Constitutional Courts and Consolidated Power

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Constitutional Courts and Consolidated Power

Abstract: Many new democracies exhibit a disturbing lack of electoral competition. All too often, the first party to hold office creates a network of power and patronage that chokes off meaningful political challenge. These strong party democracies, with power often being held by the inheritors of the political mantle of those that led the opposition to prior authoritarian rule, exhibit a tendency toward the three “C’s” of associated with the lack of accountability: clientelism, cronyism, and corruption. Such strong-party regimes and their associated pathologies present relatively new constitutional courts with a distinct set of controversies that necessarily bring the judiciary into conflict with consolidating political power.

This article explores the form that judicial responses to the excesses of political dominance might take. Three courts are selected as exemplars of such responses. In the first instance, the Colombian Constitutional Court repudiated the attempt of President Uribe to...
amend the constitution to permit a third term in office, despite the lack of reasoning to support the rejection of a largely procedurally proper constitutional amendment. In the second, the South African Constitutional Court has scrupulously avoided any frontal confrontation with the current African National Congress government, instead casting its repeated rejection of government efforts to insulate itself from accountability in narrow procedural rulings or in rulings based on other, non-politically charged sources of law. Finally, there is the Thai Constitutional Court which, while providing the strongest jurisprudential defense of its intervention, appears an active ally of one partisan camp as the country hovers on the brink of civil war.

Rather than offer any off-the-rack solution for the difficult realm of constitutional courts as democracy falters, this Article examines the relation between the issues presented to such courts and the fundamental absence of electoral challenge and accountability. To the extent these courts navigate this difficult terrain, the Article concludes, the decisive feature will likely be the ability to contribute to the establishment of a competitive electoral system able to constrain single-party dominance.
Twenty-five years have now passed since the fall of the Berlin Wall. The historic end of the Cold War brought with it a triumphal 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.

With the fall of the Soviet Union, the proxy wars of the great powers ended, leaving the client states of East and West vulnerable to popular demands for liberty and democratic rule. In short order, apartheid fell in South Africa, 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.

History was on the march, and this was a glorious Whiggish account, with perhaps a touch of Dr. Pangloss thrown in for good measure. The Hegelian unfolding of events had revealed the “end of history,” as proclaimed by Francis Fukuyama:
What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.\footnote{Francis Fukuyama, \textit{The End of History?}, \textsc{The Nat’l Interest}, Summer, 1989, at 4.}

Perhaps the rapid collapse of the Soviet Union invited such broad claims. The new democratic period seemed to invite precipitate popular upheavals in the name of democracy and its associated liberties. The Rose Revolution in Georgia led to the Orange Revolution in Ukraine, which led to the Cedar Revolution in Lebanon, and ultimately to the most improbable democratic gain, the Arab Spring itself. Surely, China was next.

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.

Certainly there were cautionary signals along the way. Resurgent Islamic parties in the Middle East and Turkey presented uncertain commitments to democracy, even as they enjoyed the benefits of electoral politics to compete for state power. Terrorism complicated the picture as the demands for national security compromised the liberal openness associated with the robust give and take of electoral politics. Economic crises provoked
an anti-liberalization backlash in Latin America even before the Euro crisis and the global economic downturn of the post-2008 period. But these could all be considered exogenous to democracy itself. Religious identity, even religiously-motivated terrorism, and perhaps even poorly managed fiscal policy, all were matters of statecraft to be managed by democratic governments. Surely, they could not—or must not—call into question the fundamentals of the great fin-de-siècle democratic legacy.

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. The most difficult to realize, and likely the key to any long-term democratic stability, would be 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 Praworski and his colleagues, have come to define as an operational core of genuine democratic governance.2

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 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.

Of more interest are the countries that emerged from the post-1989 period with incomplete institutions of democratic transition. Some of these,

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2 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. ADAM PRZEWORSKI, MICHAEL E. ALVAREZ, JOSÉ ANTONIO CHEIBUB & FERNANDO LIMONGI, DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 18–27 (2000). No new democracy can satisfy the fourth requirement of some experience of incumbents being voted out.
like Poland and the Czech Republic, are the success stories of Europe. Their counterparts are found in South Korea, in Mexico, in Colombia, in countries that struggle through the creation of a responsible political system, often in the face of economic dislocations and severe challenges from sinister forces such as narcoterrorism.

In yet another paradox of history, many of these post-Soviet era democracies, Samuel Huntington’s famous “third wave” of democratic surges,³ face an unexpected threat. The threat is not the stifling of democracy under the autocratic ancien régime, but the excess of democracy. Better put, the risk is the excessive consolidation of democratic power by an increasingly dominant party. The obstacle to electoral competition and rotation in office is not the fraud or violence associated with tyrannical regimes, but the suffocating control by the party that manages to consolidate its political apparatus in office. As Sujit Choudhry well puts the question in identifying the problem of “dominant party democracies,” what happens when “one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud?”⁴

Democracy without electoral uncertainty is precarious. Excessive consolidation of power is impeded by periodic elections, mixed constituencies for upper and lower chambers of bicameral legislatures, and

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federalism constraints on central power. Each introduces an entry point for the political opposition to mobilize and resist an all-or-nothing claim to authority by a numerical majority at any one point in time. Authoritarian rule is often accompanied by plebiscitary approbation, as in Germany and Italy in the 1920s and 1930s, or in Crimea in 2014. The plebiscitary model short circuits any role for political parties, for legislative processes, for intermediary organizations. In the strong-party state, the plebiscite is an extreme form of formal democratic choice without meaningful contestation for power. But elections under a completely controlling party, even if untainted by rampant fraud or violence, are nothing more than an up or down vote without a meaningful alternative. In the absence of meaningful forms of electoral competition, the single-party elections are, in effect, plebiscites on complete control by one institutional actor.

The post-1989 democracies introduced a distinct source of constitutional authority that could withstand, in many instances, the initial concentration of political authority. A defining feature of all the new democracies is the creation of a strong form of constitutional court review of the political process. Where political competition lags or fails, these courts are often the only institutional actor capable of challenging an excessive consolidation of power. Constitutional courts provide a necessary forum for challenges to single-party domination, particularly when it compromises the

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institutional integrity of democracy or leads to what David Landau terms “abusive constitutionalism.”6 But constitutional courts facing consolidated political power are themselves terribly handicapped by their absence of power over the sword or the purse. 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 simply disregarded.

The subject of present inquiry is how courts should respond when facing serious challenges to democratic contestation coming from an elected dominant party. In such circumstances, courts are unlikely to have support from strong institutional actors that can rival the dominant party. The problem is creating a basis for judicial challenge to legislative or constitutional initiatives that have the form of democratic legitimacy but threaten the capacity for democratic contestation, the problem of the “democratic threat to democratic transitions,” as I described the current dilemmas in South Africa. To the extent that courts highlight the central threat to democracy posed by concentrated power, they can typically invoke the highest aspirations of the constitutional order. But such appeals to first-order principles puts them on a stronger collision course with the governing authorities. On the other hand, to the extent that courts evade the central questions of constitutional limits on power, they risk rendering trivial

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6 David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189, 195-200 (defining and explaining “abusive constitutionalism”).
judgments that may be circumvented as lacking any sustaining legitimacy. The prudent course of non-confrontation may simply postpone the inevitable reckoning with excess power, likely at a time when dominant party authority is even more entrenched.

What follows is not a survey of the full range of judicial responses but examples of three approaches. First, there is the forceful declaration of result with little reasoning, exemplified by the Colombian Constitutional Court. The second is the fully reasoned, but politically problematic response of the Thai Constitutional Court. Finally, there is the non-confrontational partial reasoning of the South African Constitutional Court. All three had to engage efforts at consolidated power, and all three responded within recognizable judicial strategies. While each is likely the product of nuanced local circumstances, it is possible to examine the judicial responses as products of a similar reaction to the failure of other institutional checks on single-party dominance. It would be fanciful to claim that there is a single judicial response that must be taken, or even that is more likely to work in any given national arena. But the question of how to respond to dominant power is becoming a defining issue for courts in the period after the initial democratic transition.

I. COUNTERMAJORITARIAN COURTS
The early consolidation of power may seem inevitable where a political party draws its authority from a successful triumph in revolutionizing social relations. The key examples are the Partido Revolucionario Institucional in Mexico and the African National Congress in South Africa. Each could claim the legacy of a democratic mobilization that allowed the mass of the society its first opportunity at self-governance. Another such example is the tremendous authority of President Álvaro Uribe of Colombia beginning in 2002. Under Uribe’s stewardship, Colombia consolidated “democratic security” that permitted the restoration of civilian governmental control over a country ravaged by drug lords and insurrectionary guerilla fighters. In such cases, power consolidated readily around the heroic image of a country rescued from its oppressive past.

But the early development of a dominant party need not result from its role in the transition to civilian or democratic rule. It can also result from the early hold of the first dominant party on the state apparatus and the ability to leverage government jobs, public works contracts, or simply cronyism into dependence on office holders for economic advantage. Such consolidated power is an ever-present risk in countries thrown suddenly into contested claims for power where, again using Samuel Huntington’s formulation,

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“participation in politics has outrun the institutionalization of politics.”

The result is to “intensely politicize all areas of organized collective existence,” but without the genuine political competition that characterizes stable democratic governance. New democracies lack institutions with a credible commitment to “policies that serve the general welfare.” In particular, political parties cannot organize politics beyond the immediate advancement of narrow economic claims upon the state; indeed, “the shaky state of political parties contributes significantly to the inadequate aggregation and representation of interests which is such a debilitating problem in so many new and struggling democracies.”

Alongside underdeveloped political institutions, the post-Soviet wave of democracies quick-started another, more recent institutional actor into the constitutional mix. Essentially all the new constitutional democracies entrust constitutional courts with the power to discipline erroneous exercises of state authority. In most instances, the difficulty comes from a too-strong executive, privileged by the greater difficulty of organizing meaningful parliamentary opposition, but also benefited by the ease of assuming prerogative power in a polity accustomed to authoritarian rule.

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8 Samuel P. Huntington, Political Order in Changing Societies 82 (1968). For Huntington, this led to a style of politics he termed “praetorian.” Id. at 80.
In other pieces, I have given considerable attention to the emergence of constitutional courts as an intermediary in newly formed fragile democracies. Constitutional courts mediate uncertain allocations of power and thwart excessive consolidations of power that threaten delicate balances amid the ethnic, religious, and linguistic divides that characterize almost all of the nascent efforts at democracy. These courts were modeled on the postwar German Court in standing apart from the ordinary judiciary and by having their jurisdiction directed to oversight of the political branches. Following the German Constitutional Court’s lead, these courts had supervisory powers designed to ensure that guarantees of rights and continued public engagement in governance were not abrogated—regardless of the political claims to electoral support.

Early in the post-Soviet experience, constitutional courts had decisive impacts on the stabilization of democratic governance in general, and in particular on thwarting the excessive concentration of power. The examples are many, but a few hallmarks should suffice for present purposes. The most prominent may well be the South African Constitutional Court in upholding core commitments to limited government, entrenched liberties, and separation of powers. Famously, in the Certification Decision, that Court struck down the initial Mandela-era constitution as insufficiently faithful

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12See, e.g., Issacharoff, Hedging, supra note 5; Samuel Issacharoff, Constitutionalizing Democracy in Fractured Societies, 82 TEX. L. REV. 1861 (2004).  
to the principles of the pacted transition from apartheid—in effect, the unconstitutionality of the constitution itself. Of most importance, the Court found many rights guarantees and limitations on centralized political power to be insufficiently “entrenched” in that they were subject to amendment or override by simple parliamentary majorities.14

Poland provides an important lesson in early court confrontation of the increasingly authoritarian regime of the late President Lech Kaczynski and his identical twin brother, Prime Minister Jaroslaw Kaczynski. In 2006, the Polish government imposed a lustration law that imposed a ten-year ban on office holding for anyone who could not explain how his or her name came to be on any government “lists” from the communist regime. Given the realities of the Soviet-era police state, just about anyone could be compromised by such a loose definition of collaboration. 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.15

The Polish Constitutional Court turned down what was widely seen as an effort by the Kaczynski brothers to see their opponents “purged from

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14 Issacharoff, *Constitutionalizing Democracy*, supra note 123 at 1880 (discussing the *In re Certification* decision).
15 See Joanna Rohozińska, *Struggling with the Past*, CENT. EUR. REV. (Sept. 11, 2000), http://www.ce-review.org/00/30/rohozinska30.html.
offices and replaced by their own loyalists.\textsuperscript{16} The Court limited the permissible scope of lustration laws:

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[m]easures to dismantle the heritage of the former communist totalitarian systems may remain in agreement with the ideas of a democratic state ruled by law, provided that the measures, while conforming to the principles of a democratic state ruled by law, will be directed against situations threatening the fundamental human rights or the process of democratization.\textsuperscript{17}
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\end{quote}

To survive constitutional scrutiny, the Court held, lustration laws should protect democracy from a return to authoritarian reign, not stymie political competition. Second, and even more suspect, was the lustration law’s retroactive effect in removing elected public officials from office. There, the court stressed that such an influence on these rights would make “illusory” the right to vote and the right to run for office and would act as a dismantling of the “principle of the sovereignty of the Polish People.” 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, deeming

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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.” 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.”

The range of court engagements is also significant, sometimes undertaken by other apex courts. The Ukrainian Supreme Court stood up to efforts by then Prime Minister Viktor Yanukovych to steal the presidential election in 2004. The attempted power-grab prompted the Orange Revolution of late 2004, and the crowning moment was the decision of the Court to invalidate the first announced election results and order a new election, a decisive act that allowed Viktor Yushchenko to prevail as the legitimately elected president.

In Mexico, the emergence of an independent electoral commission and the creation of the Mexican Supreme Electoral Tribunal in the 1990s were critical developments in moving the country from the one-party stranglehold under the Partido Revolucionario Institucional, the PRI. The Electoral

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Tribunal now hears upwards of 8,000 cases a year on matters ranging from local electoral practices to disputes over campaign expenditures under Mexico’s system of public finance. Under the Court’s tutelage, Mexico has now had multiple presidential elections in which one party was able to displace the incumbent power.\(^{20}\)

Any catalogue of early-stage constitutional court engagements with the integrity of a fragile democratic process would certainly go on for quite some time. Whether in South Korea,\(^{21}\) Taiwan,\(^{22}\) Eastern Europe or even Mongolia,\(^{23}\) the pattern of confrontations with excessive political power is a constant refrain emerging from the decisions of these courts. As the current events in Ukraine show, however, the consolidation of democracy is a contested battleground, and court intervention is no guarantee of that democratic contestation will take hold or that the electoral process would not be used to suffocate political competition. The question then becomes how


courts engage democratic deficits not at the early stages of democracy where power has not yet settled, but down the road when elections are buttressing excessive concentrations of power.

II. COURTS IN THE BREACH

Democracy is, first and foremost, the ability to contest established governmental authority and claim a mandate for a new ruling coalition, one that in turn will be subject to subsequent contestation by new rivals vying for the support of the electorate.

The dominant exposition of democracy as the perpetual competition for state authority comes with the work of Joseph Schumpeter, an Austrian economist who briefly served as Minister of Finance in Austria before ultimately settling into an academic career at Harvard. In his classic exposition in *Capitalism, Socialism and Democracy*, Schumpeter challenged all claims that democracy turned on either the aggregation of pre-existing voter preferences or the participatory deliberation of the populace. Rather, representative democracy necessarily entailed a competition for office by political elites, who would in turn educate, cajole, and entice the citizens to vote for them. As Schumpeter defined the task, “the democratic method is that institutional arrangement for arriving at political decisions in which
individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”

Two elements of democracy stand out in this theory. First, the key to legitimacy is the presence of a competitive struggle for support. It is the fact of competition that assures both accountability of the political elites and legitimacy in the subsequent exercise of state authority. Second, the judgments of the people are not based on their pre-existing preferences, but on an evaluative assessment of the performance of those in power and on their claim to continue to be in power.

The exercise of the franchise is largely a retrospective assessment of government, rather than a prospective act of molding anticipated acts of state to set preferences among the electorate. That “collectives act almost exclusively by accepting leadership” does not condemn democracy, but gives it vitality. The key to democracy is the retrospective ability of voters to “evict” the incumbents, and it is the ability “throw the rascals out” that becomes the defining feature distinguishing a vital democracy from an authoritarian state whose governors may originally have been selected through election. Elections in a democracy are defined by the permanent

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25 Id. at 270.
26 The formulation that this is the nub of democracy is from G. BINGHAM POWELL, 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.” SCHUMPETER, supra note 24 at 272.
insecurity of the rulers who may face displacement through competition for votes.

Competitive elections work like merchants at the market trying to procure a sale by explaining what is wrong with the offerings at the next stall. Individuals lack both the time and expertise to assess the attributes of all the products they may need to purchase, just as they lack the ability to master all the diverse undertakings of government. In any market where there is only one product, the consumer is at great risk. But introduce a second merchant or a full marketplace and the consumer is empowered.

I recall walking through the Grand Bazaar in Istanbul some years ago, determined to buy a rug at the stalls, an undertaking reported from the time of the Crusades and likely well before. I knew nothing meaningful about rugs, nor did I have any sense of what the real price of anything might be. A lamb ready for slaughter, no doubt. My sense of unease would likely have led me to abandon the enterprise had there been only one seller. But there were dozens and over cups of tea, each would explain a little more how to assess the quality of rugs, what kind of price could be arranged. This was no act of educational generosity. They needed me to appreciate why they were offering a superior product to that of their rivals. Of necessity, they had to persuade all potential customers who then, imperfectly to be sure, would leave with a better sense of what separates the goods under consideration. Slowly but surely, the process of competition led them to educate me enough to make a purchase. Undoubtedly, I still paid too much (at some point the
time value of additional education began to weigh in the balance) and undoubtedly there were many points I missed. Nonetheless, that rug is still a favorite, not only for its workmanship, but for the primary lesson in how markets incentivize the powerful to convey information to the weak.

Markets also reward repeat play. Were I to return time and again to buy rugs, then I would also have the benefit of testing my knowledge by assessing which of the merchants were more honorable, which really took extra care in the workmanship, and other details that would have allowed the next level of informed interaction. With more time, I might turn to a trusted intermediary, such as on-line surveys or a Consumer Reports, to compare my evaluations with that of other consumers. But even with the limited investment available in a busy life, I could emerge a more informed decision maker from the simple marketplace of exchange.

Political markets operate in the same fashion. In the political marketplace, the coin of the realm is the challenged claim of the incumbent powers to the wisdom of their stewardship. Countering that claim is another political merchant, the opposition, trying to give the electorate sufficient reasons to discharge the incumbents and vote in the opposition. That the information may be conveyed through invective, rhetoric, negative ads is simply a feature of how the consumers process information. (I dare say that some of the assessments of the personal integrity of rival merchants in the Istanbul bazaar would find ready company in the attack ads of modern campaigning.) Whatever the norms of campaigning, it is only in the
competitive crucible of periodic elections that the claims of superior leadership are meaningfully tested. Further, because political parties are repeat players making claims and promises over the cycles of many elections, the voting public has the advantage of testing the claims over time and relying on these intermediaries to organize the issues in a digestible form. Political competition offers not only an incentive for the leaders to educate the public, but an opportunity for repeat play learning.

Unfortunately, this account of democracy assumes what may well be lacking in many newly constituted democracies: truly competitive elections. The emergence of a single dominant party, such as the PRI in Mexico or the ANC in South Africa, tests the vitality of democracy under the control of a single dominant party. In such circumstances, there are elections that decide who will assume governmental office, and the elections may fairly tabulate the votes cast by the citizenry. Further, such elections may be entirely or relatively free of coercion, chicanery or efforts to deny the decision making power to the voters themselves. 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.

Many of the pathologies of noncompetitive democracies translate into potential legal challenges to the authority of the dominant regime. For purposes of this presentation, I will focus on two of them: the attempt to change legal rules to protect the sinecure of the incumbent authorities and the
efforts to diminish legal accountability for the risk of self-aggrandizing use of state and private resources by those in power. The first can be thought of as rule changes that protect the entrenched power of incumbency. The second is a mechanism that ensures political loyalty of supporters by the ability to dispense the benefits of connection to government authority in a state with consolidated political power.

As was made evident in the U.S. in the dispute over Florida vote counting procedures leading to *Bush v. Gore*\(^27\), election procedures make a difference. Procedures with the capacity to control outcomes can be embedded at the constitutional level, as with term limits or eligibility requirements, but they can also exist at the more mundane regulatory level, as with the vote-counting procedures at issue in Florida in 2000. The most transparent of these mechanisms, the “abusive constitutionalism” that diminishes electoral accountability, “involves the use of the mechanisms of constitutional change—constitutional amendment and constitutional replacement—to undermine democracy.”\(^28\)

Stated generally, constitutional commands are more embedded legally and require a greater political command in order to change. But when analyzed from the vantage point of entrenching ruling authority, non-constitutional amendments can serve the same end. For example, quite contrary to the general trend in Latin America toward independent and

\(^27\) 531 U.S. 98, 102 (2000).
\(^28\) Landau, *supra* note 6, at 191.
specialized electoral courts and administrative authorities, as in Mexico, the current government in Argentina has repeatedly sought to redirect increasing administrative oversight from a specialized judicial chamber to the Ministry of the Interior.29 As a matter of formal Argentine law, this transfer of authority is a matter of non-constitutional legislative decision. Nonetheless, the potential compromise of independent election administration is the same, regardless whether the source of the change is constitutional or statutory. Even if electoral oversight in Argentina has thus far been honorable, the risk from embedding electoral oversight close to incumbent political power remains.

Corruption may seem an odd candidate for concern with regard to the functioning of the political process. It is far too easy to see corruption as the surreptitious quid pro quo between public officials and their benefactors or those seeking access to state resources. This simple view of corruption begins with an individual moral failing on the part of an individual whose official position allows transforming a state gatekeeping role into a private source of toll collection.30 While avarice and temptation are an everpresent part of human existence, focusing on individual weakness misses the

29 See Samuel Issacharoff, Prologue, 11 Election L.J. 529-30 (discussing the 2009 Argentinean law giving more oversight power to the Ministry of the Interior and marginalizing the electoral court).
30 For the complicated understandings of corruption in the political domain, see Samuel Issacharoff, On Political Corruption, Error! Main Document Only, 124 Harv. L. Rev. 118 (2010).
endemic feature of the relation between misuse of state resources and self-perpetuating political power.

Without rotation in office, the three “C’s” of consolidated power take hold: clientelism, cronyism, and corruption. Incumbent power tends to feed on itself, creating an expanding state bureaucracy with ever greater control of the economy. The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. The phenomenon was described by Mancur Olsen in his classic work on the pressures toward the growth of both the size and complexity of government.\textsuperscript{31} Politics becomes not a matter of electoral contests for power but of connections to government. The ensuing clientelism, the organizing of power to protect incumbent sinecure by dispensing state benefits and contracts to loyal followers, suffocates the opposition.

In this environment, the domain of electoral politics is not so much a contest of parties or ideologies, but of access to control of state resources, a battle in which incumbent authority is paramount. The concentration of governmental power benefits those with connections to the state. The greater the scale of government enterprise the more it rewards those who can master its by-ways in a process that is non-transparent to the public and that resists either monitoring or accountability.

\textsuperscript{31} \textsc{Mancur Olsen}, \textit{The Rise and Decline of Nations} 69-71 (1982).
In strong party democracies, the clientelist pressures and the absence of political competition reinforce each other in suffocating the ability of ordinary politics to offer a respite. Where one party has complete control of the state apparatus, and where the state sector, either directly through employment or indirectly through licensing and public contracts, controls a large swath of the economy, rival political parties face immense obstacles in launching any meaningful political challenge. To break with the ruling party means at least a potential loss of jobs, public benefits, and contractual opportunities for those who defy incumbent authority. As strong parties consolidate their hold, it is well understood from Russia to Zimbabwe that proximity to the regime is a pathway to prosperity and defiance leads to penury or worse. Even if there are leaders willing to assert their independence and bravely challenge the powers that be, what can they possibly offer their followers? Without any hold on the levers of power, can would-be challengers really offer any protection of the economic well-being of their adherents?

New democracies are particularly vulnerable to the pressures toward clientelist commands.\(^{32}\) Almost invariably, their political parties are weak and the central state is large. Control of state institutions may be simply too great to be dislodged absent a further source of institutional challenge. The

question is whether courts can step into the breach and, if they do, how they should confront the real world fact of consolidating political power.

III. AFTER THE TRANSITION TO DEMOCRACY

Much of the scholarship dealing with the role of courts in the post-1989 period has addressed the establishment of a rule of law in the early stages of democratic transition. This makes sense because it was in the first opinions of the South African Constitutional Court,33 or in the far-reaching efforts of the Hungarian Constitutional Court,34 or in the early confrontations with strong-armed efforts to defeat democracy that the new era was most fully and most proudly on display. Key to the transitional period is the maintenance of democratic rule in the face of efforts to stabilize civilian authority against efforts to restore the autocratic rule of the past or simply to overthrow weak democratic regimes. Issues of human rights and minority protection necessarily loom large, as do the protection of the separate institutions of government.

Shift the time horizon, however, and courts still confront issues of stabilization. Now a new source of concern emerges not so much from the

past as from the present. Courts are in a more precarious situation because their claim to authority is not the importance of constitutional democracy against vestiges of an autocratic past, but of a superior set of constitutional values against democratic claims to power. Courts are not simply a central part of the transition to democracy, but are the enforcers of limits on majoritarian prerogatives, of what in contemporary European debates are referred to as “constrained democracy.”

The difficulty inheres in that these cases pit the branch with the least democratic authority against the popularly elected political branches, generally over matters within the confines of formal legality.

Three examples provide context for the conflict between constitutional courts and majoritarian excesses. Two of them (Colombia and South Africa) offer a clear democratically conferred lockhold on government, while the third (Thailand) presents a more complicated picture of a cohesive majority using its electoral base to tamp down opposition. Before turning to the concluding section on the inherent strategic dilemma facing courts in any confrontation with a popular democratically-elected government, a bit of context from the three national settings.

A. Colombia

On one reading, Colombia is an outlier in the post-1989 wave of democratizations. Rather than overcoming a history of autocratic rule, Colombia was a dysfunctional state. A decade of brutal communal war beginning in the 1950s left over 200,000 dead and was followed by the rise of the drug cartels. By the end of the 20th century, if Colombia was not actually a failed state, it was at the very least one that could not offer rule of law guarantees to vast stretches of the country. Add in a leftist insurrection drawing on both the civil wars and the drug lords, and the result was widespread violence and civic disorder.36

In what may have seemed a flight of fancy, in 1991—in the face of overwhelming odds—a democratically-elected constituent assembly promulgated a new constitution that served as part of the “profound constitutional moment throughout the Americas.”37 The date corresponds to the general period of the post-Soviet wave of democratization, but also to the democratic revival following the fall of military dictatorships across much of South America, most notably in Argentina, Brazil, Chile and Uruguay. The constitution sought to overhaul many of the institutions of Colombian

government, but none so much as the judiciary. Among the constitutional innovations was the creation of a constitutional court, and one that that “must be by any measure one of the strongest courts in the world.”\textsuperscript{38} In the words of then President Cesar Gaviria, the court was integral to the new democratic order: an institution with the “mission of preventing any other powerful authority from hampering the transformations you are encouraging with laws, decrees, resolutions, orders, or any other administrative decisions or happenings . . . The new Constitution requires, in order to be adequately applied, a new system of constitutional judicial review.”\textsuperscript{39}

Civilian authority was restored after President Uribe took office in 2002. The story is complicated,\textsuperscript{40} but the bottom line is that Uribe restored compromised state institutions to reassert governmental power, in no small measure militarily. As kidnappings and murders receded, and as a prosperous normality blossomed, Uribe’s popularity soared. Although the Colombian constitution limited presidents to one term in office—the norm in Latin America—the prospect of Uribe’s being forced to retire at the end of his term left Colombians with a threatened loss of stable civilian rule.


\textsuperscript{40} A fuller account of the constitutional events in Colombia and South Africa may be found in Samuel Issacharoff, \textit{The Democratic Threat to Democratic Transitions}, Const. Ct. Rev. (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324861, from which parts of this version is drawn.
In the confrontation between a democratically popular president and the rigidity of the constitution, democracy prevailed and the Constitution was amended in 2004, allowing Uribe to seek and obtain a second term as President. However, as Uribe consolidated power, the trappings of excess began to appear. Democratic security, the greatest conquest of the Uribe administration, was itself compromised by the regime’s association with paramilitary groups who moved in as local lords of power when the drug gangs and guerrillas were dislodged. The paramilitary groups and the government itself developed a propensity for retaliation against all enemies, insurgent or not. Corruption and wiretaps of political enemies filled out the picture of democracy ceding to strongman rule. Increasingly, the new democratic order narrowed to the person of the President. Perhaps not surprisingly, Uribe rallied his supports, pressured his opponents, and forced a reluctant Congress to permit him to run for a third term as President. As is so often the case when power consolidates, formal limitations fail, such as the separation of powers between different government institutions.

The stage was set for the greatest constitutional confrontation in Colombia’s history. A third term raised the specter that Colombia would succumb to the Latin American tradition of caudillos, the strongmen who hold on to power indefinitely and become the gravitational center of political life. Democracy recedes when entrepreneurial sectors “depend on close personal relationships with the government to obtain permits or public
contracts,” and when state institutions, even outside the executive, are staffed entirely by individuals who depend on the incumbent president for their appointment. The mobilization of the state under Uribe was the perfect medium for a popular elected president to pull up the gangplanks of electoral accountability.

The victory of Uribe in obtaining yet another constitutional amendment was a painful confirmation of the failure of democratic restraints to take hold. Under these circumstances, the Court emerged as the sole check on the prospect of increasingly unilateral executive power. The difficulty is that the judiciary has no independent democratic mandate, particularly as compared to a popular ruler such as Uribe. Nor could the Constitutional Court intervene in the name of a narrow procedural limitation on governmental power; from a technical point of view, the procedures taken to permit a third term seemed unassailable. Instead, any judicial intervention had to draw upon a constitutional rather than democratic mandate in which “the Court, rather than the legislature, as the best embodiment of the transformative project of the 1991 constitution.” The Court had early on laid down just such a constitutional marker:

The difficulties deriving from the overflowing power of the executive in our interventionist state and the loss of political leadership of the legislature should be compensated, in a

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42 Landau, supra note 38, at 344 (footnotes omitted).
constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order. This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.43

To its credit, the Colombian Constitutional Court took up the challenge of the claimed third term for Uribe. And, to its credit, despite numerous procedural difficulties in the congressional endorsement of the constitutional change and in the popular referendum that brought it into being, the Court did not issue a technical opinion on so momentous an issue. The procedural issues alone, the Court acknowledged, were not of sufficient magnitude to overturn the popular support for the constitutional measure. Instead, the Court reached further and struck down as unconstitutional the proposed constitutional amendment on the basis of deeper commitments to the base requirements for democratic rule. In a strikingly short and un-theorized opinion, the Court simply announced its end result without elaboration: “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

43 Landau, supra note 38, at 346.
office according to preestablished time periods." For so momentous a case, that was all there was in terms of articulation of legal principles.

Despite his strong popular mandate, Uribe acceded to the Court’s decision and immediately withdrew his candidacy for office—to his great honor and to the benefits for the prospects of further democracy in Colombia. Had Uribe resisted, the inescapable question is whether the paucity of reasoning would have undermined the claimed constitutional legitimacy of the Court’s intervention. The principles of separation of powers, and the importance of checks and balances may well be desirable, indeed indispensable, in a stable democracy. Nonetheless, much more work needs to be done before these translate into something as concrete as holding a particular reform unconstitutional. The United States well survived three terms and a fourth election of Franklin Roosevelt as president with its democracy intact, even strengthened, in the face of overwhelming military challenge. Subsequent U.S. constitutional amendment limited the presidential term of office, but no claim could be made that this particular amendment was mandated by deeper democratic requirements in the American context. Perhaps there is a difference of Roosevelt standing for repeat election under the existing rules of the game, or changing the rules to extend his mandate. If so, the constitutional significance of the fact of changing the electoral rules would still have to be explained. Missing in the Colombian context was not

\[^{44}\text{Corte Constitucioal de Colombia, No. 09 Comunicado 26 de febrero de 2010, available at http://www.cortoconstitucional.gov.co/comunicados/No.%2009%20Comunicado%2026%20de%20febrero%202010.php (translation by author).}\]
only an account of the structural role of the Colombian court in securing
democratic governance, but the deeper jurisprudential wellsprings that would
justify its role.

B. South Africa

Whereas the Colombian Constitutional Court found itself in one decisive
confrontation with the Uribe government, the situation in South Africa has
more the feel of a slow burn as the ANC under President Jacob
Gedleyihlekisa Zuma moves time and again to restrict effective constraints
on one-party rule in both the political and economic domain. Amid swirling
accusations of corruption and official aggrandizement, not the least of
which is the construction of a massive retreat for President Zuma himself,
the government has sought to limit political challenges to the ANC hierarchy
and to disable independent oversight of governmental improprieties. Notably,
all of these cases arose out of ordinary legislation as opposed to
constitutional amendment, though the cumulative effect on constitutional
separation of powers was rather proximate.

45 See, e.g. Lydia Polgreen, *Storied Party of Mandela Faces South African Unrest*, N.Y.
Times (Nov. 9, 2013), http://www.nytimes.com/2013/11/10/world/africa/storied-party-of-
property-renovations-report-finds/article17562101/ (“President Jacob Zuma’s palatial home
was an island of opulent luxury, fitted with everything from a swimming pool to a medical
clinic—much of it provided by taxpayers at an ‘unconscionable’ and ‘appalling’ cost, an
investigation has found.”).
Even if one were to judge solely by the cases reaching the South African Constitutional Court—an admittedly limited methodology—the prevalence of challenges involving claims of governmental overreach is striking. In a series of high-profile cases over the past two years, the dominant theme is the relation between consolidated one-party rule and the prospects for democracy. Each of these cases addresses the problem of concentrated executive power, a power that is unlikely to be effectively constrained by a legislature controlled by the same dominant party. This is especially true given the unified executive in South Africa, in which the president is both head of state and head of government. Most critically, the South African president is elected by the National Assembly and thus is directly accountable only to the dominant legislative bloc, an unlikely source of strong limitations in the absence of parliamentary contestation.47

Whatever the formal issue presented in particular cases, in each instance the Court has had to review attempts by the ANC either as a party or as the government or through the executive to wall itself off from accountability and institutional constraints on its power.48 To give but one example, in *Ramakatsa and Others v. Magashule and Others* the Court confronted an

allegation of internal ANC voting irregularities in the selection of delegates to the Free State Provincial Congress of the party. The ANC is the sole institution of meaningful political power in the country, and in order to uphold a measure of democratic accountability, the Court tacitly had to recognize that constitutional guarantees in present day South Africa required reaching deep inside the internal party structures of the ANC. In granting relief that included the dissolution of the Provincial Executive Committee, the Court had to apply to the ANC party the constitutional guarantee of a right to participate in the activities of a political party as set out in Section 19(1)(b) of the South African constitution.

The South African Constitutional Court in these recent cases has been reticent to develop a formal jurisprudence of challenging the increasingly close hold on power of the ANC. Although the Colombian court failed to elaborate its theory of democracy, the decision to deny President Uribe a chance at a third term was framed in the language of protecting democratic integrity, even if abstractly posited. By contrast, the South African court tries to address the excess power claims of the ANC under more anodyne standards of rationality review, as evident in the two leading cases having to do with independent prosecutorial or anticorruption authority.

Both Democratic Alliance v. President of the Republic of South Africa, et al. and Glenister v. President of the Republic of South Africa pose rather

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49 Ramakatsa and Others v. Magashule and Others 2012 JDR 2203 (CC) (S. Afr.).
50 S. AFR. CONST., § 19(1)(b).
directly the question of the legal accountability of the ANC for the widely-reported excesses of its administration. The issue before the Court was first the appointment of the National Director of Public Prosecutions and subsequently the independence of the National Prosecuting Authority (NPA), a specialized prosecutor for political corruption cases. In each case, the Court interceded to roll back executive conduct that would have further insulated the government from anticorruption checks on official misconduct. Strikingly, however, in each case the Court tried to employ the same restrictive rationality review for the structure of government as it had used for the broader policy objectives that are properly the province of Parliament.

In *Democratic Alliance*, the Court confronted the President’s decision to appoint a candidate to a public prosecutor’s position who was himself compromised by earlier public charges of financial improprieties. Applying a rationality standard of review that avoided all mention of accountability as such, the Court found that, procedurally, the President’s failure to consider prima facie evidence of dishonesty rendered the appointment invalid.

*Glenister* is the more far-reaching and interesting decision that raises not the appointment of cronies so much as a structural alteration in overall governmental accountability. At issue was the National Prosecuting Authority Amendment Act, which abolished a critical part of the NPA and placed control of anticorruption prosecutions in the hands of the police, rather than a special prosecuting body. The existence of institutional checks on the executive through the NPA, or even the more generalized oversight of
all branches through the Public Prosecutor, remains an important constraint as political competition ebbs in the face of ANC hegemony.\textsuperscript{51}

The opinion, while ruling against the government, shows the ambivalence of the Court. The Court emphasized that the anticorruption unit need not be formally independent, only that it retain “an adequate level of structural and operational autonomy.”\textsuperscript{52} That, the Court found, was also a question of the reasonableness of the decision, and placing the unit within the Police Force was not \textit{per se} unreasonable, nor was the decision to disband the Directorate of Special Operations (DSO). Still, the Act was deficient both in failing to provide “secure tenure” for DPCI employees and in providing for “direct political oversight of the entity’s functioning.”\textsuperscript{53} Previously, senior DSO personnel enjoyed considerable protection—once appointed, the President was limited in his ability to discharge and, any presidential decision was subject to Parliamentary veto.\textsuperscript{54} The Court argued that this provision placed “significant power in the hands of senior political executives” who might “themselves . . . be the subject of anti-corruption

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\textsuperscript{51} For a discussion of the importance of the Public Prosecutor being able to shame officials into responsiveness and discharge of their tasks, see \textsc{Stuart Woolman}, \textit{The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law} 246-48 (2013).
\textsuperscript{52} Glenister v. President of the Republic of South Africa and Others 2011 (3) SA 347 CC, at para. 162 (S. Afr.).
\textsuperscript{53} \textit{Id.} at para. 213.
\textsuperscript{54} \textit{Id.} at para. 225-26.
\end{flushright}
investigations.”\textsuperscript{55} This, the Court insisted, was “impossible to square with the requirement of independence.”\textsuperscript{56}

Defining the issue as one of independence only began the inquiry, however. The Court still had to find a constitutional obligation that would prevent this important erosion of presidential accountability. For the Court, the primary source of such constitutional authority lay not in the protection of democratic accountability but in the relationship between the domestic Constitution and international law. Section 39(1)(b) of the Constitution requires that courts “consider international law” in interpreting the Bill of Rights, while Section 231(2) provides that a ratified international agreement “binds the Republic.” \textsuperscript{57} Further, according to the Court, Section 7(2) “implicitly demands” that steps taken to fulfill the state’s obligation to promote the Bill of Rights be “reasonable.”\textsuperscript{58}

The Court concluded that an anticorruption program could not be constitutionally “reasonable” if it failed to honor South Africa’s treaty obligations. South Africa is party to a number of international conventions which require member states to establish anticorruption agencies that are “independent from undue intervention” and political pressure.\textsuperscript{59} When read in light of these obligations—as the Court argued it must be—the

\textsuperscript{55} \textit{Id.} at para. 232.
\textsuperscript{56} \textit{Id.} at para. 236.
\textsuperscript{57} \textit{Id.} at para. 192.
\textsuperscript{58} \textit{Id.} at para. 194.
\textsuperscript{59} \textit{Id.} at para. 184, 183-86.
Constitution imposed on the government an affirmative duty to create an independent anti-corruption unit.\textsuperscript{60}

Placing responsibility for its decision on international law is an interesting judicial expedient. It has the effect of avoiding a direct confrontation with the constitutional underpinnings of democratic authority and turning attention to the commands of foreign engagements. Yet the purportedly compelling international commitments are far too abstract to carry the weight of the exact institutional framework for locating government anticorruption officials, something which no doubt varies tremendously within the signatories to an international covenant, to the extent that it is not in fact honored in the breach by most signatories.

The only recent decision that truly invokes first-order principles of constitutional democracy concerns the executive’s authority over the judiciary itself. When confronted with Section 8(a) of the Judges’ Remuneration and Conditions of Employment Act, which authorized the President to extend Chief Justice’s term of office beyond the twelve-year constitutionally prescribed term, the Court did show it had to reach deeper to protect its own institutional integrity from executive overreach. In \textit{Justice Alliance of South Africa v. President of the Republic of South Africa}, the Court relied more heavily on first-order principles of controlling concentrated executive power. “The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional

\textsuperscript{60} Id. at para. 194.
democracy,” and by permitting the President to ask the Chief Justice to stay on for an additional term of years, “the Act threatened judicial independence by implying that the Chief Justice serves at least to some degree at the pleasure of the President, and is thus subject to Executive influence.”61

C. Thailand

Another alternative approach to judicial intervention is found in Thailand, in what is probably the most currently unsettled democratic setting outside Ukraine. Trying to give a nutshell account of Thai politics is impossible. For present purposes, the central divide is between the Pheu Thai Party which controls an absolute majority of the now-suspended Thai House of Representatives and the opposition, led by the Democrat Party. At the time of the constitutional showdown, the Pheu Thai government was headed by Prime Minister Yingluck Shinawatra, the sister of former prime minister Thaksin Shinawatra, who had been forced into exile after being removed by a military coup in 2006 and convicted of corruption in 2008. With the return of civilian rule, the Pheu Thai Party returned to power, backed by its associated United Front for Democracy Against Dictatorship—who together were colloquially known as the “Red Shirts.”

61 Id. at para. 65, 67-68.
The Pheu Thai governments pursued populist policies that no doubt benefitted the Thai poorer classes, particularly the rural poor. The Thaksin government was widely perceived as deeply corrupt and increasingly autocratic, but an expanding economy and expansive clientelist policies, such as subsidies to rice farmers, built up a loyal constituency outside the more educated, middle-class sectors of Bangkok and the urban parts of the country. Urban uprisings, led by the “Yellow Shirt” opponents of the government ultimately brought down the Thaksin government and set up the constitutional conflicts that engulfed Thailand in 2013-14. These uprisings possess the “Tahrir-Square appeal” of westernized, educated protesters claiming the public arena with iPhones, twitter and all the trappings of modern cosmopolitan engagement. The difficulty remains that while these urban protestors readily capture what may be termed the “CNN moment,” they operate at a political and social distance from the poorer and generally more conservative rural mass of the population.

Two legislative initiatives sparked the current crisis. First, the Yingluck-dominated House of Representatives in an odd pre-dawn special session initially approved and then subsequently passed an amnesty provision that would clear Thaksin of his conviction and permit his return to Thailand, and presumably to political office. Of greater significance was the adoption of a constitutional amendment providing for direct election of the upper chamber.

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of the parliament, the Senate. Prior to the 2006 coup, the entire Senate was elected, but currently only half the Senate is elected from regional constituencies, with the remainder filled by a complicated form of appointment by a select committee outside direct governmental control. As a result, the Senate had remained outside the control of the electorally hegemonic Pheu Thai Party.

The opposition sought to invalidate the Senate-selection constitutional amendment before the Constitutional Court. Unlike the third term for President Uribe, the proposed constitutional change did not trigger any immediate democratic objection at the level of general principle. Other than the American Tea Party’s curious obsession with the direct election of Senators as a result of the 17th Amendment to the U.S. Constitution, it is hard to think of any mass democratic movement that has invoked an appointed branch of the national legislature as its objective. At the same time, the move to a directly elected Senate would remove an important institutional bar to consolidated rule of the sort that had prompted earlier street riots and military intervention. The question was whether any constitutional principle could really prevent a procedurally-proper constitutional amendment that did not have any of the obvious hallmarks of being “abusive.”

In a landmark opinion, the Thai Constitutional Court struck down the proposed constitutional amendment. Uniquely among the constitutional courts that have had to engage the issue of democratic majoritarian excess, the Court spoke openly about the need for vigilance against the risk of what it termed a “majority dictatorship”:

There must be measures to prevent ones who gain the position to exercise people's sovereign power not to arbitrarily abuse the power for personal or for the particular group's benefits, by holding the principles of division of sovereign power . . . If any party is left with absolute authority without being checked and counterbalanced, it would be highly tempted to cause damages and lead the country to ruin because of a stray indulgence of the state power holder.64

While the Thai decision is that most elaborately reasoned engagement with the problem of dominant party democracy, it also exposes the fraught nature of a judiciary getting too close to the live wire of electoral politics. The Court clearly aligned itself with one faction of Thai society, moving closer to the argument of Ran Hirschl that a cosmopolitan “juristocracy” assumed the power of constitutional review to hold at bay the more conservative impulses of the poorer and less worldly sectors of the society.65 The Thai setting does not have the central religious narrative that was central

64 My thanks to Siranya Rhuvattana for translating the Constitutional Court’s decision.
in Hirsch’s narrative, but it shares the fundamental conflict of more traditional and more cosmopolitan world outlooks.

Whatever the gain in judicial reasoning, the Thai court’s intervention did little to alleviate the building conflict. Within two months of the Court’s ruling, street riots consumed Bangkok and the government declared a sixty-day state of emergency. Protesters then turned their wrath on the next scheduled elections and called on their followers to not only not participate, but to block the electoral process. In the final judicial piece of the puzzle, the Constitutional Court invalidated the judicial results, further inflaming the political unrest. Ultimately, and as of the time of this writing, the Thai military has taken control of the entire country, declaring a state of emergency, and suspending operation of all non-military governmental institutions. This is certainly no rosy outcome.

IV. CONCLUSION: COURTS IN THE CROSSFIRE

The constitutions of the late 20th century institutionalized an aggressive power of judicial review as a constitutional check upon the political branches. Almost invariably, these constitutions give express textual protection to democratic processes and to the institutions of democratic politics, first and foremost political parties. Further, these constitutions frequently impart to the judiciary a direct administrative role in ensuring the integrity of the electoral process, even apart from controversies presenting
themselves in the form of litigation. The question then becomes how courts should discard that function when the ensuing constitutional democracy is threatened by an excess of concentrated political power.

Courts may well seek to promote political balance and electoral contestation as giving more space to judicial authority. Uncertainty about who the officeholders of tomorrow might be provides a powerful incentive to all political actors to have a judicial intermediary to hedge the downside potential of a lost election. Yet, all this leaves open the question about how courts are supposed to discharge that function. Most basically, and most specifically, how confrontational can or should constitutional courts be in challenging the hegemonic aspirations of a dominant political party?

Alexander Hamilton warned of the limits of judicial power, possessed as it was with neither the purse nor the sword. In repeated confrontations with entrenched political power, a confrontational judiciary is at grave risk of being the loser. While there are certainly occasions of principle, the nature of the cases that come before courts generally have the feel of incremental alterations of government relations. As with the institutional placement of the prosecuting agency for public corruption, the lines of judicial principle rarely appear quite so clear cut.

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67 The Federalist No. 78, at 393 (Alexander Hamilton) (Gary Wills ed., 1982).
At the same time, there is a failure to stake a claim of principle when judges rely on strained procedural rulings or on questionable claims of international law to mask the nature of the real issues at stake. My late colleague Ronald Dworkin invoked the concept of “law as integrity” to try to impose upon the judiciary the obligation to reach for compelling accounts of principle: “Law as integrity . . . requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.”68 Few courts could, or likely should, seek to achieve this level of principle in the face of unsettled societal commitments to the rule of law. Yet, the flight from principle in the face of consolidating political power appears a path fraught with peril. If judges do not have claim on a broader principle for confronting the political branches, then why should they not stand down in the face of the political will of the majority?

The three national settings under review illustrate the problem rather than prescribe the remedy. The Colombia, South African and Thai courts differed both in terms of how confrontational to be with regard to entrenched political authority, and in terms of how expansive to be in providing a rationale for judicial engagement as a matter of higher-level principle. The results are not yet clear in any of the three, but to the extent that Thailand appears poised for civil war, or that South Africa is at risk of descent into the excesses

68 RONALD DWORIN, LAW’S EMPIRE 245 (1986).
associated with strong-arm rule, it is unlikely that any of this turns ultimately on the tactical decisions made by courts along the way. Perhaps strong judicial opposition, as in Ukraine during the Orange Revolution, can galvanize or embolden political oppositions. But as recent events in Ukraine show, there is little that can be guaranteed in fragile democracies still struggling to develop the institutional predicates for competitive elections.