Perspectives on balancing that focus too heavily on the universal, such as David Boetti's view of proportionality as a "universal rule of law," have already come under fire for not telling "the whole story" about different systems. These critiques, however, have so far emphasized elements such as the fact that balancing and proportionality will often "co-exist with attention to historically specific aspects of national constitutions" or that "the way in which balancing is done will differ depending on a society's history and expectations concerning the relative importance not only of individual rights and social interests, but also of the role of courts and legislatures." By underscoring the suggestion that the very idea of balancing itself has different meanings in different legal systems and cultures, this preliminary study should contribute to the development of a richer, fuller perspective on the legitimizing force of a type of argument on which much of modern judicial practice in the field of fundamental rights has come to rest.

QUESTIONS AND COMMENTS

1. Recall Frankenberg's essay in Chapter II. In what ways does Bomhoff draw on those concerns. (Consider here Bomhoff's juxtaposition of the risks of ethnocentrism and irrelevance.) In what ways does Bomhoff's critique differ from Frankenberg's?

2. If Bomhoff is correct that "expressivism" cannot be neatly distinguished from "functionalism," can they be reconciled through a practice of a "contextualized functionalism," which "requires a willingness to question whether functions, concepts, or doctrines that appear similar may in fact be quite different in different societies; an attention to how seemingly separate institutions or legal practices are connected to, and influenced by, others; and a commitment to be open to noticing how legal rules or doctrines may be affected by the idiosyncratic or expressivist aspects of the constitution." Vicki C. Jackson, Comparative Constitutional Law: Methodologies in Oxford Handbook of Comparative Constitutional Law 72 (Michel Rosenfeld & András Sajó eds. 2012). Or is it illusory to think that this approach escapes the perils of false simplification of functionalist approaches and the highly contextualized view of expressivism that sees each constitution as unique and incommensurable?

3. Is balancing or proportionality any more likely than other approaches—for example, of categorical rules against "torture" or "cruel or inhuman punishment" as exist in many constitutional systems—to challenge the methodological categories of comparative analysis?

C. JUDICIAL LEGITIMACY AND JUDICIAL EFFICACY

Legitimacy is not the same as efficacy; a court may be regarded as legitimate while its decisions prove ineffectual. Yet legitimacy and efficacy may also be related; a court whose judgments are generally

indeficacious is likely to lose legitimacy as rights holders or challengers learn that their judgments are not valuable. Enforcement of judgments has been a major concern, for example, of the Russian Constitutional Court. There is a vigorous debate in the literature about the efficacy of the Court. See, e.g., Gerald Rosenbarg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

In a study of the U.S. Supreme Court and racial equality, Prof. Michael Klarman, FROM Jim CROW TO CIVIL RIGHTS 484 (2004), writes that:

The efficacies of Court decisions depends on certain social and political conditions: the unity and the determination of beneficiaries in enforcing newly declared rights; the relative physical security with which rights can be exercised; the intensity of opponents' resistance; the geographic concentration of opposition; the ease with which particular rights can be erased; the extent to which the vindication of rights turns on disputed facts, which appellate courts find difficult to review; the availability of sanctions for violators; the presence of lawyers with the inclination and capacity to support litigation; the type of court in which the litigation is likely to occur; the existence of organizations that are able to spread the risks and costs of litigation while capturing the benefits; the availability of a market mechanism to facilitate the implementation of rights and the extent to which the enforcement of rights depends on the law as opposed to custom and social norms.

An additional consideration is the extent to which the political branches are willing to provide support for the enforcement of the court's decisions.

To what extent do these factors appear likely to be important in other countries? To what extent are other factors important? Is the Court's interpretive approach related to the likely efficacy of its judgments? What weight, if any, should constitutional courts give to the question whether their judgments will be efficacious? These issues are discussed in the next reading.


The Supreme Court and the President of the Supreme Court enjoy great acclaim and respect within Israel and abroad, but have recently come under attack from a variety of sources... The fact that in some sectors extremely harsh criticism of the court is seen to be an electoral boost testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat.
contribution to the prevalence of these hyperbolic and dangerous attacks, as I am.

. . . [The question of the role of courts in democracies is not one of jurisprudence or an analysis of the concepts of "democracy" and "court.
It is a normative-political question, the answer to which depends on a number of assumptions, both empirical and normative.

. . . [Different conceptions of the role of the court may be based on different conceptions of society and democracy.

. . . [There are some further structural implications for adjudication which follow from a commitment to democracy, however democracy is conceived.

First is the important structural anti-populist aspect of the role of courts in democracy. Courts are assigned the crucial task of prevention of populism ( Lynch ing in the broad sense; i.e., the victimisation of individuals who are perceived by the majority to be enemies and a threat.
The special and unique importance of courts in such cases is that majorities in these examples do not want to change the rules as they apply to society at large. They want the rules, which they fully support when applicable to them, not to apply in cases where they would protect others. The courts should, in such cases, rely on their independence and protect the individuals by defending the law, which reflects the better, long-term judgment of the majority itself. Some claim that the records of courts on these issues are not straightforward, but the structural point is important and central.

. . . This is the reason why judicial independence is universally accepted as an important element of any regime which protects human rights and the rule of law.

A distinction should be drawn between protecting human rights in such " Lynching" situations (in the broad sense), and protection against a pervasive, institutionalised policy of violation. A court would be failing in its duty if it did not protect human rights in the first type of case. However, the court's role is more complex, and its performance is harder to evaluate, in the latter case. In the first case, there is no real counter-majoritarian difficulty. The majority knows what is right, it merely succumbs to the temptation to do the wrong thing. The courts are there to help the majority resist that temptation.

In the second case, the institutional limitation of courts is very central. A moralistic position which is inconsistent with the moral convictions of a large part of the population, and with the political compromises that were made between people of varying moral outlooks on the issue, is likely to undermine the legitimacy of the court without promoting desirable states of affairs. Under such circumstances, a more cautious political stance may be called for, one that stresses the need to legitimate the immoral situation. Another unique role of the courts in democracy is the protection of democracy itself against anti-democratic processes and factors within the political system. The courts cannot, single-handedly, defend a society against its own self-destruction, but the courts do have the power, and the function, of policing both the rules of the game required for formal democracy and those basic rights that are essential to it. When anti-democratic forces manage to attain a majority, the court's invalidation of their attempt is a protection, not a destruction, of democracy. The obvious example is the decision of a court to invalidate a decision by the legislature to suspend general elections for an indefinite period. The court may be powerless to prevent this collapse of democracy, but it will clearly not act in an anti-democratic fashion if it declares this legislation invalid.

. . . [My caution regarding the role of the courts does not premise moral relativism. Neither is it based on an attitude that the state and the law should be neutral among the different conceptions of the good. The state should promote those conceptions of the good life that are worthwhile, and it should discourage forms of life that are not worthwhile. But democracy is a framework of government for people with different conceptions of the good life. And many different forms of good life are indeed worthwhile.

Law is the vehicle through which the society makes some of its basic decisions. And courts are the institution whose unique task is to defend that order of things, with all its pluralism and tensions. Courts are an important part of the institutions which society has designed to set its norms, but they should not regularly pre-empt the intricate give-and-take between the political branches and themselves. Especially since, by this pre-emption, the courts tend to conceal the essence of the issue. The legal decision is then justified by invoking pre-existing norms rather than conceding its nature as the making of (an often controversial) political choices.

When societies are cohesive and homogenous, many of the unruly aspects of law and adjudication remain unnoticed, because social consensus, or at least the convergence of judgments, often help disguise the creative elements of law, the constructive elements of adjudication and the problem of legitimacy such creativity poses. All this comfort disappears when societies crack and it becomes impossible to maintain the core of harmony of the interests of all, and when there is deep conflict regarding decisions made by political authorities and the courts. Under such circumstances, politicians are likely to attempt to use the courts to promote their goals where the political process itself fails them. Naturally and inevitably, the individuals or groups that feel injured by the court, criticise both its specific decisions and its legitimacy. The criticism becomes more dangerous when the courts are perceived to be seeking to undermine the political gains some groups have made through the political process.

This is precisely what happened to the US Supreme Court in the Lochner era. . . .

In a broad sense, courts are part of government. Yet courts are also independent of the political branches, and this independence is a critical feature of their structure and role. The application of law is never "pure" and non-political. Yet courts can choose among a variety of different self-perceptions. They can view themselves primarily as appliers of law to specific cases, and as defenders of arrangements basically made in the political branches; or they can view themselves as full and equal participants in the elaboration and articulation of the values of their society.

In my opinion, courts in rifted democracies should opt for the first definition of their role. This choice is . . . best for their power to perform the crucial functions of law in society, and in that way they can contribute to the health and the robustness of social processes and the
political decision-making mechanisms of society. Ultimately, it is also the position that is most likely to safeguard their independence and credibility.

Courts who prefer the vision of social reformers invoke a set of values and preferences which they judge to be best for the country. It may be that, more often than not, they are right. In terms of the "merits"... the argument for expansive judicial review, weakened threshold rules and rules of standing, and broad grounds of review which permit replacing the discretion of the authority with that of the court, may seem extremely persuasive. However, this does weaken a true commitment to democracy as respect for the preferences of the people, and it does open the ground for the invocation of a variety of alternative sources of authority in justification of political actions.

As already mentioned, in Israel the latter danger is real and pressing. While some members of the religious establishment vehemently attack the court, they share the basic outlook under which the ultimate source of legitimacy and authority does not lie in the decision of the people through their representatives. They willingly invoke this ultimate source of authority to undermine the law and decisions made by legitimate political authorities. All courts, and all citizens committed to democracy, must fight this dangerous inclination towards the delegitimation of government, law-making and the courts in the name of religious values.

By the same token, courts themselves cannot justify their own lack of deference to... the political branches by invoking indeterminate "basic values"... Some may argue that my position weakens the resolve of courts to take clear normative positions and promote moral values. They may predict that consequently, the courts will tolerate, and thus indirectly legitimize, corruption and immorality. This may seem surprisingly inconsistent with my strong support of human rights and my rejection of moral relativism. However, there is a big difference between having strong moral convictions and fighting for them, and thinking that these convictions should be enforced by the courts on the society as a whole. ...