when courts both should act against the majority (when, for example, doing so upholds constitutional rights), and should not do so (as doing so would be to act undemocratically). This leads some to oppose the very idea of significant judicial power, and to support bringing all major decision-making under the purported control of the majority, by reducing the scope of judicial power (1) or limiting its independence (2). Bringing the courts to heel, however, is not without cost and does not in itself resolve the problem of democratic legitimacy. Judicial power has not increased for no reason: the enhanced role of the courts in scrutinising legislative and executive action has, as stated, arisen in part owing to the rise to prominence of political activism relating to individual rights, and this in turn reflects the emergence of a widely shared belief that these rights are of fundamental importance. The rise of international human rights law in the aftermath of the Second World War has coincided with processes of democratisation in countries formerly under colonial or communist control, and that often experienced appalling human rights abuses. One may also point, to some extent, to the idea that postindustrial politics has been characterised by a shift from broad questions of societal class

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

and wealth redistribution to issues which often cut across traditional political cleavages, and are often of great importance to particular minority groups. The claims of these groups are typically framed in terms of rights, and courts have been asked to uphold these rights against less sympathetic majoritarian legislatures. Much of recent political history has been marked by struggles for equality and against discrimination, initially on the basis of race and gender, and more recently on grounds such as sexuality, disability and age. Such struggle has often taken the form of a fight for legal entitlement, typified by the civil rights movement in the United States. Many now believe that governmental action should properly be limited by respect for such rights. So, for example, legislatures would act wrongly if they sought to act in ways that violated basic rights, even if they did so at the behest of a majority of the populace.

Suppose we grant that the protection of individual rights, whether understood in a relatively narrow way, in terms of classic 'negative rights' such as freedom of speech and assembly, or more expansively in relation to social, cultural and economic interests, should indeed be a priority for modern-day democracies, or, more strongly, that such rights limit the permissible scope of democratic decision-making. It does not follow from this alone that the responsibility for ensuring that rights are prioritised or the limits of permissible democratic decision-making respected should belong to the courts. Some writers, such as Jeremy Waldron, have maintained that such functions should be exercised by legislative assemblies themselves.[8] If someone has to act in this way, it may as well be legislative majorities, who at least possess a certain kind of democratic mandate. One question here, of course, is whether we think that such legislative majorities are likely to do a good job of protecting such rights – or, at least, a better job than the courts. But two further issues arise. First, there is no guarantee in many polities that a legislative majority will in fact equate to an overall majority of those voting in elections, let alone a majority of those eligible to vote. In the United Kingdom, for example, the only government since the Second World War to have the nominal backing of a majority of those who voted was the 2010 Conservative–Liberal Democrat coalition government. The Labour administration elected in 2005 had an overall majority in the Commons of sixty-six seats, despite capturing only 35.2 per cent of the popular vote, equating to just 22 per cent of the electorate. Admittedly, this is in part a function of the electoral systems used

[8] J Waldron, 'Rights and Majorities: Rousseau Revisited' (1990) 32 *Nomos* 44.

in such countries, and more proportional systems typically avoid this specific problem, though it is not obvious that those voting endorse the specific constellation of parties that end up wielding power. But more substantively, it is not clear that allowing a majority to decide such an issue does in fact result in the desired degree of democratic legitimacy, quite aside from whether we think it has the practical effect of ensuring that individual rights are upheld, given that they represent some, but not all, of the people. This is the key element of the puzzle*:* majority rule is a necessary but not sufficient condition of democratic legitimacy.

It is not that majorities do not matter. There is an inescapable truth about the role of majorities in democratic theory: when a decision has to be taken, giving each affected person the same say satisfies a principle of political equality that is generally located at the very heart of the modern-day polity, however unequal its workings may be in practice.[9] There is something profoundly unsettling, from a democratic point of view, in the idea that the rule of the state might rest upon the will of less than half of the citizenry. Numbers matter in a democracy. The ultimate democratic sanction against a regime is revolution: the massed people on the streets reclaiming popular sovereignty from its rulers. Ultimately no constitutional order can stand against such a force. So majority rule is necessary for democratic legitimacy, but it is not sufficient. The majority cannot simply do anything it wants. The obvious problem with majority rule is the minority which does not get to have its way on the matter in question. The challenge faced by any theory of legitimacy is how to deal with this issue: how to ensure that the laws that bind do not have the character of chains, imposed on the few by the many, without the latter's consent. Different theorists have responded with more or less demanding accounts of democracy, that place varying degrees of limitations upon the actions of majorities. Less demanding accounts focus on the fairness of democratic procedures, maintaining that so long as minorities have the opportunity to put their case to the public, an appropriate respect for political equality requires that they respect the outcome of the decision-making process. More demanding accounts, often associated with the republican tradition, are more avowedly counter-majoritarian, seeking to disperse political power

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[9] J Waldron, 'The Constitutional Conception of Democracy' in *Law and Disagreement* (Oxford, Oxford University Press, 1999); P Jones, 'Political Equality and Majority Rule' in D Miller and L Siedentop (eds), *The Nature of Political Theory* (Oxford, Oxford University Press, 1983).

across different institutions, allowing multiple access points to political decision-making, providing avenues for the contestation of political decisions by citizens, and, in some cases, seeking to entrench individual rights against majorities by some form of constitutional protection.[10] One the face of it, the former approach compromises on desideratum (1) of the judicial trilemma by leaving the determination of rights-based questions to elected majorities, whereas the latter will end up sacrificing either (3) the democratic legitimacy of the regime, if courts manage to stay independent of majoritarian institutions, or (2) judicial independence, if they do not. Yet the republican tradition has resources to seek the square the circle and satisfy all three desiderata. To see how this can, at least, in theory, be done, it is helpful to return to how Rousseau sought to answer this very question.

III. First- and Second-order Legitimacy

In *The Social Contract*, Rousseau argues that citizens can be both free and yet subject to law, even in cases where the law in question does not accord with their initial judgement as to how the polity should be governed. The work is primarily concerned with voluntary forms of political association, whereby each individual freely consents to join the society in question. Thus, he writes:

> There is but one law which, from its nature, needs unanimous consent. This is the social compact; for civil association is the most voluntary of all acts. Every man being born free and his own master, no one, under any pretext whatsoever, can make any man subject without his consent.[11]

So unanimity is needed in order to join the polity in the first place. Thereafter, however, Rousseau argues that it is possible to have majority rule and yet retain one's freedom. This in itself is not an unusual idea: Locke argues for a version of the claim in his *Second Treatise on Government*, arguing that the idea is entailed by the decision to join the polity in the first place: 'When any number of Men have so *consented to make one Community* or Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude

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[10] P Pettit, 'Republican Freedom and Contestatory Democratization' in I Shapiro and C Hacker-Cordon (eds), *Democracy's Value* (Cambridge, Cambridge University Press, 1999).

[11] Rousseau (n 4) 4.2, 93.

the rest.'[12] Accepting that decisions will have to be taken by majority rule is necessary if the association is to be practicable: 'For if *the consent of the majority* shall not in reason, be received, *as the act of the whole*, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such a consent is next impossible ever to be had.'[13] Whether a persistent minority in such a position may truly be said to have avoided the tyranny of the majority is evidently open to question. Rousseau's account, in any case, is more sophisticated. The thought is that a member of the minority in Rousseau's society does, in fact, consent to the law, even though they voted against it: 'The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them.'[14] The key to understanding Rousseau's position is his concept of the 'general will', which represents, in some sense, the common good of society, though its precise meaning is much disputed. Thus he writes:

> When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so.[15]

There are two primary ways of understanding this passage. Both, however, make use of the same underlying idea – the thought that the consent of the people can be preserved even in circumstances of first-order disagreement if there is a second-order agreement that the decision of the majority is the right way to proceed. The minority, accordingly, now endorses the decision of the majority – either because they believe, as a result of the information about others' beliefs revealed by the vote, that they were wrong, or because they believe that given the fact that the

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[12] J Locke, *Two Treatises of* Government, ed P Laslett (Cambridge, Cambridge University Press, 1988) s 95, 348.

[13] ibid s 98, 350.

[14] Rousseau (n 4) 4.2, 93.

[15] ibid 93–94.

majority feel as they do, the right thing for the polity to do is to implement the will of the majority.[16] In both cases, there is now consensus on how to proceed. This goes beyond the idea of 'agreeing to disagree' to a more substantive type of concord: one would expect, if the initial vote were to be re-run, that there would now be unanimity. Accordingly, Rousseau seems to have squared the legitimacy circle – the minority have been outvoted, but they endorse the outcome of the decision-making procedure in which they have been involved as representing the right course for society. As such, they can be meaningfully subject to the law, even a law they initially opposed, and yet as free as they were in the state of nature.

Rousseau's particular model is, as many have observed, a particularly demanding one, even for small city states in the eighteenth century, and undoubtedly for complex modern-day states. An approach to legitimacy that requires universal initial consent to the terms of association, at least some degree in active law-making for all citizens (though Rousseau excluded women), and some kind of unanimous and profound commitment to upholding the outcome of the legislative procedure is probably best seen as modelling an ideal type of legitimacy, rather than providing a readily replicable standard in the real world. (Indeed, Rousseau's own foray into constitution writing in Poland was rather less expansive in its ambitions.) But the underlying idea of the possibility of there being second-order agreement about what to do in a context of first-order disagreement points the way to a resolution of the judicial trilemma. The thought here is that judicial action, or other forms of counter-majoritarian intervention, could be legitimate if they had their own form of democratic support, of a majoritarian or even super-majoritarian nature. Put simply, if the people are in favour of judges acting to uphold the rights of minorities, then such action cannot be said to contravene the will of the people. This could be so even if a majority of the people were opposed to the specific decision that the courts were making in a given case. There is no logical contradiction in the idea that one is on one level in favour of course of action A, but believes that there is good reason to allow another body to make the decision, even if one knows that this will lead to course of action B. (This is why Richard Wollheim's much discussed democratic paradox, whereby an outvoted minority that is committed to the rule of the majority

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[16] For discussion, see C Brooke, 'At the Limits of General Will: Silence, Exile, Ruse, and Disobedience in Rousseau's Political Thought' (2007) 4 *Les études philosophiques* 425.

seemingly wants two different things to happen at the same time, is not strictly speaking a paradox at all.)[17] Indeed, it was in the past commonplace in a US context to point out that the Supreme Court generally had a relatively high level of public support as measured through opinion polling, consistently outperforming both the US Congress and (often) the US president, though increasing political polarisation means that this is less true now than once it was.[18] It seems clear that it would be too much of a stretch to suggest that the judicial trilemma is resolved in the contemporary United Kingdom, as one could plausibly maintain that none of the three desiderata are met in a context where the powers of the courts are limited and receding, and where their exercise has recently nonetheless been the subject of considerable contemporary disquiet. But might one seek to appeal to the idea of second-order legitimacy and the long-accepted principle of judicial review to suggest that the judicial trilemma has been resolved in the United States? There are real problems with such a move.

The first issue concerns the emaciated idea of democratic legitimacy being deployed. Recall the three aspects of Rousseau's ideal type account of legitimacy: universal consent to the terms of association, active participation in the passage of legislation, and a high (indeed unanimous) degree of consensus over political outcomes. The contemporary United States falls short on all three. Consider, for example, the notion of universal, or even widespread, consent to the terms of association. The need for some kind of non-partisan, super-majority approval for the ratification of constitutions is well understood, and one could, if particularly charitably disposed, describe the process of the 1787 Constitutional Convention in such terms. The problem comes with the amendment procedure. Amendments to the US Constitution requires the approval of two-thirds

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[17] R Wollheim, 'A Paradox in the Theory of Democracy' in P Laslett and WG Runciman (eds), *Philosophy, Politics and Society* (Oxford, Basil Blackwell, 1962).

[18] For current opinion polling data on the US Supreme Court, see https://news.gallup.com/poll/4732/supreme-court.aspx. For historical data, see JM Scheb, 'Public Holds US Supreme Court in High Regard' (1993) 77 *Judicature* 273; R Handberg, 'Public Opinion and the United States Supreme Court 1935–1981' (1984) 59 *International Social Science Review* 3.

of both houses of Congress and three-quarters of state legislatures.[19] Imagine (counterfactually) that the initial Constitution had been endorsed by the unanimous agreement of all US citizens. We could at that point cast the counter-majoritarian character of the amendment procedure in terms of second-order legitimacy: the demos, or more, precisely, all the individual members of the demos, would have agreed to constrain itself, in the manner of Ulysses ordering that he be bound to the mast so that he should not be driven to jump overboard by the song of the Siren. But it is not clear that such a justification can hold once significant periods of time pass, and the people living in the polity are no longer the people who supported the passage of the constitution at its inception, or who (more realistically) were represented by the participants at the Convention. The best-case scenario is now one whereby there is still widespread support for the Constitution's counter-majoritarian measures, even though they were not the doing of anyone currently alive. Of course there is no guarantee that this will be the case, and it is also possible that what will ensue will be an unhappy majority constrained by anti-majoritarian institutions that prevent it enacting its will. (It seems likely that coming years may see difficult disputes about the fairness of the US electoral system of just this kind, in relation to both the role of the Electoral College in electing the president, and the composition and powers of the US Senate, which is premised on each state wielding the same degree of power regardless of its population size). Even the best-case scenario, however, leaves a great deal to be desired from a democratic perspective. It cannot be said that the people are authors of their own governmental institutions in any meaningful sense if these institutions have their origins in the eighteenth century and there is no practicable pathway to their reform. Popular support for these institutions in such a context may represent not so much a genuine endorsement of the system of government as a form of Stockholm Syndrome on the part of the electorate. Public approval, on this account, is not sufficient for legitimacy: on such a metric, any number of authoritarian, explicitly non-democratic governments would possess legitimacy, and indeed, would be more legitimate insofar as they were more successful in moulding their subjects

[19] Although this is how all twenty-seven amendments to the Constitution have been passed to date, Article V of the Constitution also allows for two-thirds of state legislatures to require Congress to call a constitutional convention. Amendments which came out of such process would then need ratification by three-quarters of the states.

to accept their rule. There needs to be a more meaningful link between political opinion and political outcome. Without it, second-order legitimacy looks to be second class.

The claim, then, is that regardless of its system of judicial review, the constitutional order of the contemporary United States falls short of desideratum (3), on democratic legitimacy. Yet it can also be contended that it fails in terms of desideratum (2), on independence and the protection of rights. This is because despite the significant degree of power which the US judiciary wields, it is far from clear that this power is in fact being used independently of established political parties in defence of individual liberties. This charge may be levelled in thinner or thicker ways, depending on whether one's theory of the appropriate role of the judiciary includes a substantive commitment to a particular, progressive understanding of individual rights. On a thin level, there is good evidence to demonstrate that the Supreme Court, for example, more typically acts in accordance with, rather than contrary to, public opinion, even though scholars disagree as to the precise mechanisms that seem to constrain its decision-making.[20] Michael J Klarman, for example, argues that, in practice, constitutional interpretation 'almost inevitably reflects the broader social and political context of the times'. [21] Thus, he suggests, even seemingly progressive judicial interventions really represented the Supreme Court playing catch-up with wider society, only protecting women under the Equal Protections Clause after the hard running had been made by the women's movement, and invalidating racial desegregation only after a dramatic change in public opinion on race following the Second World War. Klarman argues that this means that judges are unlikely to be heroes or villains:

> Judges who generally reflect public opinion are unlikely to have the inclination, and they may well lack the capacity, to defend minority rights from majoritarian invasion. It is difficult to treat them as villains, because their rulings simply reflect the dominant opinion of their time and place. Yet neither are their interventions on behalf of minority rights likely to be particularly

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[20] CJ Casillas, PK Enns and PC Wohlfarth, 'How Public Opinion Constrains the US Supreme Court' (2011) 55 *American Journal of Political Science* 74; MEK Hall, 'The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation' (2014) 58 *American Journal of Political Science* 352.

[21] MJ Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford, Oxford University Press, 2006) 5–6.

heroic, as such decisions will usually reflect the views held by a majority or a sizable minority of the population.[22]

A conclusion that the courts are doing little to impact public policy contrary to public opinion is problematic if we believe, as under desideratum (2), that they should be seeking to uphold individual rights against the majority, and if we hold that public opinion is at least sometimes hostile to these rights. It is not hard to find instances of judicial acquiescence in the face of political pressure: the initial timidity of the courts in protecting the rights of terrorist suspects in the aftermath of 9/11 being an obvious case in point. If one believes that the courts should be standing up to a hostile Congress and presidency, there is little to draw the eye since the shift to accept aspects of Roosevelt's New Deal in the 1930s, the likes of *Brown v Topeka Board of Education* and *Roe v Wade* notwithstanding. More substantively, if one believes that the Supreme Court should be playing a progressive role in protecting the rights and interests of the most vulnerable members of society, there is much in its decision-making in recent years, from voting rights to reproductive health and corporate personhood, that should give rise to considerable consternation.

It may seem as if the argument of the previous paragraphs asks too much – is it not unreasonable to accuse the Supreme Court both of lacking democratic legitimacy and of tracking too closely to public opinion? But there is no contradiction here: a successful resolution of the judicial trilemma would see a court that was willing and able to stand against majority public opinion in defence of individual rights, and which would have a mandate to so act which stemmed not from a historic constitution but from contemporary process of democratic authorisation. It is to the possibility of such a model, grounded in a richer account of second-order legitimacy, that we now turn.

IV. Transformative Constitutionalism and the Courts

Suppose we accept the argument of the preceding section: that both the limited exercise of judicial power in the United Kingdon and the more expansive US model fail to resolve the judicial trilemma. Is there an alternative approach available, one that allows for the protection of individual rights by counter-majoritarian institutions without violating principles of democratic legitimacy?

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[22] ibid 6.

This section suggests that the blueprint for such a model – in theory, at least – can be found in the South African experience of transformative constitutionalism.

Recent years have seen burgeoning interest in the idea of transformative constitutionalism, with some identifying a judicial movement spreading from the Global South with the potential to revolutionise the political role of the courts around the world. In Karl Klare's influential description, the term refers to, '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'. This is an enterprise aimed at bringing about large-scale social change through non-violent political processes grounded in law. 'In the background', he writes, 'is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the "private sphere".'[23] Although it has often been associated with the justiciability of socioeconomic rights, Michaela Hailbronner argues that it should not be understood only in terms of enabling the courts to combat poverty in the South, writing:

> Transformative constitutions cherish a broader emancipatory project, which attributes a key role to the state in pursuing change. As a result, transformative constitutionalism as a legal concept is not a distinctive feature of Southern societies, but part of a broader global trend toward more expansive constitutions which encompass positive and socioeconomic rights and which no longer view private relationships as outside constitutional bounds.[24]

Accordingly, authors have identified projects of transformative constitutionalism in a large number of diverse polities, including India, Hungary, Germany and a range of states in Africa and Latin America.[25] This section, however, focuses on the location where the term was coined and first

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[23] KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[24] M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *American Journal of Comparative Law* 527, 529.

[25] O Vilhena, U Baxi and F Viljoen, *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria, Pretoria University Law Press, 2013); A von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford, Oxford University Press, 2007); E Kibet and C Fombad, 'Transformative

implemented: South Africa, following the end of the apartheid era. Advocates of the approach in a South African context, such as Klare and Justice Pius Langa, an original member of the Constitutional Court of South Africa and later Chief Justice, outlined a central role for the judiciary in advancing a programme of social reform grounded in an expansive understanding of human rights, anchored in respect for the rule of law. Langa located the basis of the idea of transformative constitutionalism in the Epilogue to the interim Constitution of South Africa, which describes the Constitution as providing

> a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[26]

This is the essence of the desired transformation of South African society, which Langa filled out in terms of three overarching goals. The first is the achievement of substantive equality, going beyond the provision of basic socioeconomic rights to include 'also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures'.[27] This rests upon an unusually expansive understanding of minimal rights, framed not only in terms of ensuring the provision of a minimal degree of well-being up to a sufficientarian threshold, but also taking into account positional goods which have a bearing on individuals' ability to compete for desirable positions within society. The second is the transformation of legal culture. Citing Etienne Mureinik's claim that the transition from apartheid needed to be characterised by a shift from a 'culture of authority' to a 'culture of justification', he writes:

> The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.[28]

Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.

[26] P Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351, 352.

[27] ibid.

[28] ibid 353.

Finally, the transformative aspect of the constitution is understood in terms of a never-ending work in progress. For Langa, the 'transformative' aspect of transformative constitutionalism does not refer solely to the transition from the apartheid era and the consolidation of a new democracy. Rather, he writes:

> [T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.

One could also look in this regard at recent work supporting 'dialogic' courts that sees them as instigators of society-wide constitutional debate. Such a perspective does not see courts as possessing a monopoly on constitutional interpretation, but as working in partnership with other political institutions to produce answers to constitutional questions that both engage society and, in the face of 'pervasive yet reasonable disagreement about the meaning of rights', are 'satisfying to the citizenry as a whole'.[29]

This is undoubtedly an ambitious vision. The model described goes beyond the articulation of a procedure of constitutional endorsement: it is not sufficient, for example, that large numbers of the public be involved in the process of constitutional drafting; rather, it must be the case that they do so in such a way that they are willing to accept the upshot of the process as sufficiently reflective of the will of the people to warrant their assent. There is no guarantee that such a process will in fact lead to a good settlement in constitutional terms. Its focus on transformation means that the success of the project is to be judged not only by the public's initial enthusiasm, nor indeed their ongoing commitment, but also by the extent to which particular progressive outcomes are realised in practice. As will be seen, the extent to which such outcomes have actually come about in South Africa is very much open to question. The model of transformative constitutionalism does, however, provide the raw materials for a resolution of the judicial trilemma. The courts are explicitly mandated with the project of social transformation, understood not only in terms of basic

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[29] C Bateup, 'The Dialogic Promise – Assessing the Normative Potential of Theories of Constitutional Dialogue' (2005) 71 *Brooklyn Law Review* 1109, 1175–76.

rights, but the more demanding ideal of social equality. The laws are to be interpreted and implemented in the light of this ideal. The ideal does not come from parliamentary law-making, nor from some idea of the original meaning of an eighteenth-century constitution,[30] nor the judges' own 'moral reading' of the polity's constitutional tradition.[31] The people's second-order agreement to judicial authority, then, is not a passive acceptance of a fait accompli. It is a result of their own active involvement in the business of constitution-making; understood not as a one-off event, but an ongoing process. Speaking in Oxford in 2008, while still Chief Justice, Langa argued that the Constitution could be understood not in terms of the hypothetical social contracts beloved by contemporary political theorists, but as an actual historical contract between the people of South Africa, at least in relation to the current generation:

> The Constitutional Assembly directly responsible for the drafting and adoption of the final Constitution took public participation to a new level. A host of public meetings and workshops were held around the country. It received over two million submissions from private individuals and organizations before the first draft was circulated for public comment. The unprecedented scale of public participation is evidence that the constitutional settlement is expressed in terms that many South Africans embrace.[32]

The explanatory memorandum attached to the beginning of the Constitution makes clear that the idea of popular agreement lay at the heart of the adoption process. It notes that the objective of the drafting process

> was to ensure that the final Constitution is legitimate, credible and accepted by all South Africans. To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the

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[30] A Scalia, 'Originalism: The Lesser Evil' (1988) 57 *University of Cincinnati Law Review* 849.

[31] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford, Oxford University Press, 1999).

[32] D Butt, 'Transformative Constitutionalism and Socio-economic Rights: Report of a Lecture by the Chief Justice of South Africa' (The Foundation for Law, Justice and Society, 2008) www.fljs.org/sites/www.fljs.org/files/publications/ChiefJusticeLanga_report.pdf.

Constitutional Assembly. This Constitution therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.

Abrak Saati details the extensive iterative process of consultation and popular participation that led to the passage of the Constitution, including an extensive public education programme involving a newsletter, television and radio programmes, a website, and talkline as well as public hearings, public meetings and participatory workshops. Thus during the first stage of the process 'a total of 20,549 people and representatives from 717 civil society organizations attended the public meetings. By the end, two million submissions had been written by the South African public and sent to the Assembly'.[33] Following the production of a working draft, a second stage of consultations was launched: 'Two hundred fifty thousand submissions were collected during this second stage. Once the submissions were reviewed, the Assembly prepared a revised edition of the draft. A copy of the revised draft was subsequently sent to each person who had made a submission.'[34] Admittedly, Saati draws attention to 'the somewhat idealized story that has developed around the South African process', noting that 'it is often "forgotten," or at least not mentioned – that the participatory elements of the process were preceded by elite negotiations on the highest political level'. The public was only invited to participate once a degree of consensus had been reached at an elite level, and then final decision-making on the contents of the Constitution rested with the directly elected constitutional assembly and the Constitutional Court. As such, the sense in which this might be genuinely described as representing the 'collective wisdom' of the South African people is open to question. Nonetheless, she maintains that there is 'no denying the fact' that the South African case 'was impressive in terms of the many avenues through which people were able to get involved in the process'.[35] This is not quite the Rousseauian model outlined above: there is no pretence that involvement or agreement was universal, and questions naturally arise as to how the passage of time has affected and will affect the initial

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[33] A Saati, 'Participatory Constitution-making as a Transnational Legal Norm: Why Does it "Stick" in Some Contexts and Not in Others?' (2017) 2 *UC Irvine Journal of International, Transnational, and Comparative Law* 113, 133–34.

[34] ibid 134.

[35] ibid.

popular grounding of the constitutional order.[36] One would not wish to overstate the degree of persisting constitutional consensus in contemporary South Africa, nor to deny the presence of deep social and economic inequalities in the present day.[37] But the project has had some real achievements in practice,[38] and in theory it provides the basis for a form of judicial policy-making extensive in scope, progressive in outcomes, with a significant degree of independence of other political actors and which possesses a much more plausible claim to democratic legitimacy than is the case in the United States or United Kingdom. Could it provide a blueprint for judicial reform in these polities? One could answer this question in an optimistic or pessimistic fashion.

The pessimistic answer is not hard to articulate. Both the United Kingdom and the United States are currently experiencing a high degree of political division and polarisation, typified by the

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[36] For more on the recent workings of transformative constitutionalism in South Africa, see M Rapatsa, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) 5 *Mediterranean Journal of Social Sciences* 887; Kibet and Fombad (n 25).

[37] Statistics South Africa, 'Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality' (2019) available at www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf.

[38] For example, Kibet and Fombad (n 25) argue: 'There is little doubt that the present South Africa is better off than in the apartheid era as far as the protection of human rights, the rule of law and constitutionalism are concerned. The landmark decisions of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (striking down laws criminalising sex between consenting males); *Minister of Home Affairs & Another v Fourie & Another* (validating same-sex marriages); *Du Toit & Another v Minister of Welfare and Population Development & Others* (affirming the rights of a lesbian couple to jointly adopt a child); *S v Makwanyane & Another* (striking down the death penalty); *Government of the Republic of South Africa & Others v Grootboom & Others* (affirming the right to adequate housing for the most vulnerable in the society); and *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* (ordering President Jacob Zuma to refund public funds used to improve his private Nkandla home in violation of the Constitution) and others, are outstanding, and illustrate this point' (354–35).

Brexit divide in the former, and attitudes to the Trump presidency in the latter. The project of transformative constitutionalism seems to require some high degree of initial consensus if it is to attain its goal of empowering the judiciary to act in a democratically legitimate fashion, and indeed of ongoing second-order consensus given the potential for acute conflict between different branches of government. But consensus seems hard to find in either polity at present. It is not that these states have never experienced such moments: one might look, for example, to the immediate aftermath of the Second World War in the United Kingdom, and the subsequent foundation of the welfare state and National Health Service, for evidence of the possibility of mass determination to make meaningful changes to the political order, inspired by concern for the least advantaged and, to at least some degree, a belief in the value of social justice and equality. But it is admittedly hard to imagine such a coming together across partisan divides in the present day. The context of South Africa in the 1990s was obviously particular and unusual, not least on account of the dominance of a single political party, the African National Congress, following the end of apartheid. From the pessimistic vantage point, even if one is willing to accept that transformative constitutionalism has made the jump from theory to practice in South Africa (which may, of course, be disputed), it does not follow that the model is applicable elsewhere, and perhaps especially not in consolidated, as opposed to transitional, democracies with, for good or ill, well-established and entrenched political institutions. One could point, for example, to the condemnation that has recently been visited upon European and British courts given their role in upholding the European Convention on Human Rights and the Human Rights Act, and suggest that the implementation of some version of transformative constitutionalism would lead to an even greater degree of conflict and vilification, as familiar political divides were reopened in the judicial branch. On this account there is no way to resolve the judicial trilemma in states such as the United States or the United Kingdom, and we will simply have to decide which of scope, independence or democratic legitimacy it is best to compromise in the name of the best all-things-considered course of action.

The optimistic perspective denies that things are as set in stone as this would appear. It points to a resurgence of interest in questions of constitutional design in both countries, even if it acknowledges that such issues have come to the fore at least in part as a result of dissatisfaction with the current order of things. Aside from the aforementioned political divisions, many feel that current systems of government have proved unable to act appropriately in relation to serious present-day and near-future threats, most obviously in relation to the COVID-19 pandemic and

the prospect of the devastating impact of climate change. The United Kingdom will necessarily need to reflect on its constitutional arrangements once the final nature of its withdrawal from the European Union becomes apparent, and there is increasing discussion of the idea of some kind of a constitutional convention to consider such issues, as well burgeoning interest in alternative forms of government such as mini-publics and citizens' juries.[39] As previously stated, dissatisfaction with many aspects of the constitutional order in the United States is becoming readily apparent, and there is good reason to think that pressure will increase at least for reform of the Electoral College in presidential elections, the make-up and powers of the Senate, and the make-up and powers of the Supreme Court, whatever the outcome of the 2020 presidential and congressional elections. So serious constitutional change will plausibly at least be on the agenda in both countries. But constitutional debate, even significant constitutional reform, is not sufficient to resolve the trilemma, in the absence of genuinely widespread consensus as to the appropriate role of the judiciary and the values which it should be seeking to reflect and implement in its rulings. Could such a consensus come about?

It is not impossible to think that it could. One could envisage various types of constitutional reform process that would seek to address the judicial trilemma. One approach would aim at identifying areas of genuine widespread agreement, such as on schedules of basic rights, and seeking popular endorsement for assigning a role to the judiciary in the protection of these rights. Quite how 'transformative' such a model would be might be open to question: a minimal approach might simply seek public inputs and look for areas of overlap between the submissions, a more ambitious programme would see popular participation as being more deliberative in character, and so would wait to see what schedule of rights came out of the relevant consultative processes before placing the final results before the public for ratification. Such a process could seek to mirror certain types of aspects of the South African model, in terms of encouraging widespread public participation and debate. But the South African example is also suggestive of a potentially much more radical approach. Scholars who write on transformative constitutionalism in the aftermath of apartheid often stress the role of the Truth and Reconciliation Commission in paving the way for the

[39] See eg S White, 'Parliaments, Constitutional Conventions, and Popular Sovereignty' (2017) 19 *British Journal of Politics and International Relations* 320.

subsequent widespread acceptance of the rule of law and of the role of the judiciary in promoting the values of the Constitution. Mashele Rapatsa, for example, writes

> The establishment of this commission paved a way for a genuine reconstruction and development, particularly with regards to soliciting a societal acceptance of democracy as a tool to heal the nation. It bred tolerance and forgiveness among the people, while also inculcating respect for the established justice serving institutions of the Constitution.[40]

The United Kingdom and the United States are not facing the same kind of political challenges as South Africa in 1994. But they are both states, like South Africa, with complicated and problematic histories of imperialism and racial malfeasance. Recent years have seen what may prove to be deeply significant stirrings of public consciousness, as a younger generation becomes interested in the persisting effects of historic wrongdoing. The model of the South African Truth and Reconciliation Commission has proved influential in a number of other states, including, for example, the work of the Truth and Reconciliation Commission of Canada in relation to Native Peoples. Transformative constitutionalism in South Africa is explicitly grounded in the particular circumstances of South African history – a link is drawn between the egregious racist wrongdoing of the apartheid era and the Constitution's present-day commitment to social equality. One could imagine an equivalent process in the United States or the United Kingdom which would represent a genuine coming to terms with the country's past, and which would result in handing the courts a role in seeking to rectify deep-rooted structural injustice, in pursuit of a shared vision of societal redress.[41] Admittedly, for so long as questions relating to reparative justice are seen through the prism of culture wars and partisan politics it is hard to see such a project coming to fruition. But perhaps the seeds have been sown for a truly progressive resolution to the judicial trilemma, whereby the people affirm an active role for the courts not only with reference to basic rights, but to the full-blooded pursuit of social justice.

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[40] Rapatsa (n 36) 894.

[41] For related thoughts in a British context, see S White, *A New Kind of Dreaming: Democratic English Patriotism* (London, Compass, forthcoming).