COURTS AND CONSTITUTION-MAKING

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INTRODUCTION

Conventional normative constitutional theory states that courts should play a highly limited role in reviewing formal, written constitution-making (constitutional amendment and replacement).[1] But three judiciaries in the Global South have developed robust forms of judicial review that have improved the politics of constitution-making.[2] This emerging jurisprudence has triggered a flurry of scholarly work suggesting that courts might be able to protect individual rights and political competition from the dangers

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1. *See* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435–36, 436 n.13 (1983) (arguing that courts should play a highly limited role in reviewing the substance and procedure of constitutional change).

2. KATHERINE GLENN BASS & SUJIT CHOUDHRY, DEMOCRACY REPORTING INT'L, CONSTITUTIONAL REVIEW IN NEW DEMOCRACIES 7 (Michael Meyer-Resende & Duncan Pickard eds., 2013), http://www.democracy-reporting.org/files/dri-bp-40_en_constitutional_review_in_new_democracies_2013-09.pdf (citing South Africa and Colombia as the examples of places demonstrating the benefits of robust judicial review); HELEN M. STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE 128–31, 167–68 (2009) (looking at Colombian, Indian, and South African courts as powerful guardians of judicially protected human rights); Jackie Dugard & Theunis Roux, *The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995–2004*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 107–52 (Roberto Gargarell et al. eds., 2006) (describing India, South Africa, and Colombia as having courts that could help provide a voice for the poor in the consolidation of democracy); Daniel Bonilla Maldonado, *Introduction* to CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 21 (Daniel Bonilla Maldonado ed., 2013) (discussing how the Indian Supreme Court, the South African Constitutional Court, and the Colombian Constitutional Court are seen as "activist tribunals" that contribute to the "public and private spheres of their countries"); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 67 (2009) (discussing "a global shift to check representative institutions with increasingly broad principles of good governance").

of majoritarian constitution-making in nascent democracies.[3] Broader comparative experience, however, demonstrates that courts are much more frequently unable to improve constitution-making politics and may actually further enable abuse by the elite of formal constitutional change. This means that scholars interested in courts and constitution-making must now ask two questions: Why do courts seek to "improve" constitution-making? And how do they gain compliance with their decisions?

As comparative law scholarship has expanded beyond the traditional canon, it has challenged many public law assumptions. One of the first lessons is that formal, written constitution-making (whether it is constitutional amendment or replacement) can be particularly dangerous to individual rights and institutionalized political competition in fragile and poorly institutionalized democracies.[4] In these contexts, partisan elites can seize on

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3. *See, e.g.*, Andrew Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, 22 INT'L J. POL. CULTURE SOC'Y 427, 429, 433 (2009) (describing the importance of judicial review in a post-sovereign form of constitution-making); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 336 (2011) (discussing the possibilities of judicial review in improving constitution-making politics); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. (forthcoming 2015); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 965 (2011) [hereinafter Issacharoff, *Constitutional Courts*] (discussing the possibilities of judicial review in improving constitution-making politics); Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1870–83 (2004) [hereinafter Issacharoff, *Fractured Societies*] (looking at the South African constitutional example and noting that there is great significance to "the provisions that reaffirmed limitations on government and those that were struck down [by the court] for what may be termed an excess of majoritarianism"); Robinson, *supra* note 2, at 3–5, 33 (discussing the role of the Indian Supreme Court in the constitutional amendment process as "a court of good governance over the rest of the government."); Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 718 (2013); Po Jen Yap, *The Conundrum of Unconstitutional Constitutional Amendments*, 4 GLOBAL CONSTITUTIONALISM 114, 136 (2015) (arguing that courts should declare constitutional amendments unconstitutional in response to attempts by dominant parties to use constitutional rules to entrench power or abuse rights).

4. *See generally* David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013) [hereinafter Landau, *Constitution-Making*] (describing how extraparliamentary process has given charismatic executives a democratic tool to circumvent parliamentary opposition in Venezuela and Bolivia). David Landau has recently called this formal institutionalization of presidential rule through the constitution-making process "abusive constitutionalism." David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013) [hereinafter Landau, *Abusive Constitutionalism*]; William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193 (2012) (discussing such occurrences in Russia, Belarus, and Kazakhstan).

electoral mandates and then use formal constitutional rules to reduce political competition and erode individual rights.[5]

Another key lesson is the increasing role of courts in regulating constitution-making politics. As "new constitutionalism" has spread around the world, constitutions have increasingly afforded courts significant formal power to intervene in politics.[6] A flurry of recent legal research has emerged suggesting that courts can play a critical role in protecting democratic outcomes in constitution-making.[7] This work has suggested that courts can be important players in overseeing "the exercise of political power" in constitutional lawmaking as well as ordinary lawmaking.[8]

Underlying this optimism is the success of courts in three countries in the Global South.[9] Perhaps the most commonly cited example is the Indian Supreme Court and its "basic structure" doctrine for reviewing constitutional amendment.[10] Also, this literature has highlighted the South African Constitutional Court and the assertive role that it has played in reviewing South Africa's constitutional replacement process.[11] Finally, this literature has examined the Colombian Constitutional Court's "substitution" doctrine and its role in limiting abusive constitutional amendment in Colombia.[12] An increasing amount of literature has focused on the way that this new emerging "canon" suggests a judicial answer to the problems of constitution-making and enforces "constrained democracy."[13] For instance, Andrew Arato argues that judicial review can ensure that the principles of constitutionalism apply not

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5. William Partlett, *The Elite Threat to Constitutional Transition*, 56 VA. J. INT'L L. (forthcoming 2015).

6. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 169–70 (2004).

7. *See* sources cited *supra* note 4.

8. Issacharoff, *Constitutional Courts*, *supra* note 3, at 965.

9. Maldonado, *supra* note 2.

10. SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 1–3 (2009); *see also* Ashok H. Desai, *Constitutional Amendments and the "Basic Structure" Doctrine*, *in* DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW: ESSAYS IN HONOUR OF NANI PALKHIVALA 90 (Venkat Iyer ed., 2000); R.D. Garg, *Phantom of Basic Structure of the Constitution: A Critical Appraisal of the Kesavananda Case*, 16 J. INDIA L. INST. 243 (1974).

11. Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809, 814 (2001).

12. Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339, 346 (2013).

13. Jan Werner-Müller, *Beyond Militant Democracy?*, NEW LEFT REV., Jan.–Feb. 2012, at 39, 44 (speaking of the "post-war European understanding of constrained democracies"); *see also* Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 770 (2001).

just to the resulting constitution but also to "the democratic *process* of constitution making."[14]

Other examples beyond the comparative canon suggest, however, myriad problems with robust judicial review in constitution-making. In some cases, courts have tried but ultimately failed to improve the constitution-making process. For instance, courts in Russia and Venezuela seeking to improve the politics of constitutional replacement were unable to block attempts by charismatic executives to impose partisan constitutions.[15] Moreover, in other cases, partisan elites have captured courts and exploited judicial review to advance their own self-interested constitution-making projects. In Kyrgyzstan and Ukraine, for instance, powerful presidents used their leverage over courts to strike down constitutions that weakened presidential power.[16] Finally, in other cases, courts have been created to ensure that cosmopolitan elites can preserve their power in the face of electoral majorities. As the experience of the Thai Constitutional Court demonstrates, although these courts might stop electoral majorities manipulating formal constitutional law, they also work to undermine the influence of mobilized electoral majorities more broadly.[17]

This broader comparative lens suggests that the critical questions for constitutional theorists should no longer be universal ones of whether unamendability clauses are democratic or if judicial regulation of constitution-making is legitimate.[18] Instead, the important questions for those interested in the judicial review of constitution-making are far more specific and context dependent. First, why have courts sought to improve constitution-making politics?[19] Answering this question requires examining how judges

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14. ANDREW ARATO, CONSTITUTION-MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ, at viii (2009).

15. Landau, *Constituion Making*, *supra* note 4, at 949; Partlett, *supra* note 4, at 212–26.

16. *See infra* Subpart III.B.

17. *See infra* Subpart III.C.

18. *See, e.g.*, Richard Albert, *Last Call—Call for Papers—Workshop on Unamendable Constitutional Provisions—Koc University, Istanbul*, I-CONNECT (Mar. 14, 2015), http://www.iconnectblog.com/2015/03/last-call-call-for-papers-workshop-on-unamendable-constitutional-provisions-koc-university-istanbul/ (asking whether unamendability provisions are "undemocratic or [whether] they reflect a deep respect for the true democratic foundations of constitutionalism").

19. Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1730 (2004) (arguing that specialized constitutional courts will tend to be relatively less deferential because "[a] constitutional court is not likely to earn its own space in the institutional system if it regularly upholds the statutes that are challenged before it").

can become independent from powerful political movements and intervene to improve deliberation.[20] Second, how have these well-intentioned courts generated compliance with their decisions? This question requires exploring when courts will be more effective in policing the process of constitution-making.[21]

This Article will begin to answer these questions by tracing similarities between the Indian, Colombian, and South African courts. This comparative analysis finds that judicial attitude—and not formal power—is critical in understanding why these three courts worked to improve the politics of constitution-making. These three courts are staffed with ambitious judges who see themselves as part of an elite community that plays an important role in fixing democratic deficiencies. Furthermore, these courts were far more likely to gain compliance when they were reviewing constitutional amendments rather than constitutional replacements. In reviewing constitutional amendments, they gained compliance because their decisions were part of a number of highly activist interventions in the political process.[22] These courts go far beyond what many might think of as the traditional role of a judiciary; thus, compliance with these decisions reviewing constitutional amendments is just part of a widely accepted activist role.

This Article will present its argument in five parts. Part I will describe the dangers of formal constitution-making. Part II will describe how the Indian, Colombian, and South African courts have played a key role in attempting to reduce the dangers of constitution-making. Part III will describe examples where courts either failed to improve constitution-making or actively undermined it. Part IV will seek to understand why the Indian, Colombian, and South African courts sought to improve constitution-making politics and how they generated compliance. The article will then conclude.

I. THE DANGERS OF FORMAL CONSTITUTION-MAKING

Formal constitution-making is often romanticized.[23] Driven by deep unease with the undemocratic nature of judicial constitutional

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20. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067–68 (2001) (discussing the problem in the United States of partisan entrenchment as the process by which successful electoral parties appoint judges who will interpret the Constitution in a certain way).

21. David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1503–04 (2014).

22. *See generally* Robinson, *supra* note 2 (discussing the rise of good governance courts).

23. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 167–80 (2006) (discussing the need for the American people to retake control of their constitutional order through formal constitution-making).

change (through interpretation) in established democracies,[24] scholars have portrayed formal constitution-making as a democratic avenue for the people to transcend elite-based discussions of constitutional law and directly participate in constitutional change themselves.[25] Comparative experience of formal constitution-making beyond the traditional canon of countries, however, shows that constitution-making is not always a time for democratic self-deliberation and reflection. Instead, in many countries across the former Soviet Union, Eastern Europe, and South America, formal constitution-making has been characterized by elite manipulation. In many cases, self-interested elites have been able to win elections and then use their resulting control of the constitution-making process to push through formal rules that undermine individual rights and entrench their own power.[26]

A. Amendment Abuse

Constitutional amendments are frequently the product of abuse. In this scenario, one group or faction is able to capture a large electoral majority and push significant formal constitutional changes through the amendment mechanism. These formal constitutional amendments are then used to weaken the power of checking institutions (which are often courts) and undermine individual rights. In the resulting system, liberal institutions remain—including elections and courts—but the power and scope of these institutions to protect individual rights or ensure political competition is diminished. Because of the entrenched nature of constitutional law, these changes are difficult to roll back.

One of the best-known examples of such an attempt to reduce political competition and individual rights through formal constitutional amendment can be found in India in the 1960s and 1970s. During this period, Indira Ghandi aggressively pursued land reform.[27] As the Indian Supreme Court struck down her policies,

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24. M. RAMASWAMY, THE CREATIVE ROLE OF THE SUPREME COURT OF THE UNITED STATES 17 (1956) (describing the United States Supreme Court as a kind of "permanent Constitutional Convention").

25. LEVINSON, *supra* note 23.

26. For discussions on elite manipulation of constitution-making in various contries, see Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, J. DEMOCRACY, July 2012, at 138 (discussing Hungary); Landau, *Constitution-Making*, *supra* note 4 (discussing Bolivia and Venezuela); Partlett, *supra* note 4, at 209–10 (discussing Russia, Belarus, and Kazakhstan); William Partlett, *Constitution-Making by "We the Majority" in Egypt*, BROOKINGS: UP FRONT (Nov. 30, 2012, 11:49 AM), http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-partlett (discussing Egypt).

27. D. Bandyopadhyay, *The Relevance of Land Reform in Post-liberalisation India*, INFOCHANGE: AGENDA, http://infochangeindia.org/agenda

she sought to use her strong majority in Parliament to pass constitutional amendments that weakened the review powers of the supreme court.[28] First, she passed an amendment that stripped the courts of the ability to declare constitutional amendments invalid.[29] Next, she pushed through another amendment stripping the courts of jurisdiction to declare certain parliamentary laws invalid.[30] These constitutional amendments sought to move India away from a system of checks and balances to one of "unchecked government authority and the assertion of one-party political power."[31]

More recently, this type of approach has emerged in the center of Europe. In Hungary, the Fidesz Party—led by Viktor Orbán—has relied on its constitutional majority in the legislature to push through amendments (and a new constitution) that weaken the autonomy of checking institutions and undermine individual rights.[32] For instance, the Fourth Amendment to the Hungarian Constitution reduced the formal power of a key checking institution: the constitutional court.[33] It also restricted individual rights, stating that the right to freedom of speech "may not be exercised with the aim of violating the dignity of the Hungarian nation."[34]

Formal constitutional amendment has also become a key way for presidents to consolidate power. Since 1990, presidents in seven countries in sub-Saharan Africa have amended their constitutions to abolish term limits and allow elite leaders more time in power.[35]

/battles-over-land/the-relevance-of-land-reform-in-post-liberalisation-india.html.

28. Granville Austin, *The Expected and the Unintended in Working a Democratic Constitution*, *in* INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 324–25 (Zoya Hasan et al. eds., 2005).

29. ROBERT L. HARDGRAVE JR. & STANLEY A. KOCHANEK, INDIA: GOVERNMENT AND POLITICS IN A DEVELOPING NATION 117–19 (7th ed. 2008).

30. INDIA CONST. art 31, *amended by* The Constitution (Twenty-Fifth Amendment) Act, 1971.

31. Issacharoff, *Constitutional Courts*, *supra* note 3, at 1000.

32. Bánkuti, Halmai & Scheppele, *supra* note 26, at 138–39.

33. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, Op. No. 720/2013, CDL-AD (2013)012 (June 17, 2013), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e [hereinafter Venice Commission 2013].

34. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY amend. IV, art. 5.2. The Venice Commission expressed concern that this provision would ultimately undermine "criticism of office holders." Venice Commission 2013, *supra* note 33.

35. Ken Opalo, *As Thousands Protest Against Term Limit Extension in Burkina Faso, Will Other African Presidents Take Note?*, WASH. POST: MONKEY CAGE (Oct. 28, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/10/28/as-thousands-protest-against-term-limit-extension-in-burkina-faso-will-other-african-presidents-take-note (discussing how Burkina Faso, Chad,

Furthermore, the newly elected President of Turkey, Recep Erdoğan,[36] has sought to strengthen his personal power by increasing the formal power of the Turkish President. In 2012, Erdoğan's party submitted a draft proposal to the Constitutional Reconciliation Committee in which the President would become both head of state and the government.[37] Although the initial attempt to introduce this amendment failed, Erdoğan has once again stated that this issue should be placed at the forefront of Turkish politics.[38]

B. Abusing Constitutional Replacement

Constitutional replacement has also emerged as a moment for abuse of formal constitutional law.[39] Charismatic leaders in the former Soviet Union have strategically exploited constitutional replacement to undermine rights and reduce checks on their power.[40] In Russia, President Boris Yeltsin was able to capture the process of constitutional replacement and then use this dominance to set up a formal constitutional system that reduced the formal checking power of two institutions—the courts and the legislature—that had opposed him.[41] The 1993 Constitution increased the size of the constitutional court from thirteen to nineteen, allowing Yeltsin to appoint a number of new loyal members to the court.[42] Furthermore, it created a bicameral legislature with an upper house that was formed in part by representatives indirectly appointed by the President.[43] Finally, this Constitution also set the President in

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Gabon, Guinea, Namibia, Togo, and Uganda have changed their term limit provisions).

36. *Recep Tayyip Erdogan Wins Turkish Presidential Election*, BBC NEWS (Aug. 10, 2014), http://www.bbc.com/news/world-europe-28729234.

37. Bertil Emrah Oder, *Turkey's Presidential Elections: Towards the Confrontation Between Constitutionalism and Power Politics*, I-CONNECT (Aug. 16, 2014), http://www.iconnectblog.com/2014/08/turkeys-presidential-elections-towards-the-confrontation-between-constitutionalism-and-power-politics/.

38. Jonny Hogg, *Erdogan Settles in as Turkey's Strongman, Constitutional Change or Not*, REUTERS (Jan. 27, 2015, 8:55 AM), http://www.reuters.com/article/2015/01/27/us-turkey-politics-erdogan-idUSKBN0L01MB20150127.

39. David Landau, *Should the Unconstitutional Constitutional Amendments Doctrine Be Part of the Canon?*, I-CONNECT (June 10, 2013), http://www.iconnectblog.com/2013/06/should-the-unconstitutional-constitutional-amendments-doctrine-be-part-of-the-canon ("[C]onstitutional replacement is also part of the toolkit of would-be autocrats. Indeed, it may be a particularly efficient way to achieve their goals.").

40. Partlett, *supra* note 4, at 210.

41. *See id.* at 213–25.

42. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 125, § 1 (Russ.).

43. William Partlett, *Separation of Powers Without Checks and Balances: The Failure of Semi-Presidentialism and the Russian Constitutional System*, *in* THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS: SOME NOTES FROM THE FIELD 105–40 (Tatiana Borisova & William Simons eds., 2013).

a position as a higher fourth branch of power that would oversee the judicial, legislative, and executive branches of government.[44] This presidentially dominated form of constitutional replacement soon spread to other countries in the former Soviet region, including Belarus and Kazakhstan.[45]

We also have also seen the problems of partisan constitutional replacement in the Middle East. In Egypt, a new constitution was hastily pushed through by Mohammed Morsi's Freedom and Justice Party ("FJP") in 2012, which reduced the power of a key check on FJP's power—the supreme constitutional court—by reducing the size of the supreme constitutional court and retaining only the ten longest serving members plus the chief justice.[46] The 2012 Constitution also reduced the jurisdiction of the supreme constitutional court by limiting judicial review of the constitutionality of laws governing presidential and parliamentary elections to the period before they are promulgated.[47] After a coup, the Egyptian military passed a new constitution two years later that continued this trend of partisan constitution-making by entrenching the institutional power of the military versus the state.[48]

II. JUDICIAL SOLUTIONS TO PARTISAN CONSTITUTION-MAKING

The Indian, Colombian, and South African constitutional courts have sought to block this abuse of formal constitutional change. This action is initially counterintuitive. Conventional normative theory tells us that courts ought not to play any role in the politics of constitution-making. Two concerns predominate. First, driven in part by the counter-majoritarian dilemma, scholars tend to worry that empowering courts could create a system of judicial supremacy

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44. *Id.*

45. Partlett, *supra* note 4, at 126.

46. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 26 Dec. 2012, art. 176; Nathan Brown, *Decoder: Morsi, the Judiciary, and Acts of Sovereignty*, ARABIST (Nov. 25, 2012), http://arabist.net/blog/2012/11/25/decoder-morsi-the-judiciary-and-acts-of-sovereignty.html (discussing the acts of sovereignty doctrine that Morsi relied on to raise the constituent assembly above judicial review); Partlett, *supra* note 26 (arguing that President Morsi's decision to strip the courts of jurisdiction ultimately undermined deliberation and turned constitution-making into a divisive project of majoritarian imposition).

47. Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285, 300 (2015).

48. Ellis Goldbert, *A New Political Dilemma for Egypt's Ruling Military*, WASH. POST: MONKEY CAGE (June 2, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/02/a-new-political-dilemma-for-egypts-ruling-military/ (explaining that a provision granting the Supreme Council of the Armed Forces the power to appoint the defense minister for eight years was aimed at safeguarding the military from a "charismatically empowered officer who sought personal power over the state, including the military").

in which courts can block popular constitutional change.[49] Second, others worry that courts will sacrifice their impartiality by handling such politically fraught decisions or will simply be unable to enforce such politicized decisions.[50]

But in weakly institutionalized or dysfunctional polities—often without strong traditions of rule of law or judicial review—constitution-making has emerged as highly legalistic.[51] This legalism is the product of a few factors. First, new constitutions often given courts significant formal review powers over constitution-making.[52] Furthermore, courts are frequently pulled into high-stakes disputes surrounding constitution-making processes when interests go to court in order to reverse political setbacks.[53] The most effective courts in responding to these challenges have been in India, Colombia, and South Africa. In these countries, courts have emerged as independent and "major overseers of the exercise of political power."[54] This role suggests that courts can play a democratically legitimate role in constitution-making.[55]

A. Amendment: The Unconstitutional Constitutional Amendment Doctrine

Judicial review is most common in the review of constitutional amendment. There is frequently a textual basis for this kind of review. Some constitutions expressly make certain parts of the constitution unamendable.[56] Other constitutions spell out the

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49. Balkin & Levinson, *supra* note 20, at 1086 (discussing "partisan entrenchment" as judicial entrenchment).

50. Tribe, *supra* note 1, at 440 (discussing problems of indeterminacy in the constitutional review of amendments).

51. Arato, *supra* note 3, at 428 (describing a post-sovereign approach to constitution-making where the process is brought under legal rules).

52. *See* Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 587 (2014) ("[B]y 2011, 83% of the world's constitutions had given courts the power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility.").

53. Perhaps the best example is the role of the South African Constitutional Court in the South African constitution-making process.

54. Issacharoff, *Constitutional Courts*, *supra* note 3, at 965.

55. Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585, 591 (2014) ("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.").

56. These countries include Azerbaijan, Belgium, the Czech Republic, Cyprus, Germany, France, Italy, Luxembourg, Moldova, Romania, Russia, Turkey, and Ukraine. European Commission for Democracy Through Law (Venice Commission), *Report on Constitutional Amendment*, Study No. 720/2008, CDL-AD (2010)001 (Jan. 19, 2010), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29001-e.

majority needed for the amendment to be approved by referendum or entrust the determination of the majority to a special law. Still others create heightened procedural barriers for altering specific constitutional provisions.[57] Moreover, many new constitutions explicitly grant constitutional courts the formal power to review constitution-making. In Azerbaijan, Kyrgystan, Moldova, Ukraine, and Turkey, for instance, the constitutional courts are explicitly given a role to play in constitution-making.[58] India and Colombia provide the best-known examples of the aggressive use of this power by courts to improve the politics of constitutional amendment. [59]

India began its judicial regulation of constitutional amendment in the 1960s and 1970s. Responding to Indira Ghandi's attempts to entrench parliamentary power over judicial review through constitutional amendment, the court developed a doctrine known as the "basic structure doctrine."[60] Despite the fact that the constitution gave the courts no power to review constitutional amendments, there was broad agreement that constitutional amendments could not legally undermine the "basic structure" of India's democracy through constitutional amendment.[61] The key logic underlying this doctrine was that the power to amend the Indian Constitution should not represent the power to destroy it.[62]

More recently, the Colombian Constitutional Court has developed a similar doctrine. In Colombia, the constitution empowers the court only to review constitutional amendments on the basis of procedural errors.[63] Nonetheless, the court has also given itself the power to review the substance of constitutional amendments based on what it has called the "replacement test."[64] In 2010, the court faced a challenge to an attempt by the popular Colombian President to call a referendum on amending the

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57. *Id.* (including Albania, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Estonia, Greece, Israel, Kazakhstan, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Serbia, South Africa, Spain, Switzerland, Ukraine, and the former Yugoslav Republic of Macedonia).

58. *Id.*

59. *See* Roznai, *supra* note 3, at 54–58, 76–77.

60. KRISHNASWAMY, *supra* note 10; *see also* Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, 1 SUP. CT. CASES J. 45 (1974) (India); Desai, *supra* note 10; N.A. Palkhivala, *Fundamental Rights Case: Comment*, 4 SUP. CT. CASES J. 57 (1973) (India); Garg, *supra* note 10; P.P. Rao, *Basic Features of the Constitution*, 2 SUP. CT. CASES J. 1 (2002) (India); P.A. Sathe, *Amendability of Fundamental Rights: Golaknath and the Proposed Constitutional Amendment*, 33 SUP. CT. CASES J. 33 (1969) (India); P.K. Tripathi, *Kesavananda Bharati v. State of Kerala: Who Wins?*, 1 SUP. CT. CASES J. 3 (1974) (India).

61. Barak, *supra* note 3, at 336–37.

62. *Id.* at 337 (calling this an "implied eternity clause").

63. Bernal, *supra* note 12, at 340.

64. *Id.* at 344.

constitution to allow a President to serve a third term.[65] In response, the court blocked the referendum. Underlying this ruling was the "substitution" doctrine.[66] The key logic was that constitutional amendments should not be used to fundamentally alter the nature of the constitutional order and therefore "replace[] the principle of checks and balances."[67]

B. Replacement

Courts have played a much less visible role in constitutional replacement. One widely cited example of the benefits of robust constitutional review of constitutional replacement, however, can be found in South Africa. The South African Interim Constitution created a constitutional court with vast power to review the substance of the final constitutional draft prior to ratification to ensure that it was not a partisan document but instead one that corresponded with core values of constitutionalism.[68] The list of core constitutional principles in the Interim Constitution included constitutional supremacy, judicial review, an independent judiciary, the protection of the right to equality, separation of powers with checks and balances, protection of human rights, and a division of powers between national and provincial government.[69]

In 1996, the court issued a sweeping decision rejecting a proposed constitution.[70] In rejecting the draft constitution, the court "set out in fairly unambiguous terms the changes that were necessary if the constitution was to meet the test of principles."[71] These changes included the requirement that the Bill of Rights be entrenched by supermajoritarian rules that go beyond a two-thirds majority in the lower house.[72] This substantive judicial review of constitution-making in turn ensured that key rights enjoyed greater procedural protection in the constitution. One leading scholar has argued that this judicial intervention helped to improve the bargaining process by shifting certain problems "out of the formal political process to another forum during the constitution-making process—this time, the constitutional court."[73]

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65. *Id.* at 345–46.
66. *Id.* at 343 & n.11.
67. *Id.* at 346.
68. Murray, *supra* note 11, at 814.
69. S. AFR. (INTERIM) CONST., 1993. They were included as Schedule 4. *Id.*
70. *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.), http://www.saflii.org/za/cases/ZACC/1996/26.pdf.
71. Murray, *supra* note 11, at 835.
72. *Certification* 1996 (4) SA 744 (CC) at 75, 91–92.
73. Murray, *supra* note 11, at 835.

C. *Democratically Legitimate*

Scholars have described how the Indian, Colombian, and South African courts have helped to improve the politics of constitution-making. Sudhir Krishnaswamy writes that the Indian Supreme Court's basic structure doctrine responds to "a deliberative dysfunction in higher law-making under the Indian [C]onstitution."[74] Carlos Bernal-Pulido states that the Colombian Constitutional Court's substitution doctrine can best be justified as a way of "preserving or improving deliberative democracy."[75] Samuel Issacharoff has described how the South African Court has been able to ensure "structural restraints on the centralization of power, stressing limitations on government and striking down provisions that may be termed an excess of majoritarianism."[76]

Scholars have in turn argued that these courts set an example that can help to improve the problems of constitution-making. Aharon Barak—a former President of the Israeli Supreme Court—describes how courts can deploy the unconstitutional constitutional amendment doctrine to play an important role in "protect[ing] democracy."[77] David Landau argues that courts can play a role in controlling "certain extreme exercises of political power that threaten the institutional order itself."[78] Issacharoff describes how constitutional courts have proven effective in blocking the "consolidation of unaccountable political power in the hands of the first officeholder."[79] He goes on to say that constitutional courts therefore have a broader duty "to reinforce the functioning of democracy more broadly."[80] Po Jen Yap has argued that courts should review constitutional norms when the "dominant party/coalition in power has unilaterally harnessed the amendment process to achieve manifestly unreasonable political outcomes."[81]

This democracy-improving role for courts in constitution-making bears strong similarities to the "political process" justification for judicial review in ordinary politics. The founder of this school, John Hart Ely, argues that courts should intervene when officeholders seek to "chok[e] off the channels of political

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74. KRISHNASWAMY, *supra* note 10, at 204.

75. Bernal, *supra* note 12, at 355 (analyzing the Colombian example and arguing that "the content of constitutional amendments cannot derogate any of the specific constitutional rights and procedures that make it possible for the political system to institutionalize a deliberative democracy").

76. Issacharoff, *Constitutional Courts*, *supra* note 3, at 995.

77. Barak, *supra* note 3, at 336.

78. Landau, *Abusive Constitutionalism*, *supra* note 4, at 237.

79. Issacharoff, *Constitutional Courts*, *supra* note 3, at 983.

80. *Id.* at 986.

81. Yap, *supra* note 3, at 136.

change to ensure that they will stay in and the outs will stay out."[82] He grounds this approach in footnote four of the U.S. Supreme Court's *United States v. Carolene Products Co.*[83] decision.[84] In this footnote, the Court speculated that it would consider applying "exacting judicial scrutiny" to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[85] Using this approach, the Court has subsequently struck down restrictions upon the right to vote, restraints upon the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly.[86]

The actions of these three courts hold out the tantalizing possibility that unamendability clauses and judicial review of constitution-making can play a similar kind of anti-entrenchment role in constitutional politics.[87] In this role, courts help to foster a "competitive partisan political environment" and ensure "that 'artificial' barriers to robust partisan competition not be permitted."[88] Courts can therefore help block highly costly "partisan lockups" of entrenched constitutional law.[89] In particular, judicial review can ensure that the principles of "constitutionalism" apply not just to the resulting constitution but also to "the democratic *process* of constitution making."[90]

III. PROBLEMS

Despite optimism about the possibilities of unamendability clauses and courts in improving constitution-making, broader comparative experience suggests that these three courts are the exception. In many other countries, familiar problems of judicial impotence and exploitation emerge. First, comparative experience shows that courts are often ignored in their attempts to regulate constitution-making processes.[91] Second, robust judicial review of constitution-making can itself become a powerful tool for new

82. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

83. 304 U.S. 778 (1938).

84. *Id.* at 783–84 n.4.

85. *Id.* at 783 n.4.

86. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 710 (1998) (examining the Court's role in adjudicating issues of individual rights and competing state interests).

87. *Id.* at 678, 708 (1998); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–98 (1997).

88. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1607 (1999).

89. Issacharoff & Pildes, *supra* note 86, at 702.

90. ARATO, *supra* note 14, at viii.

91. *See infra* Subpart III.A.

elites.[92] Third, courts can become guardian institutions that help to protect a particular elite from concerted electoral majorities.[93]

A. Judicial Impotence: Russia and Venezuela

Courts are weak actors: they neither wield the power of the sword nor the purse.[94] In some cases, the political branches can "stack" courts with pliant judges or disband them completely. In other cases, courts themselves choose to avoid confrontations with powerful political forces. In both cases, courts are unable to block partisan exploitation of formal constitutional rules. This weakness is particularly acute during times of constitutional replacement when powerful elites—often commanding electoral majorities—seek to fundamentally change the framework of the constitutional order.

Russia presents the archetypal example of this judicial weakness during constitutional replacement. In 1992 and 1993, the Russian Constitutional Court took an active role in attempting to enforce the constitutional rules of the game.[95] In its first case, the court struck down a presidential decree seeking to merge the internal police and the KGB as a violation of separation of powers.[96] The Russian Constitutional Court did not just limit presidential power; later decisions also struck down unconstitutional extensions of power by the Russian Parliament.[97]

Over time, however, the court increasingly came into pitched conflict with the presidential administration. The final moment came when the court struck down a decree by the Russian President disbanding the legislature.[98] In the aftermath of this decision, President Boris Yeltsin disbanded the constitutional court and unilaterally pushed through a new constitution entrenching presidential power.[99] When the court reopened two years later, it had far more pliant judges.[100] Despite the best attempts of the court to check the power of the president, it had ultimately been unable to improve the politics of constitution-making by blocking Yeltsin's imposed constitutional draft.

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92. *See infra* Subpart III.B.

93. *See infra* Subpart III.C.

94. THE FEDERALIST NO. 78 (Alexander Hamilton).

95. Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1794–1837 (2006).

96. Herbert Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 CORNELL INT'L L.J. 305, 336 (1992).

97. Partlett, *supra* note 4, at 212.

98. *Id.* at 220.

99. *Id.* at 221.

100. Scheppele, *supra* note 95, at 1838–39.

We see a similar failed attempt by a court to check an abusive process of constitutional replacement in Venezuela. This controversy emerged most clearly in the litigation surrounding referendum questions for a new constitutional assembly.[101] A critical question asked whether voters authorized newly elected President Hugo Chávez to personally determine "the bases of the electoral procedure in which the National Constituent Assembly will be elected."[102] The court struck this provision down and held that the assembly would not reflect "the true popular will" if voters were forced to vote on an electoral procedure without knowing what it was.[103] The court issued a follow-up decision clarifying that the National Constituent Assembly was "bound to the spirit of the constitution in force."[104] President Chávez easily circumvented both of these decisions, however, by writing the electoral rules in a way that helped ensure that he could dominate the Assembly and later declaring that a National Constituent Assembly dominated by his supporters stood above the existing constitution.[105] Ultimately, therefore, the court failed to block Chávez in his attempt to unilaterally fashion the constitutional rules of the game.

Another example of judicial impotence can be seen in the refusal of the Pakistani Supreme Court to review constitutional amendments. The supreme court has long claimed the power to review constitutional amendments for their correspondence with the "salient features of the Constitution."[106] But in a number of cases, the court has refused to apply this power. In reviewing the seventeenth amendment to the constitution—which allowed Pervez Musharaff to be both President and head of the Army—the supreme court explained that there was a "basic structure" to the constitution. It explained, however, that this power should be "exercised and enforced" not by the court but instead by the "body politic, i.e. the people of Pakistan."[107] In another challenge to sections of the eighteenth amendment that involved appointment of judges, the court "refer[red] the matter first to Parliament for reconsideration in light of the concerns expressed and the suggestions made in the order."[108]

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101. Landau, *Constitution-Making*, *supra* note 4, at 939–49.

102. *Id.* at 943–44 (citing *Caseo: Gerardo Blyde, contra la Resolucion No. 9990217-32 (Supreme Court of Justice, Political-Administrative Chamber)*, REV. DER. PUBLICO, nos. 77–80, 1999, at 78 (Venez.)).

103. *Id.* at 944.

104. *Id.*

105. *Id.* at 944–46.

106. Roznai, *supra* note 3, at 699.

107. Syed Masroor Ahsan v. Ardeshir Cowasjee, (1998) 50 PLD (SC) 823 (Pak.).

108. Roznai, *supra* note 3, at 699.

B. *Judicial Exploitation: Ukraine and Kazakhstan*

A second problem is when courts are captured by elites and then used as tools for weakening deliberation and negotiation in constitution-making. Courts are extremely prone to be captured and used as the tool of powerful elites seeking to control democratic politics and formal constitutional amendment.[109] In this scenario, powerful political actors use their powers of removal and appointment to create pliant courts that will consistently rule in their favor. As these actors fear a loss of power, they will do anything—including judicial exploitation—because they "focus on winning at all costs in the immediate future" since "losing a battle now might mean losing the whole war."[110]

This type of "strategic pressure" is particularly common in countries formerly part of the Soviet Union.[111] In Ukraine, for instance, the constitutional court has significant powers to review constitutional change.[112] Equipped with these review powers, the court has been repeatedly exploited by those with presidential power.[113] The most recent example in Ukraine involves a series of constitutional amendments passed in 2004, in the wake of the Orange Revolution, that weakened the power of the Presidency and strengthened the Parliament.[114] Although the amendments were made in violation of the constitution, the constitutional court took no action.[115] Seven years later, however, the Ukrainian Constitutional Court struck down these 2004 constitutional amendments under heavy pressure from the newly elected President, Viktor

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109. This concept of the judicial instrumentalism of courts is a familiar story to many students of judicial review in the developed world. Balkin & Levinson, *supra* note 20, at 1086 (discussing "partisan entrenchment" as judicial entrenchment).

110. Alexei Trochev, *Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine*, 18 DEMOKRATIZATSIYA 122, 125 (2010).

111. Maria Popova, *Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine*, 43 COMP. POL. STUD. 1202, 1203 (2010).

112. Alexei Trochev, *A Constitution of Convenience in Ukraine*, JURIST (Jan. 26, 2011), http://jurist.org/forum/2011/01/jurist-guest-columnist-alexei-trochev.php.

113. *Id.*

114. *Id.*

115. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Procedure of Amending the Constitution of Ukraine*, Op. No. 305/2004, CDL-AD (2004)030 (Oct. 11, 2004), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29030-e (expressing deep concern about the lack of involvement by the constitutional court in the amending process).

Yanukovych.[116] This decision effectively enhanced President Yanukovych's powers and weakened his opponents' powers in the legislature.

Robust judicial review has also been exploited in post-Soviet Central Asia. In Kazakhstan, the constitutional court played a critical role in aiding President Nursultan Nazarbayev's use of formal constitution-making to undermine checks on the power of the Presidency. In the wake of the passage of Kazakhstan's first post-Soviet Constitution, the Kazakh Parliament began to increasingly check the power of the President.[117] In order to weaken Parliament's power, Nazarbayev relied on the Kazakh Constitutional Court.[118] After playing no role in Kazakh politics since its creation, the court suddenly ruled on a major electoral claim regarding the parliamentary election.[119] This decision rendered the Parliament invalid because "[a]lthough the complaint had been brought about a single voting district in Almaty, the constitutional court ruled that the entire 1994 parliamentary elections had been unconstitutional."[120]

After the decision, Nazarbayev appeared before Parliament and "disbanded parliament, turning off its power, water, and telephone, and sending in workmen to begin remodeling the building."[121] Nazarbayev then held another referendum to endorse the adoption of a constitution, which "expanded presidential power at the expense of the legislature, which became a largely consultative body, with legislation initiated by the president."[122] This new constitution further removed parliamentary checks on presidential power.

Almost fifteen years later, the President of Kyrgyzstan also exploited the constitutional court to entrench his own power. In the wake of the 2005 Tulip Revolution, the Kyrgyz Parliament adopted a new constitution that created a parliamentary system that weakened presidential power.[123] On September 14, 2007, the constitutional court completely annulled this new constitution under

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116. Ekaterina Mishina, *The Difficult Destiny of the Ukrainian Constitution*, INST. MOD. RUSS. (Mar. 24, 2014), http://imrussia.org/en/rule-of-law/698-the-difficult-destiny-of-the-ukrainian-constitution; Trochev, *supra* note 112.

117. Partlett, *supra* note 4, at 232.

118. *Id.* at 232–33.

119. *Id.* at 233.

120. MARTHA BRILL OLCOTT, KAZAKHSTAN: UNFULFILLED PROMISE? 110 (2010).

121. Partlett, *supra* note 4, at 233.

122. OLCOTT, *supra* note 120, at 111–12.

123. *Kyrgyzstan: President Bakiev Dissolves Parliament After Referendum on New Constitution*, EUR. F. DEMOCRACY & SOLIDARITY (Oct. 29, 2007) [hereinafter *Krgyzstan*], http://www.europeanforum.net/news/434/kyrgyzstan_president_bakiev_dissolves_parliament_after_referendum_on_new_constitution.

heavy pressure from President Kurmanbek Bakiev.[124] Five days later, President Bakiev issued a decree submitting a new version of the constitution as well as a draft electoral code for its adoption by referendum.[125] Once passed in a referendum, this new constitution weakened the Parliament by increasing its size.[126] It also helped to entrench President Bakiev's power by constitutionalizing a requirement that members of Parliament be members of a recognized party.[127]

C. Guardian Courts: Thailand

A final scenario is when courts are an institution used by cosmopolitan, secular elites to preserve their power in the face of a mobilized electorate.[128] Although courts in these cases block attempts by those commanding large electoral majorities to abuse formal constitutional rules, they do not exercise their power of constitution-making to improve the politics of constitution-making. Instead, these courts inevitably do so to preserve the power of entrenched elites. In fact, they inevitably go too far and block the power of electoral majorities.[129] These courts therefore do not ultimately seek to improve the politics of constitution-making but instead to ensure that one elite always prevails.[130]

Thailand is a recent example. The constitutional court was created in 1997 to be a "guardian" institution that could limit the "alleged excesses of partisan politics."[131] The constitution gives the court a number of ancillary powers in order to fulfill this constraining role.[132] Since its creation, the Thai Constitutional Court has fulfilled its role in banning populist parties and checking the power of electoral majorities.[133] In 2013, the court struck down

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124. European Commission for Democracy Through Law (Venice Commission), *Draft Opinion on the Constitutional Situation in the Kyrgyz Republic*, Op. No. 457/2007, CDL (2007)128* (Dec. 7, 2007), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2007)128-e.

125. Bruce Pannier, *Kyrgyzstan: President Sets Referendum Date on New Constitution*, RADIO FREE EUR. RADIO LIBERTY (Sept. 19, 2007), http://www.rferl.org/content/article/1078718.html.

126. *Kyrgyzstan*, *supra* note 123.

127. *Id.*

128. HIRSCHL, *supra* note 6, at 138–39.

129. Ran Hirschl, *Constitutional Courts vs. Religion Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1857–58 (2004).

130. *Id.* at 1819.

131. Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, 7 INT'L J. CONST. L. 83, 101, 103–04 (2009) (discussing how the Thai Constitutional Court had significant powers as a "watchdog institution").

132. *Id.* at 86 (discussing the role of the monarch as a constraining force).

133. *Charter Court Chief Focuses on Balance*, NATION (Mar. 16, 2013, 1:00 AM) http://www.nationmultimedia.com/politics/Charter-court-chief-focuses-on-

a constitutional amendment passed by the populist Pheu Thai Party that would have created a fully elected Senate.[134] In support, the court reasoned that there must be "measures" to prevent those in power from exercising the "people's sovereign power" for "personal or for the particular group's benefits."[135] But the court's agenda went much further and included dismantling the populist Pheu Thai Party. This partisan agenda was revealed most clearly in its decision in 2014 to remove the Pheu Thai Party's Prime Minister Yingluck Shinawatra from power on charges that she had abused power more than three years earlier.[136] Yingluck was the third Prime Minister that the constitutional court has removed from power in recent years.[137]

IV. NEW QUESTIONS OF COURTS AND CONSTITUTION-MAKING

Comparative experience beyond the traditional comparative-law canon therefore helps to sharpen the key questions surrounding courts and constitution-making. The actions of the Indian, Colombian, and South African courts demonstrate that courts *can* play a democratically productive role in constitution-making. But most other courts do not. Thus, abstract debates about whether unamendability clauses or judicial interventions in constitution-making are democratic do not address the most important questions about courts and constitution-making.

Instead, this varied comparative experience suggests a different and more context-dependent set of questions. In particular, what explains why courts would seek to improve constitution-making politics?[138] In particular, how do courts become independent from political forces? Are there any commonalities in the "good governance" courts that would help us understand how they

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balance-30202064.html (including comments from the President of the constitutional court about the importance of the court in maintaining law and order when the people take to the street).

134. Joshua Kurlantzick, *Thailand's Prime Minister Removed, but No One Happy with the Result*, DIPLOMAT (May 10, 2014), http://thediplomat.com/2014/05/thailands-prime-minister-removed-but-no-one-happy-with-the-result/ ("The court also repeatedly has demonstrated that it comes down firmly on the side of the anti-government protestors in Bangkok, and generally on the side of the conservative, royalist Bangkok elites . . . .").

135. Issacharoff, *supra* note 55, at 609.

136. Murray Hiebert & Phuong Nguyen, *Thai Constitutional Court Removes Prime Minister Yingluck from Office*, CTR. FOR STRATEGIC & INT'L STUD. (May 8, 2014), http://csis.org/publication/thai-constitutional-court-removes-prime-minister-yingluck-office.

137. *Id.*

138. Comella, *supra* note 19, at 1718, 1730 (arguing that specialized constitutional courts will tend to be relatively less deferential because "[a] constitutional court is not likely to earn its own space in the institutional system if it regularly upholds the statutes that are challenged before it").

emerge?[139] Second, how do these well-intentioned courts gain compliance with their decisions? This Part will begin to answer these questions by looking at the common features of the Indian, Colombian, and South African courts.

A. *Good Governance Courts: Attitudinal Commitment*

What explains the rise of independent courts that seek to improve constitution-making politics? One of the most influential approaches in the rational choice literature argues that elites create powerful and independent courts to generate political insurance.[140] Tom Ginsburg argues that in times of political uncertainty, politicians who fear electoral loss in the new constitutional system will create strong new courts to protect themselves from the tyranny of election winners in the future.[141] In this way, powerful courts became a form of political insurance for elites fearing the loss of political power.

Evidence from these three exemplar courts suggests that it was more than just formal powers that made courts willing to improve the fraught politics of constitution-making. Both the Indian Supreme Court and Colombian Constitutional Court went well beyond their formal powers in their substantive review of constitutional change.[142] The Colombian Constitutional Court, for instance, was only given the power to review the *procedure* of constitutional change.[143] Yet, it still claimed the formal power to review the substance of constitutional amendments.[144] Furthermore, nowhere in the Indian Constitution is the supreme court given the explicit power to review either the procedure or substance of constitutional change.[145] But it too asserted the power to review formal constitutional change.[146] Finally, courts with broad formal powers do not exercise this power independently and to improve politics. For instance, the Ukrainian Constitutional Court has broad formal powers of review but has proven extremely easy to strategically manipulate.[147]

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139. Balkin & Levinson, *supra* note 20, at 1067–68 (discussing the problem in the United States of partisan entrenchment as the process by which successful electoral parties appoint judges who will interpret the Constitution in a certain way).

140. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22–25 (2003).

141. *Id.*

142. *See* Bernal, *supra* note 12, at 340; Robinson, *supra* note 2, at 4.

143. Bernal, *supra* note 12, at 340.

144. *Id.*

145. Robinson, *supra* note 2, at 27.

146. *Id.* at 33.

147. Popova, *supra* note 111, at 1224.

Instead of formal power, a key factor across all three of these courts can be found in judicial attitudes. The judges on these courts see themselves as playing an important role in building and preserving the integrity of democratic governance.[148] In Colombia, for instance, justices on the constitutional court "openly treat the weaknesses in political institutions—and particularly in the Congress—as a justification for their choice to take on a protagonist's role."[149] In a decision striking down a national security law, the court complained that the Congress "[should be a] space of public reason" and in another case the court struck down a tax because it had not been the product of "a minimum of rational deliberation."[150] Indian judges saw themselves in a similar role.[151] In India, for instance, the court has expanded its role beyond its formal powers "in an attempt to combat the perceived governance shortcomings of India's representative institutions."[152] One judge on the Indian Supreme Court wrote in a decision that "one wonders whether our municipal bodies are functional irrelevances, banes rather than booms and 'lawless' by long neglect, not leaders of the people in local self-government."[153]

In South Africa, many of the constitutional court judges saw themselves building a new, more rights-respecting country. For instance, one of the most prominent members of the South African Constitutional Court—Justice Albie Sachs—discussed how the court was responsible for ensuring that "certain fundamental interests and preoccupations of the minority groups would be catered for."[154] Sachs has further argued that in the "twenty-first century . . . the judiciary will establish principles and norms to control both parliament and the executive."[155] Judges on these three courts therefore closely valued their place at the center of a dense network of legal and human rights elites that stress the value of "broader social justice and liberal reform."[156] With their reputation and career prestige closely linked with these communities, they were far more likely to be independent of political pressure from the elected branches.

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148. Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. INT'L L.J. 167, 208–09 (2015).

149. Landau, *supra* note 21, at 1514.

150. *Id.*

151. Robinson, *supra* note 2, at 3.

152. *Id.* at 3–4.

153. Municipal Council, Ratlam v. Shri Vardichand, (1981) 1 SCR 97, 107 (1980) (India).

154. Albie Sachs, *Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 672 (1997).

155. Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?* 53 SMU L. REV. 1381, 1387 (2000).

156. Mate, *supra* note 148, at 209.

A key institutional factor in encouraging this attitudinal commitment was that all three courts were "recognition" judiciaries where judges were chosen later in life based on a strong outside reputation in the legal community.[157] This selection process tends to increase the possibility that judges will be independent from political structures and will seek to forge an independent path.[158] It also allows the personnel for the court to be drawn from "a small number of respected and untainted jurists"[159] that are far more likely than preexisting judges to challenge the political branches and remain independent implementers of principle. These judges can then perceive themselves as guardians helping to fix the deficiencies of democracy.[160] In the Indian case, this elite culture of independence was a product of the common law culture of appointing distinguished advocates to the bench.[161] For the Colombian and South African constitutional courts, the special mission that these courts adopted was aided by the fact that the courts were specialized, stand-alone constitutional courts and therefore had specially chosen judicial personnel.[162]

Because of the need in a recognition judiciary to draw from within an attitudinal community, formal judicial appointment rules also played an important role in ensuring that the judges on these courts were able to play a role in selecting their successors. Perhaps the most obvious example is India. The Indian Supreme Court has gone out of its way to ensure that it plays a decisive role in appointing replacements.[163] In a series of cases, the court has sought to ensure that it retains primacy over judicial appointments.[164] Furthermore, in a landmark case in 2011, the South African Constitutional Court similarly sought to guard its independence from the power of the executive.[165] Finally, in the

157. Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228, 241 (2009).

158. *Id.*

159. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 458 (1999).

160. Landau, *supra* note 21, at 1536–37.

161. *See* Robinson, *supra* note 2, at 25–26.

162. *See* Landau, *supra* note 21, at 1520.

163. Mate, *supra* note 148, at 210–11.

164. *Id.*

165. *Justice Alliance of South Africa v. President of the Republic of South Africa* 2011 (5) SA 388 (CC), http://www.saflii.org/za/cases/ZACC/2011/23.pdf; *see also* Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531, 532–34 (1997). More recently, however, the court has been viewed as having lost independence. *See* Issacharoff, *supra* note 55, at 605.

Colombian case, most of the candidates put forward for the court are the result of judicial—and not political—appointment.[166]

Not all specialized constitutional courts, of course, fit this recognition model. For instance, Kyrgyzstan, Ukraine, and Kazakhstan had constitutional courts, but judges on these courts were easily manipulated.[167] These countries lacked the depoliticized judicial appointment procedures as well as the supportive and public-minded legal attitudinal community needed for a constitutional court to be a true "recognition" judiciary. By contrast, the Colombian Constitutional Court—created in 1991—emerged from a tradition in which judicial review had been respected and was widely seen as necessary in resolving Colombia's poor human rights record.[168] The constitutional court itself was pushed by the current president as a body that would have the time and expertise to develop constitutional law.[169] It was also described as a body that would enhance the capacity of the state.[170] In an important speech to the constituent assembly, he argued that "[a]bove all, which body is going to have the mission of preventing any other powerful authority from hampering the transformations you are encouraging with laws, decrees, resolutions, [and] orders?"[171] Finally, in South Africa, the creation of the constitutional court was a key demand of those seeking human rights protection in post-apartheid South Africa.[172] Nelson Mandela described it as an institution that would "ensure that the values of freedom and equality which underlie our interim constitution . . . are nurtured and protected so that they may endure."[173]

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166. Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L & COMP. L. REV. 59, 81 (1995) (stating that in Colombia, justices are nominated by the President, the supreme court, and the administrative court and then the Senate selects from those options).

167. *See* Partlett, *supra* note 4, at 233; Popova, *supra* note 111, at 1224; *Kyrgyzstan*, *supra* note 123.

168. Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, DEMOCRATIZATION, no. 4, 2003, at 46, 50.

169. Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 550 (2004).

170. *Id.*

171. *Id.* at 551.

172. *See generally* Lynn Berat, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS U. L.J. 849 (1993) (arguing that South Africa's history of judicial conservatism must give way to activism); Lynn Berat, *The South African Judiciary and the Protection of Human Rights: A Strategy for a New South Africa*, 5 TEMP. INT'L & COMP. L.J. 181 (1991) (suggesting a pro–human rights approach for the South African judiciary).

173. Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 206 n.3 (1998).

B. *Effective Courts: Activist Context*

But even if courts seek to improve the politics of constitution-making, how do they actually generate compliance? Even with a strong attitudinal commitment to improving the politics of constitution-making, courts will often find it difficult to actually gain compliance with their decisions. This is particularly the case in constitutional replacement. Put in comparative context, the power of the South African Constitutional Court to review the constitutional draft is exceptional and not generalizable. Frequently seen as a constitutional revolution, constitutional replacement is particularly difficult for courts to control. In Venezuela for instance, the court was unable to effectively control a constitution-making process that labeled itself the Bolivarian Revolution.[174] Similarly, amidst the institutional upheavals including the dissolution and forcible storming of the Russian Parliament, the Russian Constitutional Court was ultimately unable to effectively enforce limitations on presidential power and was disbanded by President Boris Yeltsin in October 1993.[175] Even in more recent nonrevolutionary processes of constitutional replacement, courts have not played any significant role in reviewing constitutional replacement.[176]

Courts have, however, secured compliance with their review of constitutional amendments. The beginning of an answer to how these three courts have gained compliance must start with the foundational rational choice literature. In this approach, courts are seen as strategic actors who seek to increase their power in the political system. One of the most influential of these accounts can be found in the work of Lee Epstein, Jack Knight, and Olga Shvetsova. The authors argue that courts should seek to build their institutional legitimacy by reinforcing those features of the constitutional system "about which there is already substantial agreement."[177] In this approach, courts seek to ensure that their decisions fall within the political branches' "tolerance interval" for every case that they decide.[178]

This strategic element is clearly important in the judicial review of constitutional amendment. In these cases, courts are taking on

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174. *See* Landau, *Constitution-Making*, *supra* note 4, at 949–58.

175. Scheppele, *supra* note 95, at 1794–98.

176. Partlett, *supra* note 5 (discussing the role of paraliamentary politics in a nonrevolutionary form of constitutional replacement in post-communist Europe).

177. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maitnenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117, 156 (2001) (describing rational choice approaches).

178. *Id.*

concerted majorities; thus, courts must be very careful to ensure that they do so pragmatically by engaging in "strategic calculations about how their decisions are likely to be received."[179] We can see pragmatism emerge in the three courts under investigation here. For instance, in one of the landmark basic structure cases, the Indian Supreme Court struck down a key jurisdiction-stripping amendment but made sure to avoid a head-on confrontation with the current Prime Minister, Indira Ghandi.[180] Furthermore, the basic structure doctrine itself in India is notoriously unclear—this lack of clarity helps to ensure that the court can apply it flexibily.[181] The Colombian Constitutional Court has developed a five-factor test to determine if a constitutional amendment is constitutional.[182] This is another example of a "context-sensitive, multifactor test" that allows courts to balance flexibility and principle in the review of constitution-making.[183] Finally, the Colombian Constitutional Court has also been careful to intervene before popular action has been taken—such as through a referendum vote—in order to reduce collisions with the expressions of popular will.[184]

Pragmatism alone, however, is not enough to ensure compliance. A critical factor is also the context in which these decisions are being made. Following their strong attitudinal commitment to improving governance, these courts frequently go beyond the traditional judicial realm in order to improve and protect governance. In India, for instance, the supreme court has expanded its role outside the common law adversarial tradition by entertaining and ruling on petitions from citizens asking the court to intervene in certain key issues.[185] A similar petition process operates in the Colombian Constitutional Court.[186] Even in South Africa, the court has gone far beyond traditional common law justiciability doctrine to adjudicate widely on positive rights claims.[187]

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179. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 115 (2009).

180. Robinson, *supra* note 2, at 32.

181. *Id.* at at 31.

182. Bernal, *supra* note 12, at 345 (discussing the seven-tiered test for determining substitution).

183. Roux, *supra* note 179, at 115.

184. *See, e.g.*, Cepeda-Espinosa, *supra* note 169, at 673–74 (discussing how the court is controlled somewhat by the people through referenda and petition processes).

185. Robinson, *supra* note 2, at 43–44 (discussing how the court has switched to a more inquisitorial approach).

186. *See* Cepeda-Espinosa, *supra* note 169, at 552 (discussing how the *accion de tutela* judicial review allows individuals to go before the court when their fundamental rights are being violated).

187. *See* Dugard & Roux, *supra* note 2.

A key strategy that these three courts have used to buttress this broadly activist role is cooperation with other institutions in order to make them more effective in their tasks of checking a potentially dominant branch of government. To achieve compliance in these new realms, these courts are actively allying themselves with other institutions and bodies. Landau describes how the Colombian Constitutional Court has allied itself with institutions like the national ombudsman and attorney general's office in its large-scale structural cases involving internally displaced persons and ombudsmen, making these institutions both monitors of the executive bureaucracy and sources of information about future policy ideas.[188] To do this, the court has exercised what we might term legislative powers to build popular support.[189]

Another key cooperative community is the legal community. Analyzing the South African Constitutional Court, Theunis Roux describes how the court's principled jurisprudence helped it to gain the support of the legal community.[190] By deciding cases "according to forms of reasoning acceptable to the legal community of which it is part," the South African Constitutional Court has thus been able to build its legitimacy and secure the support of the legal community—a "community of principle."[191] There are strong parallels between this experience and the Indian Supreme Court, which relies heavily on the professional bar for its prestige and activism.[192]

Given this activist and cooperative context, compliance with judicial decisions reviewing constitution-making are simply one part of the court's expansion of judicial power. These decisions are therefore just another extension of the power of these courts. By contrast, the courts that have failed in gaining compliance generally lacked a supportive context. The Russian Constitutional Court, for instance, struggled from its first case in ensuring compliance with many of its ordinary decisions.[193] It even had trouble getting the newspapers to publish its decisions and achieving compliance from adversely affected parties.[194] Furthermore, as its decisions were increasingly criticized as unprincipled interventions in the political process, it lost legitimacy in the eyes of an important segment of the Russian elites.[195] In particular, many criticized the court for overstepping its bounds by playing too political a role in the

188. Landau, *supra* note 21, at 1524.
189. *Id.*
190. Roux, *supra* note 179, at 115–16.
191. *Id.*
192. Mate, *supra* note 148, at 208–09.
193. Scheppele, *supra* note 95, at 1847.
194. *See id.* at 1795–96.
195. *Id.* at 1815–16.

process.[196] Thus, it is clear that these three exemplar courts achieved compliance because their decisions reviewing constitutional amendment were part of a widely accepted activist judicial role.

CONCLUSION

This survey of comparative experience demonstrates that scholars, judges, and constitutional designers are asking the wrong questions when they seek to understand if unamendability clauses or judicial review in constitution-making are democratic in the abstract. Instead, this experience tells us that context is critical in determining whether courts play a democracy promoting role or not; some courts were successful in improving constitution-making and many others were not. Thus, the important conceptual questions of courts and constitution-making necessarily involve the conditions most likely to forge well-intentioned, democracy promoting courts and the reasons for compliance with these courts' decisions.

By looking at the practice of the courts in India, Colombia, and South Africa, this Article has begun to explore these questions. First, this Article has found that formal constitutional design and textual clauses do not play a decisive role in explaining democracy-promoting courts. Instead, courts are more likely to attempt to play a positive role in improving constitution-making when the judges on these courts see themselves as the part of a community which has a broad role in improving the functioning of democracy. Judges for recognition judiciaries, such as specialized constitutional courts, are more likely to develop this type of attitudinal commitment. Furthermore, these types of recognitional judicial attitudes are more likely to develop in contexts with historically ingrained respect for judicial review, independent and public-minded lawyers' associations, and where courts have control over who is appointed to the court.

Second, this Article has also discovered that courts are far more likely to gain compliance with the review of constitutional amendment than replacement. In reviewing constitutional amendment, well-intentioned courts more frequently gain compliance with their decisions when they are able to successfully engage in broad interventions in other parts of the polity. This success frequently requires cooperation with other institutions. This active role in improving politics in turn helps to make it more likely that political actors will respect their review of constitutional amendments.

These preliminary findings raise a series of additional questions. How effective are institutional design solutions like

196. *Id.*

specialized constitutional courts in building courts that will improve constitution-making politics? Is there a growing trend toward these kind of good governance courts? Can the international community help to buttress well-intentioned courts against powerful outside actors? What are the costs of this kind of judicial intervention? How stable can courts be as guardians of democratic process over time? The answers to these questions will be of significance to judges and scholars interested in better understanding the possibilities and perils of courts and constitution-making.

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