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Comparative Constitutional Law as a Window on Democratic Institutions

Samuel Issacharoff

I. Introduction

The preamble to the 1948 Universal Declaration of Human Rights compelled a central commitment to the proposition that “[a]ll human beings are born free and equal in dignity and rights.” The ensuing discourse over the definition and meaning of human rights, their expansion into social and economic rights, and the demands upon government to be accountable to the dominion of dignity and rights, came to define much of the subsequent late 20th century discourse over the obligations of law. In the face of universalist commands of the rights and dignity owed to all individuals, regardless of place or circumstance, any national law necessarily receded as the shaping force of domestic legal arrangements.

Among the tensions created by human rights universalism was the role of constitutional law, what had previously been seen as the highest source of domestic legal authority in democratic states. The postwar period also saw the creation of constitutional courts as a central domestic guarantor of basic rights, first in Germany and Italy, and then throughout the post-1989 spread of the third wave of democratization. The emergence of strong courts, as I have chronicled in my work on Fragile Democracies (Issacharoff 2015), enabled judicial review of democratic processes in the name of a higher order of law than simple statutory enactments. While these courts were the fruits of particular constitutional orders—frequently the product of democratic reorganization after either conflict or the fall of an authoritarian regime—seemingly these courts could claim two sources of authority. On the one hand, following the American origins of judicial review, the courts could claim to be, per John Marshall, the ultimate arbiters of the specific constitution from which they sprang. Yet, on the other, constitutional courts could claim a mandate in universal law traditions to assume the role of protector of human rights against transgression by the state and its political institutions.

Not surprisingly, this tension in the source of ultimate authority for judicial review pervades the modern study of comparative constitutional law, a field that consolidates only in the postwar period. Previously, efforts to assess constitutional orders systematically were subsumed in the study of politics, rather than judicial approaches to constitutional law. The field traces

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to Aristotle’s assessment of the constitutional orders of the Greek city-states, and the rejection of any search for a Platonic ideal form of political organization:

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\text{[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.}
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(Aristotle 1958, 181.) The Aristotelean approach held forth even as the academic study of politics developed, particularly before the study of public law shifted from the departments of government to the legal academy. An early primer on comparative constitutional law would therefore downplay the significance of the constitutional protection of enumerated rights as an incident of political organization; something that “simply indicates that the power to abolish them is deposited at another point in this organism than in the absolute state.” (Crane and Moses, 5). The objective was not the universal, but taking “a particular government at a particular period” as the point of reference so as to identify “in what person or department the preponderance of power lies, or how power is distributed” (Crane and Moses, 1).

Undoubtedly this narrow approach could not withstand the increased focus on courts as protectors of individual rights, regardless of the particular forms of national political organization. Under pressure from rights universalism, there was a strong impulse to find “constitutional guarantees [that] are cut from a universal cloth,” in which “all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles . . .” (Choudhry 1999, 833). As a result, “the renaissance of comparative constitutional law has focused heavily on rights jurisprudence and to a considerable extent overlooked structural judicial decision making” (Landau 2016, 1070). For the universalist camp, “human rights language is now a common feature of national constitutions,” and the “shift in discourse from the rights of man and citizen to the rights of all humanity is a long standing historical, and now global, process” (Beck, Drori, and Meyer 2012). In its strongest formulation, “[t]hese commonalities are at points so thick and prominent that the result may fairly be described as generic constitutional law—a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction” (Law 2005, 659).
Certainly there is truth to the increased overlap of language among courts, and to the growing sense of shared enterprise. But acontextualism has its limits. As Ran Hirschl well assails, this “brisk traffic in constitutional ideas has been accompanied by the rise of what may be termed generic constitutional law—a supposedly universal, Esperanto-like discourse of constitutional adjudication and reasoning, primarily visible in the context of rights and liberties” (Hirschl 2013, 1). For comparative constitutional law to advance our understanding of constitutional governance, the trick seems to be finding a proper perch that gives enough distance from the particular to allow perspective, but not to reach such heights of overview as to lose the drama of struggle and institutional pathways.

Because the emergence of strong constitutional courts coincides with the efforts to buttress democracy against the authoritarian forces of the 20th century, I have spent a considerable amount of time examining the relation between courts, constitutionalism and democracy. The focus has been institutional. The aim is to give a structural account of why courts emerge as the guarantors of a modern liberal vision of limited government, and how constitutional checks on political authority shore up an anti-authoritarian commitment to democratic self-governance. The approach draws from the universal in terms of trying to observe general trends and parallels in the practices and problems across national settings, especially in the rise of court-centered constitutionalism. Yet, it is also anti-universalist in the Aristotelean tradition of seeing constitutional arrangements as responsive to the particular political conflicts that accompany the formation of each state entity.

The aim here is to outline an approach to comparative constitutional law that is court-centered but not rights-oriented. A focus on the institutional role that courts can play in weak democracies allows a comparative overview without trying to mandate the resolution of particular cases according to acontextual abiding principles. In this brief overview, I want to highlight four questions that comparative constitutional analysis may elucidate, without in any conclusive way trying to resolve these issues in this short presentation. The four are: (1) establishing the role of new constitutional courts and their powers of judicial review; (2) how the role is used in new constitutional democracies; (3) how courts survive confrontations with political power; and (4) the prospects for success of court-centered constitutionalism as a strategy to protect democracies.

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3 This argument about the interactive effect of judicial dialogue and reinforcement is forcefully advanced by Anne-Marie Slaughter. See, e.g., Slaughter 2000, 1109–23 (identifying the intersection of human rights law and domestic constitutional law as the primary sources of “substantial and growing judicial cross-fertilization”).
II. The Role of New Constitutional Courts

The first proposition is the easiest to establish. Without exception, the post-1989 democracies adopted court systems designed to serve two functions. First and foremost, courts were to forestall any incipient return to an autocratic past. Second, these courts were to serve as the handmaidens of a new democratic organization of political power. In general, the form of the judiciary followed the German post-World War II model of a separate constitutional tribunal with a distinct jurisdictional basis and a unique model of appointment (Kommers and Miller 2012, 3). Some countries vested constitutional authority in a Supreme Court of general jurisdiction (see Rait and Schneider 1998, 98), and yet others created a distinct constitutional chamber within a generalist apex court (see Lopez 2008, 531–2). Some allowed a priori review in the style of the French Conseil Constitutionnel (see Sweet 2000, 63–5), while others allowed general powers of review (see Issacharoff 2015, 238–9). Some permitted constitutional review in specific cases (see Sadurski 2014, 13–4), others like the Hungarian court allowed action popularis review upon citizen petition (Sadurski 2014, 15). Others still limited review to the minority in parliament, again following the French tradition.4

What unified all these courts is the power of judicial review. For all that American jurisprudence has worried over the countermajoritarian claim of authority by the US Supreme Court, the new courts faced an easier task of self-definition. There is simply no reason to establish a constitutional court except as a check upon the democratic branches of government. The power of judicial review flowed organically from the creation of a court charged with superintendence of constitutional principles in the face of challenged legislative or executive conduct.

Much as the original model of a post-authoritarian constitutional court would have been inconceivable without the post-fascist examples of Germany and Italy, so too the modern wave of democracies would have been inconceivable without the collapse of the Soviet Union. Most apparently, the removal of the Soviet armed presence allowed the mobilization of democratic forces without the threat of the invasions of Hungary in 1956 and Czechoslovakia in 1968. The impact of the demise of Soviet power reached much further, however. The easy divide of the world along the Cold War lines of demarcation ended, with far-reaching consequences. The American patrons of right-wing regimes reexamined their commitment to non-democratic rulers once freed from the need to maintain the anticomunist alliance. Similarly, client states of the Soviet Union from outside the Soviet bloc found their benefactor and, oftentimes, financier suddenly unresponsive.

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No country seems more removed geographically from the Cold War struggle than South Africa. The National Party (NP) government was no mere American puppet, and in its final stages, the apartheid state had to withstand increasing economic sanctions from its Western allies. The insurrectionary African National Congress (ANC) was certainly no simple Soviet ploy either, despite its decades-long collaboration with the South African Communist Party. The struggle against apartheid was many-fronted and the ANC struggled to be the big tent in which the diverse opposition elements could rally toward a collective end. Even so, the end of the Cold War removed from the ANC its longtime association to Soviet backing and removed from the NP its last remaining international card as part of the Western anticommunist alliance.

Despite being at a remove from the frontlines of the collapse of the Soviet empire, South Africa offers a perfect launching point for the inquiry into the structural role of the new constitutional courts. As the transition process matured, there were three facts that drove the ultimate result: first, South Africa would have to enjoy some form of democratic government; second, the majority of the electorate was black; and, third, the ravages of apartheid had left a prosperous white minority amid overwhelming black poverty. The combination of these three factors made continuation of complete parliamentarism impractical as insufficiently protective of minority rights, including minority property rights.

Although South Africa had no experience with formal judicial review, the creation of a strong constitutional court well fit the country’s needs. At the simplest level, the judiciary offered a potential check on an excess of majoritarian power in the parliament. But beyond the simple check on parliamentary prerogatives, a strong judiciary carried forward the struggle against apartheid that had long been waged in the universalist language of human rights and the rule of law. The international conventions on human rights that followed from the end of World War II created a robust international law of relations between states and their citizens. All of the democracies created in the late twentieth century necessarily internalized the rights commitments, at least formally. Even in states with woeful human rights records, there is generally a legal commitment to rights protections for the citizenry. Almost inescapably, the enshrinement of rights commitments also pushes toward the creation of an independent judiciary.

Further, South Africa reveals the structural interrelation between the new form of constitutionalism that emerged after 1989 and the stabilization of democracy. Most of the new democracies were created in states bearing deep historic divisions along lines of race, ethnicity, religion or language. In all such countries, achieving buy-in from the various constituencies was a critical feature to stabilize democratic governance. Rather than the formalized consociational power-sharing that dominated the emergence of new democracies after World War II and the fall of colonialism, the post-
1989 period saw a dampened enthusiasm for power-sharing as a mechanism for protecting vulnerable minorities. Instead, the third wave of democracy substituted an institutionalized set of checks on majoritarian power enshrined in a strong form of constitutionalism combined with an empowered independent judiciary. The well-documented transition in South Africa serves as the most visible of the constitutional allocations of power in a new democracy, but it is hardly unique in using constitutional governance to address the fundamental divides in a nascent democracy.

Constitutionalism was designed to provide an institutional buffer against legislative overreach. In South Africa, the interim constitutional arrangement was designed to share power for five years, while a more lasting arrangement could be negotiated. Within that time period, the interim government was required to cede power to a more formal constitution that could only be implemented if deemed faithful to the original negotiated limits on the new state. Moreover, the National Assembly, required by Principle VIII of the Interim Constitution to be selected through proportional representation, would also serve as the formal drafting body for the final Constitution. As a result, the final Constitution would have two critical features. First, it would bear a democratic legitimacy that could not be claimed by a negotiated compromise among political leaders, no matter how much de facto authority they could muster. Second, the interim Principles of the Constitution, rather than the formalities of power-sharing, could serve to assuage minority concerns over the limits of majoritarianism.

South Africa innovated in two significant ways in its constitutional formation. First, it divided the process of negotiating the political accords from the final step of constitutional adoption. In some real sense, the functional Constitution of South Africa was the 34 Principles that emerged from the original Kempton Park negotiations between the ANC and the NP. These Principles represented the negotiated accord and enshrined not only the transition from apartheid but the political and institutional protections demanded by the NP negotiators. Second, the transition accords required a process of popular engagement in creating the exact form of constitutional governance through a popularly elected constituent assembly. That resulting draft was broadly communicated to the public prior to its presentation to President Mandela for signature. The two phases of the process were tied institutionally by the Constitutional Court. No final constitution could go into effect until and unless the Court certified that it was true to the previously negotiated 34 Principles.

While the tension between a negotiated accord and popular approval of a constitution was hardly a new problem in South Africa, the use of the nascent

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5 S. AFR. (INTERIM) CONST., 1993 ch. 5, § 71.
6 S. AFR. (INTERIM) CONST., 1993 sched. 4, Principle VIII.
7 S. AFR. (INTERIM) CONST., 1993 ch. 5, § 68.
Comparative Constitutionalism

Constitutional Court was a novel solution. The negotiating parties agreed to the minimum baselines of protection of the interest of all parties. The subsequent process of final constitutional drafting and popular approval would proceed, but only to the extent that the end product met the negotiated commitments of the underlying political accords. The 34 Principles were the agreed-to pact, and the Constitutional Court was enlisted as the institutional commitment that the agreement would be honored.

The task of ensuring compliance was given in its entirety to the Constitutional Court. In effect, once South Africa emerged as a full constitutional democracy, the Constitutional Court would stand as the ultimate arbiter of the Constitution, holding full powers of judicial review. Ironically, however, the Constitutional Court would predate the Constitution and would serve as the final body approving the adoption of the Constitution itself. Hardly customary yet innovative, this arrangement seemed to satisfy the security interests of all parties and was integral to the peaceful transition to constitutional democracy.

The Constitutional Court’s historic moment came in July 1996 when the proposed permanent constitution was submitted for review. While some courts have had to confront the constitutionality of particular amendments to the national charter, no other court has ever had to pass on the suitability of the entire constitutional project. Two months later, in September 1996, the Court handed down its decision, upholding much of the constitutional project, but significantly rejecting a number of key provisions.8 The rejected provisions had in common that they gave too much power to the majoritarian processes, meaning that the Constitution in general, and the Court in particular, served to constrain the political will of the democratic majority.

Viewed in this light, the Court’s first constitutional certification opinion9 draws a distinction between the domains of specific institutional structures, which were left to the constituent assembly process, and the areas of express commitment to minority protections, which were held to a higher level of judicial scrutiny. In the second group were particular provisions of the 34 Principles that restricted the ability of a democratic majority to act, and hence could not be compromised in the ratification process. Among the key provisions struck down for an excess of majoritarian control were the attempt to preclude constitutional review from certain categories of statutes, the absence of federalist safeguards on centralized power, and the lack of supermajoritarian protection for certain components of the Constitution itself,

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8 In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 744 (CC) (S. Afr.).
9 The Court certified an amended proposed constitution three months later. See In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SALR 797 (CC) (S. Afr.).
including the liberty protections of the Bill of Rights. With regard to the latter, the Court found that the proposed constitutional provisions violated the principles of the Interim Constitution by failing to “entrench” the rights in question. Only upon subsequent amendment did the new constitutional period begin in South Africa.

South Africa had the good fortune to enter the constitutional period with a developed industrial base, a well-functioning market economy, and robust institutions of civil society both inside and outside the market arena. The country had a strong legal tradition, however fatally contaminated by the laws of apartheid. Even without a background of judicial review, the concept of a constitutional court acting as a constraint on a genuine parliamentary democracy was easily adapted.

Though no country emerges from a period of conflict or authoritarian rule in identical fashion, with similar social cleavages, or with the same institutional capabilities, the South African experience is nonetheless generalizable at the institutional level. The role of an overseeing constitutional tribunal was to ensure that democracy would not be captured by the first electoral majority, that assurances could be given to the minority of security in property and person, and to provide process integrity in the future electoral processes.

For countries emerging from authoritarian rule or from a crisis born of civil war, the creation of a mediating institution at least offers the promise of democratic renewal. Particularly in deeply riven societies, what emerges is the use of limitations on majority power as a mechanism for stabilizing democratic governance without the reinforcement of ethnic and racial divides created by formal power-sharing.

**III. How the Role is Used in New Constitutional Democracies**

Next is the question of what the constitutional courts actually have done. Here it is necessary to push back against the naïve expectations that democracy was the natural order for societies, absent the imposition of wayward state authority. The historic end of the Cold War brought with it a heralding that the epochal wars of the 20th century had at last been concluded. Democracy was triumphant. Its ideological challengers of fascism and communism were defeated. The market was ascendant in China and the few outliers in North Korea or Cuba were simply rogue states that were ill-suited to resist the demands of their populations for freedom and improved material standards of living. In short order, apartheid fell in South Africa,

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10 This is referred to as the requirement that there be “special procedures involving special majorities” for constitutional amendment and for any alteration of the constitutional guarantees of individual rights. *Id.* at 821.

11 *Id.* at 822.
democracy took root in the Pacific Rim, and Mexico recovered competitive elections. Entire regions were transformed, as with the stabilization of civilian rule in Latin America. Even in sub-Saharan Africa, long the bastion of strongman rule, there was actual rotation in office for the first time in the postcolonial period.

What a heady time it was. Democracy was both inevitable and easy. Just hold elections for head of state—the visible touchstone for any regime claiming democratic legitimacy—and, poof, democracy ensues. Once elections were held, democracy was secure. Every post-Soviet country held at least one election, as did Afghanistan and Iraq after foreign intervention. And upon election of a government, mission accomplished.

Would that it were so. A quarter-century retrospective confirms what should have been apparent all along. Democracy is a complicated interaction between popular sovereignty, political competition, stable institutions of state, vibrant organs of civil society, meaningful political intermediaries and a commitment to the idea that the losers of today have a credible chance to reorganize and perhaps emerge as the winners of tomorrow. Elections are the end product of democratic selection, but not the definition of democracy as such. The great challenge, particularly for the constitutional courts that are the focus here, was how to ensure that the first election was not the last election.

In countries emerging from authoritarian rule or violent conflict, the multiple institutional pillars of democracy are slow to emerge and invariably are unlikely to appear all in tandem. Indeed, in the disorganization that followed the sudden collapse of the Soviet Union, to take but one example, the easiest component to organize was formal elections. Foreign experts, like the Venice Commission of the European Union, could provide oversight and a reasonable integrity to the election itself. After an initial election, the most difficult component to realize, and likely the key to any long-term democratic stability, is the proven ability to have rotation in office. No new democracy could possibly have a track-record of peaceful surrender of power to an electoral challenger. Yet, that is what wise observers, such as Adam Przeworski and his colleagues, have come to define as an operational core of genuine democratic governance.\(^\text{12}\)

Too often, in retrospect, early elections appear as a contest not over democratic governance but over which political or ethnic faction would seize the instrumentalities of the state. In the worst cases, such as the former Soviet Republics of Central Asia, the elections were simply a prelude to the

\(^{12}\) According to Adam Przeworski and his coauthors, there are four threshold requirements for a state to claim democratic pedigree: (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 (Przeworski et al. 2000, 18–27). No new democracy can satisfy the fourth requirement of some experience of incumbents being voted out.
consolidation of new strong-armed power. In some instances, as in Belarus, a weak electoral system was overtaken by the former Communist Party, ill-disguised in its resumption of power. It is hard to credit that any real democratic moment occurred in these countries, simply an interregnum in a cycle of autocratic rule.

In yet another paradox of history, many of these post-Soviet era democracies—Samuel Huntington’s famous “third wave” of democratic surges (Huntington 1991)—faced an unexpected threat. The threat was not the stifling of democracy under the autocratic ancien régime, but the excess of democracy.

Most recently, with the rise of extreme parties in Europe and the anger reflected in Brexit, the medium of democratic excess is a destabilizing populism. But in the initial period of transition, populism tends to be harnessed by the first dominant political party as a means to consolidate power in the hands of executive control. The obstacle to meaningful democracy is not the naked repressive force of authoritarianism but the suffocating control by the party that manages to consolidate its political apparatus in office.

Constitutional courts emerged in country after country in the post-1989 period as an institutional barrier to this initial concentration of political authority. They served to insure that there might be an obstacle to subsequent oppression of a losing minority, to use Tom Ginsburg’s formulation (Ginsburg 2003, 25). The hope is that if political competition lags or fails, these courts can serve as an institutional actor capable of challenging an excessive consolidation of power. But constitutional courts facing consolidated political power are themselves terribly handicapped by their absence of independent levers of power. Once power is truly consolidated, courts are capable of being bypassed as irrelevant institutions, as in Russia today, or subject to replacement of their leading jurists, as in Hungary—or perhaps simply disregarded.

The capacity to defer the risk of political consolidation—what I term a “democratic hedge” (Issacharoff 2015, 224)—is the promise of constitutional courts, a promise to vouchsafe that there will be rotation in office and that all political factions will ultimately benefit from some kind of arbitrated guarantee of a fair process. In the absence of such a mediating institution, the risk is that the first political force to consolidate, typically the executive, will consolidate into the focal center of all state functions, ranging from the economic to the military. These courts serve as an “in institutional barrier to majoritarian abuse” (Sheive 1995, 1221).

What remains is some account of why political forces would entrust this role to a judiciary. 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 continue to be independent and protect the democratic bargain. Neither construct can explain all the nuances of the state-by-state
experiences of the past 25 years of democratic experiences, yet they provide some insight as to why the creation of a strong judicial power may help fill the void in legitimate power after the fall of autocracy.

The first construct is that the presence of an external authority might facilitate the ability of the contending parties for state power to realize an initial that permits a government to be formed. On this view, the ability to turn to an arbiter to resolve complications in implementing the initial accord relieves the negotiating parties of the burden of hammering out all details of how the new government will operate. The key insight is that parties to any contract are better able to reach accord if they can reduce the difficulty of negotiating all details to completion. The presence of an external arbiter promotes efficiency in the bargaining process by allowing the parties more efficiently to reach a solution.

But that is only the first step. A second construct looks not to the question whether a bargain can be reached, but whether the terms might be more just or enduring. The insight is that the presence of a future constitutional arbiter may improve the quality of the solution reached. For this purpose, the existence of a court to rule on imprecise issues concerning the bounds of state authority 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 theory 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 (Shaked and Sutton 1984, 1363).13

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” carry forward the soupçon of commitment without the substance of the agreement. Oftentimes this is the product of the inability to resolve deeply contested issues. 14 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 tax the ability of the parties to reach express understandings. 15

13 See also Binmore, Shaked, and Sutton 1989, 757 (testing the impact of an outside option on bargaining outcomes in a laboratory setting).
14 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 (Kull 1992, 67–9).
15 For a more formal account of how deliberately vague language can be welfare enhancing by mitigating conflict, see Blume and Board 2013 (providing numerous examples of
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.” 16 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 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 comes from Professor Tom 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 (Ginsburg 2003, 30–1). 17 This argument may be pushed even further, perhaps by extension of Richard Pildes’s caution against excessive rigidity in initial constitutional design (see Pildes 2008, 173–5), 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 initial constitutional framework.

Although American constitutional law remains excessively focused on the justification for the power 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 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 Staton and Vanberg 2008.

16 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.”).

17 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 Finkel 2005, 88.
of the original pact, the contemporary approach in new democracies 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 democratic 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 (Ginsburg and Elkins 2009, 1440–1). 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 (Ginsburg and Elkins 2009, 1443).

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.

IV. How Courts Survive Confrontations with Political Power

If courts are indeed to serve as arbiters of democracy against vested power, the question then becomes an issue of how they do that. Certainly any attempt to assert watchdog powers invites confrontation, and courts are notoriously possessed of neither the purse nor the sword (Hamilton 1788). This is a puzzle that defies easy explanation.

An anecdote helps ground the inquiry. In conversations over the years with Justices from the South African Constitutional Court, and with South African scholars, I always come back to a question of historical uncertainty. By the time the South African court entered its famous decision in the Certification case discussed above, the transition to post-apartheid governance had been largely completed. Now secure in his role as head of state, President Mandela had control of the police and the military, had a formidable legislative majority, and possessed an overwhelming sense of authority as the unquestionably dominant figure in South African politics. The initial proposed permanent constitution that emerged from the constituent assembly process may have had defects, but at bottom it was just
not that bad. The question I then ask is why Mandela did not simply disregard the Constitutional Court. Why would political power cede to the first assertion of judicial supremacy?

To ask such a question is to invite a bewildered look of incomprehension. To begin with, Mandela’s personal trajectory—notably his long legal battles against his incarceration on Robben Island—left him with a surprisingly deep respect for the rule of law. But the answer cannot be Mandela alone. During the period of constitutional court ascendancy following 1989, the striking result is that ruling leaders in country after country acceded to the assertion of muscular judicial oversight.

In recent work with Rosalind Dixon (Dixon and Issacharoff), we look to a few examples of confrontation to develop a model of judicial deferral, a strategy that draws from the historic example of *Marbury v. Madison.* To make this point concrete, contrast the polar examples of the Argentine decision, known as the *Acordada,* with the Colombian Constitutional Court’s rejection of President Uribe’s efforts to secure constitutional authority for a third term in prison (Dixon and Issacharoff, 7–9). The *Acordada* emerged from a legal challenge to the governmental authority of the military government of General Uriburu after the 1930 coup. On abstract review, the court found that the possession of governmental power by the military “is a de facto government whose title cannot be disputed judicially . . .” The “recognition” afforded by the Court was seen as necessary to the formalization of the military regime’s ability to act as a state authority. In terms of formalizing judicial powerlessness, the Argentine judgment is simply an overt and extreme expression of the assumption that courts ultimately are adjuncts of political power and helpless before first-order contestations of power. The longstanding American doctrine of non-justiciable “political questions” represents a milder form of judicial self-limitation in the face of matters best entrusted to the political branches.

The *Acordada* fares poorly in the modern era of strong constitutional courts. Increasingly, these courts have assumed superintendence over what the Indian Supreme Court has termed the “basic structures” of democracy. The idea of constitutions enshrining core commitments to democracy is a defining feature of modern constitutionalism. Clearly the era of judicial passivity exemplified by the Argentine withdrawal in the face of military rule

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19 *Acordada* of the National Supreme Judicial Court, Legitimating the 1930 Coup d’Etat. Translation by the author.
poorly translates into the South African context in which a newly created Constitutional Court is asked to assess the validity of the founding constitutional document.

Across the divide is the extreme Colombian Constitutional Court’s confrontation with President Uribe over the question of a constitutional reform that would have permitted a third term in office. As Uribe consolidated power after restoring order beginning in 2002, he sought first one, then another constitutional amendment allowing him to serve a second and then a prospective third term in office (see Posada-Carbó 2011, 138). The Court accepted the first constitutional amendment and Uribe was elected to a second term. However, confronted with a constitutional reform that looked to enshrine a new Latin American caudillo, the Colombian Court issued a forceful short ruling, against a backdrop of hundreds of pages of divided judicial opinions, that directly challenged Uribe and struck down the proposed constitutional amendment as contrary to deeper, though textually unspecified, constitutional principles:

The Court finds that [the proposed amendment] ignores some of the structural axes of the Political Constitution, such as the principle of separation of powers and the system of checks and balances, [and] the rule of alternation in office according to preestablished time periods.23

Courts in other parts of the world, as in Peru with Fujimori or Russia with Yeltsin and Putin, forcibly confronted executive power and were quickly pushed aside. Unlike the Peruvian and Russian courts, the Colombian court prevailed and, in short order, Uribe stepped aside, new elections followed, and Colombia institutionalized the rotation in office, emblematic of healthy democratic governance.

Dixon and I suggest that neither the older Argentine model of abdication nor the headlong confrontation of Colombia is likely to provide guidance to new constitutional courts—and neither captures how courts protect democracy against excessive political power. Most typically, courts avoid a frontal confrontation with political powers, particularly on the ultimate issue of who should rule. We refer to this as the strategy of “judicial deferral,” a process of accreting judicial authority in a fashion that does not directly engage the political branches. In some cases, the process of deferral is built in to constitutional design, what we term “first-order deferral.” For example, the Canadian notwithstanding clause or the European Community powers of derogation each give national political branches the power to set aside contrary judicial rulings—raising the political consequences of doing so

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23 Corte Constitucional [C.C.] [Constitutional Court], septiembre 8, 2010, Sentencia C-141/10, Por medio de la cual se decide sobre la constitucionalidad de la ley 1354 de 2009, de convocatoria a un referendo constitucional (translation by author).
without challenging the authority of the courts to engage the constitutional questions. The Canadian Supreme Court’s ability to offer an “appropriate and just” remedy under the Canadian Charter of Rights and Freedoms also entails the ability to delay enforcement “until Parliament or the provincial legislature has had an opportunity to fill the void” created by any declaration of constitutional infirmity. Such first-order deferral also promotes dialogue between the judiciary and the political branches seeking an accommodation between expediency and long-term principle.

More intriguing is what we term the process of “second-order deferral,” or more brusquely, the “Marbury strategy.” Unlike first-order deferral, this is a court-created approach that allows courts to assert their constitutional authority in a fashion that does not force a frontal confrontation with the political branches. In Marbury itself, the US Supreme Court announced its constitutional authority to review legislation and declare it invalid, while holding—under the facts of the case—that it had no warrant to disrupt the decisions of the Jefferson administration. The contrast between broad pronouncements of judicial authority and circumspect rulings continues to this day in the US, even though the power of judicial review is by now well established (cf. Sunstein 2001). Deferral shifts the burden of confrontation from a power reach by the judiciary to a relatively unthreatening claim of reserved authority by a seemingly pliant judiciary. Delay favors the entrenchment of the claimed power of review, either because of institutional accommodation to the judicial role, or because other institutional actors ranging from civil society to the political opposition may rally to the support of the judiciary.

Considered from the vantage point of the Marbury strategy, even Uribe’s decision to back down in the fact of the Colombian Constitutional Court appears more nuanced. Recall that the key Colombian confrontation came not on Uribe’s first attempt to amend the constitution to his benefit, but on the second. The first had come when Uribe sought to extend his electoral mandate to a second term, something that was prohibited under the Colombian Constitution. Yet Uribe was enormously popular for the success of his program of “democratic security” in curbing the power of narco-terrorism, confronting the Revolutionary Armed Forces of Colombia (FARC), and restoring domestic order. The result was a substantial decline in the rate of murder and kidnapping across the country, and Uribe’s popularity soared (see Posada-Carbó 2011, 138).

When confronted with a constitutional amendment enabling a second term, the Colombian Court could easily have hesitated and found the entire matter of constitutional amendment non-justiciable, or perhaps only justiciable as to the procedures invoked for the amendment process. But the Court found a different path that allowed a broader assertion of judicial

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authority over the core of democratic governance, while at the same time avoiding direct confrontation with the broad mandate enjoyed by Uribe. The Court held that even a constitutional amendment could be judicially reviewed to ensure that it was at bottom in conformity with the constitutional design, and not simply the product of a supermajoritarian overthrow of a constitutional order.\textsuperscript{25} Even the Constitution’s grant of power of amendment to Congress could be checked by the broader contours of constitutional authority, a strategy reminiscent of the Indian Supreme Court’s articulation of the basic structures doctrine. There too the Indian Court announced its expansive powers of constitutional review, including the ability to strike down procedurally-proper constitutional amendments as violative of a deeper commitment to democracy, in the course of holding the actual proposed constitutional amendment \textit{sub judice} to be \textit{constitutional}.

With regard to the specific question of Uribe’s ability to seek a second term, the Court found that an eight-year term limit for the Presidency did not alter the defining aspects of the Constitution, which establish a “social and democratic state.” Rather, it held that such a change simply “modified” one element of its prior operation, or amended its specific mode of operation, in a manner consistent with Congress’ power of amendment. Uribe was therefore free to run, and indeed was the first re-elected Colombian president in 2006.

By the time of the proposed second constitutional amendment, the Court’s doctrine had germinated into a powerful constraint on constitutional change. In its dramatic confrontation with Uribe’s claim for a third term, the Court could now decree that three terms effectuated a substantive alteration of the Constitution. The Court could assert that multiple terms altered the constitutional structure of limited executive power by allowing a single president to name members of the central bank, the attorney general, the ombudsman, the chief prosecutor, and many members of the Constitutional Court itself, in a way that was not the case given an eight-year term limit. At a minimum, the Court had sown the seeds of its authority well before the final confrontation with Uribe.

Second-order deferral, the \textit{Marbury} strategy of assertion of judicial capacity but holding in abeyance its realization, appears with remarkable frequency across the newly assertive apex courts of the post-World War II period. Even the wellspring of modern constitutional courts, the German Federal Constitutional Court, developed its famous doctrine of proportionality review cautiously, in a case that did not challenge state authority directly.

As Niels Petersen explains, the Court awaited a test case that allowed it to test the boundaries of judicial authority with little risk of provoking a

confrontation with the political branches (Peterson 2015, 67). In the Lüth decision of 1958, however, the Court found an ideal vehicle for introducing its “balancing framework and develop[ing] it without undermining its own legitimacy” (Peterson 2015, 72). At immediate issue was a dispute concerning a Nazi propagandist whose efforts to rehabilitate himself provoked a boycott campaign. A state court had found against Lüth, the Hamburg-based leader of the boycott, and enjoined all further efforts to organize a boycott (Quint 1989, 253–4).

Proportionality review emerged from Lüth’s challenge that the injunction was a violation of his Article 5 freedom of expression.26 Though there was no state action at issue, the Court held that the Basic Law “erects an objective system of values in its section on basic rights,”27 thus protecting freedom of expression not only from state but also private threat,28 which required protection of Lüth. For our purposes, what is critical is that there was no threat to governmental power presented in the case, particularly given the strong anti-Nazi mandate of the postwar Federal Republic. As Petersen rightly concludes, the Court managed to expand its power of review without any threat to the legislature or executive: the Court selected “a case that catered to the suspicion against the general judiciary. Lüth was thus ideal for claiming the review authority and to introduce balancing as a doctrinal tool” (Peterson 2015, 72).

More important than the sheer number of cases falling into the deferral category is the significance of the cases themselves. The key exposition of the basic structures doctrine in India comes with Minerva Mills Ltd. v. India29 in 1981 (see Issacharoff 2015, 162–3),30 a constitutional property challenge to the government seizure of underperforming industries. The Indian constitution was freely amended by Congress and included the ability to remove certain congressional enactments from judicial review altogether. At issue in Minerva Mills was a specific statutory authorization for the seizure of mills that also removed constitutional protection from nationalizations of

28 Quint 1989, 262 (“If the goal of the ‘objective’ value is to encourage the optimal amount of speech for the good of society, that value can be significantly impaired by repression of speech whether the repression comes from the state or from private individuals or groups.”).
29 (1981) 1 S.C.R. 206 (Supreme Court of India).
30 For an in-depth account for the Court’s “basic structure doctrine” jurisprudence from the self-proclaimed “standpoint that the ‘basic structure’ doctrine is anti-democratic and counter-majoritarian in nature,” see Ramachandran 2000, 107.
this sort—by demoting the right to property from its status as a fundamental right.\textsuperscript{31} Congress placed it outside the scope of judicial review.

In Solomonic fashion, the Court asserted its authority to challenge government action—a matter of tremendous importance following the period of Emergency Rule in the 1970s—while at the same time allowing the seizure to go forward. Under the Court’s rationale, there remained a residual basis of constitutional review of the basic structures of democracy, even in the face of constitutional amendment, but that under the particulars of the case the form of property right at issue was not outside the scope of congressional regulation (Mate 2014a, 467–77). As Dixon and I sum this up, the Supreme Court won, the government lost, but the owners of Minerva Mills got nothing in the process (Austin 1966, 507 n.25). Rather than an act of usurpation, the opinion gathered “strong approval” from elites and the media for whom the judiciary was now a strong limiting partner against governmental excess (Mate 2014b, 375).

A final example shows the force of this strategy. Israel at this point has a strong tradition of constitutional review by its Supreme Court. Yet in the absence of a written constitutional text, the authority for judicial review is power ascribed to a statutory Basic Law. The Supreme Court has invested the Basic Law with both the force and presumed immutability of a constitution and, on the basis of the need to implement the Basic Law, has asserted a strong form of judicial review powers. The leading case imparting to the Basic Law (and the Court) this overarching authority was United Mizrahi Bank Ltd. v. Migdal Cooperative Village,\textsuperscript{32} a decision in which the Supreme Court forcefully asserted “that it viewed the Basic Laws as Israel’s formal Constitution and that, as a result, it had the power of judicial review over primary legislation” (Weill 2012, 499). Yet here, as in India, a challenge to property rights under the Basic Law failed and the Israeli Court, again as in India, asserted the doctrine of structural guarantees of democracy in a case that upheld challenged legislation.

The creation of apex courts vested with power over the constitution is clearly an invitation to judicial review of the outputs of the political branches. Wojciech Sadursky describes a “strategy of reassurance” that courts in mature democratic societies can offer that they are part of a joint enterprise with the political branches.\textsuperscript{33} Such judicial authority easily coexists with democracy, whatever the momentary countermajoritarian tensions. But in nascent or fragile democracies, the stakes seem much higher and the capabilities of all branches of government are in flux. Courts tread carefully

\textsuperscript{31} The Constitution (Forty-Fourth Amendment) Act (1978); see also Austin 1966, 506.

\textsuperscript{32} 49(4) PD 221 [1995] (Supreme Court of Israel).

\textsuperscript{33} See Sadurski 1987 (describing a strategy of forcefully asserting reasons that would seemingly lead to the opposite of the actual holding).
in such circumstances and may find the steady accretion of authority to allow the broadest authority to protect against political collapse.

V. The Aims of Constitutional Overview of Democracy.

Over the past 20 years or so, a group of public law scholars in the United States embarked upon a project of resuscitating a structural look at constitutional law not organized around the presumed centrality of rights discourse. In particular, one focus was the law governing the political process, an area that had been parcelized doctrinally among laws governing freedom of expression, freedom from discrimination and freedom of association, with little connective tissue about the proper operation of democratic self-government. One attempt to reconfigure the legal terrain came with the publication of The Law of Democracy, by Pamela Karlan, Richard Pildes and myself. The aim was to organize the extensive law that had ensnared the judiciary in the “political thicket” of policing democratic politics.

In turn, the inquiry focused more and more on the question of the competitive balance that keeps democracy accountable to the electorate. Drawing on prior work ranging from Joseph Schumpeter to John Hart Ely, this approach to constitutional law focused on the role of constitutional constraints in maintaining democracy, a process of repeated contestation for governmental power. In turn, the approach cast a suspicious eye on the various mechanisms by which those with power were likely to make challenges more difficult, whether by restricting the money or organization available to challengers, or frustrating the capacity of new entrants to politics to appear on the ballot, or simply denying the franchise to disfavored groups or political forces.

Once constitutional law was redirected to a focus on the democratic process, it provided a platform for a comparative look at the relation between constitutionalism and democracy. Comparative constitutional law could then incorporate a discernible theoretical inquiry into how law and the judiciary as institutions stabilize democratic governance. One need only recall Philip Bobbitt’s caustic account of the way comparative constitutional law had developed in the American academy:

Comparative constitutional law courses are usually paralyzingly boring; they typically consist of arid comparisons of the provisions of different written constitutions—which ones protect trial by jury, which ones have a bicameral legislature, and so forth . . . such comparative constitutional law courses . . . are lifeless because they lack the animating aspect of the subject being studied.
Approached as a question of the relation of constitutionalism to democracy, the post-Soviet experience allows a final question: how likely is the experiment in court-supervised constitutional democracy to succeed? Despite the provenance for the new form of court-enforced constitutionalism in the need to watch over the democratic process, the reality is more complicated. In many instances courts back away from this role, fearing wisely or not that intervening in the name of democratic legitimacy threatens direct conflict with political powers. The question then arises of what happens when courts are not capable of assuming a protective role in nascent democracies, or lose the will to continue doing so after the initial transition from authoritarian rule.

Here, South Africa again serves as an important illustration and offers a sobering cautionary note. Of particular concern for present purposes is the difficult role for courts in the face of consolidated power. Simply put, the ANC of today is not what it was under Nelson Mandela. The leadership of the revolutionary movement soon became the uncontested heads of the new political order, well accustomed to almost unchallenged political rule. ANC leadership became synonymous with black-majority rule. As expressed by one South African journalist, “[i]n the intervening years the A.N.C. has grown into something of a religion; it is the only thing that several generations, old and young, associate with the liberation of blacks from descendants of white settlers” (Madondo 2014). With that authority came the temptation to stifle political challenges, especially as time passed and the founding political generation faded from the scene.

Dominant party democracy is a crisis that afflicts many new states. In such circumstances, there are elections that decide who will assume governmental office, and these elections may even be relatively free of fraud or violence. Yet, such elections in reality may be desultory affairs in which there is only one real contender for office and in which the results are a foregone conclusion. Hollowed out democracy, devoid of electoral competition, introduces its own set of challenges.

The South African court, beginning with the historic Certification decision of 1996, ushered in a period of what Bruce Ackerman has termed “constrained democracy.” In that role, the Court was created as a central institutional guarantor of the orderly transition from apartheid to competitive elections open to all South Africans. As the ANC consolidated power, however, the Constitutional Court’s role changed. The task of securing a peaceful transition ended, and in its place a new challenge was presented by the lack of political challenge to one-party rule. Increasingly, the key issues taken up by the Court were presented as questions of broad interpretation of constitutional protections for minority parties or of the independence of prosecutors with authority over official corruption. In each instance, the
South African court was called on to assume a role beyond enabling the transition to a multiethnic constitutional democracy. Instead, the Court confronted the effects of the stranglehold on power of the triumphant ANC.

One example highlights the problem. The Constitution contained an “antidefection” principle in addition to the protections of proportional representation, under which a member of Parliament would have to resign if he or she attempted to switch parties. In principle, there is a logic to antidefection provisions in election systems in which voters choose a party slate and then seats are apportioned to reflect the votes each slate received. No individual legislator can claim an individual electoral mandate that could stand independent of the party slate that was the initial electoral vehicle. Ease of defection undermines the creation of viable political parties and is an invitation to corrupt offers to draw legislators across the aisle. In Brazil, party switching is endemic, accounting for at times a quarter of the Chamber of Deputies, and is closely tied to ongoing corruption scandals (see Desposato 2006).

In the particulars of South Africa, however, the antidefection provision was something more. The provision was an express subject of negotiations in the transition from apartheid because of the perception from the beginning of the transition process that the ANC might emerge too powerful. Antidefection obstacles reflected the fear that the likely parliamentary majority of the 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.

Unfortunately, once in office, the ANC sought to consolidate its parliamentary majority by repealing the antidefection provision. It forced through new legislation allowing defection, but only if at least ten percent of the party’s legislative delegation defected at once. In practice, a ten percent threshold would pose an insurmountable hurdle to defections from the ANC, but would leave defection a matter of individual choice for any party with less than ten members of parliament, and allow the ANC to pick off individual legislators one by one (Fombad 2007, 32).

The floor-crossing constitutional amendment prompted a constitutional challenge, this time a claim that the amendment would violate the principles of party integrity and separation of powers inherent in the entire

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34 In re Certification, 1996 (4) SALR at 829 (considering whether the antideflection principle was unconstitutional) (Supreme Court of South Africa).
35 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 Palmer 2006, 610 and n.64.
Comparative Constitutionalism

Certainly defection was not the make-or-break issue in South African constitutional governance, but it was a signal point on the road to one-party domination. The Court did not confront the ANC and rejected a constitutional challenge on the grounds that no individual voter could claim a right of faithful representation after the election. Had the Court sought to intercede, there were textual grounds such as the constitutional guarantee of effective minority party participation consistent with the aims of democracy that would have allowed it to do so. As it happened, floor-crossing proved to destabilize the ANC parliamentary delegations because of the need to renegotiate seniority and other perquisites, and it was ultimately abandoned politically.

If constitutional design is seen as furthering the aims of democratic self-government, the South African experience with the consolidation of the ANC illustrates a broader problem. South Africa began the post-apartheid period with tightly ordered power-sharing, including rotation in office among the various political parties. This was the classic consociationalist response to the problem of potential winner-take-all elections in divided societies. Under its thoughtful transition program, formally divided power was to recede in favor of democratic elections, but with alternative guarantees of constraint on what the majority could do once in power. Constitutionalism provides the critical limitations on how political power may be exercised. As Daryl Levinson well captures this core feature of constitutional rule:

Constitutionalism is the project of creating, allocating, and constraining state power. Doing any of these things successfully requires constitutional designers and interpreters to determine how power should best be distributed among political actors and institutions, how much power these actors and institutions in fact possess, and how power shifts in response to legal and political arrangements and interventions.

(Levinson 2016, 33.) Following this view, the simpler consociational models from Ceylon or Cyprus or Lebanon were one strain of constitutionalism that sought to constrain the use of state power to inhibit ethnic or religious strife. Formalized power sharing of this simple form proved unable to withstand changed demands for power over time, or simply the shifting balance between the constituent groups. Current constitutional models give wider berth to democratic choice. The head of state is either the largest vote-getter

38 Id. at 516.
or the head of the largest parliamentary bloc, not the preassigned representative of one community or another.

Nonetheless, the changed form of allocating and constraining state power should not obscure the same core purpose of allowing both democratic choice and a guarantee of limits on the exercise of state authority. What has changed is the focus on constitutional limits on democratic power, and on constitutional courts to enforce the boundaries of the new political order. The introduction of courts invariably introduces a rights dimension to the expanded scope of constitutional adjudication. But the jurisprudential import of rights claims should not obscure the institutional role that constitutional courts are called upon to perform in recent constitutional design. The jurisprudence may sound more or less in the language of rights, but the role is a structural guarantee of the stability of democracy, particularly in fractured societies.

Ultimately, the question presented is one of institutional design. It is not a question of the optimal arrangement for all democratic societies at all times, but a matter of survival for democracies confronting the task of stabilizing contested claims to power. Recall that most of these democracies are created in countries that fail John Stuart Mill’s admonition that democracy must presuppose a common language and culture. To the contrary, democracy in the modern era does not follow from the creation of common national enterprise, but often is the effort to what would more properly be the preconditions for democratic governance.

The new and weak democracies of the late 20th century turned to a new institutional design to shore up their vulnerable rule. A quarter century after the new wave of democracies hit the world stage, the historical account remains incomplete. In some areas, such as the former Soviet Republics of Central Asia, democracy had little traction and the attempts ceded to authoritarian rule relatively quickly. In other parts, such as Ukraine and even Russia itself, the history was more contested, even if the prospects look poor.

Even so, there remain more people living under some form of democratic rule than a quarter century ago, and certainly more than at any time before that. Contested elections for power are found in previously unwelcoming places, including Africa, Central America, and the Pacific Rim. Characteristically these are countries without strong civil society institutions, without a developed sense of national solidarity and without a tradition of core liberties of speech or association. These were hardly the optimal conditions for democracy to blossom.

Not surprisingly, the historical ledger reveals mixed results. Whether courts can ultimately stabilize democratic governance in fragile democracies has yet to be determined. The key role assigned to a new institutional actor, the constitutional court, is one of the signal innovations of the post-1989
wave of new democracies. While the final accounting is yet to be written, the lesson thus far is that entrusting these courts with stewardship over the democratic enterprise was certainly a valiant experiment.

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