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UNRESPONSIVE JUDICIAL REVIEW: HOW FORMALISM ON THE AMERICAN BENCH THWARTS DEMOCRACY DEFENSE

—Andrea Scoseria Katz

At a time when worldwide democratic decline is of grave concern, Rosalind Dixon's *Responsive Judicial Review* is vital and timely. Dixon sketches an attractive vision of courts' highest role as one of democracy-defense: protecting free and fair elections, ensuring rights and freedoms remain in vigor, muscularly enforcing checks and balances. Granted, argues Dixon, "responsive" courts must exercise their powers in a context-sensitive way; courts in fraught environments cannot get away with *quite* as much entrepreneurial judging as their counterparts, and they should tailor a remedy to ensure, one, its own feasibility, and two, the court's survival. The pragmatic character of Dixon's responsive judicial review ensures that it could be adopted by courts across any number of jurisdictions. One, it seems to me, in which it is sorely needed is the United States.

Among global courts of constitutional review, the U.S. Supreme Court is distinctive for a number of reasons: its age, its independence, and, a result of those two factors, its influence on other jurisdictions. Today, however, it might be considered an "anti-model"[1] in a few ways, including its politicized, acrimonious appointment process for judges and the lifetime tenure they serve.[2] Still another reason, one could argue, is the value-neutral formalism that characterizes much of its separation-of-powers jurisprudence: the Court, in other words, pledges to be rule-bound in deciding these conflicts and therefore not to care about the outcome, as though this were a strength.[3] To be sure, rule-bound adjudication is a critical source of limitations on a court. But at a moment when democracies are backsliding throughout the globe via gradual "death by

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1 Mathias Siems, Comparative Law 244 (2nd edn. 2018) (using the term specifically in the context of American-style federalism).

2 Daniel Epps & Ganesh Sitaraman, 'Supreme Court Reform and American Democracy,' The Yale Law Journal Forum (March 8, 2021) (identifying a legitimacy challenge for the Supreme Court and proposing structural reforms to save it); Final Report by the Presidential Commission on the Supreme Court of the United States (December 2021), accessed on September 15, 2022, at: <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

3 It is fair to note, however, that the court applies this doctrine inconsistently in the separation-of-powers arena, as a classic article from 1987 pointed out. See Peter L Strauss, 'Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency,' 72 *Cornell* L R*ev* 488 (1987)

a thousand cuts, rather than the clean slice of the coup maker,"[4] outcome-blind adjudication is no longer justifiable—and, Dixon shows us, it is not necessary to a principled mode of judicial review.

If democracy-defense is a clarion call these days for courts across the world, then the U.S. Supreme Court has developed an unfortunate tin ear.[5] Decades ago, under Chief Justice Earl Warren (1953-69), the Court *was* in the business of invalidating legislation that invidiously diluted the voting power of racial minorities, or as the Court described it in a crucial broader formulation: "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[6] This formula became the basis for a classic in legal philosophy—John Ely's *Democracy and Distrust*, a book which Dixon credits as a model—which argued that striking down legislation restricting the vote was the *ne plus ultra* of judicial power-exercised in a benign way. This was because of democracy-restricting legislation's notorious circular quality: who but a court could abolish legislation that barricaded the "ins" (politicians) in office against replacement by the "outs"?[7]

But times have changed. American elections are considered among the worst-run among wealthy democracies, with growing evidence of manipulation of electoral maps by incumbents, primarily (but not exclusively) from the Republican Party.[8] Entering the November 2022 midterm elections, four state-level maps were found by courts to be illegally drawn by Republican legislators, yet these maps were still used in the elections.[9] Even while the skew grows, the Supreme Court has refused to correct maps that favor one party over another. In R*ucho*, a landmark 2019 case involving skewed electoral districting plans, the Court admitted that the challenged plans were "highly partisan, by any measure," but doubted "whether there is an appropriate role for the Federal Judiciary in remedying the problem of partisan gerrymandering."[10] A scathing dissent rebuked the Court for what it considered to be a self-chosen

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4 Tom Ginsburg and Aziz Huq, 'How We Lost Constitutional Democracy' 157 *Can It Happen Here*? (Cass Sunstein ed 2016) (Kindle edition).

5 *See*, for just a few possible examples of literature in this genre, Rachel Sieder, Alexandra Huneeus, Javier Couso (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (2013); Samuel Issacharoff, 'Fragile Democracies,' 6 Harv L Rev 1405 (2007); Yvonne Tew, *Constitutional Statecraft in Asian Courts* (2020).

6 *United State v Carolene Products Co.* 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). For examples, see, eg, *Baker v Carr* 1962 SCC OnLine US SC 40 : 7 L Ed 2d 663 : 369 US 186 (1962), *Wesberry v Sanders* 1964 SCC OnLine US SC 25 : 11 L Ed 2d 481 : 376 US 1 (1964), *Reynolds v Sims* 1964 SCC OnLine US SC 132 : 12 L Ed 2d 506 : 377 US 533 (1964).

7 John H Ely, *Democracy and Distrust: A Theory of Judicial Review* 103, 105 (1980).

8 *See*, eg Pippa Norris, *Why American Elections are Flawed* (*And How to Fix Them*) (2017).

9 *See* Michael Wines, 'Maps in Four States Were Ruled Illegal *Gerrymanders*. They're Being Used Anyway,' The N*ew* Y*ork* T*imes* (Aug. 8, 2022).

10 R*ucho v* C*ommon* C*ause*, 588 US ___ (2019) (slip op. at 2).

blindness, and highlighted the stakes of judicial non-intervention in the problem:

> [Gerrymandering is] anti-democratic in the most profound sense. [Of] all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.[11]

According to one leading theory of presidential politics, America has been in an ascendant conservative political regime since the presidency of Ronald Reagan (1981-1989).[12] Given the centrality of presidential preferences upon Supreme Court nominees, the effects of this conservative turn on many areas of the law have been obvious: presidential power, administrative law, campaign finance, immigration, and church-and-state separation, among others.[13] Crucially, conservativism on the judiciary has also been associated with a value-neutral formalism that purports to ignore societal need in favor of neutral application of the law.[14] It was not always so. For a time, a Warren Court liberal on criminal procedure, voting rights, and civil rights coaxed American progressives into embracing judicial solutions to political problems.[15] But the Court's pragmatic, context-specific vision of the law attracted significant backlash, and once its composition changed around 1969, when Warren Burger became Chief Justice, conservative judges were eager to replace the liberals' Darwinian "living" constitution with one that was emphatically "dead, dead, dead."[16] In the realm of the social, formalism's ramifications quickly became apparent: the law would not be used as a tool for egalitarian policymaking, and laws applying to all people equally would not be invalidated simply because they burdened some more than others *in actual fact*.[17] For instance, in 1974, the Court held that inner-city public schools that were de facto segregated as

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11 *Id*. KAGAN, J., dissenting (slip op. at 33).

12 Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* (3rd edn. 2020).

13 *See Trump v Hawaii* 2018 SCC OnLine US SC 28 : 585 US __ (2018), *Seila Law LLC v Consumer Financial Protection Bureau*, 591 US __ (2020) , *Citizens United v Federal Election Commission* 2010 SCC OnLine US SC 10 : 558 US 310 (2010), *Jennings v Rodriguez* 2018 SCC OnLine US SC 4 : 583 US __ (2018), and *Kennedy v Bremerton School Distt* 2022 SCC OnLine US SC 10 : 597 US __ (2022).

14 Brian Z Tamanaha, 'The Progressive Struggle with the Courts: A Problematic Asymmetry,' in *The Progressives' Century* (Stephen Skowronek et al eds) (2016), 66-67.

15 Joseph Fishkin and William Forbath, *The Anti-Oligarchy Constitution* (2021); Ezra Klein, 'Liberals Need a Clearer Vision of the Constitution. Here's What It Could Look Like (feat. Larry Kramer),' The Ezra Klein Show (Jul 5, 2022), <https://www.nytimes.com/2022/07/05/opinion/ezra-klein-podcast-larry-kramer.html>.

16 Jonathan Easley, '"Scalia: Constitution is 'dead, dead, dead",' *The Hill* (Jan. 29, 2013).

17 Andrea Scoseria Katz, 'Up From Originalism,' *Boston Review* (Jun 23, 2022).

a result of years of "white flight" and underinvestment in educational facilities triggered no constitutional violation absent proof of deliberate discriminatory intent.[18]

Here I would like to stress the less-explored links between formalism and America's relatively impoverished constitutional defenses against democratic backsliding. For decades, America's balance of powers has been tilting in a pro-presidential direction, exacerbated by factors including the growth of de facto legislative delegation of authority[19]; the politicization of neutral institutions like the prosecutorial power and the armed forces (exacerbated under, but hardly limited to the Trump administration)[20]; growing public distrust in the trustworthiness of the media[21]; attacks on the public sphere (both coordinated by political sources as well as unintended ones, consequences of consolidation of the tech industry itself)[22]; and finally, the manipulation of election rules (both in gerrymandered state electoral maps and, at the national level, the unprecedented presidential conspiracy to overturn the results of the 2020 election).[23] Faced with these challenges, the Court has opted for constitutional avoidance, preferring instead to entrust the resolution of such problems to the "hurly-burly, the give-and-take of the political process between the legislative and the executive."[24] At this point, it is clear, for the reasons pointed out by John Ely, that such system dysfunction does not lend itself to ordinary political resolution.

Dixon's responsive review could be a powerful corrective, and it is strongly suited to the American context: a political system featuring a strong court with the institutional leverage to correct system dysfunction but which is unwilling to do so for ideological, not institutional reasons. Responsive review could be potent when deployed by such a court, supplying the lacking motive for action. As Ely insisted, correcting blockages in democratic channels [etc] (and/or, I'd

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18 *Brown v Board of Education of Topeka* 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 US 483 (1954). *Milliken v Bradley* 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 418 US 717 (1974).

19 Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* and *Liberal Democracy and the Social Acceleration of Time* (2004).

20 Jeffrey P Crouch, Mark J Rozell, and Mitchell A Sollenberger, *The Unitary Executive Theory: A Danger to Constitutional Government* (2021). On politicization of these offices under President Trump, *see* Carol Leonnig and Philip Rucker, *I Alone Can Fix It: Donald J. Trump's Catastrophic Final Year* (2021).

21 Brett Samuels, 'Trump ramps up rhetoric on media, calls press "the enemy of the people",' *The Hill* (April 5, 2019).

22 Ezra Klein, *Why We're Polarized* (2020).

23 Richard L Hasen, *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* (2020); Pippa Norris, *Why American Elections Are Flawed* (*And How to Fix Them*) (2017).

24 Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel), quoted in *Trump v Mazars* USA, LLP 2020 SCC OnLine US SC 5 : 591 US __ (2020) (slip op. at 7).

add, halting a progressive slide toward hyper-presidentialism) is the court's most important function. Applied in the U.S. context today, I believe Dixonian review would entail the abandonment of three judge-made doctrines with deeply deleterious consequences for the separation of powers today.

One is the non-justiciability doctrine, which the Court has deployed to avoid trenching upon the concomitant powers of other constitutional actors, particularly in the areas of foreign policy, Congress's internal governance, impeachment and partisan gerrymandering.[25] Responsive review requires judicial involvement in areas where political remedies are failing. Hence, it would necessary entail the curtailment of the non-justiciability doctrine in the context of elections. While respect for coordinate actors, including state governments who administer American elections, is important, where democratic channels are blocked, a Dixonian court cannot avoid exercising its powers of review. As applied, this would produce the antigerrymandering jurisprudence called for by many election watchers today.

Two, responsive review counsels in favor of abandonment of the unitary executive theory, a doctrine of recent vintage which effectively barricades the Executive Branch from reasonable legislative oversight.[26] To date, the Court has argued that the President's unitary status as chief executive bars attempts to render him or her accountable to independent actors who play important oversight roles in other systems, like the public prosecutor.[27] While context-sensitive responsive review acknowledges the importance of deference to the coordinate branches of power, it would not require a court to be tone-deaf to abuse of powers that take place in the executive branch, particularly the attempted politicization of "apex institutions"[28] like the Department of Justice, a kind of power grab witnessed in practically every backsliding context.[29] To be sure, not every manifestation of presidential expansion (or attempted expansion) is a product of bad motives, but some of the worst examples of recent history were, e.g., Watergate, the Iran-Contra Scandal, the Ukraine arms quid-pro-quo scandal, and the attempt to overturn the 2020 election. A form of review that is sensitive to democratic defense is suited to targeting these cases. In the present-day context of global backsliding and overreaching executives, responsive review in American separation-of-powers cases could helpful entail that accountability-ensuring mechanisms are not held hostage to a hollow value neutrality.

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[25] Joanna R Lampe, The Political Question Doctrine: An Introduction (Part 1), Congressional Research Service (June 14, 2022).

[26] *See* David Driesen, *The Specter of Dictatorship* 85 (2021).

[27] On the troubled history of the U.S. independent prosecutor, see Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be An Independent Counsel Law*, 5 Widener L Symp J. 1 (Winter 2000).

[28] David Landau, Hannah J Wiseman, and Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 T*x* L R*ev* O*nline* (Feb. 2021).

[29] *See* Driesen, *Specter*, at 119-120.

Third and finally, a more responsive approach could mean an opening for judicial remedial creativity. The Supreme Court, as Dixon notes, has adopted a "restrained view of its own remedial power," in practice treating "systemic government inaction" as beyond the scope of a court's powers of review.[30] Dixon cites climate change and gun violence as illustrative arenas. As climate change activists have been pointing out for years, inactivity by the federal judiciary actually entails, not mere preservation of the status quo, but passive complicity in a worsening state of affairs. This has been poignantly illustrated by the recent turn in American elections. Yet sometimes heightened crisis gives way to creativity. Dixon gives the example of a hypothetical spike in gun-related deaths: "Imagine the idea of a future (Democratic-majority appointed) Court declaring an 'unconstitutional state of affairs' in relation to the current level of gun-violence in the US, and imposing a 12 month deadline for Congress to take action—or face the Court itself imposing a default model of uniform background checks and a ban on assault weapons sales."[31] In the electoral context—so intimately related to the health of the republic—the Court has refused to correct skewed maps on the grounds that an operable remedy does not exist (that is, *who* is to determine what a fair map would look like?). Yet demonstrably, there exist no constitutional hurdles to the Court adopting an expansive view of its own remedial powers—only a failure of the imagination—and in a very few cases the Supreme Court has afforded itself some remedial creativity.[32] In one recent one involving a separation of powers dispute, the Court largely devised of its own making a set of tests to be applied in determining when Congress may make use of its subpoena power to demand information from the President.[33]

It is true that, in America, the political winds are blowing against the Supreme Court proactively adopting a form of Dixon's responsive review. This is not the same as saying that the current conservative bench practices judicial minimalism—far from it, as the Court's recent adventurist opinions on gun control and abortion illustrate.[34] Rather, its preferred method of judicial formalism obscures the ineluctable social component of adjudication, and in turn, the political element that is always in play when a court of constitutional review wields its powers. Perhaps the judicial "legitimacy crisis" that many have identified as brewing for the U.S. Supreme Court promises a window of possibility

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30 Dixon, *Responsive Judicial Review*, at 194. A pair of cases frequently invoked to illustrate this point are *Castle Rock v Gonzales*, 2005 SCC OnLine US SC 66 : 545 US 748 (2005) and *DeShaney v Winnebago County* 1989 SCC OnLine US SC 31 : 103 L Ed 2d 249 : 489 US 189 (1989).

31 Dixon, *id*. at 194.

32 An important example, usually treated as an outlier, is *Brown v Plata*, 2011 SCC OnLine US SC 142 : 563 US 493 (2011), in which the Court ordered a California prison to limit its population on the grounds that the level of overcrowding had reached unconstitutional levels.

33 *Trump v Mazars* 2020 SCC OnLine US SC 5 : 591 US _, at 19-20 (slip op.) (2020).

34 *New York State Rifle & Pistol Assn. Inc v Bruen* 2022 SCC OnLine US SC 8 : 597 US ___ (2022); *Dobbs v Jackson Women's Health Organization* 2022 SCC OnLine US SC 9 : 597 US ___ (2022).

for a form of review that is more context-aware, more transparent about value-laden judging, and more committed to its democracy-defending mission—a more responsive form of judicial review, in short.[35]

[35] *See*, among a raft of public commentary, Dalia Lithwick, 'John Roberts Can't Admit What's Happened to the Supreme Court,' *Slate* (Sept 13, 2022); Ezra Klein, 'Dobbs is Not the Only Reason to Question the Legitimacy of the Supreme Court,' *The New York Times* (June 30, 2022); Jamelle Bouie, 'The Supreme Court Seems Awfully Nervous About Its Own Legitimacy,' *The New York Times* (Oct 4, 2022).