

Constitutional Courts and Democratic Hedging

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INTRODUCTION

The American discussion of legal oversight over the democratic process approaches the role of courts gingerly. Every constitutional decision addressing the structure of democracy necessarily supplants the choices made through the political process. In such cases, perennial concerns surface about the proper role of judicial review and the worry about the countermajoritarian dilemma, to invoke Alexander Bickel's timeless formulation, by which every declaration of a law being unconstitutional "thwarts the will of representatives of the actual people of the here and now" as a court purports to exercise control "not in behalf of the prevailing majority, but against it."¹ For Bickel and for critics of the far-reaching powers of the judiciary, at its essence, "judicial review is undemocratic."²

This charge is most potent when the judiciary claims to act under constitutional authority to control the political process itself. One consequence of this broadside against judicial review in the United States has been the apparent caution present from the beginning of the modern era of the law of democracy over the role of the judiciary. Uncertainty over the claims of the courts to police democracy is apparent even in the opening throes of the modern era, starting with the reapportionment cases of the 1960s that jettisoned narrow conceptions of the political question as an obstacle to constitutional engagement.³

Thus, when Justice Brennan, in *Baker v. Carr*, proclaimed malapportionment justiciable, he did so within the "familiar" confines of equal protection law,⁴ rather than the more searching inquiry offered by the Republican Guaranty Clause.⁵ Equal protection offered a safe harbor for a hesitant Court, one that allowed it to package questions about the integrity of the democratic process within the secure domain of individual rights. Grounding judicial intervention in the protection of the rights-based claims of classes of deprived voters landed the new political cases within the refuge offered by *Carolene Products*, which, in a famous footnote, sanctioned a higher degree of judicial scrutiny for

1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (2d ed. 1986).

2. *Id.* at 17.

3. *See Baker v. Carr*, 369 U.S. 186, 226–28 (1962) (finding that a challenge to a state apportionment statute did not present a nonjusticiable political question because of "well developed and familiar" judicial standards under the Equal Protection Clause); *see also Reynolds v. Sims*, 377 U.S. 533, 557–59 (1964) (affirming that controversies over legislative apportionment schemes present justiciable controversies).

4. *Baker*, 369 U.S. at 226.

5. *Id.* at 218. For an argument in favor of utilizing the Republican Guaranty Clause in redistricting cases (rather than the "embarrassingly standardless" Equal Protection Clause doctrine currently used), *see* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000).

legislation that appeared to discriminate against vulnerable groups.⁶ As presented by *Baker*, judicial intervention against the malapportioned deformities of the electoral process could be justified as an example of solicitude for the discrete and insular outcasts from the broader polity. Even John Hart Ely's pioneering work on the distinct need for protections for the integrity of the political process, *Democracy and Distrust*, joined the debate in defense of the Warren Court as a by-product of the perceived need to justify judicial review.⁷

In this Article, I want to step away from the American experience and the particular way in which it shapes our law of democracy. American law engaged the questions of democratic integrity late and did so amid specific concerns within a particular legal culture.⁸ Much of our contemporary dialogue in cases concerning what is termed the law of democracy is an artifact of the path-dependent byways that brought us to a robust body of law governing the political process. The particular forms of these debates over rights versus structures and process versus substance reflect the manner in which our courts engaged these issues. Our Constitution is conspicuously silent on the contours of democracy, and many of our subsequent doctrinal developments are the consequence of a perceived need for judicial backfilling.

Much work remains to be done on how we understand the force of individual claims to participate in the political process and the more comprehensive issues presented by topics such as campaign finance and partisan gerrymandering. Although these are important ongoing sources of debate and elaboration, they are by this point familiar, and I want to illuminate these issues by looking away from the American experience and examining the ways in which "third wave" constitutions and constitutional courts define the contours of the political arena in nascent democracies. By turning to the examination of recently fashioned democratic systems, this Article seeks to illuminate underlying concerns over the political process that are often left obscured in doctrinal shadows by American jurisprudence.

There is by now a recurring pattern through which courts in many different constitutional regimes have had to confront surprisingly similar issues, regardless of the precise constitutional regime at play. A simple example: most constitutional regimes at present—particularly those of recent vintage—have provisions for constitutional courts. By their nature, these are courts that stand apart from the ordinary appellate chain of the regular judiciary.⁹ They have no

6. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

7. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

8. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

9. Although this is formally the case, the use of special processes of referring constitutional concerns to these specialized courts has increasingly brought constitutional judicial review closer to the ordinary workings of the judiciary. See Pasquale Pasquino, *Constitutional Adjudication, Italian Style* (2010) (unpublished manuscript) (on file with author) (describing how the judicially created doctrine of referral in Italy has created new mechanisms of constitutional review of as-applied challenges in ordinary legal disputes).

warrant for their existence save the need to subject the normal outputs of the political process to constitutional scrutiny by the judiciary. Not surprisingly, these courts are little detained by concerns over the authority for judicial review or over the countermajoritarian consequences of constitutional challenge.¹⁰ In practice, the role these courts play may be little different than that played by national Supreme Courts—such as those of India or Israel—that have had to proclaim their own authority through judicial construction rather than express constitutional command.¹¹ The problem of judicial oversight of the democratic process is an enduring one, even in countries not requiring their *Marbury v. Madison* moment.¹²

My focus in this Article will be on emerging democracies of the post-Soviet period. As these countries embark on their experiments with majoritarian rule, constitutional courts are invariably assigned a central role in the creation and maintenance of a democratic order. Perhaps more notable is that these courts appear to be a required element for the creation of these new democracies. Invariably, these courts are established with the primary purpose of ensuring the constitutional pedigree of the actions of the new political orders, a charge that leaves them unencumbered by the American fixation with the source of the authority for judicial review and the accompanying hand wringing over countermajoritarianism. If we were to look at the role of these courts as part of a common enterprise—leaving aside the structural and political differences within the varying new democracies—the question could become one of defining the role that these courts are expected to play under the broad rubric of constitutional democracy. Specifically, the inquiry is twofold. First, how should we understand the role of these courts? Second, how do these courts discharge that role?

10. See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* xiii (2005) (“European constitutional adjudication has *not* developed a tradition of self-doubt, agonising over legitimacy, or ‘exercising the utmost care’ whenever ‘breaking new ground’ in constitutional matters.”).

11. See Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 *CARDOZO L. REV.* 2013, 2017–27 (1989) (comparing the Israeli Supreme Court’s development of an independent, interpretive role for the courts to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *infra* Part IV.

12. I leave to the side two arguments about the operation of distinct court systems. The first is the claim by Victor Ferreres Comella, among others, that the limited authority of constitutional courts, as opposed to the broader jurisdiction of supreme courts, leads courts of last instance to overly constitutionalize the law as they exercise their judicial functions. See Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 *TEX. L. REV.* 1705, 1718, 1730 (2004). The second is the claim by Ran Hirschl that the forms of judicial review obscure the broader role of constitutional courts in suppressing popular democratic impulses often inspired by religious ardor. See RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004). In this Article, I am primarily concerned with emerging democracies, almost all of which have chosen the constitutional court model. There are virtually no supreme courts whose intervention into contested political issues is premised on a general grant of jurisdiction. With regard to Hirschl, it may be that courts reinforce elite educated sentiment in some countries, as he argues. In the countries under consideration here, I will suggest that the emergence of strong courts is most often the product of elite compromise among the leaders of contending rival forces.

In previous writing I have focused on the need for all democracies to police their boundaries. My central piece in this area, *Fragile Democracies*, is an effort to draw out the types of and justifications for the suppression of antidemocratic groups seeking to use the instrumentalities of democracy to dismantle the democratic system.¹³ In this Article, I want to turn to the complementary risk of what I will term “one-partyism,” the effort to centralize power so as to undermine democratic accountability. For the purposes of this Article, it is possible to think of *Fragile Democracies* as having addressed the threats to unstable democratic rule from without, and the new project as looking to the threats from within. In each case, I suggest, constitutional courts may be called upon to play a limiting role to protect the vitality of democratic competition for office and the ability of the political process to dislodge incumbents.

The initial inquiry is framed by an examination of the “third wave” of democratization that has spread democratic governance to nations with histories of political and social conflict. Part II will then turn to the particular manner in which constitutional courts engage with foundational issues defining the political arena in these new democracies. This is then fleshed out by two theoretical frameworks that attempt to account for how these courts, certainly the weakest of the new branches of government, nonetheless have emerged as major overseers of the exercise of political power starting with the moment of constitutional creation, with particular examination of the experience of South Africa to develop the basic argument on the role of constitutional courts. Finally, the last Part grounds the activities of constitutional courts in a prerogative to preserve the “basic structures” of democracy, and suggests certain arenas in which the courts may most effectively fulfill this mandate while preserving the democratic nature of the political system.

I. THE DEMOCRATIC MOMENT

Beginning roughly with the fall of the Soviet Union, the “third wave” of democratization has swept across the globe. There have been more governments that would be termed “democratic” in place over the past two decades than at any point in human history, and it is likely that a broader percentage of humanity has a democratic say in the elections of its governors than at any time in the past. But the definition of democracy here must mean more than simply the ability of a majority of citizens to vote for the head of state.¹⁴ Rather, I want to focus on a definition of democracy that is not backward-looking in terms of whether or not the citizenry was consulted on the current head of state, but is instead forward-looking. The critical issue in democratic governance must be whether the political process offers some prospect of removing from office

13. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

14. The sparest definition may be found in Jon Elster, *Introduction to CONSTITUTIONALISM AND DEMOCRACY* 1, 1 (Jon Elster & Rune Slagstad eds., 1988) (arguing that democracy is “simple majority rule, based on the principle ‘One person one vote’”).

incumbents who have incurred the wrath of the public.¹⁵ The ability to “throw the rascals out” becomes the defining feature that distinguishes a vital democracy from an authoritarian state whose governors may originally have been selected through election, even if the original election was a contested event.¹⁶ Particularly in states emerging from authoritarian rule, the critical question is not whether an election will be used to determine the first set of rulers, but whether there will be a second election in which the continued tenure of the heads of state is seriously at issue.¹⁷

The most significant development in the recent political period is the creation of democratic states from the detritus of the Soviet empire. The largest number of democracies is clustered within the former Soviet Union itself, its satellite states in Eastern Europe, and the former Soviet republics of the land mass stretching from Asia Minor to Mongolia. But the same period also saw the emergence of democracies and the consolidation of democratic rule in South Africa, Mexico, South Korea, Thailand, and Taiwan, to mention some of the more prominent.

New democracies face characteristic challenges. Some are external, such as the likelihood that they will face military confrontation with neighbors. Most, however, are internal. Of the internal challenges, there are two that are most prevalent. In fractured societies, emergent democracies confront the risk of historic enmities defined by race, religion, or ethnicity being redirected to political mobilizations vying for state power. Too often, the battle for power is simply the struggle for the ability to carry out the conflicts of the past in the name of state authority. Alternatively, an unstable democracy may see its first officeholders claim the authority of political processes to ensure their continued

15. I rely here on a more dynamic, though still spare, definition of democracy that focuses on the ability to remove incumbents from office. There are many variants of such minimal definitions of democracy. For application to the nascent democracies of the former Soviet orbit, it is useful to follow the four thresholds set forth by Adam Przeworski and his coauthors: (1) the election of a chief executive either by direct election or parliamentary election; (2) the election of the legislative branch, whether by party slate or by direct election of the legislators; (3) the existence of more than one party; and (4) the possibility of “alternation” in office and some experience with incumbents being voted out. ADAM PRZEWSKI, MICHAEL E. ALVAREZ, JOSÉ ANTONIO CHEIBUB & FERNANDO LIMONGI, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 18–27 (2000). For the most sophisticated assessment of the democratic viability of governments around the world, see José Antonio Cheibub, Jennifer Gandhi & James Raymond Vreeland, *Democracy and Dictatorship Revisited*, 143 *PUBLIC CHOICE* 67 (2010), available at https://netfiles.uiuc.edu/cheibub/www/DD_page_files/Cheibub%20Gandhi%20Vreeland%20DD%20Revisited.pdf.

16. The formulation that this is the nub of democracy is from G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 47 (2000). The underlying view holds that “the primary function of the electorate” in a democracy is not only creating “a government (directly or through an intermediate body)” but also “evicting it.” JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 272 (3d ed. 1975).

17. I have previously argued that U.S. policy abroad is overly fixated on the fact of elections being held, rather than whether the institutional prerequisites to democratic accountability have been established. For an assessment of the first elections in Iraq from this perspective, see Samuel Issacharoff, *Democracy Isn't Built on One Election Alone*, *WASH. POST*, Jan. 23, 2005, at B1.

rule, the process that Richard Pildes and I describe in the American context as a “lockup” of democratic politics.¹⁸ In either case, the object is to prevent the entrenchment of a ruling group that places itself increasingly beyond democratic accountability.

The new democracies of the post-Soviet period arrive on the scene the inheritors of the lessons of the last major wave of democratization, the one that followed from the demise of the European colonial empires after World War II. In country after country, the dispiriting lesson of experiments in democratic rule was that elections were a brief transition between the overthrow of colonialism and the rise of one-party or one-man autocracy. If anything, the elections served primarily to legitimize the control that one faction had on state authority as it went about the often violent task of eliminating its political opponents.

It is against the backdrop of the descent into what has been termed “one man, one vote, one time”¹⁹ that the structures of the most recent efforts at democratization present themselves. One of the interesting developments in this third wave of democratization is the actual form that democracy takes. Despite the formal differences across the range of parliamentary versus presidential systems, there are striking parallels in many of the governmental structures selected by new democracies.²⁰ Almost all regimes import some notion of proportional representation in order to give broad representational opportunities to all social groups and to try to forestall parliamentary dominance by a single faction. All the new democracies provide checks against the power of the dominant legislative coalition, and no new democracy has adopted a Westminster-style system of complete parliamentary sovereignty, particularly as regards the interpretation of legal rules. All new democratic regimes have specified many of the conditions and limitations of democratic rule in strong constitutional texts. And nearly all the new democracies²¹ have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of their constitutions.²²

18. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

19. The phrase “one man, one vote, one time” captures the proclivity of new democracies to succumb to strongman rule by the first elected governor. The phrase is attributed to former Assistant Secretary of State and U.S. Ambassador to Syria and Israel Edward Djerejian. See Ali Khan, *A Theory of Universal Democracy*, 16 WIS. INT’L L.J. 61, 106 & n.130 (1997).

20. The data set compiled by Cheibub, Gandhi & Vreeland, *supra* note 15, reveals that in the immediate post-Soviet period from 1991–1993, six new democracies adopted pure parliamentary systems, five adopted presidential systems, and twelve adopted some form of mixed system. The data set is available online. See José Antonio Cheibub, Jennifer Gandhi & James Raymond Vreeland, *Democracy and Dictatorship Revisited*, DD PAGE, https://netfiles.uiuc.edu/cheibub/www/DD_page.html (last visited Jan. 14, 2011). My thanks to Oona Hathaway for organizing the information in this fashion.

21. Estonia has a “Constitutional Review Chamber,” one of several chambers of the highest National Court. In effect, it functions as a specialized court directed to constitutional review of legislative acts. Formally, however, it is part of the central court structure. SADURSKI, *supra* note 10, at 5.

22. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 6, 7–8 & tbl.1.1 (2003) (“[A]lthough there are institutional variations, providing for a system of constitutional review is now a norm among democratic constitution drafters.”).

It is the last feature that is the subject here. An examination of the post-Soviet democracies, particularly those that seek admission to the European Union, reveals that the newly created constitutional courts are a centerpiece of the effort to comply with rule of law requirements. For the eastern European countries of the former Soviet bloc, integration into the EU has emerged as almost a prerequisite for economic and political stabilization. EU membership carries many requirements, including currency stabilization, governmental transparency, a demonstrated commitment to democratic governance, and, in some instances, explicit safeguards of minority rights.²³ The commitment to democracy is difficult to demonstrate in countries without a democratic heritage and with only one or two elections in place at the time they seek admission to the EU. But the existence of functioning constitutional courts has emerged as a critical indicator of democratic status for these states,²⁴ a *sine qua non* for compliance with the Copenhagen criteria for accession to the EU.²⁵

The aspirations of entry into the EU may help to explain the acceptance of the constitutional court model across the former Soviet bloc of Eastern Europe, as well as the curious fact that across these countries there was little debate over the creation of these courts. But entry into the EU alone cannot explain the repeated use of constitutional courts. Even if, as Professor Sadurski argues, there could have been little known prospect of EU integration at the time of the fall of the Soviet Union,²⁶ the post-War model of constitutional court review, particularly as exemplified by Germany, was still the assumed standard for emulation.²⁷ The form of review in these constitutional courts followed as well from the European post-War courts. The constitutional court's focus on ex post review of statutes for constitutional infirmity (and the right to conduct "abstract" review, or the adjudication of the constitutionality of a legislative act outside the context of a specific case or controversy) was for the most part a product of simple adoption of Western constitutional innovations, again most notably those of Germany.²⁸ These constitutional courts stand apart from the

23. On the importance of anticipated EU or NATO membership in stabilizing the transition away from Soviet rule and keeping the former Communist parties at bay electorally, see Jeffrey S. Kopstein & David A. Reilly, *Geographic Diffusion and the Transformation of the Postcommunist World*, 53 *WORLD POL.* 1, 25–32 (2000).

24. See Bruce Ackerman, Essay, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771, 776 (1997) (observing that Eastern European leaders understand "that highly visible confrontations with their domestic constitutional courts will gravely threaten prospects for early entry into the European Union").

25. One of the three governing Copenhagen criteria requires: "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." *Enlargement–Accession Criteria*, EUR. COMMISSION, http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (last visited Nov. 15, 2010).

26. See Wojciech Sadurski, *Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?* 7 (Univ. of Sydney, Sydney Law Sch., Legal Studies Research Paper No. 09/38, 2009), available at <http://ssrn.com/abstract=1401242>.

27. *Id.* at 20.

28. *Id.* at 3, 7.

national court system that is empowered to adjudicate ordinary disputes, even if a constitutional question is present.²⁹ To the extent that any dispute may turn on the constitutionality of a legislative enactment, however, the specific case in the normal court structure in which the constitutional question is raised must be suspended and the question of the constitutionality of the statute under review must be referred to the specialized constitutional tribunals.³⁰

Despite the origin in established European structures, these courts were consumed with trying to make sense of an unstable and often underspecified constitutional order. In almost every one of these new democracies, courts have had to review deeply contested claims of improper internal lock holds on power. A ready example would be the Ukrainian Supreme Court in 2004 derailing efforts to close off the electoral process in that country, ordering a revote, and allowing for election of the opposition candidate, Viktor Yushchenko.³¹ Although subsequent developments in Ukraine have shown the vulnerability of democratic gains,³² the role of an independent tribunal in at least providing the space for democratic challenge was critical. Constitutional authorization to police the structures of democracy may also be vested outside the courts, with the similar result of an antimajoritarian check on the democratic process. Independent election authorities with a constitutional mandate created the pathways for the ultimately successful termination of decades of one-party rule by the *Partido Revolucionario Institucional* (PRI) in Mexico.³³ Cases of this sort are common enough in these new democracies—even outside the EU context—to allow some generalizations from the historical examples and to develop a normative framework for assessing the justification for the role of constitutional courts in checking the threats posed when the first holders of power attempt to become the last.

The aim here is not to explore the world of judicial review as such or to re-examine the debates on constitutional constraints on democratic politics. Both are important considerations. Without the organizing role of structural constitutional limitations on majority processes, democracy threatens to consume itself. Similarly, without some form of independent arbiter of those constitutional limits, democratic politics may fail to protect minorities or allow for political competition. This Article accepts as its point of departure that the historic judgment of the third wave of democratization is that the role of

29. See SADURSKI, *supra* note 10, at 5.

30. *Id.*

31. See *Preface to FOCUS ON POLITICS AND ECONOMICS OF RUSSIA AND EASTERN EUROPE* vii–viii (Ulric R. Nichol ed., 2007).

32. See Steven Lee Myers, *Stalled by Conflict, Ukraine's Democracy Gasps for Air*, N.Y. TIMES, June 1, 2007, at A4; see also Yulia Tymoshenko, *Save Ukraine's Democracy*, WSJ.COM (Oct. 29, 2010), <http://online.wsj.com/article/SB10001424052702303362404575579890814896292.html>.

33. See JULIA PRESTON & SAMUEL DILLON, *OPENING MEXICO: THE MAKING OF A DEMOCRACY* 496–99 (2004); Jamin Raskin, *A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 564 (2004) (describing the key role of independent electoral commissions in making political change possible).

independent arbiter is best played by courts, and generally by specialist courts devoted exclusively to constitutional matters.

Instead, the aim here is to look beyond the question of constitutional review as such, and examine how such constitutional courts face these “political questions” and the jurisprudential tools that emerge as they try to resolve them. In order to give meaning to cases from dispersed courts, it is critical to address in broad strokes the institutional prerequisites for democratic competition to exist or survive. Almost all new democracies emerged from civil law systems that to greater or lesser extents rejected the common law role of precedent. In the transition to constitutional regimes premised on judicial review, these countries turned to constitutional courts, in part so as not to empower the normal judicial structure with common law authority, including the right of constitutional review.³⁴ In many circumstances, the creation of a constitutional court—following the example of Germany after World War II—also allowed the creation of an independent judicial organ composed of persons not tarnished by their roles as judges in the prior regime without requiring a lustration of the entire judiciary.³⁵

The result, paradoxically, is often a more interventionist form of judicial review by powerful courts unencumbered by limiting principles³⁶ such as the American doctrine of not reaching a constitutional question in a case that can be decided on statutory grounds.³⁷ Moreover, these courts in many instances have procedures that reserve judicial constitutional review for questions of political authority brought by political bodies, and not for claims of mistreatment brought by individuals.³⁸ Although claims of violations of fundamental rights may get to these courts, the critical structural power remains the ability to adjudicate claims of competing authority between the political branches.

The underlying normative thesis develops from the observation that in the new democracies of the third wave, the most typical scenario is an ethnically riven society emerging from the collapse of authoritarianism, or less frequently a postconflict society with the same defining characteristic of a gaping social divide. In these circumstances, a constitution needs to be drafted to bridge the divide to democratic rule. The problem is that the constitutional negotiations take place against the backdrop that one party to the negotiations will hold power over the other. Further, under the press of time, uncertainty, and distrust,

34. See Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 107–09 (2006); cf. GINSBURG, *supra* note 22, at 9–10 (arguing that decentralized review is particularly unattractive for new democracies).

35. See Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Anti-majoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1207–08, 1215–16 (1995).

36. See Ferreres, *supra* note 12, at 1730 (arguing that specialized constitutional courts will tend to be relatively less deferential because “[a] constitutional court is not likely to earn its own space in the institutional system if it regularly upholds the statutes that are challenged before it”).

37. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

38. Martin Shapiro, *The Success of Judicial Review*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193, 205 (Sally J. Kenney et al. eds., 1999).

the parties are poorly positioned to work out all the details of the constitutional compact—even leaving aside the strategic obstacles always attendant to such enterprises.

As a result, the parties have to get the basic blueprint of governance in place, understanding that many of the critical terms—including the explosive issue of the exercise of emergency powers—will likely be impossible to specify. Viewed in this light, constitutions emerge as a species of underspecified contracts. In mature commercial settings, most countries provide principles of contract law that facilitate the realization of the basic contours of the parties' intent and aspirations, even when time or unforeseen circumstances compel agreement beyond that which was specified at the time of contract formation. The argument therefore is that the turn to constitutional courts plays a similar role to that of common law courts seeking to realize the intent of the parties in a long-term relational contract. The ability to put decisions off to subsequent interpretation and application takes pressure off of the original political contracting parties of specifying all the restraints on the exercise of majoritarian political power following the first democratic election. The corresponding move is to insist that courts should approach such constitutional cases with a commitment to shoring up the fundamental promise that majoritarian rule be subject to contestation by subsequent shifts in political majorities.

II. FOUNDATIONAL CONSTITUTIONAL ADJUDICATION

Let me give some examples of the scope of constitutional cases that arise in new democracies. I present these cases not so much to assess whether the resolutions were correct, which is often a difficult undertaking from afar. Rather, I want to show that the courts rise to fill gaps in the governing political structure that cannot easily be repaired within an emergent democracy. These cases present a distinct jurisprudential problem, one in which the courts cannot pretend to find an agreed-upon, controlling societal organizing principle, as my colleague Ronald Dworkin would demand.³⁹ Nor, given the frailty of political structures, do they offer an opportunity for legislative resolution of fundamental contestations of power, as another esteemed colleague, Jeremy Waldron, would have it.⁴⁰ The breadth of these examples indicates the range of commitments courts have made to shore up threatened democratic systems.

A. IMPEACHMENT

If one looks at the role quickly assumed by the new constitutional courts, what emerges immediately is the lack of hesitation in adjudicating what might elsewhere be termed a political question. For example, it is hard to imagine a more central political issue in the life of a country than the possible removal

39. See RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986).

40. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 82–90 (1999).

from office of the president by the legislature. In older constitutional arrangements, as in the United States, the judiciary is given no formal role in the decision-making process, save for the ceremonial role of presiding over the actual impeachment session. But in a number of more recent democracies, the constitution explicitly gives the constitutional court (or analogous body) the authority to render final judgment by way of appellate review of the parliamentary decision to impeach. This is true in Hungary and the Czech Republic,⁴¹ as well as in South Korea, where this power was dramatically used in 2004.⁴² At issue in Korea was the increasing antagonism between President Roh Moo-hyun and the National Assembly, which finally voted to impeach Roh by a vote of 193–2, with Roh’s supporters either abstaining or being barred from the vote.⁴³ The Constitutional Court of Korea found that Roh had indeed violated the law in three of the ways alleged by the National Assembly,⁴⁴ but that when weighed against the consequences of removing him from office, the impeachment should be dismissed and he should be reinstated as President.⁴⁵ The costs of removal, as determined by the Court, included prematurely ending the term of a democratically elected official and the political chaos that would be caused by requiring the election of a new president. The Court held that “[t]he acts of the President violating the laws were not grave in terms of the protection of the Constitution to the extent that it would require the protection of the Constitution and the restoration of the impaired constitutional order by a decision to remove the President from office.”⁴⁶

B. ACCESS TO THE ELECTORAL ARENA

In other circumstances constitutional courts have had to deal with the mechanics of the election system. Perhaps following the lead of the German Constitutional Court in directing attention to electoral opportunity, this has been a fertile area of judicial engagement. Even among the active Eastern European constitutional courts, the leader is probably the Hungarian Constitutional Court, which has also been among the most receptive to emerging international standards of

41. This is common in the post-Soviet states. See Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225, 235 (Tom Ginsburg & Robert A. Kagan eds., 2005).

42. Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403, 407 (2005).

43. *Id.* at 409–12.

44. Roh transgressed the law in the following ways: 1) violating a statute that required the political neutrality of officials during elections (Roh publicly stated his preference for the newly formed Uri Party prior to the parliamentary election), 2) not demonstrating proper respect for the Constitution and constitutional bodies by challenging the National Election Commission’s ruling that he had violated political neutrality, and 3) illegally calling a national referendum to assess the nation’s confidence in his leadership. *Id.* at 414.

45. Constitutional Court [Const. Ct.], 2004Hun-Na1, May 14, 2004, (16–1 KCCR, 609) (S. Kor.), available in English translation at <http://english.court.go.kr/>.

46. *Id.*

democratic intervention.⁴⁷ The Hungarian Court was one of the first to begin work and has been handing down important decisions since the early 1990s.⁴⁸ And, having had an early start, it has been unusually successful in gaining widespread legitimacy, despite (or perhaps as a result of) striking down one third of all legislation passed between 1989 and 1995, according to one estimate.⁴⁹ Indeed, other constitutional courts that have emerged more recently in Eastern Europe report comparable and even higher levels of overturning legislation.⁵⁰

An example of the Hungarian Court engaging the vitality of the political process is its striking down of a proposed amendment to the electoral law that stated that elected representatives of the “self-governments of social security”⁵¹ could not be put forward as candidates at the parliamentary elections.⁵² For democracies emerging from extended periods of authoritarian rule—the Soviet example dominates, but it is not significantly different from post-Nazi Germany or post-apartheid South Africa or even post-Saddam Iraq—coming to terms with the monopoly of technical expertise by those compromised by association with the prior regime is invariably a dominant social and political issue. The difficult line between accountability and revenge is all too often policed by the newly created constitutional courts, as presented in Romania,⁵³ Ukraine,⁵⁴

47. See CATHERINE DUPRÉ, *IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS* 13–16 (2003).

48. See Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1266 (2008).

49. See Kim Lane Scheppelle, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 25, 44 (Adam Czarnota et al. eds., 2005); see also Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy*, 42 INT’L & COMP. L.Q. 332, 341 (1993) (describing Hungary’s court as pursuing its mission with “remarkable vigour”).

50. One striking study found that among the courts with the fewest number of reported constitutional decisions on the political process (Czech Republic, Georgia, and Latvia), the rejection of legislation ranged from sixty to an astonishing eighty-five percent. See Shannon Ishiyama Smithey & John Ishiyama, *Judicial Activism in Post-Communist Politics*, 36 LAW & SOC’Y REV. 719, 723 tbl.1 (2002). My thanks to Ryan Kennedy of the University of Houston Political Science Department for alerting me to this study.

51. For background on the elected self-governments responsible for social security funds in Socialist-era Hungary, see BÉLA TOMKA, *WELFARE IN EAST AND WEST: HUNGARIAN SOCIAL SECURITY IN AN INTERNATIONAL COMPARISON, 1918–1990*, at 92–95 (2004).

52. See Alkotmánybíróság (AB) [Constitutional Court] Mar. 25, 1994, MK.16/1994 (Hung.), translated in 1 EAST EUROPEAN CASE REPORTER OF CONSTITUTIONAL LAW 245–46 (Anton van de Plas & Adrie Labrie eds., 1994).

53. See SADURSKI, *supra* note 10, at 156 (reviewing the decision of the constitutional court upholding a time-limited exclusion of prefects and other police officials from presenting themselves as candidates in the first post-Communist election).

54. See Rishennia KSU (Konstyutysijnogo Sudu Ukrainy) [Constitutional Court] Jan. 26, 1998, Nos. 03/3600-97, 03/3808-97, 1-13/98 (Ukr.), summarized in EUROPEAN COMM’N FOR DEMOCRACY THROUGH LAW, *THE BULLETIN OF CONSTITUTIONAL CASE LAW* 146–48 (Ch. Giakoumopoulos et al. eds., 1998) (invalidating a categorical ban on persons from candidacy because of their former roles as judges, public prosecutors, or state employees).

Macedonia,⁵⁵ and perhaps most notably, Poland,⁵⁶ an example to which I will return later in the Article. Even more troubling is the prospect that lustration laws take a form that sweeps in an ethnic group compromised by association with the old regime, but now subject to recriminations by resurgent ethnic claims, as in Moldova⁵⁷ or the Baltics.⁵⁸ Particularly in the Baltics, the presence of a Russian population associated with Soviet occupation provided an almost irresistible target for xenophobic retribution, even though the Russian population by the end of the Soviet era had had a generations-long presence in the region.

C. THE LIMITS OF GOVERNMENTAL POWER

A particularly striking example of first-order judicial engagement with the foundations of the political process is found in Mongolia, although in the unusual posture of having to protect the authority of the executive in order to maintain separation of powers. In so doing, a newly created Constitutional Court waded into the very heart of the political thicket in the first election that successfully displaced the embedded Mongolian People's Revolutionary Party, the longstanding Communist rulers. The Court in 1996 issued a threshold ruling interpreting the new constitutional order to decree that members of the parliament could not hold cabinet positions in the new coalition government.⁵⁹ The ruling confronted a series of efforts by the Mongolian parliament (the State Great Hural) to appoint acting members of the parliament to the presidential cabinet. The Constitutional Court ruled that such a practice was unconstitutional, first when the matter was brought on petition of a private citizen in 1996,⁶⁰ and again by striking down a law passed by the parliament in 1998.⁶¹ The issue of parliamentary control of executive functions continued to dominate Mongolian legal disputes in the early years of non-Communist rule until 2000,

55. See *FYROM Constitutional Jurisprudence*, U.br:2/97 off 12.03.1997, RIGAS NETWORK, http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/FYROM/Jur_fyrom.htm (last visited Dec. 20, 2010) (invalidating the exclusion from election to local councils or mayoral office of members of armed forces, police, and intelligence officers).

56. See Trybunał Konstytucyjny [Constitutional Court] May 11, 2007, No. K. 2/07 (Pol.), translated in *Judgment of 11th May 2007*, file Ref. No. K 2/07, at 20, TRYBUNAŁ KONSTYTUCYJNY, http://www.trybunal.gov.pl/eng/summaries/documents/K_2_07_GB.pdf (striking down sweeping disqualification of former "collaborators" as being of such scope as to render "the principle of the sovereignty of the Polish People . . . illusory").

57. See, e.g., *Moldova: Setback for Russian Language*, N.Y. TIMES, Feb. 22, 2002, at A6; Michael Wines, *History Course Ignites a Volatile Tug of War in Moldova*, N.Y. TIMES, Feb. 25, 2002, at A3.

58. See, e.g., Fredo Arias-King, *Estonia: Little Country That Could*, 11 DEMOKRATIZATSIIYA 619, 620–21 (2003) (book review) (describing Western groups' condemnation of Estonia's lustration laws as a type of apartheid); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, L. & CONTEMP. PROBS., Autumn 1996, at 181, 190–92; Tomas Skucas, *Lithuania: A Problem of Disclosure*, 12 DEMOKRATIZATSIIYA 411, 421–23 (2004).

59. The account that follows is based on GINSBURG, *supra* note 22, at 158–205.

60. Tom Ginsburg & Gombosuren Ganzorig, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309, 311–13 (2001).

61. *Id.* at 314.

when the political parties sufficiently unified in demanding parliamentary authority and the Court ultimately backed down.⁶²

Although the Mongolian case illustrates the ultimate vulnerability of these new constitutional courts to persistent political pressure,⁶³ it is nonetheless noteworthy that the terms of engagement were framed by a first-order dispute as to whether Mongolia was a presidential or parliamentary system. Perhaps surprisingly (then again, perhaps not), this question had apparently not been specified in the multiparty and broadly participatory Mongolian constitutional design. The issue hinged on the interpretation of Article 29(1), which states that members of the parliament “shall not hold concurrently any posts and employment other than those assigned by law.”⁶⁴ In order to strike down the proposed dual role of ministers, the Court had to first decide that Mongolia was constitutionally obligated to adhere to a presidential system, and then conclude that a division of functions between members of the parliament and members of the executive was necessary to maintain both separation of powers and political competition between the branches.⁶⁵ Mongolia may well present an extreme version of a court having to resolve the basic structure of democracy, but it is far from the only such case. Courts are critical to establish the boundaries of governmental power in unstable democracies. In Bangladesh, for an extreme example, in order to forestall incumbent manipulation of the powers of state during the elections, a retired judge is required to head a caretaker government during the election period.⁶⁶ More typical is the experience of Albania, where the power of judicial review was established in a series of opinions addressing the terms under which an independent constitutional officer, the General Prosecutor (the equivalent of the Attorney General), could be removed from office by the Assembly and the President.⁶⁷ The Court decided that in dealing with an independent officer, the political branches were constrained both substantively (only certain offenses suffice to remove such an officer) and procedurally (certain procedures are required for the removal to be valid).⁶⁸ As in Mongolia, however, the Court ultimately lost out politically as the Assembly then undertook to follow the prescribed procedures and remove the General Prosecutor

62. Stewart Fenwick, *The Rule of Law in Mongolia—Constitutional Court and Conspiratorial Parliament*, 3 AUSTL. J. ASIAN L. 213, 219–20 (2001).

63. This is the core of the argument, in the American context, advanced by my colleague Barry Friedman. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

64. THE CONSTITUTION OF MONGOLIA, art. 29, § 1.

65. See GINSBURG, *supra* note 22, at 187–92 (describing the arguments and outcome of the case).

66. Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 66 (2009).

67. Gjykata Kushtetuese e Republikës së Shqipërisë [Constitutional Court] Apr. 20, 2002, No. 76 (Alb.), translated in *Decision No. 76 of the Albanian Constitutional Court* 4–5, ACCUEIL, http://www.accpuf.org/images/pdf/cm/albanie/052-jc-autres_jurisp.pdf; Gjykata Kushtetuese e Republikës së Shqipërisë [Constitutional Court] Apr. 19, 2002, No. 75 (Alb.), translated in *Decision No. 75 of the Albanian Constitutional Court* 8–9, ACCUEIL, http://www.accpuf.org/images/pdf/cm/albanie/052-jc-autres_jurisp.pdf [hereinafter *Decision No. 75*].

68. *Decision No. 75, supra* note 67, at 11.

from office.⁶⁹ Nonetheless, as noted by the Albanian legal academic Agron Alibali, the “case evidenced an important role which Constitutional Courts can play in post-Communist societies . . . as a true guarantor of the Constitution and the rights provided therein to its citizens.”⁷⁰

D. MINIMUM THRESHOLD REQUIREMENTS

In other situations, courts must confront minimum thresholds for parliamentary office under proportional representation elections. The issue of exclusion thresholds has a rich history, drawing, most notably, from Germany’s Federal Constitutional Court (*Bundesverfassungsgericht*). The German court has pursued a functional balance in this area, recognizing that high thresholds can be a barrier to political choice, while also recognizing that low thresholds risk impotent governance as representation is fractured among minor parties. The Court repeatedly upheld thresholds of five percent by recognizing that there was a compelling governmental interest in effective governing bodies and that this in turn required avoiding the splintering of parties, ““which would make it more difficult or even impossible to form a majority.””⁷¹ It has also been vigilant in overturning partisan capture of the political process. Most interestingly, the Court struck down the same five percent threshold after German reunification, on the grounds that it could not guarantee a sufficient level of representation for the former East Germany, whose nascent political actors were unlikely to forge sufficiently strong national lists for the first post-unification elections.⁷² The Bundestag then amended the election law in accordance with the Court’s suggestions, and in the ensuing elections, some groups from the former East Germany did manage to achieve representation.⁷³

Following the German lead prior to reunification, the constitutional courts of the Czech Republic and Romania similarly upheld thresholds for election against constitutional challenges.⁷⁴ In each case, the claim was that the threshold violated a constitutional commitment to proportional representation and to equal access to electoral office.⁷⁵ Further, courts confronted with such claims have weighed the claimed right of representation against the “excessive splintering of the political spectrum”⁷⁶ and the need for efficient political decision

69. See Agron Alibali, *Two Landmark Decisions of the Albanian Constitutional Court: The Individual, the Employee, and the State*, 29 REV. CENT. & E. EUR. L. 219, 244–45 (2004).

70. *Id.* at 245.

71. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 187 (2d ed. 1997).

72. See *id.* at 188–89 (translating the 1990 National Unity Election Case).

73. *Id.* at 191.

74. See SADURSKI, *supra* note 10, at 154.

75. See *id.*

76. See *Nález Ústavního soudu zed ne 02.04.1997 (ÚS)* [Decision of the Constitutional Court of Apr. 2, 1997], sp. zn. Pl. ÚS 25/96, translated in 5 EAST EUROPEAN CASE REPORTER OF CONSTITUTIONAL LAW 166 (1998) (Czech).

making.⁷⁷ Without hesitation, these courts have assumed that the primary responsibility for protecting the integrity and accountability of the political process lies with a constitutional commitment to democracy, as shepherded by the constitutional court.

E. INSULATION OF THE POLITICAL PROCESS FROM PARTISAN CONTROL

Alternatively, some countries, particularly in Latin America, have established specialized electoral courts, designed again to insulate the political process from direct partisan or legislative control. The well-known Latin American propensity for presidential strongman⁷⁸ rule translates into an unfortunate inability to use the electoral system to vote presidents out of office. Thus, in the entire history of Latin America through 2005, there were only three instances of elected presidents being voted out of office in subsequent elections⁷⁹—a statistic that overstates the phenomenon by not taking into account the one-term limit on presidents in some Latin American countries, but also understates the problem because it does not address the permanence in office of one-party control of power, as through the rotation in office of the official PRI candidates in Mexico. This history of incumbent sinecure is strong the world over, and the displacement of elected presidents remains the exceptional story. Although Africa emerged from colonialism with a number of states with apparent multiparty democracy, by the end of the 1960s, only Botswana, Gambia, and Zambia appear to have had multiparty elections.⁸⁰ Even these were extremely limited such that in Africa in the postcolonial period between 1960 and 1990, there was only one head of state who was deposed electorally.⁸¹ In fact, prior to 1990, there appear to have been only eight presidents outside the U.S. who have run for office as incumbents and lost *in world history*, and in three of those cases the newly elected president was then overthrown. The picture has improved in the third wave of democratization, and there are now thirteen incumbents who have been voted out outside the United States (and none overthrown between 1990 and 2000), in addition to the nine United States presidents who have been defeated in attempts at re-election.⁸²

77. See Curtea Constituțională României [Constitutional Court of Romania] Jun. 30, 1992, No. 2/1992, translated in 2 EAST EUROPEAN CASE REPORTER OF CONSTITUTIONAL LAW 232 (1995).

78. See Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 6 (Juan J. Linz & Arturo Valenzuela eds., 1994) (listing features of strongman rule).

79. Adam Przeworski & Carolina Curvale, *Instituciones Políticas y Desarrollo Económico en las Américas: el Largo Plazo*, in VISIONES DEL DESARROLLO EN AMÉRICA LATINA 157, 175, (José Luis Machinea & Narcís Serra eds., 2007) (Chile).

80. See generally GUY ARNOLD, AFRICA: A MODERN HISTORY 353–54 (2005) (describing the politics of postcolonial Africa in the 1960s).

81. Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, 18 J. DEMOCRACY 126, 131 (2007). The only exception was Somalia in 1967, and the winner was quickly overthrown. See *id.*

82. I am indebted to Adam Przeworski for these data, compiled from his large data set on electoral accountability. See E-mail from Adam Przeworski, Carroll & Milton Petrie Professor of European

It is tempting to attribute this lack of political check on incumbents to the concentration of individual power in presidential regimes versus the control of party authority in parliamentary governments. Looking at the history of presidentialism outside the United States, however, points more to the fundamental difficulties of maintaining democratic rule rather than the attributes of the specific form of democratic governance. The stability of democratic governance appears to be the product of internal political factors rather than the specific form of executive power. Thus, I am drawn to the proposition that “the fragility of presidential democracies is a function not of presidentialism per se but of the fact that presidential democracies have existed in countries where the environment is inhospitable for any kind of democratic regime.”⁸³

Nonetheless, there is a history in Latin America—over its history, certainly an inauspicious terrain for stable democratic governance—of the use of specialized courts to guard against the excesses of presidential authority. The current Latin American model of judicial restriction on executive control of the political process draws its inspiration from a 1924 Uruguayan reform that established a stand-alone electoral court with plenary power of administration of the electoral system.⁸⁴ Not only was administrative power kept at a remove from incumbent political power, but the electoral court also served as the supreme electoral court.⁸⁵ The Uruguayan court is widely seen as having stabilized democratic governance, save for a tragic decade of dictatorship in the 1970s. Even so, with the re-establishment of democratic rule in 1984, the court again began serving as the anchor for renewed electoral integrity.⁸⁶

The Uruguayan model was adopted in the 1920s in Chile⁸⁷ and in the 1940s in Costa Rica.⁸⁸ These three countries can claim the most sustained history of

Studies, Professor of Politics, Econ., N.Y.U., to Samuel Issacharoff, Bonnie & Richard Reiss Professor of Constitutional Law, N.Y.U. Sch. of Law (Oct. 26, 2009) (on file with author). These data are limited to presidential systems and do not include either parliamentary regimes or semi-presidential systems, in which the president stands for general election but serves alongside a prime minister who, like the cabinet, is appointed by parliament. See generally Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 EUR. J. POL. RES. 165 (1980).

83. JOSÉ ANOTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 136 (2007).

84. See Fabrice E. Lehoucq, *Can Parties Police Themselves? Electoral Governance and Democratization*, 23 INT’L POL. SCI. REV. 29, 36 (2002). Per Lehoucq, a “stalemate between *colorados* and *blancos* [in the Uruguayan government] led to depoliticization of electoral governance” in 1924. *Id.* at 37. For additional discussion of the early political history of Uruguay, see LUIS E. GONZÁLEZ, *POLITICAL STRUCTURES AND DEMOCRACY IN URUGUAY* (1991).

85. Phillip B. Taylor, *The Electoral System in Uruguay*, 17 J. POL. 19, 22–24 (1955).

86. HÉCTOR GROS ESPIELL, *LA CORTE ELECTORAL DEL URUGUAY* 10 (1990). For a more critical account, including laying some of the blame for the 1973 coup on the electoral court, see MARTIN WEINSTEIN, *URUGUAY: THE POLITICS OF FAILURE* 127 (1975).

87. See FEDERICO G. GIL, *THE POLITICAL SYSTEM OF CHILE* 225 (1966).

88. See FABRICE E. LEHOUCQ & IVÁN MOLINA, *STUFFING THE BALLOT BOX: FRAUD, ELECTORAL REFORM, AND DEMOCRATIZATION IN COSTA RICA* 209–10 (2002) (describing the creation of the National Electoral Tribunal (TNE) for the 1946 elections); BRUCE M. WILSON, *COSTA RICA: POLITICS, ECONOMICS AND DEMOCRACY* 45 (1998) (relating the transformation of the TNE into the Supreme Tribunal of Elections (TSE) by constitutional amendment in 1975, and the subsequent role of the TSE as, effectively, the fourth branch of government).

democratic governance in Latin America, though not without unfortunate exceptions. Of greater interest here, however, is the role that independent electoral tribunals have played in the re-emergence of democratic governance starting in the 1980s, most notably in Mexico. The Mexican Supreme Electoral Tribunal today hears over 8,000 cases a year⁸⁹ on matters ranging from local electoral practices and party finance issues to politically freighted presidential election challenges.⁹⁰

III. A FRAMEWORK FOR CONSTITUTIONAL COURTS

With few exceptions, constitutions are reduced to texts reflecting the initial constitutional compromise. In many of the new democracies, however, the capacious texts⁹¹ convey a sense not only of what the parties were able to agree to, but a significant domain of unpacted considerations that may prove integral to the survival of democracy.⁹² Under this view, the constitutional courts and the constitutions themselves emerge as guarantors of a weak and incompletely realized commitment to democratic processes. In turn, the role of the constitutional courts is defined not simply by the explicitly pacted agreements, but by the role that the courts as institutions played in the delicate bargaining giving rise to democracy. Recognizing the responsibility of constitutional courts to fulfill the incomplete project of constitutional compromise, Justice Albie Sachs of the South African Constitutional Court remarked, “We are aware that we are simultaneously both heirs to a timeless international tradition, and promoters of

89. Interview with Salvador Magdo, Magistrate, Electoral Tribunal of the Fed. Judiciary, in Madrid, Spain (Apr. 24, 2009). In the same period, the Mexican Supreme Court also asserted its independence under the new Unconstitutional Laws provision for judicial review, part of the 1994 judicial reforms. Most notably, in 1998, the Supreme Court struck down an electoral law in the state of Quintana Roo that was passed to shore up the PRI against possible electoral challenge. See Jodi Finkel, *Supreme Court Decisions on Electoral Rules After Mexico's 1994 Judicial Reform: An Empowered Court*, 35 J. LATIN. AM. STUD. 777, 796 (2003).

90. The most significant and controversial decision by the Supreme Electoral Tribunal came in the hotly contested 2006 presidential election. In a close election turning on the outcome of a few contested voting areas, the Court had to in effect decide the election outcome—shades of *Bush v. Gore*, 531 U.S. 98 (2000), for the American audience. Strikingly, the Court's ruling in favor of Felipe Calderón not only settled the issue, but was presented by the media as the decisive ruling. See, e.g., Carlos Avilés y Arturo Zárate, *Proponen Magistrados Declarar Presidente Electo a Calderón*, EL UNIVERSAL (Mexico City), Sept. 5, 2006, available at <http://www.eluniversal.com.mx/notas/373197.html>. The efforts of the defeated challenger Manuel López Obrador to rally supporters in the street quickly fizzled, in large part because of the legitimacy conferred to Calderón's victory by its confirmation by the independent tribunal. See, e.g., James C. McKinley Jr., *Mexican Leftist Suffers Setback in Local Race*, N.Y. TIMES, Oct. 17, 2006, at A10.

91. I leave to the side here the propensity of new constitutional orders to include broad commitments to what are termed “social rights” and the accompanying question of the extent to which such rights commitments are legally enforceable. See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

92. The range of unpacted considerations may include central questions about the basic structure of government. For a discussion of how the 1978 Spanish transition to democracy was made possible by “dumping the problem of provincial autonomy” on the future constitutional court, see generally ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING* (1987).

a new constitutional jurisprudence, this in a country that both longs for transformation and desperately needs predictability.”⁹³

This Part turns away from the specific examples discussed in Part II to consider two theoretical frameworks for constitutional courts operating at the moment of constitutional creation. The first considers the constitutional moment through the lens of contractual theory, whereas the second applies a game-theoretic model to the specific threat of emerging democracies devolving into one-party rule.

A. THE CONTRACTUAL MODEL

The wave of newly constituted democracies allows reflection on the dynamics of the process of creating a constitutional pact.⁹⁴ If we generalize across the many national settings in which new democracies have emerged, certain common features stand out, even if the fit may be imperfect to any particular national events. First, the new democracies tend to emerge in countries bearing the deep fractures of prior divisions—often violent divisions. These can take the familiar form of racial, ethnic, or religious strife, ranging from postapartheid South Africa and the explosive divisions in Iraq to the smoldering hatreds in Moldova and the Balkans. But these divisions emerge even in the seemingly more homogeneous populations of the Baltics, with its generations-old Russian population, which must now be integrated into a postoccupation role in a functioning democracy.⁹⁵

Second, the process of constitutional negotiation is unlikely to yield a completely realized set of agreements. The romantic view of constitutional design assumes a Rawlsian baseline of dispassionate founders, deeply immersed in the political theory of the day. But constitution making, the act of actually getting a political accord that will provide the foundations of a democratic state, is more likely a rhapsodic event. The precommitment process of constraining future actors to an elaborated political design—termed “Peter sober” binding “Peter drunk”⁹⁶—may get one critical detail wrong. Reviewing the political tensions and accompanying forms of social release that accompany actual constitutional negotiations, Jon Elster provocatively claimed the precommitment to be “Peter

93. JUSTICE ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* 50 (2009).

94. See MILADA ANNA VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE AND INTEGRATION AFTER COMMUNISM* 11–13 (2005) (studying the reform trajectories of six post-Communist Eastern European states, in particular the rent seeking which occurs during a period of reform).

95. This concern was already recognized in academic literature in the early 1990s, during the first experiments with democracy in the newly liberated Baltic states. See, e.g., Eric Rudenshiold, *Ethnic Dimensions in Contemporary Latvian Politics: Focusing Forces for Change*, 44 *SOVIET STUD.* 609 (1992) (recognizing the challenge posed to the nascent Latvian democracy from ethnic conflicts within the mixed Russian and Latvian electorate).

96. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 135 (1995); see also JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 176–77 (2001) (focusing on intertemporal cooling off as central to constitutional order).

drunk” binding “Peter sober.”⁹⁷ It may be that the euphoria of the founding moment ill serves the more prosaic undertaking of later governance.

Even Elster’s less ennobling account fails to give full force to the modern constitutional settings. In less divided societies, it is possible to ratify a constitution through relatively unrepresentative proceedings, or even by fiat, as with the American imposition of a new constitutional order on militarily defeated Japan.⁹⁸ But a constitution is fundamentally a social compact, one that has long been recognized as a political resolution of the competing claims for power in the particular society:

[P]olitics has to consider which sort of constitution suits which sort of civic body. The attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not only to what is the absolute best, but also to what is the best in relation to actual conditions.⁹⁹

The fractured settings for the newly emergent democracies require a process of negotiation that can create an enduring form of governance, but must do so through accommodation reached by parties or groups frequently bearing longstanding historic grievances against each other. This generally means two things. First, the process will take time, what Ruti Teitel terms the “fits and starts” of constitutional negotiation.¹⁰⁰ As a result, any rush to “premature constitutionalization” threatens the ability to form a political consensus over what can be agreed to, and just as centrally, what the parties are not able to agree to.¹⁰¹ The two-stage process of constitutional negotiation in South Africa provides a helpful model, in which a preliminary constitution predicated on broad and relatively noncontentious principles of governance serves as an intermediate step in the process of constitutionalization.¹⁰² And, second—again as in South Africa—the resulting agreement is likely to leave critical issues

97. See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1768 & n. 51 (2003); see also JON ELSTER, ULYSSES UNBOUND 159 (2000) (reciting historic examples of constitutions drafted against backdrops of social disruptions).

98. See generally KOSEKI SHŌICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* (Ray A. Moore trans., Westview Press 1997) (1989).

99. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 181 (Ernest Barker trans., Oxford Univ. Press 1948).

100. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 196 (2000).

101. Cf. Noah Feldman, *Commentary, Imposed Constitutionalism*, 37 CONN. L. REV. 857, 870–72 (2005) (chronicling the risks associated with imposed constitutional provisions in the context of multilateral negotiations in Iraq and Afghanistan). For a related argument on the necessity of a flexible amendment process for new constitutions, see Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 275 (Sanford Levinson ed., 1995).

102. See *infra* Part IV.

unresolved.¹⁰³ Vicki Jackson refers to the resulting process as yielding either incremental constitutionalism or even an interim constitution.¹⁰⁴ In either case, the immediate task of the constitutional process is to signal a clear break from the prior regime, even if the precise terms of the new constitutional order are left to another day, or another actor. Most significantly, leaving some matters unresolved avoids forcing the parties “into a negotiation ‘for all the marbles’ in a zero-sum environment.”¹⁰⁵

Unfortunately, the incompleteness of the constitutional commitment can have fatal consequences for nascent democracies. Some forty percent of proto-democracies in postconflict countries revert to violence within a decade,¹⁰⁶ suggesting the fragility of these accords. In such circumstances it is hard to avoid the conclusion of Paul Collier that the press for elections to consolidate democratic rule actually exacerbates the risk of violence, as competing factions see the election as simply a way to continue the civil war with the authority of state power.¹⁰⁷ To give but one example, the early election in Burundi in 2005 resulted in victory by the Hutu forces, with a return to political repression almost immediately, including the expulsion of UN peacekeepers.¹⁰⁸

Here we may suggest that when viewed as a complex, cross-temporal compact, the incompleteness of constitutional accords and the need for institutions to fill the gaps in the underlying accords is not surprising. Indeed, this conception of constitutionalism shares much in common with conventional accounts of gap filling in private contracts, and with the use of courts as independent institutions tasked with honoring the generalized but incomplete intentions of the parties. Further, the typical incompletely realized constitutional compact will require separation of powers among different institutions of government in order to limit the reach of the first group to hold office. As political scientist Martin Shapiro notes, “[w]henver a constitution divides powers, it almost always necessitates a constitutional court to police the boundaries.”¹⁰⁹

Although Shapiro aptly captures the function of constitutional courts after a regime of divided powers is in place, his formulation fails to address the role that may be played by the prospect of constitutional courts serving as a condition precedent to the birth of democratic rule. It is not simply that the founding pact is likely to be incomplete; there is no guarantee that the first democratic choices will follow anything other than the former lines of division. In other words, the imprecise boundaries of democratic power will place state

103. An older example is the inability of the Israeli founding generation to agree on formal terms on such questions as the extent of religious influence in the new state. See GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 102–03 (1993).

104. Jackson, *supra* note 48, at 1265–68.

105. Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 *TEX. L. REV.* 1627, 1629 (2009).

106. PAUL COLLIER, *WARS, GUNS, AND VOTES* 75 (2009).

107. *See id.* at 81–82.

108. *Id.* at 78.

109. Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 37, 49 (1993).

authority in one of the previously contending factions for political power. On this view, courts serve as a significant obstacle, though hopefully not the only one, to the consolidation of unaccountable political power in the hands of the first officeholder.

Nonetheless, even if constitutions are anticipated to be incompletely realized agreements, courts are unlikely to find fully satisfactory guidance within the four corners of the text or through the more common forms of contract interpretation. At the time of constitutional negotiations, particularly in societies quickly emerging from authoritarian rule, the participants in the constitutional bargain are unlikely to have longstanding relations of trust among themselves, nor much experience with what may be the difficult issues of implementation in the new constitutional order.¹¹⁰ The result is likely to be a document that is in large part aspirational and that uses terms of broad ambition but little specificity (for example, “due process of law,” “equal protection,” or “privileges and immunities”). This places a distinct institutional pressure on constitutional courts in new democracies to act as common law rather than civil law institutions, ones attendant to the incremental realization of core constitutional objectives through the accretion of decisional law. For jurists largely trained in the civil law tradition of close-quartered exposition of textual commands, the transition is challenging. The divide between the common law demands of constitutional adjudication and the civil law tradition for nonconstitutional cases reproduces the divide in the European Union. There, too, a largely common law set of practices has emerged in the European Court of Justice and the European Court of Human Rights, which in turn have to be translated into national law by national courts rooted in the civil law tradition.¹¹¹

Viewed in this light, there is an inevitable tension in the role to be assumed by constitutional courts. Because the ultimate authority of these courts comes from the fact of a constitutional accord, courts will likely succeed in helping forge a constitutional order to the extent that they appear to honor the intentions of the parties. As a working assumption, the intention to be bound by the agreement is best revealed by the definiteness of the terms of the pact, in constitutions as in ordinary contracts.¹¹² But contract law teaches that for a variety of reasons, including imperfect knowledge of future conditions and strategic withholding of private information, parties to a contract frequently fail

110. The problem of information asymmetries and the strategic withholding of information in constitutional negotiations is identified in ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 69–71 (2009).

111. For an examination of the encounter between the common law of European Union courts and the civil law practiced in member nations, see Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and Homogenization of the European Union*, 7 *COLUM. J. EUR. L.* 63, 72–75 (2001).

112. The *Restatement (Second) of Contracts*, for example, states: “The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.” *RESTATEMENT (SECOND) OF CONTRACTS* § 33(3) (1981).

to specify all of the relevant terms, leaving the contract incomplete.¹¹³ Modern contract law has generally abandoned formalist rules that rendered contracts unenforceable when significant gaps in material terms existed, in favor of a more liberal rule that permits courts to serve a gap-filling role.¹¹⁴ The Uniform Commercial Code, for instance, expressly accepts as enforceable a “contract with open terms” that allows gap filling with reasonable or average terms.¹¹⁵ Similarly, the *Restatement (Second) of Contracts* also favors liberal application of incomplete contracts when it is clear that the parties intended to be bound by the agreement.¹¹⁶

There are at least two arguments for gap filling, sounding primarily in efficiency,¹¹⁷ each of which has some implication for the role of courts addressing constitutional compacts. The first theory is based on the idea that it is inefficient for parties to invest in discovering and negotiating all of the details and contingencies that might arise in their agreement. If the transaction costs of forming a full contract exceed the benefits, it makes sense for some terms to remain open and to allow a court to fill in the gaps as the necessity arises. In these situations, the commonly accepted remedy is for the courts to fill in the missing terms as they believe the parties would do themselves under costless bargaining.¹¹⁸ This method of gap filling is described as “majoritarian” because it seeks to provide terms that most parties would have endorsed under the circumstances.¹¹⁹

The second theory for efficient gap filling is based on informational asymmetries or other strategic obstacles to full disclosure between the parties that prevent the optimal contract from being formed.¹²⁰ Information-forcing default rules can induce the contracting parties to reveal private information by providing terms that would be unfavorable to the better informed party.¹²¹ So, for

113. See, e.g., Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821–22 (1992).

114. See, e.g., Omri Ben-Shahar, “Agreeing to Disagree”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 389 (2004). Although there has been a general shift toward a lax application of the indefiniteness doctrine, the common law rule has not completely fallen by the wayside. See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1643–44 (2003).

115. U.C.C. § 2-204(3) (2002) (“Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”).

116. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

117. See Ian Ayres, *Default Rules for Incomplete Contracts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 586 (Peter Newman ed., 1998).

118. *Id.*; Ben-Shahar, *supra* note 114, at 397–98.

119. Ayres, *supra* note 117, at 586.

120. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989); see also Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J.L. ECON. & ORG. 284, 286 (1991).

121. These “penalty” default rules have been shown to produce more economically efficient outcomes than the alternatives. See Ayres & Gertner, *supra* note 120.

instance, if one party values performance more than would be ordinarily assumed by the other party, it is efficient for this information to be communicated to the other party so that that party might take the necessary precautions to ensure performance. If the default rule sets damages at the average or ordinary cost of nonperformance, the party with the idiosyncratically high valuation will have the incentive to reveal his private information during bargaining.¹²² Further, the knowledge that courts will enforce incompletely realized agreements itself provides incentives for the parties to negotiate as many terms as they can, knowing they may be held to a less desirable outcome by an independent adjudicator.

Translated to the context of constitutional bargaining, constitutional courts may facilitate the transition to democracy in two ways. The first is by permitting the parties a quick transition to basic democratic governance before they are capable of full agreement. Constitutions, by contrast to statutes, are notoriously open-textured in their commands. Imprecise but evocative terms such as “due process,” “equal protection,” or “privileges and immunities” carry forward the *souppçon* of commitment without the substance of the agreement. Oftentimes this is the product of the inability to forge agreement on deeply contested issues.¹²³ At other times, vagueness may serve as an efficient mechanism to allow the parties to reach sufficient consensus to proceed in circumstances where either social norms or strategic considerations might overly freight express understandings.¹²⁴

The second advantage offered by constitutional courts has more to do with the specifics of constitutional compromise, recognizing in the spirit of John Marshall that “it is *a constitution* we are expounding.”¹²⁵ Unlike parties in conventional contracts, the harm in constitutional breach is not retrospective but prospective. Parties to a constitutional compact do not so much fear that their expectations at the time of contracting will not be realized as they fear that the powers they are creating will be used prospectively against them. At the heart of any constitutional compromise lies the brutish fact that some of the parties to

122. See *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 9 Ex. 341; Ayres & Gertner, *supra* note 120, at 101; Bebchuk & Shavell, *supra* note 120, at 284–85.

123. For example, Andrew Kull’s review of the legislative history of the Fourteenth Amendment shows how the term “equal protection” was chosen because of fundamental disagreements on the rights to be afforded the freed slaves. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 67–69 (1992).

124. For a more formal account of how deliberately vague language can be welfare enhancing by mitigating conflict, see Andreas Blume & Oliver Board, *Intentional Vagueness* (Univ. of Pittsburgh Dep’t of Econ. Working Paper, 2010), available at <http://www.pitt.edu/ojboard/papers/vagueness.pdf> (providing numerous examples of commonplace uses of vagueness ranging from sexual innuendo to the famously inscrutable pronouncements of former Federal Reserve chairman Alan Greenspan). For an account of how vague judicial opinions might ease tensions over judicial intrusion on the political branches, see Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 58 AM. J. POL. SCI. 504 (2008).

125. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (“[W]e must never forget, that it is *a constitution* we are expounding” that is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”).

the pact will soon hold state power over their erstwhile fellow negotiators.

From this perspective, constitutional courts play the role of an “insurance policy” against forms of power grabs that cannot be specified or negotiated at the outset of the constitutional process. The term is from Professor Ginsburg, who attributes to the courts the power both to cement the terms of the bargain and to provide for an acceptable response to conditions subsequent to the negotiations:

[U]ncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty, it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change.¹²⁶

This argument may be pushed even further, perhaps by extension of Richard Pildes’s caution against excessive rigidity in initial constitutional design,¹²⁷ to say that the prospect of active superintendence of the constitutional pact by courts may allow for greater experimentation and flexibility in the initial institutional design under the constitution.

Although American constitutional law remains excessively focused on the powers of judicial review, the prevalence of constitutional courts indicates at least a tacit recognition that judicial review may indeed be indispensable to establishing a functioning constitutional democracy. On this score, the legitimacy of these courts subsequent to the founding may turn on the degree that they reinforce the “democratic hedge” that accompanied the founding. This is a departure from the conventional debates, at least in the United States, about the source of legitimacy of constitution-based judicial review—the proverbial imposition of the dead hand of the past on the political will of the present majority. Rather than being tied to a narrow originalist vision of enforcing the agreed-upon terms of the original pact, this approach imposes a broader duty on a constitutional court to reinforce the functioning of democracy more broadly. The original pact turns not only on the areas where agreement was reached—text, of course, is still central—but also on the areas where no agreement was possible save for the overall commitment to political accountability of the first set of rulers.

This idea that courts are integral structural parts of the moment of original constitutional creation is confirmed by the additional responsibilities over demo-

126. GINSBURG, *supra* note 22, at 30–31. A similar argument can be made in the context of more gradual democratization of autocratic regimes. For example, in Mexico, the emergence of strong challengers to the PRI’s hegemony and the possibility of electoral reversals created an incentive for the ruling PRI to institute reforms granting real measures of autonomous judicial authority. See Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 *LATIN AM. POL. & SOC’Y* 87, 88 (2005).

127. See Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES* 173, 173–75 (Sujit Choudhry ed., 2008).

cratic accountability given to them. In most new democracies, the creation of these constitutional courts is accompanied by “ancillary powers” beyond simply the ability to subject legislation to judicial review.¹²⁸ Most common among these additional powers is some form of oversight over the electoral process itself, reaching in many cases to election administration, the subject matters of elections, the eligibility of parties to compete in elections, and electoral challenges. Indeed, fifty-five percent of constitutional courts hold specific powers of either administration or appellate review over the election process.¹²⁹

The combination of constitutional review of legislation affecting the political process and administrative oversight of elections appears fortuitous. Both afford constitutional courts the ability to check efforts to close the political process to challenge. More centrally, both correspond to a vision of strong constitutional courts as a necessary check on excessive concentration of political power under conditions that are unforeseeable at the time of constitutional ratification or whose terms cannot be specified under the strategic uncertainties of the installation of democracy.

Here an American example may be helpful. In a fascinating critical account of the process of Iraqi constitutional formation, Ambassador Feisal Amin Rasoul al-Istrabadi recalls how the American Constitution was forged in the face of the Framers’ inability to resolve the fundamental question of slavery.¹³⁰ Whether explicit (as in the recognition of a time limit for the slave trade)¹³¹ or implicit (as with the absence of federal involvement in the internal political affairs of the states),¹³² much of the constitutional structure was delicately balanced around a recognition that to address the question of slavery was to call the Union into question. Moreover, once the Supreme Court removed the capacity for further political accommodations of the slavery issue,¹³³ an explosive Civil War ensued. The question for new constitutional regimes is whether the sources of political accommodation not available at the founding may be developed over time. Indeed, the question is whether under conditions of political accommodation and increased trust, the divisions may prove more tractable and the American experience of a brutal civil war can be avoided.

Although the contract analogy helps explain how courts can fill the breach in nascent democracies, it is by its nature a limited analogy. There are inherent difficulties in fashioning any comprehensive theory of interpretation, even at the

128. Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1440–41 (2009).

129. *Id.* at 1443 tbl.1.

130. See al-Istrabadi, *supra* note 105, at 1629–30.

131. See U.S. CONST. art. 1, § 9, cl. 1.

132. See generally Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466 (1992).

133. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

level of commercial contracts.¹³⁴ Once the move is made to the realm of statutes, the difficulties of interpretation are compounded by the institutional incapability of courts to apply any canons of interpretation consistently and accurately. As Elizabeth Garrett argues, many canons of statutory interpretation falter precisely because of the limited “institutional capacity of judges” to apply them.¹³⁵ Moved one step higher to the plane of constitutional interpretation, the difficulty is again compounded. Unlike in the case of commercial contracts, there is not a relatively accessible economic presumption that the parties seek to maximize their joint welfare. And, unlike statutory interpretation, the canons of construction do not operate against the customary presumption—even if difficult to realize in practice—that the legislature in its continuing capacity is free to override improper court interpretations of its objectives. Even in the context of legislation, there are critiques of the ability of courts to construct a “democracy-forcing statutory interpretation.”¹³⁶ And, yet, that is the task with which constitutional courts are charged.

B. THE BARGAINING MODEL

The paradox in any constitutional bargain in divided societies is why the parties would enter into any bargain with imprecise terms and why they would expect the objectives of the bargain to be honored.¹³⁷ Societies suddenly thrust into the proto-democratic arena (like the former Soviet Republics) typically lack the civil society institutions that buttress democratic rule, the political parties that can organize democratic participation, and even the basic cadre of candidates groomed in the public demeanor of democratic politics.¹³⁸ The immediate issue is why immature political movements in emerging democracies would look to create independent courts. This is a different question from the one generally posed in the law and economics literature, which focuses on what explains the long-term stability of relatively independent courts in successful democracies.¹³⁹ The basic move here is to view the independence of the judiciary from the vantage point of an indefinitely repeated Prisoners’ Dilemma,

134. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003) (arguing that modern contract law has neither a descriptive nor normative theory that is sufficiently complete to apply across the spectrum of private contracts).

135. Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2137 (2009) (reviewing EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008)).

136. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 132 (2006).

137. In this section, I expand beyond the claim that I have previously made that a strong form of constitutionalism may increase the stability of democracies in fractured societies. See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1861 (2004) (addressing the role of “constitutionalism in stabilizing democratic governance in . . . fractured societies . . . because of the limitations it imposes on democratic choice”).

138. This point is made in the political science literature dealing with emerging democracies. See, e.g., Lucan A. Way, *Authoritarian State Building and the Sources of Regime Competitiveness in the Fourth Wave: The Cases of Belarus, Moldova, Russia, and Ukraine*, 57 WORLD POL. 231, 232 (2005).

139. For an example of this type of inquiry, see generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

one in which parties are forever uncertain of who will rule and seek to limit the ability of the other to exploit momentary political favor.¹⁴⁰ As a result, “[e]nforcement of the constitution . . . might be understood as an equilibrium resulting from the tacit agreement of two or more social groups to rebel against a government that transgresses the rights of either group.”¹⁴¹

From a theoretical perspective, there are two possible answers to the paradox of negotiating parties at the foundational moment of a new democracy creating an independent judicial authority and then believing that it will in fact carry out that function. The first is that the presence of an external authority might facilitate the initial bargain. This is essentially what the contract model presented above is intended to elucidate. Under this formulation, an external authority promotes efficiency in the bargaining process and allows the parties to reach a solution. But that is only the first step. It may also be that the presence of a future constitutional arbiter can improve the quality of the solution reached. On this view, the existence of a court to rule on imprecise issues concerning the bounds of majoritarian power may promote a fairer initial bargain and may lessen the advantage obtained by the first officeholders. Here the focus is not upon the ability to realize a bargain, but on the actual terms contained in *the* bargain that is achieved. In the game-theoretic literature, the ability to turn to an alternative trading partner or an alternative arbiter during the process of negotiation is known as bargaining with an outside option.¹⁴² Although the term might be narrowly defined as a guaranteed value that is available in case bargaining fails to yield agreement, the term here is used to denote an alternative process that might constrain the downside risk in the event of a party losing out on the initial selection for governmental power. In turn, the question is whether the presence of an outside option in the form of a constitutional court can be expected to promote efficiency in bargaining and fairness in the results.

In terms of the efficient achievement of the bargain, we can begin with the intuitively attractive insight that the fewer the issues that negotiating parties have to agree upon, the more quickly agreement might be realized. In this sense, the presence of contractual defaults or a postpact arbiter would serve to relieve the cost of bargaining, as recognized in the UCC approach to majoritarian

140. For a simple example, during the negotiations leading up to Hungary’s transition to democracy in 1989, the Communists sought a strong constitutional court that would strike down anti-Communist legislation. JOHN W. SCHIEMANN, *THE POLITICS OF PACT-MAKING: HUNGARY’S NEGOTIATED TRANSITION TO DEMOCRACY IN COMPARATIVE PERSPECTIVE* 162 (2005). The foundational article using this approach is Landes & Posner, *supra* note 139. For a counter argument focusing on the specific case of Japan and the effect of one party having a long-term hold on political office, see J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722, 727–28 (1994).

141. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1835 (2009).

142. The classic paper on this is Avner Shaked & John Sutton, *Involuntary Unemployment as a Perfect Equilibrium in a Bargaining Model*, 52 ECONOMETRICA 1351, 1363 (1984); *see also* Ken Binmore, Avner Shaked & John Sutton, *An Outside Option Experiment*, 104 Q. J. ECON., 753, 757 (1989) (testing the impact of an outside option on bargaining outcomes in a laboratory setting).

defaults. But the game-theoretic literature is more equivocal on this score because the presence of an outside option, in the form of a strong arbitration rule, may compel the parties to turn to the arbiter and not to attempt to resolve disputes themselves.¹⁴³ The models typically consider the relative strength of the outside arbiter as a key variable in determining under which conditions the parties are likely to realize agreement among themselves and when they will push off the dispute onto the arbiter and not attempt private resolution.¹⁴⁴ The earlier phases of the literature tried to model the outside option as being exogenous to the actual negotiations such that a party could invoke an option to exchange with some third party as an alternative to continuing to negotiate. The terms of the third-party exchange would not be affected by what happened in the course of negotiations.¹⁴⁵

The assumption of independence of the outside option from the conduct of the parties in the negotiation has limited applicability to law. The most common outside option is a court or arbitrator, and no contract dispute could be analyzed without reference to the bargaining intent of the parties. In the theoretical literature that has tried to model the outside option as being dependent on what happens in the negotiations, the results are more complicated and may actually yield inefficiencies in bargaining depending on the costs associated with delay.¹⁴⁶ In one study, however, the presence of an outside arbiter with the power to adjudicate the dispute (as opposed to choosing among the final competing offers of the parties) does allow the parties to converge more quickly around the expected decision of the arbiter, or leave it to the arbiter to resolve.¹⁴⁷

Nonetheless, the specific constitutional arrangements entered into after 1989 do not readily map onto the model of bargaining with an outside option, even if the process of negotiation is factored in. The distinct feature of the often rapid-fire process of state formation after the fall of the Soviet Union was the need to consolidate a blueprint for elections and governance. Part of the negotiations between the parties was, in effect, over what form the outside option would take if constitutional courts were created to police the political pact and fill in its voids. Under such extraordinary circumstances,

143. See, e.g., Marc J. Knez & Colin F. Camerer, *Outside Options and Social Comparison in Three-Player Ultimatum Game Experiments*, 10 GAMES AND ECON. BEHAV. 65 (1995). For an interesting analogy to the ability of laws governing marriage and divorce to alter the availability of divorce and, consequently, the divorce rate, see Abraham L. Wickelgren, *Why Divorce Laws Matter: Incentives for Noncontractible Marital Investments Under Unilateral and Consent Divorce*, 25 J.L. ECON. & ORG. 80 (2009).

144. See Mercedes Adamuz Peña, *Essays on Bargaining with Outside Options* 38–50 (Dec. 12, 2002) (unpublished Ph.D. dissertation, Universitat Autònoma de Barcelona), available at <http://www.tesisenxarxa.net/TDX-1108105-164319/> (arguing that the authority of the arbitrator influences the outcome between parties).

145. See *id.* at 8–12.

146. See, e.g., MARTIN J. OSBORNE & ARIEL RUBINSTEIN, *BARGAINING AND MARKETS* 50–55 (1990) (identifying outside options as one of the factors that may contribute to delay in reaching bargaining resolution).

147. The theoretical literature on this point is not well developed. I was, however, impressed with the presentation of this point in a recent dissertation. See Peña, *supra* note 144, at 2–14.

the theoretical literature does little beyond confirming the plausibility of the intuitive understanding that parties can more quickly reach agreement if they are able to leave some sticking points to be worked out over time.

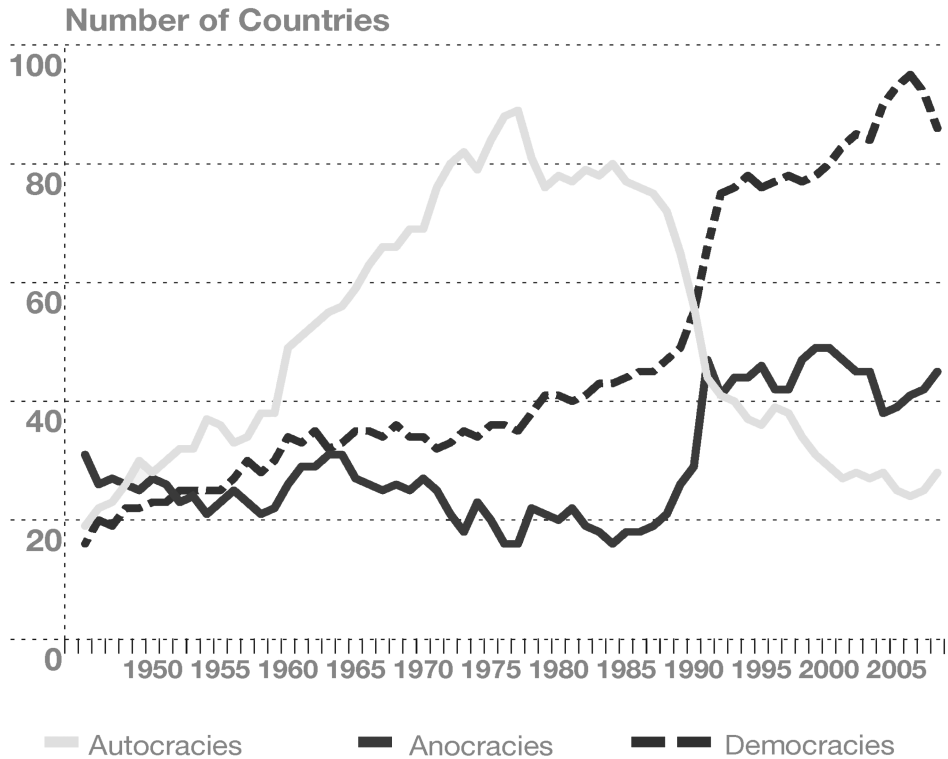
An outside option may alter the distributional outcome between negotiators as well. Most of the theoretical literature on bargaining with an outside option concerns whether the parties will bargain quickly to the midpoint of the differences between them, a variant of what is termed the Rubinstein alternating offers model.¹⁴⁸ The presence of an outside option should alter the focal point of the negotiations in such a way as to promote the substantive fairness of the outcome, even if the parties are unable to realize that in negotiations. Although the literature on this is thin, the argument to date is that the presence of a strong outside option, such as a strong arbitrator, results in the weaker party in the negotiations being better able to resist pressure toward an inequitable bargaining outcome.¹⁴⁹ This is again highly intuitive and corresponds to the sensible result that the ability to seek a strong outside ally for the weaker bargaining party diminishes the power of the stronger party to cram down its desires. It is possible to think of the negotiation between a strong incumbent political power and its defeated rival as an ultimatum game in the absence of an external alternative actor, such as a constitutional court.¹⁵⁰ Without the outside option of turning to another institutional actor, the weaker party fears that subsequent political negotiations will take the form of a cram down of the classic take-it-or-take-it sort, in which no alternative but recourse to full confrontation is presented. The defeated rival has the choice only of accepting whatever is doled out by the triumphant party, or else repudiating the entire agreement—in effect, either submitting to or rejecting democratic pathways, presumably by derailing the functioning of government or in extreme cases by insurrection. The presence of a court gives the weaker power an alternative avenue for seeking to vindicate its interests, although even this scenario is complicated if there are multiple parties and the bargaining process could yield coalition politics. Moreover, uncertainty over the actions of a powerful outside arbiter increases the likelihood that the parties will in fact reach a negotiated solution on mutually acceptable terms.¹⁵¹

148. See Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97, 98–101 (1982). The basic insight is that, with perfect information, parties bargaining across a potentially infinite series of offers and counteroffers will quickly and efficiently converge upon the midpoint to resolve their dispute. In worlds of imperfect information, the results are more complicated and agreement may be reached only after some delay, and there remains some first-mover advantage. When there is a need to match offer and acceptance for either party to gain anything, the Rubinstein model becomes more of a coordination game, as well summarized in Richard H. McAdams, *Beyond The Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 *S. CAL. L. REV.* 209, 236–37 (2009). For applications of coordination strategies to explain similar structures in international accords, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 *U. CHI. L. REV.* 1113, 1127–28 (1999).

149. See Peña, *supra* note 144, at 51–52.

150. I am indebted to Oliver Board for the analogy to an ultimatum game with a strong first-mover advantage.

151. See Peña, *supra* note 144, at 53.

Figure 1: Pre- and Post-1989 Democracies¹⁵²

The importance of quickly and equitably realizing the initial bargain over governance is underscored if we think of the post-Soviet period not as the triumph of democracy but as the reversible reassertion of autocratic rule. Posed as the story of democratic ascendancy, the narrative threatens to become a whiggish tale of the eventual triumph of good over evil, certainly a curious claim for many countries manifestly lacking in the per capita income levels and the civil society institutions that characterize stable democracies. A snapshot of the Soviet orbit before and after 1989 certainly would tell a heartening story of the growth of democratic governance. But a more nuanced inquiry would reveal an initial period of democratic contestation across the former Soviet empire beginning in 1989 and then a gradual reemergence of autocratic authority in a number of the former Soviet states, most notably Belarus and Russia in the West, and virtually all the central Asiatic states in the East.

It is thus possible to invert the inquiry and start not with the story of democracy ascendant, but with the assumption that the natural state of affairs

152. Amy Pate, *Trends in Democratization: A Focus on Minority Rights*, in *PEACE AND CONFLICT* 2010: EXECUTIVE SUMMARY 20 (J. Joseph Hewitt et al. eds., 2010). The formatting of this figure has been slightly modified from the original.

for these countries is some form of authoritarian rule or even collapse of central state functions—what in Figure 1 is termed an “anocracy” and what is more customarily referred to as a “failed state.” Framed in this fashion, political scientist Lucan Way analyzes these countries not in terms of the lead-up to democracy, but as the failure of autocracy to take hold initially: “Thus, competitive politics were rooted much less in robust civil societies, strong democratic institutions, or democratic leadership than in *the inability of incumbents to maintain power or concentrate political control* by preserving elite unity, controlling elections and media, and/or using force against opponents.”¹⁵³ On this view, democracy turns out to be the potential training ground for future oppression, and democratic governance becomes the organizational incubator for the tyrants in waiting. Following this decidedly less rosy view, the challenge is to safeguard the “renewability of consent”¹⁵⁴ that characterizes the rotation in office of democratically elected officials. A constitutional court then becomes not only a facilitator of the initial bargain, but a central actor in its maintenance. The role of a strong constitutional court in the initial constitutional bargain can be seen as anticipating the need to enlist another institutional actor to constrain potential strong-arm rule by the first government in office. The constitutional bargaining anticipates this need: “Independent judicial review is valuable to political competitors when those competitors would prefer to exercise mutual restraint but the necessary monitoring and enforcement of restraint are not possible or are prohibitively costly.”¹⁵⁵

IV. COURTS AND CONSTITUTIONAL TRANSITIONS: THE EXAMPLE OF SOUTH AFRICA

It is impossible within the confines of an article to elaborate on the nuanced settings in which constitutional courts address the need to prevent democracy from collapsing into the permanent one-party rule of the initial holders of governmental power. But the contract analogy, though limited, allows some general outlines that can be illuminated through the example of South Africa. The basic proposition is that countries emerging from conflict or authoritarian rule will likely have to formalize a transition to a new order long before any conditions of trust or solidarity will carry them through the formal processes of creating a stable constitutional order. At the same time, such countries desperately need to establish political institutions that can mediate power and provide some legitimacy to the new governmental order. The need for political stability is unlikely to be met through any plebiscitary elections because this will likely reproduce the divisions of old across a direct (and potentially final) struggle for state power. Democracy needs the assent of the people, but—as we note in

153. Way, *supra* note 138, at 232.

154. This is the term I used to describe the core democratic commitment in *Fragile Democracies*. See Issacharoff, *supra* note 13, at 1456–66. The formulation owes to Bernard Menin.

155. Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 84 (2003).

opening our casebook on the Law of Democracy—“there is no ‘We the People’ independent of the way the law constructs democracy.”¹⁵⁶ The paradox is that there needs to be some legitimacy for the institutions that will then claim popular assent as their source of legitimacy. The result is that, as Kapstein and Converse conclude in their study of nascent democracies, “*when effective checks and balances are missing from institutional arrangements, even rapid economic growth may not save a democracy from reversal.*”¹⁵⁷

South Africa provides a wonderful example of the process of constitutional formation, and then perhaps a sobering cautionary note. In the first instance, nowhere was the question of limitations on state power through constitutional compromise more directly posed than in South Africa. The accords that paved the way for the transition from apartheid were the product of a long, multiparty negotiation. The central issue was how to provide for a transition to democratic governance with power exercised by the black majority, while limiting the potential for retribution against the former white rulers.

The process of a negotiated transition from a repressive regime included two innovative steps that shape the discussion here. First, the negotiations would yield only an interim constitution with fixed representation for the various political groups, but with a mandate to use the ensuing legislative arena to negotiate a permanent constitution. Despite the inability to create a full constitutional order in the transition period, the negotiations did yield an immutable set of thirty-four Principles that were required to form the basis for a final constitution.¹⁵⁸ Under the negotiated provisions of the Interim Constitution, the final Constitution could not be adopted unless it faithfully adhered in its implementation to the negotiated general principles set out in the Interim Constitution.¹⁵⁹ Most novel was that the task of ensuring compliance was given in its entirety to the Constitutional Court.¹⁶⁰ Thus, the Constitutional Court was created not to interpret a constitutional text—most evidently, because none was in existence—but to guarantee that the structures and limits of democratic rule would be honored. In accordance with that mandate, in July 1996, the proposed permanent Constitution was submitted for review to the Constitutional Court, which rendered its decision two months later.¹⁶¹

156. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL REGULATION OF THE POLITICAL PROCESS* 2 (3d ed. 2007).

157. ETHAN B. KAPSTEIN & NATHAN CONVERSE, *THE FATE OF YOUNG DEMOCRACIES* xvi (2008).

158. The thirty-four Principles contained a number of antimajoritarian protections. *See S. AFR. (INTERIM) CONST.*, 1993. As a general matter, these take three forms: 1) an elaborate set of rights guarantees that extends to the confiscation of property, 2) limitations on the exercise of government power through a balancing of powers within the national government and principles of federalism, and 3) protections provided by the supermajority processes needed to amend the Constitution that require not only a two-thirds vote in the upper house of the national Parliament but also approval by a majority of provincial legislatures. Issacharoff, *supra* note 137, at 1875–76.

159. SIRI GLOPPEN, *SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION* 199 (1997).

160. Issacharoff, *supra* note 137, at 1877.

161. *In re Certification of the Constitution of the Republic of S. Afr. (Certification Decision)* 1996 (4) SA 744 (CC).

The ruling in what is known as the *Certification Decision* is instructive. The South African Constitutional Court was particularly attentive to structural restraints on the centralization of power, stressing limitations on government and striking down provisions that may be termed an excess of majoritarianism. Specifically, the Court reaffirmed the importance of checks and balances across the branches of government¹⁶² and rigorously enforced the commitment in the Principles to federalism, ensuring that the national government would not encroach on the powers of the provinces.¹⁶³ The Court also strictly construed the requirement of “special procedures involving special majorities” for constitutional amendments.¹⁶⁴ According to the Court, the purpose of this provision was to secure the Constitution “against political agendas of ordinary majorities in the national Parliament.”¹⁶⁵ Various provisions of the proposed Constitution requiring supermajoritarian action were nevertheless struck down for failing to create special procedures outside the framework of ordinary legislation.¹⁶⁶ For example, the Court found that allowing the Bill of Rights to be amended by a two-thirds majority of the lower House failed the “entrenchment” requirement of Principle II,¹⁶⁷ which, the Court ruled, required “some ‘entrenching’ mechanism . . . [to give] the Bill of Rights greater protection than the ordinary provisions of the [Constitution].”¹⁶⁸ The Court also found that the rejection of judicial review for certain categories of statutes violated the commitment to constitutional supremacy and the jurisdictional guarantees of judicial power contained in the Principles.¹⁶⁹ The Constitutional Assembly then revised the constitutional draft to meet the Court’s concerns in October of 1996, and following a second round of judicial scrutiny, the new Constitution was signed and implemented by President Nelson Mandela in December of 1996.¹⁷⁰

162. *Id.* at 776 para. 6, 788 para. 45. The Court pointed specifically to the creation of an upper house (the National Council of Provinces) that would not be based on equipopulational voting, but on the election of ten representatives from each of the nine provinces. *Id.* at 865–66 paras. 318–20. This has great practical significance because one of the provinces is majority Zulu (hence outside the political orbit of the ANC) and two others have large concentrations of white and black voters. *See* GLOPPEN, *supra* note 159, at 204, 222–23.

163. S. AFR. (INTERIM) CONST., 1993, sched. 4, princ. XXII. The Court found unconstitutional those provisions that failed to provide the required “framework for LG [local government] structures” as well as the failure to ensure the fiscal integrity of political subdivisions. *Certification Decision*, 1996 (4) SA at 861 para. 301, 911 para. 482. For the Court, the South African Constitution should provide only those powers to the national government “where national uniformity is required,” and only economic matters and issues of foreign policy met this restrictive definition. *See id.* at 845–46 para. 240, 849 para. 254.

164. S. AFR. (INTERIM) CONST., 1993, sched. 4, princ. XV.

165. *Certification Decision*, 1996 (4) SA 744 (CC) at 821 para. 153.

166. *Id.* at 822 para. 156 (striking down a provision that required approval of a two-thirds majority of the lower House for any constitutional amendment for failing to dictate “special procedures” for ratification in addition to supermajoritarian assent).

167. S. AFR. (INTERIM) CONST., 1993, sched. 4, princ. II.

168. *Certification Decision*, 1996 (4) SA 744 (CC) at 822–23 para. 159.

169. *Id.* at 820 paras. 149–50.

170. *See Constitution Signed*, WINNIPEG FREE PRESS, Dec. 11, 1996, at B1, available at 1996 WL 17258872.

Of particular concern for this project, however, is the Court's broad interpretation of constitutional protections for minority parties, a check even in the early days of post-apartheid governance against the possibility of one-party domination. I want to focus here on a relatively secondary provision among party protections, one that has caught my eye before but is nonetheless significant here. As part of the *Certification Decision*, the Court had to address various constitutional provisions protecting minority parties. Beyond the protections of proportional representation, the Constitution contained an "antidefection" principle in which a member of Parliament would have to resign if he or she attempted to switch parties.¹⁷¹ The provision was an express subject of negotiations in the transition from apartheid, reflecting fears that the likely parliamentary majority of the African National Congress (ANC) could be used to woo minority legislators and overconcentrate political power. South Africa joined other countries that formalized such antidefection concerns through legal prohibitions on what is known as floor walking or floor crossing.¹⁷²

Although such provisions may restrict expression of beliefs by legislators, there is an overriding concern that minority legislators could be induced to sway from their constituents' interests to support majoritarian policies. Because by definition there are fewer minority than majority representatives, any single minority defection would have a more severe impact on the representation of the minority population than the defection of a majority legislator would have on the representation of the majority. Such defection to the majority is not only more costly, but also more likely. Realistically, minority caucuses are unable to offer the same sort of inducements in terms of personal advancement or choice legislative programs as is the majority. In rejecting the civil liberties challenge to the antidefection clause, the Court noted that antidefection clauses were found in the constitutions of Namibia and India and were therefore entirely consistent with democratic governance.¹⁷³

But that did not end the debate over floor crossing in the South African

171. See *Certification Decision*, 1996 (4) SA 744 (CC) at 829 paras. 180–81 & n.136 (considering whether the antidefection principle was unconstitutional).

172. New Zealand similarly prohibited party switching by members of parliament in the Electoral (Integrity) Amendment Act, 2001, but the prohibition was statutory and sunsetted in 2005. See Mathew S. R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 610 & n.64 (2006).

173. *Certification Decision*, 4 (SA) 744 (CC) at 830 para. 184. The minority party protections of the antidefection mechanism were subsequently repealed by constitutional amendment. The repeal is troubling for three reasons. First, the antidefection principle was a significant subject of debate and compromise in the creation of the overall constitutional framework. See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 110–12 (2000) (discussing the origins of the antidefection clause). Second, the proponent of the repeal was the ANC, clearly the majority party least at risk to suffer defection. See *United Democratic Movement v. President of the Republic of S. Afr.* 2003 (1) SA 495 (CC) at 517–18 paras 53, 59. Third, on my reading of the *Certification Decision*, the structural minority protections provided the central analytic framework for compliance with the interim Principles. Although troubled, the Constitutional Court held the repeal to apply only to the procedural requirements of constitutional amendment. The Court did not attempt to impose a doctrine of structural integrity of minority protections to prevent the

Parliament. Once in office and once its political power was consolidated, the ANC used its legislative supermajority to repeal the antidefection provision. Under the new law, defection was permitted so long as the defecting group constituted at least ten percent of the party's legislative delegation.¹⁷⁴ This did little to placate critics because this would pose a large hurdle to defections from the ANC, but would leave defection an individual choice for any party with less than ten members of parliament.¹⁷⁵

The constitutional amendment prompted a second constitutional challenge, this time a claim that the amendment would violate the principles of party integrity and separation of powers inherent in the entire constitutional structure.¹⁷⁶ Though not an issue of overriding historical significance, the anti-defection question nonetheless challenged the Constitutional Court's role in guaranteeing the structures of democracy. The *Certification Decision* had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power, something that was certainly in the air in the immediate aftermath of the South African negotiations. The question was whether the Court would continue to use the democracy-promoting metric as the analytic foundation for evaluating efforts by the ANC to consolidate power.

Viewed after the passage of apartheid, and after the first generation of leadership left office, the antidefection question could have been a watershed moment in the history of South Africa under the ANC. The robust political exchange at the time of transition assumed that there would be black majority rule, that the ANC would emerge as the dominant political actor, and further that constitutional guarantees would serve as a bulwark against the overcentralization of power. The political shakeout of post-apartheid politics had not yet occurred, and even the ascension of the ANC into increasing political hegemony was tempered by the calibrated leadership of Nelson Mandela. As the founding generation moved off the historic stage, however, and as less-broad-minded functionaries took the reins of power, the heroic ANC emerged as the head of an increasingly one-party state, with all the attendant capacity for antidemocratic abuse.¹⁷⁷ South African democracy entered a period of what is termed "dominant party" democracy, a term that may simply connote the imminent collapse

amendment, which perhaps signifies a retreat from the role the Court assumed in the *Certification Decision*. See *id.* at 532 para. 119.

174. Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 § 23A(2)(a) (S. Afr.), *repealed* by S. AFR. CONST., Amendment Act of 2003.

175. Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa*, 55 AM. J. COMP. L. 1, 32 (2007).

176. *United Democratic Movement*, 2003 (1) SA 495 (CC) at 510 paras. 26–27, 530–31 paras. 115–17.

177. The extent of the threat posed by the ANC's electoral dominance is still uncertain. See Roger Southall, *The "Dominant Party Debate" in South Africa*, 39 AFR. SPECTRUM 61, 61 (2005) (arguing that although "the ANC's electoral and political hegemony does carry threats to democracy, . . . the ability of the ANC to extend its dominance is subject to considerable limitations").

of real democratic contestation.¹⁷⁸ From this perspective, the question of the day is whether the ANC will turn into the PRI, the Mexican Institutional Revolutionary Party, which was similarly the inheritor of a romantic revolutionary struggle, but which then imposed one-party rule to suffocate Mexico for almost the entire twentieth century.¹⁷⁹

Translated into the context of constitutional adjudication, the antidefection issue offered the Court the ability to reassert the structural underpinnings of the *Certification Decision*. Instead, the Court retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights. Thus, the Court rejected the challenge both on the procedural ground that the mechanisms of constitutional amendment had been adhered to, and on the grounds that no individual voter could claim a right of faithful representation after the election:

The rights entrenched under s[ection] 19 [of the Constitution] are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.¹⁸⁰

Perhaps the Court could have drawn deeper structural authority not only from the negotiated history of South Africa's transition from apartheid, but from the text of the South African Constitution. The South African Constitution contains a unique provision guaranteeing some form of effective minority party participation consistent with the aims of democracy. As set out in the Constitution, the rules and orders of the National Assembly must provide for "the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy."¹⁸¹ Within the sections establishing the structure of the legislative bodies at the various levels of the federal system, parallel language requires that the rules for the National Assembly, the National Council of Provinces,¹⁸² and the provincial legislatures provide for minority party participation "in a manner consistent with democ-

178. The best account of this process in South Africa is found in Sujit Choudhry, 'He Had a Mandate': *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332.

179. I am indebted to Pablo de Grieff for the analogy to the PRI.

180. *United Democratic Movement*, 2003 (1) SA 495 (CC) at 516 para. 49.

181. S. AFR. CONST., 1996 § 57(2)(b).

182. *Id.* § 70(2)(c) (stating that the rules and orders of the National Council of Provinces (NCOP) must provide for "the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy"). In addition, the allocation of delegates to the NCOP "must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy." *Id.* § 61(3).

racy.”¹⁸³ Instead, the Court deferred to the ANC to define the rules of governance, and the antidefection provision was allowed to stand until the ANC itself decided that it had served its purpose and no longer yielded the hoped-for political benefits, and in turn decided to abandon it.¹⁸⁴

The South African Court might well have looked to the jurisprudence developed by the Supreme Court of India when faced with efforts to amend the Constitution of India to restrict constitutional commitments to property rights and judicial review. Under Article 368 of the Indian Constitution, a liberal amendment process requires only a majority vote in both houses of Parliament with two thirds of its members present¹⁸⁵—a comparatively easy standard internationally where the amendment process typically requires either a supermajority or concurrent majorities over successive sessions of the legislature. Following independence, constitutional law had little independent traction in defining the political powers of India. In large part this reflected the Indian Court’s inability to break from its jurisprudential attachment to the Westminster tradition of parliamentary supremacy and its concept of narrow procedural review of government action. As a result, the Indian Court played a secondary role in the early years of Indian democracy. Beginning in 1967, however, the Supreme Court held that the Indian Parliament’s power to amend the Constitution was limited, and that Parliament could not abridge any fundamental rights inherent in the substantive provisions of the Constitution.¹⁸⁶ In broad strokes, the emergence of a substantive doctrine of democratic protection allowed the Indian Supreme Court to break from its relatively deferential role in the development of Indian democracy after independence and through the increasing use of emergency decrees as the central form of governmental authority.¹⁸⁷

183. *Id.* § 116(2)(b) (stating that the rules and orders of a provincial legislature must provide for “the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy”).

184. For a fuller account of the efforts of the ANC to secure the right to woo opposing legislators and the role that floor crossing played in ANC maneuvers at the provincial level, see Choudhry, *supra* note 178. In December 2007, the ANC concluded at its Polokwane National Conference that floor crossing should be abolished. The Democratic Alliance characterized the ANC’s decision as one of political expediency, claiming the ANC relented only because it no longer needed the tactic. See *Days Numbered For Floor-Crossing*, MAIL & GUARDIAN ONLINE (Aug. 20, 2010), <http://www.mg.co.za/article/2008-08-20-days-numbered-for-floorcrossing>. The result was the constitutional abolition of floor crossing in the S. AFR. CONST., Fourteenth Amendment Act of 2008. Paradoxically, the Independent Democrats and Democratic Alliance have recently discussed allowing party members to claim dual membership, which would functionally bring back floor crossing. See *ANC Riled by ID, DA Tango*, INDEPENDENT ONLINE (May 5, 2010), <http://www.iol.co.za/business/business-news/anc-riled-by-id-da-tango-1.815561>.

185. INDIA CONST. art. 368.

186. See I.C. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762, 815 (India). For a discussion of the limitations on amendment trenching on structural protections in the Indian Constitution, see Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT’L & COMP. L. REV. 55, 93–94 (2009).

187. See S.P. Sathé, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29, 43–49 (2001).

The critical moment came in the aftermath of the landslide victory by the Congress Party in 1971 when Indira Gandhi's party pushed through the Twenty-Fourth Amendment, purporting to vest constitutional supremacy in the legislature and eliminating the right of constitutional judicial review.¹⁸⁸ In one sense, this amendment was consistent with the English colonial tradition of parliamentary sovereignty and the absence of judicial review of legislation. At the same time, the Twenty-Fourth Amendment was inseparable from the consolidation of increasingly unchecked government authority and the assertion of one-party political power that would ultimately lead to the state of emergency of 1975–1977.¹⁸⁹

In the wake of the state of emergency of 1975–1977, the modern Supreme Court of India emerged as a central force challenging the use of electoral majorities to consolidate one-party rule. The Court began to intercede much more heavily in the core organization of the Indian political process, no doubt in response to its acquiescence to Indira Gandhi's broad use of emergency powers to shut down internal political opposition.¹⁹⁰ In response, and over a series of highly controversial cases, the Supreme Court developed the doctrine of the "basic structure" which served to limit even procedurally proper alterations to the Constitution, most notably in *Minerva Mills Ltd. v. India*, a case that expressly struck down amendments attempting to curtail the judicial power of review.¹⁹¹ Key to the Indian approach was the idea that even constitutional amendments could not alter the deeper commitment to democratic governance.¹⁹²

A basic-structure approach, modeled on the Indian Supreme Court's doctrine, could potentially have provided the South African Constitutional Court a structural lever for evaluating the effect of single-party political consolidation resulting from the potential for floor crossing. The textual guarantee of minority party participation, inherited from the original thirty-four Principles, could have provided a stronger doctrinal basis for this assertion of a judicial guarantee over

188. See S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 68 (2002).

189. See Lloyd I. Rudolph & Susanne Hoeber Rudolph, *To The Brink and Back: Representation and the State in India*, 18 *ASIAN SURV.* 379, 397–99 (1978).

190. As well formulated by Upendra Baxi, "[j]udicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power." Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *JUDGES AND THE JUDICIAL POWER* 289, 294 (Rajeev Dhavan et al. eds., 1985). The emergence of the Indian Supreme Court, though no doubt a direct response to the emergency period, also corresponds to the increasing delegation of governmental authority outside the traditional division between courts, legislatures and the executive. See generally Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 688–90 (2000) (putting forth the need for "functional specialization" as part of the constitutionally constrained exercise of parliamentary authority).

191. *Minerva Mills Ltd. v. India*, (1981) 1 S.C.R. 206, paras. 22, 59–61 (India).

192. See Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution?: A Comparative Perspective*, 4 *INT'L J. CONST. L.* 460, 483 (2006).

the democratic process than that existing in India. And the Constitutional Court tacitly recognized this potential for democratic integrity in the *Certification Decision*¹⁹³ by reaffirming the centrality in the transitional Principles of constitutional supremacy subject to judicial control. Although floor crossing is no longer part of the political challenge to democracy in South Africa, the consequences of deference to a dominant party remain an act in progress.

V. COURTS IN THE BREACH

The argument thus far posits that the newly minted constitutional courts emerge from an uncertain moment of regime change. The presence of a constitutional court may facilitate the transition to a democratic regime and allow for the creation of civilian rule. In turn, these courts may serve as a hedge against one-party consolidation of exclusive political and military power. On this account of their role in the new democracy, these courts should be relatively unconstrained by a legitimacy concern over interceding in the political process. Their creation works as a barrier against the excessive centralization of power in much the same way as federalism, proportional representation, and many other features of recent constitutional regimes serve to thwart a descent back into autocratic rule. If we imagine early elections in unstable democracies as having the potential feature of a winner-take-all tournament,¹⁹⁴ then we appreciate the concerns of the founders of these regimes and the stakes present in the early stages of democracy. To complete the picture, courts become key actors not as semilegislative bodies competing to initiate social policy,¹⁹⁵ but rather as guarantors of the limits of politics and guarantees to the losing and vulnerable minorities that electoral loss is not to be synonymous with wholesale oppression. Thus, it is not surprising that a substantial portion of the caseload of the new constitutional courts, reaching to more than half the total cases heard in the first few years of constitutional governance in some countries, may be classified as involving challenges to the structure of the political system.¹⁹⁶

193. *In re Certification of the Constitution of the Republic of S. Afr. (Certification Decision)* 1996 (4) SA 744 (CC) at 744, 820 paras. 149–50.

194. I take the imagery from Joel S. Hellman, *Winners Take All: The Politics of Partial Reform in Postcommunist Transitions*, 50 *WORLD POL.* 203 (1998).

195. There are those who claim the opposite and try to find justification for judicial review in some form of democratic expression either of the true will of the majority or as integral to the legislative bargain. *See, e.g.*, Scheppele, *supra* note 49 (arguing the former); ALEC STONE SWEET, *GOVERNING WITH JUDGES* (2000) (making the second argument). Alternatively, some argue directly that constitutional courts are legitimated through the quasi-parliamentary nature of their review. *See* SADURSKI, *supra* note 10, at 58 (arguing that court legitimacy comes from quasi-legislative function). Needless to say, I find these arguments unpersuasive as providing a core justification for creating constitutional courts. As a general rule, the capacity of nonelected judicial bodies to claim democratic authority as against the politically accountable branches must be suspect.

196. *See* Smithey & Ishiyama, *supra* note 50, at 724.

A. THE BASIC STRUCTURES OF DEMOCRACY

Assuming part of the justification for constitutional courts in new democracies is as a hedge against excessive concentration of power, the courts thus created would be expected to generate a jurisprudence based on the maintenance of competitive democracy. Put another way, the issue for these courts is whether they can produce within the confines of their emerging constitutional culture a domestic version of the Indian doctrine of a basic-structure with the aim of stabilizing democracy.¹⁹⁷ This is a difficult claim to assess on a generalized basis given the diversity of specific case presentations and the difficulties (linguistic being the most obvious) in creating a comprehensive picture of constitutional courts in new democracies.

Nonetheless, what is distinct about a basic-structure approach to constitutional adjudication is that it protects the core features of contested democratic governance, even if it is not apparent from the outset of a democracy which provisions may prove to be central. Insofar as the basic-structure doctrine seeks to remove critical features of a democracy from immediate majoritarian pressure, it bears critical similarities to the unamendable provisions of the German or Israeli constitutions, or to the prohibition in Italy and Norway against amendments that compromise the republican character of the state.¹⁹⁸ Or, as set out in the more recent vintage of the 2007 Constitution of Thailand, a constitution can simply forbid amendments that “chang[e] the democratic regime of government with the King as Head of State or chang[e] the form of the State.”¹⁹⁹

The difference, however, comes from the level of precision required for the unamendable provisions of a constitution. Rather than specify *ex ante* which provisions of the constitution form the core and which occupy the periphery of the commitment to democracy, the basic-structure doctrine leaves that open for subsequent judicial exposition. The basic-structure doctrine seems most suitable to the incomplete character of the negotiations that mark most of the recent transitions to democracy. It also seems best directed to the threat of one-party consolidation of power that threatens to undermine weak democracies from within the processes of democratic decision making. Constitutional court oversight to protect democracies from collapse into autocratic power provides a constitutional remedy for latent democratic disability.

Paradoxically, the new constitutional courts are cautious about trumpeting this new role as institutional stabilizers of democracy. They tend to disclaim the

197. As colorfully expressed by Justice Khanna of the Indian Supreme Court, “Provision regarding the amendment of the Constitution does not furnish a pretence [sic] for subverting the structure of the Constitution nor can [it] be so construed to embody the death wish of the Constitution or provides sanction for what may perhaps be called its lawful harakiri.” *Kesavananda Bharati v. Kerala*, A.I.R. 1973 S.C. 1461 (India) (Khanna, J.).

198. See Issacharoff, *supra* note 13, at 1428–30.

199. SOMDET PHRA PARAMINTHARAMAHA BHUMIBOL ADULYADEJ SAYAMMINTHARATHIRAT BOROMMANATTHA-BOPHIT [CONSTITUTION], Aug. 24, 2007, ch. XV, art. 291 (Thai.).

exigencies of the extraordinary moment of regime transition, and they resort frequently to the more familiar language of human rights or basic civil rights in justifying their significant assertion of constitutional authority.²⁰⁰ From the vantage point of outside observers, however, these courts are nonetheless devoting significant institutional resources to issues that go to the heart of democratic governance, even if the courts themselves are not likely to provoke the political authorities by trumpeting this role.²⁰¹ Despite the unwillingness to broadcast a broader judicial role, the constitutional courts do repeatedly engage issues that force the development of a basic-structure-style approach. This initiative naturally involves a measure of risk that the court will step farther than it is politically safe to go, but there is every reason to believe that it is precisely when the political branches are immature and the stabilization of democracy is precarious that courts emerge as central actors in consolidating the constitutional order.²⁰² This is, after all, the role played by the U.S. Supreme Court under Chief Justice Marshall in the early days of our republic, and it is the role played by the European Court of Justice as the European Union struggled to create its competent political institutions.²⁰³

The role of these constitutional courts is perhaps most critical in the transition period because of the immaturity and likely weakness of not only political institutions, but the ancillary civil-society participants in democratic life—most notably, program-based political parties. The relative reticence of the courts to announce their role reintroduces in a curious way the debates in more mature democracies over the role of judicial review of democratic decision making. Even accepting that constitutional courts are expected to have the power of review over legislation does not establish what should be the aim of that power of review. Not surprisingly, the easiest justification comes in terms of the post-World War II rights discourse of civil liberties and fundamental human rights.²⁰⁴ Even though often cast as a matter of fundamental rights, many of these decisions are significant both in terms of securing the liberties associated

200. The wariness over structural arguments about stabilizing democracy and the reliance on claims of protecting civil liberties or individual rights is well noted by Professor Sadurski. SADURSKI, *supra* note 10, at xiii.

201. See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 160–62 (2002).

202. This point is forcefully made in the many writings of Professor Scheppele on the role of processes of state formation in nascent democracies. See, e.g., Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1757–61 (2006) (describing “the separation of powers as a contact sport” in which the constitutional courts play a central role).

203. See, e.g., Herbert A. Johnson, *Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice*, 33 J. MARSHALL L. REV. 1063, 1068 (2000) (comparing the similar roles both courts played in providing “shape and substance” to the emerging democratic institutions to which they belonged).

204. I am indebted to Dieter Grimm for reminding me that no matter what structural role is assigned to constitutional courts, the discourse of fundamental rights remains the *lingua franca* of judicial review.

with liberal democracy *and* because they thwart the exercise of majoritarian political power against disfavored *political* minorities. The burden of this Article is to insist that the emerging jurisprudence must have not only an individual rights dimension but must also lead the constitutional courts into a more active role (certainly in the initial period) in debates over political structures. Ultimately, much of the legitimacy of these courts depends on their ability to fulfill their role in facilitating the constitutional enterprise.²⁰⁵

B. MAKING DEMOCRACY WORK

Despite the reluctance of new constitutional courts to broadcast their expanded authority over the political process, there are certain repeated themes in the early jurisprudence of constitutional courts that force a confrontation with broader questions of the integrity of democratic governance. Two examples are useful to illustrate both the risk of one-party domination and the corresponding risk of weak and ineffectual governments. Each shows courts confronting a central structural question of forestalling a collapse of their respective democratic experiments.

1. Curbing the Political Opposition

Moldova presents a useful example of a constitutional court forced to respond to an attempt to restore one-party control of a former Communist regime. In December 2001, the Moldovan government, led by the former Communist Party, announced that it was planning to make Russian compulsory in all Moldovan schools, an issue that exacerbated the ethnic divisions of the country.²⁰⁶ The move prompted protests, with the opposition Christian Democratic People's Party (CDPP) taking a major role, and in turn prompted the government to ban all party activities for one month.²⁰⁷

The ban was upheld by the docile Moldovan Supreme Court of Justice (a holdover court, as opposed to the post-Soviet Constitutional Court), a decision that "temporarily took the steam out of the protests."²⁰⁸ Under pressure from EU officials and others,²⁰⁹ the government rescinded the ban two weeks before it was due to expire.²¹⁰ Nonetheless, the government tried to shore up its

205. Stressing the direct tie between the role of these courts in easing the initial constitutional bargain and the role of judicial review after the democratic transition was helpfully suggested by Owen Fiss.

206. See, e.g., *Moldova: Setback for Russian Language*, *supra* note 57; Wines, *supra* note 57.

207. See *Christian Democratic People's Party v. Moldova*, 2006-II Eur. Ct. H.R. 98, 104 (2006); *Constitution Watch*, 11 E. EUR. CONST. REV. 2, 32 (2002).

208. *Constitution Watch*, *supra* note 207, at 33.

209. See *id.* at 32 ("The ban prompted Walter Schwimmer, secretary-general of the Council of Europe to request Chisinau [the government capital] to explain the ban (utilizing Art. 52 of the European Convention on Human Rights)."). Eventually, in 2006, the European Court of Human Rights declared the ban in contravention of the Convention's Article 11. See *Christian Democratic People's Party*, 2006-II Eur. Ct. H.R. at 118.

210. *Constitution Watch*, *supra* note 207, at 32-33.

political power by moving up local elections so as to exploit the disarray of the opposition caused by the ban.²¹¹ At this point, the CDPP appealed to the Constitutional Court, and the Court declared the move unconstitutional.²¹² The U.S. Department of State cited the decision as one example of “the Constitutional Court show[ing] strong signs of independence during the year,” “balancing out several controversial initiatives of the Communist authorities.”²¹³

Poland provides an even stronger example of the limitations imposed by constitutional courts on the use of exceptional powers by the executive after the immediate transition period had ended. The Polish example is particularly illuminating because of the early activism of the Polish court and the broad legitimacy it held.²¹⁴ The clearest example comes with a 2007 decision of the Constitutional Court striking down the central provisions of a new lustration law.²¹⁵

The lustration laws are a repeated problem in postauthoritarian societies.²¹⁶ Often, as was the case in Eastern Europe, the sudden collapse of the prior regime means that democratic forces are poorly prepared to function in the new electoral arena. The only organized political forces are the holdovers from the ancien régime, and their removal from the political arena is often central to the survival of a new democratic politics.²¹⁷ At the same time, the government functionaries of the old regime are often the only source of technical and administrative competence for the nascent democracy. The combination of the expertise and likely organization of the cadres of the former regime makes them a formidable threat to weak democracies. The perceived need to remove the former Communist officeholders from the new contests for political power represents an uneasy mix of the healthy impulse for democratic stability and the

211. *See id.*

212. *Id.* at 33.

213. *See Country Reports on Human Rights Practices—Moldova*, U.S. DEP’T OF STATE (Mar. 31, 2003), <http://www.state.gov/drl/rls/hrrpt/2002/18381.htm>.

214. *See* László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy*, 18 INT’L SOC. 133, 148–49 (2003).

215. *See International Legal Developments in Review: 2007—Regional and Comparative Law*, 42 INT’L LAW. 975, 1005–06 (2008) [hereinafter *International Legal Developments*] (describing the 2006 lustration law and Judgment K 2/07). In Hungary, the question of legal accountability for the old regime was posed in acute fashion by a government act that would have allowed punishment for all crimes committed under Communist rule, even if the statute of limitations had passed. Alkotmánybíróság (AB) [Constitutional Court] Mar. 5, 1992, MK.11/1992 (Hung.), http://www.mkab.hu/admin/data/file/736_11_1992.pdf. In Decision No. 11/1992, the Hungarian Constitutional Court not only struck down the law, but took the occasion to reassert the supremacy of constitutional limitations over the demands of the political branches: “[P]olitical endeavours of any kind must be realized within the constitutional framework and . . . everyday political considerations are precluded from the adjudication of the constitutionality of the laws.” *Id.*

216. For an insightful discussion of the difficult legal and moral issues in the lustration debates in virtually all the Soviet bloc countries of Eastern Europe, see SADURSKI, *supra* note 10, at 223–58.

217. The need to remove antidemocratic forces from electoral contestation and the justifications for it are discussed at length in Issacharoff, *supra* note 13.

less admirable (if understandable) desire for revenge.²¹⁸ Even in its most defensible guise as a forceful closing of the door on a past oppressive regime, lustration presents difficult legal and moral questions. Invariably, lustration imposes the legal order of the new regime on actions undertaken in a different legal setting under different forms of state coercion. Further, lustration laws are invariably roughly hewn and sweep in entire categories of persons who are primarily guilty of passive association with the former regime, even though the new prohibitions have a criminal law quality to them.²¹⁹

Because of the group-culpability sweep of the lustration laws and their criminal-like quality, the lack of individual findings and procedural protections for banned individuals has been a significant issue in the implementation of the lustration laws.²²⁰ Further, in some cases, such as Moldova and particularly the Baltics, lustration quickly implicated critical ethnic divides between the local population and Russian speakers or ethnic Russians. In the Baltics, the latter group was a generations-long presence as part of the Soviet effort to establish control of the region, which included forcing Russian as the official language and filling the ranks of the security state with ethnic Russians. In Estonia, for example, the ethnic Russians came to represent one-third of the entire civilian population by the end of the Soviet period.²²¹

Poland's history is both revealing and representative. In 1997, Poland passed a sweeping lustration law designed to force Soviet-era collaborators to identify themselves and in turn to subject the identified collaborators to removal from or ineligibility for public office.²²² The lustration law set the prohibitions in motion by requiring that "persons performing certain public functions file a declaration as to whether they had collaborated with the *ancien regime*."²²³ Although the Polish Constitutional Court upheld the law as nonpenal and providing sufficient procedural guarantees,²²⁴ the European Court on Human Rights (ECHR) disagreed and in 2007 held the law in violation of Article 6 of the European Convention on Human Rights, which guarantees basic rights of open and fair criminal trials.²²⁵ Even while the challenge to the first Polish law was pending, the nastier side of lustration took hold.

Under the increasingly authoritarian regime of the late President Lech Kaczyn-

218. See Ellis, *supra* note 58, at 181–82.

219. See SADURSKI, *supra* note 10, at 258.

220. See, e.g., VLADIMÍRA DVOŘÁKOVÁ ET AL., LUSTRATION AND CONSOLIDATION OF DEMOCRACY AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE 54–56 (2007) (examining challenges to lustration laws on the grounds of insufficient procedural protections in Poland, Slovakia, and Latvia).

221. See SADURSKI, *supra* note 10, at 216.

222. *International Legal Developments*, *supra* note 215, at 1003–05.

223. *Id.* at 1003.

224. See *id.* at 1004; see also SADURSKI, *supra* note 10, at 245–46.

225. See *Matyjek v. Poland*, 2006-VII Eur. Ct. H.R. 391, 392, 402 (2007). The ECHR held that the law was penal in nature and failed to provide for a fair trial. *Id.* at 402, 407–08.

ski and his identical twin brother, Prime Minister Jaroslaw Kaczynski,²²⁶ the Polish government adopted in late 2006 a new lustration law that broadened the sweep of targeted individuals through an “exponentially expanded definition of persons ‘performing a public function.’”²²⁷ The law would have imposed a ten-year ban on office holding for any individual who failed to submit a declaration explaining how his or her name came to be on any government “lists” from the communist regime.²²⁸ Given the pressures and pervasiveness of totalitarianism, innumerable individuals would be compromised by such a loose definition of collaboration.²²⁹ Indeed, during the 2000 election, both famous Solidarity leader Lech Walesa and the winning candidate, Aleksandr Kwasniewski, were charged with having been collaborators because their names appeared on lists of persons who had spoken to Communist security officers—an almost inescapable fate for anyone of any public stature under the prior regime.²³⁰

Coming in the wake of the ECHR’s decision on the earlier lustration law, the new law sparked a good deal of criticism about witch-hunting from EU officials²³¹ and the foreign press,²³² as well as charges that the new lustration law was nothing more than a “generational bid for power,” an effort by the Kaczynski brothers to see their opponents “purged from offices and replaced by their own loyalists.”²³³ Opponents charged that the lustration law was “only one act among many in a systematic effort by the [Kaczynskis’] party and its supporters to undermine the country’s democratic institutions.”²³⁴

On second review by the Constitutional Court, limits were imposed on the exercise of lustration authority. The Court’s response was to caution the government that lustration was not an opportunity not to settle political scores but to serve the broader ends of justice.²³⁵ The Court took pains to limit the reach of the law to those who were proven to have cooperated specifically with the state

226. In July of 2010, Jaroslaw faced a narrow defeat in a special presidential election held following the death of his brother Lech in a plane crash. Nicholas Kulish, *Acting President in Poland Wins a Narrow Victory*, N.Y. TIMES, July 5, 2010, at A4.

227. *International Legal Developments*, *supra* note 215, at 1005.

228. *Id.*

229. See Wiktor Osiatynski, Op-Ed., *Poland Makes Witch-Hunting Easier*, N.Y. TIMES, Jan. 22, 2007, at A19.

230. See Joanna Rohozińska, *Struggling with the Past*, CENT. EUR. REV. (Sept. 11, 2000), <http://www.ce-review.org/00/30/rohozinska30.html>.

231. See, e.g., *Former Polish PM Refuses to Sign Lustration Document*, RADIO FREE EUROPE/RADIO LIBERTY (Apr. 26, 2007), <http://www.rferl.org/content/article/1076122.html> (noting that European Parliament President Hans-Gert Poettering expressed support for a Polish member of the European Parliament who refused to comply with the Polish lustration law).

232. See Osiatynski, *supra* note 229.

233. *Id.*

234. Adam Michnik, *The Polish Witch-Hunt*, N.Y. REV. BOOKS (June 28, 2007), <http://nybooks.com/articles/archives/2007/jun/28/the-polish-witch-hunt>.

235. Trybunał Konstytucyjny [Constitutional Court], May 11, 2007, No. K. 2/07 (Pol.), *translated in Judgment of 11th May 2007, file Ref. No. K 2/07*, at 6, TRYBUNAŁ KONSTYTUCYJNY, http://www.trybunal.gov.pl/eng/summaries/documents/K_2_07_GB.pdf.

security agency (not other, civil agencies).²³⁶ More significantly perhaps, the Court limited the ability of the law to reach political opponents of the Kaczyński government—most notably, journalists were completely exempted from the requirement to submit a declaration.²³⁷ As a matter of compassion for life under authoritarian rule, the Court further exempted those who acted “under compulsion in fear of loss of their life or health [or that of] closest persons.”²³⁸

Of greater significance here are the steps taken to protect against lustration being the opportunity for Poland to revert to one-party governance. The Court held that officeholders who had been “elected in universal elections” prior to the entry in force of the new law were not obligated to submit declarations,²³⁹ deeming the application of the declaration requirement to incumbent officeholders a “legal trap” that is “inadmissible in light of the principle of protection of trust in the State and its laws.”²⁴⁰ Like the Albanian court discussed above,²⁴¹ the Court recognized the connection between due process rights for individual government officials and the rights of the individuals those officials serve and represent; giving the law retroactive effect, it held, “influences both the right to vote and the right to stand as a candidate in elections, hence the rights that are constitutionally guaranteed.”²⁴² If those who had been elected prior to enactment of the law could be forced out for failure to file a declaration or for making a false declaration, it would make “the principle of the sovereignty of the Polish people . . . illusory.”²⁴³ Despite internal divisions yielding nine dissenting opinions, the Court went on to demand “‘repair’ activities on the part of the legislator” lest any further legislation be struck down as well.²⁴⁴ At the same time, the Court took pains to indicate that lustration principles remained valid so long as there remained a threat of former Communist officials reestablishing their authority.²⁴⁵

In the words of Poland’s most significant democratic intellectual, Adam Michnik, “The Constitutional Court stood up to its responsibilities and, after repeated government efforts to postpone the court’s session and to impeach its judges, it reviewed the new law and found it unconstitutional.”²⁴⁶

236. *See id.* at 4.

237. *Id.* at 5. The lustration of journalists was described by the Court as consistent with “the former goals of the communist State, particularly interested in the control—at every stage—of publications as well as persons involved in the production thereof,” but “unproductive in the new democratic order of the State.” *Id.* at 21.

238. *Id.* at 18.

239. *Id.* at 5 (emphasis removed).

240. *Id.* at 19.

241. *See supra* notes 67–69 and accompanying text.

242. Trybunał Konstytucyjny [Constitutional Court], May 11, 2007, No. K. 2/07 (Pol.), translated in *Judgment of 11th May 2007, file Ref. No. K 2/07*, at 20, TRYBUNAŁ KONSTYTUCYJNY, http://www.trybunal.gov.pl/eng/summaries/documents/K_2_07_GB.pdf.

243. *Id.*

244. *Id.* at 26.

245. *See id.* at 6.

246. Michnik, *supra* note 234.

2. Party Eligibility

While the lustration cases look much like a vindication of individual rights, cases on the other side of the spectrum force a confrontation between a simple rights claim and the broader concerns over democratic stability. An excellent example is found in the Czech Constitutional Court's case concerning the five percent threshold for inclusion in parliament of a minority party—the Democratic Union (DU).²⁴⁷

In the election preceding this challenge, DU had received nearly 170,000 votes, sufficient for five seats on the basis of strict proportionality.²⁴⁸ DU's failure to secure five percent of all votes cast, however, meant that the party was awarded no parliamentary seats at all.²⁴⁹ According to the DU, their exclusion from Parliament violated Article 18 (guaranteeing voting according to a principle of proportional representation) and Article 19 (guaranteeing the eligibility of Czech citizens to seek election) of the Czech Constitution.²⁵⁰ Specifically, DU argued that the electoral threshold violated voter equality by disenfranchising minority-party supporters, distorted true proportionality, and denied otherwise qualified citizens the right to seek elected office.²⁵¹

Whereas a simple rights approach might have credited DU's argument that voters were being denied their electoral due, the Court was unpersuaded. Although the Czech constitution and its precursor of 1920 enshrined proportional representation, the Court reasoned,

It was only the experience of European parliaments [before and after World War II] that led to the search for a system that would limit an excessive splintering of the political spectrum [T]he experience [of the Weimar Republic and the French Fourth Republic] confirmed that excessive diversification . . . and unrestricted proportional representation may become a tool of political de-stabilization and an element destructive of a constitutional state.²⁵²

Thus, the Court held that, at least as concerns proportional representation, the 1993 Constitution did not draw on the 1920 Constitution, but rather “upon the theoretical foundation and institutional solution of contemporary democratic states,”²⁵³ which support both legislation and judicial decisions that election

247. *Nález Ústavního soudu ze dne 02.04.1997 (ÚS)* [Decision of the Constitutional Court of Apr. 2, 1997], sp. zn. Pl. ÚS 25/96, *translated in* 5 E. EUR. CASE REP. CONST. L. 159, 166 (1998). I focus on the Czech opinion because of its extensive discussion of the underlying reasons for its ruling. The Romanian Court reached a similar result. *Curtea Constituțională a României* [Constitutional Court of Romania], No. 2/1992 of Jun. 30, 1992, *translated in* 2 E. EUR. CASE REP. CONST. L. 229, 232 (1995).

248. *See Nález Ústavního soudu ze dne 02.04.1997 (ÚS)* [Decision of the Constitutional Court of Apr. 2, 1996], sp. zn. Pl. ÚS 25/96, *translated in* 5 E. EUR. CASE REP. CONST. L. 159, 162 (1998).

249. *Id.* at 163.

250. *Id.* at 161–62.

251. *Id.* at 166–67.

252. *Id.* at 166.

253. *Id.*

threshold provisions did not “fundamentally limit proportional representation.”²⁵⁴ For the Court, the key question was the relation of the rights claims to the ability to build a functioning democratic state:

While the purpose of voting is, undoubtedly, to differentiate the electorate, the objective of elections is not, however, to obtain a mere expression of political preference by individual voters [S]ince the exercise of state power presupposes the capacity to adopt decisions, elections and the electoral system must have regard to the capacity to adopt such decisions on the basis of the majority’s will. To base the composition of the Assembly of Deputies on a strict proportional image of voting results might give rise to a political representation fragmented into a large number of small groups promoting diverse interests, which would make the formation of a majority much more difficult if not entirely impossible.²⁵⁵

The object of constitutional scrutiny, and indeed of the constitution itself, was to permit effective governance, and no claim could be entertained if it threatened “the parliamentary system’s capacity to function and to adopt measures, as well as its continuity.”²⁵⁶

CONCLUSION: CAN COURT CONSTITUTIONALISM SUCCEED?

The object of this Article has been to signal the centrality of constitutional courts in constitutional democracies of recent vintage, and to try to give some theoretical grounding as to why courts may function as important guarantors of democratic integrity in conflicted societies. In this regard, constitutional courts serve to refract the exercise of political power in ways that may complement the proportional representation systems and the use of federalism that characterize the recent constitutional democracies. The surmise is that this ability to cabin the exercise of majoritarian prerogatives in the early stages of new democracies permits a constitutional pact to be realized in countries without well-developed political institutions or conditions of trust among rival groups.

Two critical questions follow. The first is a jurisprudential inquiry into how courts discharge this function. Courts created exclusively for the purpose of constitutional review of subsequent governmental action should be comparatively unconstrained by subsequent questions on the legitimacy of judicial review as such. Without the power to review and reject legislation, these courts would serve no apparent purpose. At the same time, that special role in the process of constitutional formation should lend greater saliency to the democracy-reinforcing steps that these courts must take. One of the objects of this inquiry is to place in different relief the decisions of the U.S. courts since the reapportion-

254. *Id.*

255. *Id.* at 169–70.

256. *Id.* at 170.

ment cases of the 1960s, perhaps allowing an examination of the American law of democracy outside its immediate doctrinal moorings. Locating these constitutional courts within the struggles to create a constitutional democratic order begs the more difficult question: whether reliance on courts can actually stabilize democracy. Courts are, after all, empowered with neither the sword nor the purse, to borrow Alexander Hamilton's classic formulation.²⁵⁷ Whatever respect time and tradition might accord to the pronouncements of courts in mature democracies, why should courts be able to exercise any meaningful restraining effect in conditions of initial political uncertainty? Perhaps even more challenging is the question whether courts will be inclined at all to play a role in shoring up democracy rather than capitulating to new authoritarian power. History offers examples of courts that have utterly failed in the face of the collapse of democracy.²⁵⁸

The concluding answer is that, under some circumstances, courts do appear to be playing this stabilizing role—particularly when they have an external source of support outside the domestic political structure. Thus, constitutional courts have had significant impact in Eastern Europe in countries in which entry into the European Union, or the aspiration for admission, requires a fidelity to law that would discourage any regime from lightly transgressing the mandates of its own courts. By contrast, the history of the post-Soviet regimes east of the Urals—and hence beyond the potential reach of the EU—has not been inspiring.

It is certainly possible, based on the experiences in the former Soviet orbit, to conclude simply that looking to constitutional courts to play a significant role in shoring up precarious democracies is chimerical. The evidence is present that any meaningful role assigned to such courts is likely to be an artifact of more significant external constraints, as with the NATO oversight of Bosnia, for example. But I want to resist this easy conclusion, for the historical record also shows courts playing a significant role in shoring up democracy in South Korea, Taiwan, South Africa, and Mexico, all countries with complicated histories, but each of which exercised full sovereignty in its transition to democracy.

A more inspiring conclusion is that the role of constitutional courts as a buffer against unchecked majoritarian power in the first stages of democratic rule alters the dynamics of the initial constitutional balance. Courts may emerge as a pole of independent authority ensuring a corrective against the inherent frailties of democracy. At the stage of constitutional formation, the argument

257. THE FEDERALIST No. 78, at 393 (Alexander Hamilton) (Gary Wills ed., 1982).

258. The classic example is of course the shameful complicity of the German judiciary in the Nazi regime. See, e.g., Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199, 284 (1997) (discussing the American Tribunal's characterization of Third Reich courts as "complicit[] in crime"). Unfortunately, this is not an isolated example. See, e.g., LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 39–40 (2007) (summarizing the failure of the Chilean judiciary to attempt in any significant manner to thwart the dictatorship of General Pinochet).

runs, the creation of constitutional courts alters the political equilibrium and results in a greater margin of protection for political and other minorities. At the very least, the presence of such courts makes it more difficult for the first generation of political rulers to disregard the terms of the founding political balance. The question in turn is whether the courts thus created will rise to the challenge, and whether they will succeed in the longer term in stabilizing democratic governance.