

Global Democracy and Comparative Distrust

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Stephen Gardbaum, *Comparative Political Process Theory*, 18 *Int'l. J. Const. L.* __ (forthcoming, 2020), available at [SSRN](#).

The United States is a democracy in crisis. Deep-seated institutional racism and ongoing systemic threats to the political process in the United States demand our active attention. The challenges to American representative democracy that John Hart Ely outlined in *Democracy and Distrust*—voter suppression and systematic political disadvantage due to discrimination—and his arguments for remedial representative reinforcement seem more salient than ever. But what of the global crisis? Democracies around the world are faltering. Do Ely's insights have purchase for Poland or Hungary, South Africa or Turkey? [Stephen Gardbaum](#) persuasively argues that they do, albeit after some elaboration and refinement, in his new piece, [Comparative Political Process Theory](#), forthcoming this winter in the *International Journal of Constitutional Law*. (The article will also be the focus of a set of ICON Debate! commentaries, published in the same issue.) Using Ely as inspiration, Gardbaum provides a new and broader framework for identifying and categorizing political process failures in representative democracy, and explores a wider set of remedies for these breakdowns, including—though not limited to—judicial review.

A political process failure is the violation of core democratic procedural values or principles either by “delegitimiz[ing] the relevant process” through a singular grave occurrence, or by “systematically undermin[ing]” them over time. (P. 33.) And to ground the analysis, Gardbaum identifies a minimum slate of these core democratic procedure values, including robust political competition and contestation; pluralistic governance; differentiated institutional roles; accountability; political equality among citizens; and representation.

As Gardbaum notes, *Democracy and Distrust* is “self-consciously parochial” (P. 1) and focuses only on specific failures of American representative democracy—efforts to prevent political change through suppression (of voices or votes) and systematic disadvantage in the political process for disfavored minority groups. But relying on the expanded list of democratic procedural values and taking a comparative lens, Gardbaum identifies many other political process failures. In addition to threats to free and fair elections and to the lawmaking process or processes flagged by Ely, Comparative Political Process Theory (CPPT) directs attention to the “institutional composition of the constitutional system”; the “modes and methods of executive accountability and oversight in between elections”; and “the rules and procedures of the various branches of government.”

This expanded set of process failures is supported by a variety of concrete examples, and Gardbaum draws on his own and others' work in detailing the dispiriting stories of democracies in crisis: challenges to independent institutions of accountability in South Africa (the National Prosecuting Agency) and to the independence of the judiciary in Hungary, Poland, and Turkey; the “weaponizing” of the legislature in South Africa to protect and insulate President Zuma from political accountability, and Boris Johnson's decision to prorogue Parliament in the United Kingdom; and the undermining of the process of legislative deliberation by efforts to push through fast-tracked or last-minute bills in the Israeli Knesset (tax) and the U.S. Congress (tax), as well as the wide-ranging legislative gamesmanship in Poland, from agenda manipulation to shifting meeting times and locations.

These failures are not all narrowly procedural; some are “impermissible because of their intended or likely effects on the political marketplace” (P. 35), thus CPPT straddles the procedural/substantive divide. In so doing, its capaciousness has implications for remedies—and the nature of judicial review. Gardbaum is not proposing that CPPT be seen as the only justifiable rationale for judicial review, and he leaves open the questions of whether or why purely substantive judicial review might also be beneficial. Similarly, he does not present CPPT as a theory of judicial restraint; in fact, “it can call for robust interventions where most courts have feared to tread.” (P. 40.) As one example, he highlights South Africa, where robust Constitutional Court review of the procedures in the National Assembly was controversial. By framing these decisions in light of CPPT, they can be understood “less as judicial overreach violating the separation of powers than as judicial protection of it.” (P. 33.)

Indeed, the variation in types of process failure may call for different measures of judicial review, from pure procedural review to [semi-procedural review](#), in which the enactment process of a legislative output “may be relevant in determining [its] substantive constitutionality.” (P. 28.) And in some contexts—such as when it is functioning to “make the process work the way it is supposed to” (P. 39), CPPT will necessarily function as a weak-form theory of review, “as its focus on remedying process failures of various kinds leaves open a broad range of outcomes that the political institutions may legitimately pursue.” (P. 35.) Again, the South African experience gives context: the full story of holding President Zuma to account included an active and independent media and the investigations of the Public Protector, the chief anti-corruption official.

In this article, Gardbaum adds his voice to the academic chorus calling attention to the steady dismantling of the structures and processes of constitutional democracy around the world. His efforts provide theoretical heft and normative justification to the work of constitutional courts that are trying to stem this tide. In this, as he acknowledges, his project dovetails with the work of law-of-democracy scholars, particularly Sam Issacharoff’s *Fragile Democracies*. That book, published in 2015, looked at the role of constitutional courts in emerging or weakened democracies in Eastern Europe, Africa, and East Asia. But as Gardbaum’s project highlights, we are all fragile democracies now.

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