



How the Roberts Court Undermines U.S. Democracy

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American ideas about preserving democracy were pioneered by the Founders, deepened by the Supreme Court in the era of Nazi Germany and Stalinist Russia, and adapted following World War II by the international community through interpretations in foreign constitutional courts. Scholarly and social scientific analyses confirm many of the key ideas: the importance of constitutional guarantees, the danger of concentrated wealth, the importance of some degree of social cohesion, and the risks that can arise from public or private threats of force. Today, many decisions by the Supreme Court under Chief Justice John Roberts conflict with principles embodied in two centuries of learning and thought, risking the future of democracy in America.

American Traditions for Furthering Self-Government

Ben Franklin remarked that the Constitutional Convention had created a republic “if [we] can keep it.” The Founders thought a lot about how to protect the governing system they had created. They wanted to nurture it with a “republican” spirit, meaning an egalitarian ethos and dedication to public welfare. They were convinced that a republic required broad distribution of resources; control over those under arms; and unification across the young, immigrant nation’s diversity. To further such underpinnings, they spread new systems of mass education, changed the law to minimize monopolies and inherited estates, and created national systems of transportation, commerce, finance, land and settlement. American law included such features before and during the Constitutional Convention, and through legislation under Presidents Washington and Jefferson in many states.

A century and a half later, the Supreme Court began to grapple with the totalitarianism of the Nazis and Communists. Cognizance of these threats was most evident in the letters and opinions of Justices Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone and in two formative decisions, *Palko v. Connecticut* and *United States v. Carolene Products*. *Palko* announced the need to protect rules central to democratic government and free society. *Carolene* suggested special scrutiny for “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” giving examples of decisions which protected rights to vote, speak, publish, associate and assemble; and it asked whether discrimination against religious and racial minorities similarly interferes with democratic processes. Those two decisions dominated American judicial thinking until abandoned by the Supreme Court under Chief Justices William Rehnquist and John Roberts.

After World War II, U.S. ideas spread amid worldwide revulsion to Nazi racism and breakdowns of self-government and the rule of law. Many constitutions written in the post-war era explicitly developed democratic standards for judicial enforcement, based on values of universalism, equality, and public welfare shared with the United States. Under postwar constitutions, foreign courts furthered universal suffrage, competition, equality and dispersion of resources.

The Science of Self-Government

Historical and social scientific scholarship confirms that democracies can fail when...

- **Due process protections and rules of inclusion break down.** People in power can control the electorate by coddling official abuse or simply excluding people from the polls – as has happened through proliferating voting rules in many U.S. states.
- **Disparities of wealth and power become too great.** Concentrated wealth, income, and power – of the sort that has grown for decades in America – create incentives and provide resources to elites willing to undermine democracy in favor of plutocratic rule.

- **Efforts to unify the country are abandoned.** Democracy depends on a modicum of mutual trust among citizens. Working, living, attending school, and serving together in the military historically pulled many Americans together. But economic and social segregation reinforced by partisan polarization can undermine mutual confidence, eroding the foundation on which the “melting pot” of American unity within diversity stands. Legal as well as technological changes have also allowed media companies to factionalize audiences and drive polarization of public opinion with little recourse to fact checking.
- **Paramilitary organizations proliferate.** Threats of force, violence, and intimidation have broken the backs of democracies around the world, and U.S. history provides many examples of force used to destroy state and local democratic government. Paramilitary organizations are again proliferating in the United States, and many Americans have proved unwilling to cope with evidence of systemic police violence toward communities of color.

Today’s Supreme Court and the Neglect of Democratic Protections

Over the course of U.S. history, the Supreme Court has at times furthered, and at other times countered or limited, trends threatening republican and democratic foundations. In the current period, the Roberts Court is furthering anti-democratic threats – by consistently issuing rulings that shrink voting rights protections; shift resources away from consumers, employees and vulnerable individuals toward businesses and the wealthy; and encourage the spread of firearms. The Roberts Court has refused to follow many precedents in strengthening key foundations of republican and democratic governance.

Experience shows that **constitutional interpretation needs to accept responsibility for protecting the health of democracy.** In recent times, Supreme Court Justices like William Rehnquist, Antonin Scalia, and their admirers have made discussion of constitutional interpretation public and fashionable. But they have at the same time drained vital content from this discussion. There is no such thing as an authentically American debate over constitutional interpretation that is not grounded in assumptions about democracy embodied in the U.S. Constitution and reinforced by historical and social-scientific learning about what it takes to preserve democratic foundations. By leaving such discussions aside, fundamentalist legal claims about texts become empty – and reinforce today’s most worrisome anti-democratic trends.

Read more in Stephen E. Gottlieb, *Unfit for Democracy: The Roberts Court and the Breakdown of Democracy in America* (New York University Press, 2016).