A Dynamic Theory of Judicial Role

***David E. Landau*[326]**
Assistant Professor of Law,
Florida State University College of Law

Abstract:

Recent scholarship has focused heavily on the activism of courts in the fragile democracies of the „Global South." Courts in countries like India, Colombia, and South Africa have issued landmark decisions in difficult political environments, in the process raising unanswered questions about the appropriate conception of judicial role in different political environments. Much of the judicial and academic effort in these contexts is self-consciously oriented towards using courts to carry out basic improvements in the quality of political systems seen as badly deficient. In other words, the core task is to improve the quality of the democratic system over time. These kinds of democracy-improving theories obviously bear a resemblance to „political process" theories in United States constitutional law, but generally differ in terms of the sweeping degree to which democracy is viewed as dysfunctional. This article critically examines the democracy-improving model of judicial review. It argues that such a theory faces several important challenges: more work must be done to assess the plausibility and effectiveness of judicial action to improve democracy, as well as the ability of the theory to distinguish between proper and improper uses of judicial power. At the same time, it sheds new light on important problems in the field of comparative constitutional law and suggests a useful empirical agenda: rather than asking whether courts actually are overstepping their bounds by taking on legislative tasks, scholars can ask about the effects of different strategies of judicial activism on the evolution of different kinds of dysfunctional political institutions.

Rezumat:

Bursele acordate recent s-au concentrat pe activismul instanțelor în democrațiile fragile din „Sudul Global". Instanțele din țări precum India, Columbia, Africa de Sud au pronunțat decizii de speță în medii politice dificile, ridicând astfel întebări care nu au primit răspuns privind rolul adecvat funcției judiciare în medii politice diverse. Mare parte din atenția doctrinei și a puterii judecătorești a fost îndreptată în mod voit spre folosirea instanțelor pentru a aduce îmbunătățiri elementare în calitatea sistemelor

[326] E-mail: dlandau@law.fsu.edu. Associate Dean for International Programs and Assistant Professor of Law, Florida State University College of Law. Workshops: Harvard/Yale/Stanford Junior Faculty Workshop at Stanford, June 28, 2014; FSU Faculty Workshop, June 19, 2014; Younger Comparativists Committee, American Society of Comparative Law, April 4, 2014.

politice care erau privite ca având deficiențe fundamentale. Cu alte cuvinte, sarcina esențială este aceea de a îmbunătăți în timp sistemul democratic. Astfel de teorii de îmbunătățire a democrației seamănă în mod evident cu doctrina „evoluției politice" din dreptul constituțional al Statelor Unite, dar se diferențiază în general prin intensitatea cu care democrația este percepută ca fiind disfuncțională. Acest articol analizează modelul de îmbunătățire a democrației prin controlul judecătoresc. Susține că o astfel de teorie se confruntă cu numeroase obstacole: trebuie depus mai mult efort pentru a analiza plauzibilitatea și efectivitatea acțiunilor judiciare de îmbunătățire a democrației și, în egală măsură, capacitatea teoriei de a distinge între utilizarea corespunzătoare sau neadecvată a puterii judiciare. În același timp, pune într-o lumină nouă problemele importante din domeniul dreptului constituțional comparat și sugerează o agendă empirică utilă: mai degrabă de a se întreba dacă instanțele depășesc atribuțiile prin asumarea unui rol legislativ, juriștii se pot întreba care sunt efectele diferitelor metode de exprimare ale activismului judiciar asupra evoluției diverselor instituții politice disfuncționale.

Keywords: judicial activism, judicial review, constitutional courts

Introduction

Recent scholarship has focused on the role of constitutional courts in new or threatened democracies.[327] This literature has pointed out that these courts are often faced with particular challenges that are different from the ones found in more mature democracies: they may act in „fragile democracies" that are at risk of sliding back into authoritarianism, they often act in the midst of poorly-functioning political systems, and they generally face the challenge of enforcing rights – like socioeconomic rights – that are costly to enforce. At the same time, any assumption that courts acting in poorly-functioning political environments are always weak courts has been definitively proven false: courts in places like India, Colombia, and South Africa have shown a surprising level of activism and independence.

This work problematizes the relationship between judicial review and democracy in different kinds of political contexts. Most clearly, it suggests the following question: what is the relevance of standard constitutional theory, which was developed largely in the United States, to contexts where democratic regimes are particularly vulnerable to overthrow or where democratic institutions are poorly-functioning?

Standard democratic theory as developed in the United States and Europe rests of premises that – by their own terms – do not apply in many newer democracies. For example, Waldron's case for judicial deference rests on an assumption of well-functioning political institutions,[328] while Tushnet's case for popular constitutionalism assumes a

[327] For examples of the recent literature on democratic transitions and judicial role, see Ozan Varol, Temporary Constitutions, 102 CAL. L. REV. 2014 (arguing that the use of temporary rather than permanent constitutions can help to resolve various problems associated with democratic transitions); David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189 (2013) (considering the problem of constitutional changes that work a significant erosion to the democratic, as well as responses to the problem); Samuel Issacharoff, Constitutional Courts and Democratic Hedging, 99 GEO. L.J. 961 (2011) (studying the role of constitutional courts in protecting democratic orders); Samuel Issacharoff, Fragile Democracies, HARV. L. REV. 1405 (2007) (arguing that the fragility of some democratic orders justifies measures like the banning of certain parties in order to preserve the democratic order).

[328] See Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1362 (2006) (making explicit an assumption of a legislature in "reasonably good working order").

robust constitutional culture.[329] A series of dysfunctions in new democracies – vulnerability to authoritarian erosion, defects in party systems and legislative institutions, and an absence of constitutional culture – render these assumptions inapplicable. The key question then becomes: if standard political theory is inapplicable, what is the proper conception of judicial role? New scholarship argues that there is a distinctive „constitutionalism of the global south," but to date this literature has focused more on a set of problems or topics faced by developing regimes, such as socioeconomic rights or access to justice, rather than on a unifying conception of judicial role.[330]

This article aims to fill that gap. Descriptively, it shows that judicial role and constitutional design in new democracies often work off of the premise that democratic institutions should be distrusted, and not just to protect insular minorities but also to carry out majoritarian will. Judges and constitutional drafters in these countries are notably unconcerned with the classic counter-majoritarian difficulty, or the dilemma of courts imposing on democratic space and taking on legislative roles. This is because they are focused on a different problem: how to make democratic institutions work better. Courts and other non-democratic institutions often see their role within such a regime as *dynamic* in nature: they aim to improve the performance of political institutions through time.

More work must be done to assess the plausibility and effectiveness of judicial action to improve democracy, as well as the ability of the theory to distinguish between proper and improper uses of judicial power.

I bring together evidence chiefly from three widely studied countries – Colombia, India, and South Africa – to show how courts have developed tools to protect democracies from erosion from within, to ameliorate defects in different kinds of party systems, and to build up civil society and constitutional cultures. A range of practices in newer democracies can best be understood through a dynamic rather than a traditional conception of judicial role. For example, courts in newer democracies routinely strike down constitutional amendments as being substantively unconstitutional because they view those amendments as a threat to democracy. From a standard theoretical perspective, striking down constitutional amendments is a much more difficult act to justify than ordinary judiciary review. As commentators have often noted, it poses a kind of ultimate counter-majoritarian difficulty, since there is no real way for democratic actors to override the decision to strike down the constitutional amendment.[331] But the doctrine of unconstitutional constitutional

[329] See Mark Tushnet, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, 14 GERMAN L.J. 2249, 2255 (2013).

[330] See, e.g., Daniel Bonilla Maldonado, Introduction: Towards a Constitutionalism of the Global South, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1 (Daniel Bonilla Maldonado, ed., 2013) (introducing a comparative study of three topics: socioeconomic rights, cultural diversity, and access to justice).

[331] See, e.g., Gary Jeffrey Jacobsohn, The Permeability of Constitutional Borders, 82 TEX. L. REV. 1763, 1799 (2004) (noting that the doctrine raises perhaps the "most extreme" form of the counter-majoritarian difficulty).

amendment becomes easier to understand with a dynamic theory, either as a way to defend against democratic erosion or as a way to send a loud signal about the importance of core constitutional values.

Normatively, this article proceeds more cautiously, but suggests that a dynamic theory of judicial role is both defensible and useful in guiding scholars towards a fruitful set of questions. It sheds new light on some of the most active and difficult debates in the field of comparative constitutional law. Take, for example, the debate on socioeconomic rights enforcement between scholars, like Mark Tushnet and Cass Sunstein, favoring „weaker" and more dialogical methods of enforcement and those scholars instead favoring more aggressive or „harder" approaches like structural injunctions.[332] The main question analysts have asked is how to square effective judicial review of socioeconomic rights – which puts courts in the awkward position of having to prioritize and manage resource allocation – with due deference to democratic institutions. A dynamic perspective suggests a somewhat distinct agenda that transcends the strong-form/ weak-form typology: courts and scholars should focus on figuring out which kinds of strategies best serve to empower civil society and to spread constitutional values. Courts engaged in such strategies can use a range of tools that lie somewhere on a spectrum between strong-form and weak-form enforcement: drafting in civil society groups to monitor compliance and formulate policy ideas, publicizing both constitutional issues and compliance failures, expanding access to the court for organizations, etc.[333] All of these tools can be employed without having more dialogical exercises of review necessarily collapse into a strong version of judicial supremacy.

More broadly, a dynamic approach suggests an empirical agenda that should guide future work. While much recent scholarship has studied the *causes* of judicial independence in difficult environments, very little scholarship has considered the *effects* of judicial activism of different types. A dynamic conception of judicial role places this question front and center, because it requires that both judges and scholars grapple with the question of how judicial interventions of different types impact the evolution of democratic institutions. It thus demands that judges consider both questions of plausibility, or which strategies are likely to be possible in different political contexts, and questions of effectiveness, or which kinds of judicial interventions are likely to have positive rather than negative impacts on democratic development. The ultimate value of the theory is thus in asking a fresh set of questions about judicial role.

The rest of this article is organized as follows: Parts I and II develop the descriptive project: they demonstrate both the problem of democratic dysfunction and a typology of the practices of constitutional courts and allied institutions in improving democratic performance. I sort judicial action into three main boxes: tools designed to protect against democratic erosion, tools designed to ameliorate weaknesses in political institutions, and attempts to build democratic spaces around political institutions by building up civil society and spreading constitutional culture. Part III

[332] See MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 228 (2007) (arguing that "weak-form" or dialogic review offers the best way for courts to enforce socio-economic rights); CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221-38 (2001) (making a similar argument).

[333] See infra Part IV.A.

develops the normative project, arguing that a democracy-improving perspective is the most reasonable fit for this descriptive evidence, and that such a theory raises a new set of questions about judicial strategies and about the effects of different kinds of activism. Part IV demonstrates the theory in action by providing new perspectives on two live controversies in comparative constitutional law: the debate between proponents of „weak-form" and „strong-form" review, and the problem of unconstitutional constitutional amendments. Part V concludes and argues that a dynamic theory has the potential to guide a productive agenda for scholars interested in the very live problem of judicial role in newer or more fragile democracies.

I. Democratic Dysfunction & Constitutional Projects

This section considers descriptive evidence about a particular set of challenges that tend to be faced by certain democracies of the „Global South." These include at least three classes of problems: (1) problems of democratic fragility, (2) problems of democratic functioning, and (3) absence of constitutional culture. Further, it presents evidence that these kinds of dysfunctions matter to constitutional designers, judges, and to the scholars focused on the constitutional systems under study. Neither claim, of course, is monolithic: the countries of the global south, and more particularly the three countries focused on in the study, vary in important ways in terms of both the kinds of problems they face and the constitutional responses to those problems. So the claim here is a narrow one: the problem of democratic dysfunction – perhaps democratic irregularity – is a central concern of the constitutionalism of the countries under study.

A. The Problems of Democratic Dysfunction

As much recent political science work has documented, the category „democracy" is a complex one, with the simply label of regime type hiding considerable variation.[334] Many newer democracies suffer from several different kinds of problems with their political systems: (1) they are more likely to face erosion towards authoritarianism, or in other words are particularly „fragile," (2) they suffer from problems in political representation, accountability, and capacity that make them function poorly even if they do not lead to democratic breakdown, and (3) they suffer from a general absence of constitutional culture – neither politicians nor the public cares about constitutional values. I take up these three points in turn.

First, though, two caveats. The first is that the list here is meant to be exemplary of problems faced by developing democracies, rather than comprehensive. The second, which the paper will return to below, is that the problems identified here represent differences of degree, and not of kind, with mature democracies. Some problems of democratic dysfunction exist in all systems, but it would be a mistake for a theory of judicial role to ignore real differences between mature and developing democracies.

1. The Problem of „Fragile" Democracy

Samuel Issacharoff has recently explored the problem of „fragile

[334] For a classic study of the variation in the term democracy, see David Collier & Steven Levitsky, Democracy with Adjectives: Conceptual Innovation in Comparative Research, 49 WORLD POL. 430 (1997).

democracies" – regimes that are particularly likely to fall back into some variant of authoritarianism.[335] Breakdowns of democracy into full-fledged authoritarianism, through military coup or similar device, are now rarer than they were in the past.[336] But erosions into hybrid or competitive authoritarian regimes, which combine elements of democracy and authoritarianism, have become increasingly common.[337] A competitive authoritarian regime is democratic in the sense that elections are held and those elections are not outright shams, but it is authoritarian in the sense that the playing field is systematically tilted in favor of incumbents.[338] These incumbents use their control over institutions like the media, judiciary, and electoral commissions to make it unlikely they will actually lose elections even when the vote counting is fair.[339]

It is relatively easy for some regimes to slip from being a democratic regime to a hybrid regime, because a would-be autocrat need not adopt an obviously authoritarian constitution. Instead, they can merely take steps to pack or neutralize institutions that are supposed to act as a check, while making some relatively subtle legal changes to entrench their own power.[340] I and others have described these kinds of democratic erosions in detail elsewhere;[341] here a few examples will suffice.

In the recent past in Latin America, presidents in Venezuela and Ecuador have replaced their existing constitutions with new ones in order to consolidate their power. In Venezuela, for example, President Chavez took office in 1999 with a bare majority of votes, but faced opposition majorities in the Congress, Supreme Court, and at the subnational

[335] See Samuel Issacharoff, Fragile Democracies, 120 HARV. L. REV. 1406 (2007). Note though that Issacharoff is talking mostly about the susceptibility of democratic regimes to erosion or overthrow. See id. at 1408 (asking whether "democracies act not only to resist having their state authority conscripted to the cause of intolerance, but also, under certain circumstances, to ensure that their state apparatus not be captured wholesale for that purpose?").

[336] See FREEDOM HOUSE, FREEDOM IN THE WORLD 2013, at 24 (2013), available at http://www.freedomhouse.org/sites/default/files/FIW%202013%20Charts%20and%20Graphs%20for%20Web.pdf (noting that the percentage of countries classified as "not free" has dropped from 46 percent in 1972 to 24 percent in 2012, but the percentage of countries classified as "partly free" has increased from 25 percent to 30 percent).

[337] The literature originated in political science as an attempt to explain post-Cold-War regime types that combined features of democracy and authoritarianism. See, e.g., STEVEN LEVITSKY & LUCAN WAY, COMPETITIVE AUTHORITARIANISM: HYBRID

REGIMES AFTER THE COLD WAR (2010) (arguing that many transitions to democracy in the post-Cold-War period have stopped at an intermediate point between democracy and authoritarianism); Andreas Schedler, The Logic of Electoral Authoritarianism, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION (Andreas Schedler, ed., 2006) (arguing that a number of regimes "have established the institutional facades of democracy, including regular multiparty elections for the chief executive, in order to conceal (and reproduce) harsh realities of authoritarianism"); Larry Diamond, Thinking About Hybrid Regimes, J. DEMOCRACY, Apr. 2002, at 21, 21-22 (noting that various regimes around the world like Russia, Turkey, and Venezuela appear to hold elections but yet not be truly democratic).

[338] See LEVITSKY & WAY, supra note 11, at 6 (arguing that a "level playing field" requirement be added to definitions of democracy).

[339] See id. at 9-12.

[340] For example, by amending constitutions to extend term limits. See Tom Ginsburg et al., On the Evasion of Executive Term Limits, 52 WM. & MARY L. REV. 1807, 1810-13 (2011).

[341] See David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189, 200-11 (2013) (giving examples of regimes that have suffered from democratic erosion).

level.[342] Without any express legal authority, he convened a Constituent Assembly, elected through rules that marginalized the opposition, to replace the constitution.[343] The new constitutional order created a more powerful president and allowed Chavez to close down and repopulate existing institutions working against him.[344] With his power consolidated, Chavez was able to push through successive constitutional amendments, most importantly one allowing him to remain in office indefinitely.[345] Chavez's use of the tools of constitutional change did not eliminate the opposition, but it did allow him to gain significant advantages due to his control of the media, courts, and state patronage, and he was removed from power only with his death.[346]

More recently, in Hungary, the right-wing party Fidesz took power in 2010, again with a bare majority of votes, but because of the voting rules won more than two-thirds of seats in Parliament.[347] With this number, and given the constitutional amendment and replacement rules in the Hungarian constitution, it was able to amend or replace the existing constitution unilaterally. The Fidesz party began by passing a series of constitutional amendments that weakened institutions designed to check its political power, such as the judiciary. A key amendment stripped the Hungarian Constitutional Court, a historically independent and powerful institution, of jurisdiction over laws dealing with fiscal and other important matters.[348] Fidesz then moved forward with a wholesale replacement of the existing constitution; the new constitution weakens the judiciary and other checking institutions, for example by altering selection rules.[349] Many commentators argue that Fidesz has worked a significant erosion of democracy in Hungary by making itself harder to dislodge and by weakening checks on exercises of power.[350]

2. Problems of Poorly-Functioning Democracy

Beyond the threat of breakdown, newer democracies may also differ from

[342] See, e.g., Michael Coppedge, Venezuela: Popular Sovereignty Versus Liberal Democracy, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 179 tbl. 8.5. (Jorge I. Dominguez & Michael Shifter, eds., 2d ed. 2003) (showing that the traditional parties still controlled clear majorities in Congress after Chavez was elected).

[343] See Renata Segura & Ana Maria Bejarano, Ni una asamblea mas sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes, 11 CONSTELLATIONS 217, 228-30 (2004) (noting that Chavez's movement won 60 percent of votes, but because of the electoral rules won about 95 percent of seats in the Assembly).

[344] See ALLAN R. BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHAVEZ AUTHORITARIAN EXPERIMENT 57-60 (2010) (recounting how the Assembly used an assertion of "original constituent power" to shut down institutions including the Congress and the Supreme Court).

[345]See Juan Forero, Chavez Wins Removal of Term Limits, WASH. POST, Feb. 16, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/02/15/AR2009021500136.html.

[346] See Steven Levitsky & Lucan A. Way, Elections Without Democracy: The Rise of Competitive Authoritarianism, J. DEMOCRACY, April 2002, at 51, 61 (classifying Chavez-led Venezuela as a competitive authoritarian regime).

[347] See Miklos Bankuti et al., Hungary's Illiberal Turn: Disabling the Constitution, J. DEMOCRACY, July 2012, at 138.

[348] See Gabor Halmai, Unconstitutional Constitutional Amendments: Courts as Guardians of the Constitution?, 19 CONSTELLATIONS 182, 192 (2012). The amendment was challenged in front of the constitutional court as an unconstitutional constitutional amendment, but the Court refused to utilize such a doctrine to strike down the amendment. See id. at 194-97.

[349] See Bankuti et al., supra note 21, at 142-44 (describing the new constitution and its process of approval).

[350] See id. at 144.

more mature democracies along a related dimension: they may have systematic deficiencies in political representation, accountability, and capacity. The self-perception of many emerging democratic regimes is not just that they are particularly prone to erosion or breakdown, but also that they do not function well. Representativeness refers to the question of whether elected officials actually push policies favored by their constituents, accountability to the question of whether voters and other institutions can punish political actors who either perform poorly or who exceed their powers, and capacity refers to the ability of political actors to gather information about social problems and to formulate effective policy responses to them.[351] Political scientists tend to attribute some problems along all three dimensions to defects in party systems, and more particularly to two types of systems commonly seen in the developing world: the non-institutionalized or weak party system and the dominant party system.

A non-institutionalized party system is one where parties lack durable roots in society.[352] Thus, within these systems parties turn over quickly, changing their share of the vote and even disappearing with great frequency.[353] Parties in these kinds of systems often have weak or non-existent ideological platforms, with personality replacing policy as a key determinant of votes.[354] Newer party systems in countries that have experienced democratic transitions often have non-institutionalized party systems because organizing stable and coherent parties is a task that takes time.[355] Parties need to establish internal structures, links with outside groups like unions and business organizations, and a reputation for effectiveness at carrying out a certain political agenda – none of these tasks can be undertaken instantaneously. In the absence of organization, actors form parties around individual personalities or irrelevant issues: a famous example is the Beer Lovers party that formed in Poland following the democratic transition.[356] New democracies like Egypt may thus be relatively unlikely to have institutionalized party systems.[357] Further, party systems can deinstitutionalize even in systems that once had stable and well-defined party systems, particularly where voters lose

[351] See, e.g., Michael Shifter, Emerging Trends and Determining Factors in Democratic Governance, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 3, 5-6 (Jorge I. Dominguez & Michael Shifter, eds., 3d ed. 2008) (giving definitions of these terms).

[352] For the classic treatment in the political science literature, see Scott Mainwaring & Timothy R. Scully, Introduction: Party Systems in Latin America, in BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 1, 4-5 (Scott Mainwaring & Timothy R. Scully, eds., 1995)

[353] See id. at 7-8 (comparing the volatility of voting patterns across different Latin American countries).

[354] See id. at 5 (noting that in non-institutionalized party systems, "more citizens have trouble locating what the major parties represent even in the broadest terms," and that these systems undergo frequent "[c]hanges in relative ideological position").

[355] See SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 422-25 (1968) (arguing that party systems are often weak and non-institutionalized in new democracies).

[356] See, e.g., Stanislaw Gebethner, Parliamentary and Electoral Parties in Poland, in PARTY STRUCTURE AND ORGANIZATION IN EAST-CENTRAL EUROPE 121, 122 (Paul G. Lewis, ed., 1996) (attributing the moderate success of the Beer Lover's party to pervasive distrust of any political party following the fall of socialism).

[357] See, e.g., Marwan Muasher, The Path to Sustainable Political Parties in the Arab World, Nov. 13, 2013, available at http://egyptelections.carnegieendowment.org/2013/11/14/the-path-to-sustainable- political-parties-in-the-arab-world (noting the difficulty that new Egyptian parties have had in getting organized, and noting the asymmetry between the newer parties, which are disorganized, and forces like the Muslim Brotherhood, which have had a long time to organize).

confidence in the legitimacy of existing political structures. Colombia and Venezuela offer two examples from recent Latin American history where once institutionalized party systems dissolved, leaving a vacuum.[358]

Non-institutionalized party systems lead to problems of representation because the absence of clear platforms or durable parties obscures links between voters and elected officials, and thus policy made by elected officials need not represent the public will.[359] Further, they may lead to accountability problems, primarily because elected officials are not rooted in strong party organizations. For example, presidential or semi-presidential regimes with non-institutionalized party systems tend to elect outsiders as chief executives, and these outsiders may be difficult for either legislatures or other institutions like courts to control.[360] The relatively recent cases of Uribe in Colombia, Chavez in Venezuela, Correa in Ecuador, and Fujimori in Peru all demonstrate how non-institutionalized or deinstitutionalizing party systems tend to produce political outsiders as presidents, and how these outsiders may threaten at least horizontal mechanisms of political accountability.[361] Finally, non-institutionalized party systems may be correlated with weaknesses in capacity. This is easiest to see in the case of legislatures: a legislature composed of small, personalist parties and high turnover is unlikely to develop the expertise to either develop policy or to supervise the executive's initiatives.[362] In the term used by Daryl Levinson, a legislature in a non-institutionalized party system is more likely to seek to „abdicate" its powers than to „empire build."[363]

Dominant-party systems form a second, somewhat different kind of problem common in the developing world.[364] In these systems, a single party tends to win most elections. This is a common problem: Mexico was a dominant-party system for most of the prior century, India had this kind of system for much of its democratic history, South

[358] In Colombia, a stable two-party system broke down in the 1990s as voters became disenchanted with traditional political institutions: an institutionalized party system was replaced with an inchoate party system with personalist parties. See Eduardo Pizarro Leongomez, Giants with Feet of Clay: Political Parties in Colombia, in THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 78-79 (Scott Mainwaring et al., eds., 2013). In Venezuela, a similarly stable two-party system imploded quickly and was replaced with a vacuum that was filled by Hugo Chavez and his movement. See Michael Coppedge, Venezuela: Popular Sovereignty versus Liberal Democracy, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 167, 182-83 (Jorge I. Dominguez & Michael Shifter, eds., 2d ed. 2003).

[359] See Mainwaring & Scully, supra note 26, at 5 (noting that non-institutionalized party systems lack strong "linkages between citizens and parties").

[360] See Guillermo O'Donnell, Delegative Democracy, J. DEMOCRACY, Jan. 1994, at 55, 60 (noting how elected presidents operating in non-institutionalized party systems sometimes run on platforms where they put themselves above politics and outside of political parties).

[361] See, e.g., Maxwell A. Cameron, The State of Democracy in the Andes: Introduction to a Thematic Issue of Revista de Ciencia Politica, 30 REVISTA DE CIENCIA POLITICA 5, 9-13 (2010) (tracing trends across different countries in the Andean region).

[362] See, e.g., Scott Morgenstern, Explaining Legislative Politics in Latin America, in LEGISLATIVE POLITICS IN LATIN AMERICA 413, 431 (arguing and providing evidence for the proposition that "only cohesive opposition parties (or coalitions) with majority control will have the means, method, and incentive to assert legislative authority").

[363] See Daryl Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. 915 (2005) (noting that the assumption that political institutions are out of expand their power rather than abdicate is an often-false assumption even of United States constitutional law).

[364] For an overview to the theoretical issues within the particular context of South Africa, see Sujit Choudhry, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, 2 CONST. CT. REV. 1, 8-23 (South Africa) (2009).

Africa – along with much of the rest of Africa – has this kind of system today, and Turkey may be evolving into such a system.[365] These systems emerge where the organizational problems left unresolved in the non-institutionalized system case are resolved, but in an asymmetric way: one party or movement grabs most of the organizational resources.[366] Once established, these sorts of systems may be difficult to dislodge because the incumbents will gain enormous advantages in terms of resources and organization over their opponents.[367]

Thus, dominant-party systems again raise challenges along the three dimensions of representation, accountability, and capacity. There is a possibility that some groups of voters not part of the coalitions for the winning party will get permanently frozen out: the dominant party has no incentive to represent their interests, and opposition groups will be unable to do so.[368] Further, the fact that the same party is virtually guaranteed to win every election may weaken the accountability between political leaders and voters; a party virtually guaranteed to win the next election has fewer incentives to pay attention to even the voters composing its coalition.[369] The dominance of a single party will also lead to predictable problems with horizontal accountability: control institutions like ombudsmen and comptrollers may be packed by members of the dominant party rather than having the necessary independence.[370] Finally, these systems may beget problems of bureaucratic capacity, in some cases by allowing corruption to flourish and to influence appointments and behavior with the bureaucracy.

It is worth noting that serious problems of representation, accountability, and capacity often exist even without these particular configurations in party systems. Capacity, for example, is often weak in newer democracies just because it takes considerable time and resources to build up competent bureaucrats. And pervasive problems of corruption, which run across a large number of less mature democracies, impact the quality of representation and the extent of accountability by weakening the links between voters and officials and by allowing officials to weaken horizontal checks on their power.[371]

3. Problems of Constitutional Culture

Finally, many theories of American constitutionalism rest at base on the

[365] See generally Hermann Giliomee & Charles Simkins, The Dominant Party Regimes of South Africa, Mexico, Taiwan, and Malaysia: A Comparative Assessment, in THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY 1 (Hermann Giliomee & Charles Simkins, eds., 1999) (giving an overview of these different regimes).

[366] See, e.g., LEVITSKY & WAY, supra note 11, at 56 (noting that hybrid regimes, which usually consist of one-party dominant regimes, are a solution to problems of political disorganization, and themselves rely on organization to survive).

[367] See id. at 9-12.

[368] See, e.g., Giliomee & Simkins, supra note 39, at 40-41.

[369] See Steven Friedman, No Easy Stroll to Dominance, in THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY 97, 106-07 (Herman Giliomee & Charles Simkins eds., 1999).

[370] See, e.g., Samuel Issacharoff, The Democratic Risk to Democratic Transitions, 5 CONST. CT. REV. 2014 (noting the ways in which the dominant-party ANC in South Africa is able to undermine institutions that are supposed to check it).

[371] See, e.g., Kanybek Nurtegin & Hans Czap, Corruption: Democracy, Autocracy, and Political Stability, 42 ECON. ANAL. & POL'Y 51 (2012) (finding that levels of corruption in unstable democracies are high, although lower than in autocratic regimes).

notion that the „people" care about the constitution and its meaning – in other words that the constitution is taken seriously as an object of social and political discourse. This conception obviously lies at the root of the „popular constitutionalist" movement in the United States. The main animating principle of this movement is that at least some power of constitutional interpretation should be taken away from the judiciary and given to the people, either exercised directly or through their political representatives.[372] Yet as Tushnet points out this idea that constitutional principles should be realized in the political realm, rather than through judicial elaboration, requires an assumption that members of the public themselves care about constitutionalism.[373] Much of the case for reining in judiciaries in the name of popular constitutionalism depends, then, on the existence of constitutional culture.

This assumption is very plausible in the United States, which has a long history of carrying on political disputes as fights about the meaning of the constitution.[374] Some other mature democracies (although not all) have similarly robust constitutional cultures.[375] But – although systematic empirical study is almost non-existent – the assumption seems to break down in many new democracies. Some of these systems are new to democratic constitutionalism and thus have little history or experience internalizing constitutional values. Others have a history of living under „sham constitutionalism" – documents that purported to create liberal democracies, but in fact were honored in the breach.[376] Finally, some have experienced a dizzying array of constitutions in succession, with none of the texts seeming to have much meaning or real-world impact.[377] Constitutions in these circumstances still play valuable functions. They may, for example, help elites solve coordination games involving which actor gets to wield which type of power. But they are not likely to serve as a widely-known source of national values, at least not initially.

[372] See, e.g., LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing for a version of departmentalism, where each branch of government would have its own power of constitutional interpretation); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000) (arguing that the development of constitutional meaning should be left primarily in the hands of political rather than judicial actors); Tom Donnelly, Making Popular Constitutionalism Work, 159 WISC. L. REV. 159 (2012) (searching for ways to allow popular constitutionalism to be implemented as part of a practical reform program in the United States).

[373] See Tushnet, supra note 141, at 2255.

[374] For an account of the construction of this constitutional culture in the first generation of the independent United States, see Jason Mazzone, The Creation of a Constitutional Culture, 40 TULSA L. REV. 671 (2005) (describing how civic associations served as a key agent for inculcating constitutional values to ordinary people).

[375] In Germany, for example, recent scholarship has traced the rise of "constitutional patriotism in the post-war period. See Jan-Werner Muller, On the Origins of Constitutional Patriotism, 5 CONTEM. POL. THEORY 279 (2006) (arguing that Germans view their constitution as the "focal point of democratic loyalty")

[376] See David S. Law & Mila Versteeg, Sham Constitutions, 101 CAL. L. REV. 863 (2013) (measuring the match between constitutional text and actual compliance with constitutional norms, and finding the highest levels of divergence in Asia and Africa).

[377] See, e.g., Daniel Lansberg-Rodriguez, Wiki-Constitutionalism: The Strange Phenomenon That is Destroying Latin America, THE NEW REPUBLIC, May 25, 2010 (noting the excessive numbers of constitutions in many Latin American countries), available at http://www.newrepublic.com/article/politics/75150/wiki- constitutionalism; Miguel Schor, Constitutionalism Through the Looking Glass of Latin America, 41 TEX. INT'L L.J. 1, 34 (2006) (finding that Latin American constitutions were designed to be "flexible" so as to suit elite interests but never captured "broad social support").

The typology of different dysfunctions outlined here suggests a series of independent but related problems with democratic functioning. First, newer democracies often suffer from very high risks that political action will endanger democracy itself – they are particularly fragile. Second, newer democracies often have political institutions that do not effectively channel the will of the people – they are poorly-functioning. And third, the public itself often does not care much about constitutional meaning and will therefore presumably not pressure political actors into making decisions based on constitutional meaning.

B. Judicial Perception and Constitutional Design in Dysfunctional Democracies

A key question is how judges, scholars, and constitutional designers have analyzed these problems. At least most realistic efforts at normative constitutional theory would build on this self-perception. Scholars and judges working on developing countries do cite and rely on perception of problems in their own democratic systems, and constitutional design has been attuned to these problems. Judges (as well as citizens and constitutional designers) can and often do overstate the problems with their own political systems. But the fact that judges, scholars, and constitutional designers recognize defects in their own political systems would seem to be relevant to a conception of judicial role.

The Indian and Colombian high court judges have been particularly clear in this regard. In Colombia, Constitutional Court justices openly treat the weaknesses in political institutions – and particularly in the Congress – as a justification for the protagonist's role that the Court has taken on within political life. In one famous decision striking down a national security law because of weaknesses in democratic deliberation, the Court complained that the Congress "should be" a „space of public reason;[378] in another case striking down a tax reform, the Court noted that a measure expanding the VAT tax to basic necessities had not been the product of „a minimum of rational deliberation."[379] One justice, pointing across the main square in Bogota from the Constitutional Court, told me that the Court, rather than the Congress, is the center of public protest, because the Court „has more relevance to people's lives."[380]

Likewise, Nick Robinson argues that the Indian Supreme Court's perception of systematic problems in elected democratic institutions has led it to seek an expanded mandate and to become a kind of „good governance court."[381]

For example, Justice Balakrishnan stated that arguments in favor of judicial restraint „fail[] to recognize the constant failures of governance taking place at the hands of the other organs of State, and that it is the function of the Court to check, balance and correct any failure arising out of any other State organ."[382] In both of these systems, the judges are giving voice to broadly-felt perceptions about the low quality of democratic institutions.

[378] See Decision C-816 of 2004, § VII.138 ("Congress is a space of public reason. Or at least the Constitution postulates that it should be."), available at http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm.

[379] See Decision C-776 of 2003, §4.5.6.1, available at http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm.

[380] Interview with Constitutional Court Justice, Bogota, Colombia, Aug. 2009.

[381] See Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court, 8 WASH. U. GLOB. STUD. L. REV. 1, 8-16 (2009).

[382] Id. at 16-17.

The situation in South Africa is somewhat different: there it has been sets of scholars surrounding the Court, rather than the Court itself, which have focused on the problems of dominant party democracy. These scholars have focused on the existence of a dominant party as one of the fundamental challenges faced by the Court, and have analyzed both the extent to which it limits the Court's range of options and the ability of the Court to mitigate some of its byproducts.

The perception of inadequate or flawed representative institutions is also a core principle of constitutional design across a range of new democracies. First, it drives a relatively „thick" approach to constitutional drafting. Constitutional framers in new democracies often write lengthy constitutions detailing a large number of rights and delving deep into the details of constitutional structure and functioning. While some commentators view these kinds of constitutional texts as aberrational or as improper constitutions, Scheppele notes that they seem to be a rational reaction to the distrust of democratic institutions.[383] Adopting detailed texts is a way to hem in and limit the power of democratic actors.

Moreover, distrust of democratic institutions leads constitutional designers to create a series of independent institutions designed to check and control elected actors. That is, while judicial review has become a standard institution almost everywhere, constitutional designers in newer democracies have found that judicial review alone is not enough.[384] They thus also create other institutions, like anticorruption commissions, ombudsmen, electoral courts and commissions, human rights commissions, independent prosecutors, independent comptrollers, etc.[385] The proliferation of these institutions is one of the most important – and least studied or understood – trends in constitutional design.[386]

In one of the few articles to study the trend, Christopher Elmendorf argues that these independent non-judicial institutions act as advisory counterparts to constitutional courts.[387] In other words, they soften the tension between democracy and judicial review by placing review-like powers with institutions that lack the coercive powers of courts. Elmendorf's classification accurately describes the functioning of some of these institutions, especially in the developed world. But in many cases, these non-judicial independent agencies have as sweeping a set of powers (within their designated domain) as constitutional courts. For example, anti-corruption

[383] See Kim Lane Scheppele, Parliamentary Supplements (or Why Democracies Need More than Parliaments), 89 B.U. L. REV. 805 (2009) (noting that modern constitutions are often thick documents, providing a series of restraints on both elected representatives and on the checking institutions themselves).

[384] See Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 633, 687-88 (2000) (calling on constitutional theorists to think about the possibility for institutions beyond parliaments and courts).

[385] See Scheppele, supra note 57, at 823-24 (discussing the different kinds of institutions that are found in modern constitutions in the developing world); see also Kim Lane Scheppele, Democracy by Judiciary. Or, why Courts can be More Democratic than Parliaments, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 37-38 (Adam Czarnota et al., eds., 2005) (linking the adoption of thick constitutions and the rise of independent checking institutions to distrust of democracy in the post-communist states).

[386] See Ackerman, supra note 58, at 688 (noting that this area is one where "the creative potential of constitutional law has been egregiously underappreciated").

[387] See Christopher Elmendorf, Advisory Counterparts to Constitutional Courts, 56 DUKE L.J. 953, 955 (2007) (noting that many of these institutions have purely advisory powers, although others may have some coercive powers

commissions often have full powers to remove and prosecute public officials.[388] Electoral courts and commissions can often take independent action to determine elections and to sanction wrongdoing.[389] Moreover, these independent institutions are often designed in addition to – rather than as a replacement for – an activist constitutional court. This has been the pattern, for example, in systems as diverse as Hungary, India, and Colombia.[390] This suggests that rather than viewing these institutions as a way to weaken the checks placed on democratic officials, they should instead be viewed as an additional manifestation of democratic distrust.

II. Constitutional Jurisprudence and Dysfunctional Democracies

While the last part took a sociological look at the attitudes of three sets of relevant actors – judges, scholars, and constitutional designers – this one looks particularly at the jurisprudence of constitutional courts. My aim here is to show that the conception that exercises of judicial review should be forward-looking and aimed at improving the performance of political institutions through time has become ingrained in the practices of courts in newer democracies. This section assembles evidence that such a conception exists, and classifies exercises of judicial review into three main camps: efforts to ensure democratic survival, efforts to build up democratic institutions and to fix problems with political systems, and efforts to work around existing political institutions by opening up alternative spaces of democratic contestation. The evidence is again drawn primarily, but not exclusively, from the courts of South Africa, Colombia, and India.

Beyond description and classification, this part demonstrates that a dynamic perspective on judicial review is helpful in raising questions for evaluating the exercises of judicial review surveyed here. That is, a dynamic perspective on judicial review is not a blank check for courts in the developing world, but instead suggests a different set of limitations on constitutional courts. I treat these questions, and potential responses to them, in a more complete way in Part III.

A. Preserving Democracy

Legal scholars and constitutional designers have envisioned a number of different responses to the threat of democratic erosion. As noted above in Part I, new democracies are often viewed as particularly vulnerable to backsliding

[388] See, e.g., JOHN R. HEILBRUNN, ANTI-CORRUPTION COMMISSIONS: PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION? 4 (2004) (noting the extraordinary investigative and coercive powers of the Hong Kong anti-corruption commission over a range of different issues), available at http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf.

[389] See, e.g., Robert A. Pastor, A Brief History of Electoral Commissions, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 78-79 (Andreas Schedler et al., eds., 1999) (noting the sweeping powers of electoral commissions and courts in Costa Rica and India)

[390] See Robinson, supra note 55, at 17 (noting that the founders of Indian democracy "set up a series of independent unelected bodies," including a national election commission, comptroller, finance commission, auditor general, and public service commissions at all levels of government, as well as a powerful court); Scheppele, supra note 59, at 40 (discussing the Court and other checking institutions in Hungary, as a response to democratic distrust); David Landau, Political Institutions and Judicial Role in Comparative Constitutional Law, 51 HARV. INT'L L.J. 319, 338-39 (2010) (noting that the Colombian Constitution of 1991 created powerful institutions like a Comptroller and Human Rights ombudsman, as well as a powerful Constitutional Court, because of "a suspicion that existing structures would not adequately enforce the Constitution and transform Colombian society").

into a variant of authoritarianism. I discuss two of these institutions here: the militant democracy model, which allows courts to ban problematic parties, and judicial control of the use of the tools of constitutional change. Both of these institutional designs and legal doctrines appear to rest on skepticism about whether maneuvers with significant political or popular support at a given point in time actually reflect the durable popular coalition that should be involved in large-scale political change; in other words, they reflect skepticism about the quality of democracy at the present. The argument is that it is relatively easy for a political force or leader to leverage a temporary spike in popularity and to make it appear to be a durable mandate for sweeping change.[391] Further, certain types of constitutional change can do lasting damage to a political system, putting a regime on a less democratic path indefinitely.[392] Put together, these two factors justify extraordinary restrictions on democracy in the present, in the name of preserving and improving it for the future.

The oldest of these mechanisms, the „militant democracy" conception developed in post-war Germany, focuses largely on the banning of parties which pose a threat to the democratic order, a power normally placed in Constitutional Courts.[393] The idea is that parties who are clearly anti-democratic, and which have anti-democratic ends, should not be able to come to power from within the democratic order. The model for this practice, of course, is the interwar Weimar Republic, where the Nazis came to power largely using democratic means, beginning as a very small party and gaining strength for their anti-system ideology as the major parties failed to stabilize the economy and government.[394] The key question is whether banning parties is a helpful response for preserving democracy, particularly against the modern threat of democratic backsliding into a competitive authoritarian or hybrid regime. Some evidence – admittedly limited – suggests that it may not be.

More recent work in constitutional theory has focused instead on designing the tools of constitutional change so as to be robust against the threat of abuse. Constitutional designers in recent constitutions have often created tiers of constitutional amendment in the text itself, making certain sensitive provisions either particularly difficult or even impossible to change.[395] For example, the Honduran

[391] See, e.g., William Partlett, The Dangers of Popular Constitution-Making, 38 BROOK. J. INT'L L. 193 (2012) (finding based on a study of Eastern European and post-Soviet states that certain models of constitution-making "have helped charismatic presidents unilaterally impose authoritarian constitutions on society"); David Landau, Constitution-Making Gone Wrong, 64 ALA. L. REV. 923, 936 (2013) (noting that in many instances of constitution-making, there is a significant risk that powerful actors will use the moment to entrench their power); Ozan Varol, Temporary Constitutions, 101 CAL. L. REV. 2014 (arguing that the use of temporary constitutions can ameliorate some of the risks of groups taking advantage of moments of constitutional change to entrench their own power).

[392] See, e.g., David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189 (2013); Partlett, supra note 65 (finding that the shape of constitution-making processes had lasting effects on constitutional orders).

[393] See Samuel Issacharoff, Fragile Democracies, 120 HARV. L. REV. 1405, 1409 (describing the militant democracy conception); see also Giovanni Capoccia, Militant Democracy: The Institutional Bases of Democratic Self-Preservation, 9 ANN. REV. L. & SOC. SCI. 207 (2013) (giving a historical overview of the concept and explaining renewed interest in it).

[394] See, e.g., Gregory H. Fox & Georg Nolte, Intolerant Democracies, 36 HARV. INT'L L.J. 1, 3 (1995) (explaining the rise of the Nazi party from within the constitution of the Weimar Republic).

[395] See Richard Albert, Constitutional Handcuffs, 42 ARIZ. ST. L.J. 667, 708-09 (2010) (noting and recommending the use of constitutional tiers with higher supermajorities as an alternative to making some provisions completely unamendable).

constitution makes its one term limit on presidential terms unamendable, and penalizes even proposals to change that provision.[396] Less dramatically, the South African constitution requires increased supermajorities for some kinds of constitutional changes as opposed to others.[397] One possible purpose of these kinds of tiered provisions is to protect constitutional norms, like term limits, that are particularly likely to be abused and to lead to democratic erosion.[398]

In an increasing number of countries, courts have invented this doctrine on their own, arguing that the „basic structure" or „fundamental principles" of the constitution may not be changed by amending the constitution.[399] This doctrine of unconstitutional constitutional amendments is, for most American lawyers, a stunning display of judicial overreach, but it has been adopted by courts in countries including India, Colombia, Brazil, Pakistan, Bangladesh, Nepal, Portugal, the Czech Republic, Taiwan, and Peru.[400] Uses in Colombia and India suggest that it may have a least limited value in protecting democracy against some kinds of threats.[401]

The case of institutions designed to protect the survival of fragile democracies raises perhaps the most dramatic conflict between traditional constitutional theory and the dynamic approach[402] Both party-banning and the unconstitutional constitutional amendments doctrine are very difficult to square with most standard approaches to constitutional theory, because they involve extraordinary restrictions on the democracy of the present. The „militant democracy" model of party banning reduces the scope of political competition and prevents some political forces from contesting political office. And the unconstitutional constitutional amendments doctrine prevents even large super-majorities from carrying out certain political changes

[396] See, e.g., Rosalind Dixon & Vicki Jackson, Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests, 48 WAKE FOREST L. REV. 149, 176-78 (explaining the design of the Honduran constitution and its role in provoking a constitutional crisis and military coup in 2009).

[397] See S. AFR. CONST. 1996, art. 74 (requiring that most amendments receive only a two-thirds majority of Parliament and in some cases super-majority approval of the National Council of Provinces, but requiring a three-quarters majority of Parliament for amendments to Chapter 1 of the Constitution).

[398] This was precisely the use of the unamendable provision in Honduras. See Dixon & Jackson, supra note 70, at 176-78.

[399] See, e.g., Yaniv Roznai, Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea, 61 AM. J. COMP. L. 657, 659 (2013) (noting that the issue of unconstitutional constitutional amendments has already been litigated in "numerous countries").

[400] See id. at 677-99 (giving an overview of usage across a broad range of countries).

[401] See, e.g., Rosalind Dixon & David Landau, Transnational Anchoring and a Limited Doctrine of Unconstitutional Constitutional Amendment, INT'L J. CONST. L. 2015.

[402] There are yet more dramatic examples of such a conflict. Some scholars have called for a constitutional role for the military as a protector of democratic stability in fragile regimes. See Ozan O. Varol, The Military as the Guardian of Constitutional Democracy, 51 COLUM. J. TRANSNAT'L L. 547 (2013) (arguing that militaries can at time promote rather than hinder democratic development in fragile regimes). The key to the logic is the observation that a military role in the constitutional order need not be antithetical to democracy; under some conditions militaries have promoted democratization. The military may in fact be especially effective at defending against threats of democratic erosion from within: judicial decisions may be ignored (or judiciaries packed), but military power is much more difficult to evade. See id. at 579-80 (noting that judicial decisions can more easily be ignored). Turkey, where the military had a long history of stepping in to protect the democratic order against the perceived threat of Islamist political forces, is often held up as a model for this type of constitutional design, and some have argued for a similar role for the military in the emerging regimes of the Arab Spring, especially Egypt. See id. at 597-605 (Turkey); 617-25 (Egypt).

without either packing the court or, perhaps, by conducting a wholesale constitutional replacement. But both emerge as potentially vital tools to protect and preserve the democracy of the future; thus a dynamic perspective emerges as the best potential defense of both doctrines.

B. Working to Improve Democratic Institutions

Beyond preserving democracy, courts also focus in some cases on improving the performance of democratic institutions through time. The sheer number of possible approaches makes it impossible to give a complete accounting here. Instead, I focus on giving examples of approaches that have been used in two well-studied political systems: the approaches of the Colombian Constitutional Court, which has focused on problems found in a non-institutionalized party system with a correspondingly overreaching executive, and the approaches of the South African Constitutional Court, which has focused on problems found within a dominant party system.

1. Colombia and Deinstitutionalized Party Systems

The Colombian Constitutional Court is faced with a party system that is often viewed as deinstitutionalized.[403] Parties are weak, turn over frequently, and lack clear policy platforms. Further, the Colombian Congress is widely viewed as corrupt, with legislators more interested in achieving personal gain for themselves or their backers than in pursuing national policy initiatives.[404] The result of these two factors has been a Congress that is very weak in carrying out the core functions of lawmaking or checking executive power. This legislative weakness is matched by a correspondingly very powerful president that is largely unchecked by other elected officials.[405] The Court and other actors within the political system, broadly speaking, have taken two approaches to these mirror-image problems: they have sought to improve the performance of the weaker institution (the Congress) by cleansing it and by attempting to force it to become more interested in policy, and they have sought to close the accountability gap by essentially replacing the congressional role in checking an overreaching executive.

Colombian institutions have, first, responded to the perceptions of corruption in the Colombian system in the simplest way imaginable: by seeking to oust corrupt or incompetent officials. The Colombian constitution includes a number of institutions aimed at removing and jailing politicians, particularly legislators, which are perceived by the population as hopelessly corrupt and ineffective. A Procuraduria [Attorney General] has the power to discipline, remove, and impose future political bans on elected and non-elected actors for a wide range of faults; the Prosecutor's Office has the power to recommend criminal charges to the Criminal Chamber of the Supreme Court, which can jail high officials; the

[403] See, e.g., Eduardo Pizarro Leongomez, Giants with Feet of Clay: Political Parties in Colombia, in THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 78, 80 (Scott Mainwaring et al., eds., 2006) (stating that the Colombian party system was going through a "rapid de-institutionalization process").

[404] See id. at 91-93 (explaining how the deinstitutionalized party system and other factors impact the behavior of the Colombian Congress).

[405] See, e.g., Rodrigo Uprimny, The Constitutional Court and Control of presidential Extraordinary Powers in Colombia, 10 DEMOCRATIZATION 46, 51-52 (2003) (emphasizing the extent to which Colombian presidents have historically ruled by using their emergency powers).

Comptroller audits state institutions regularly and broadly.[406] Other constitutional designs in new democracies tend to have similarly robust sets of institutions charged with cleansing politics.[407]

These control institutions have had an incredible impact on Colombian politics: in the 2006-2010 term about one-third of all elected congressmen were investigated and over fifteen percent actually jailed for their links to paramilitary groups.[408] Most of these investigations were based on allegations of links or dealings with paramilitary groups. And the theories of removal sweep well beyond criminal matters and outright corruption. This past year, for example, the national Attorney General utilized his broad autonomous power to remove the elected mayor of Bogota, Gustavo Petro, on the grounds that Petro had handled a proposed shift from private to public garbage vendors in a thoroughly incompetent manner.[409] Petro was also banned from future participation in politics for fifteen years. Importantly, the allegations against Petro were not based on corruption, but on poor performance.[410] In the aftermath of the Petro removal, some commentators referred to the national Attorney General – an unelected institution charged with monitoring politicians and bureaucrats – as the most powerful person in the country.[411]

Beyond cleansing, the Court and its allied institutions have also sought to improve the legislative performance of the Congress. For example, they have imposed strict limits on the kind of lawmaking power that the Congress can delegate to the president, a species of non-delegation doctrine.[412] Similarly, the Colombian Court has attempted to improve the quality of legislative deliberation by constitutionalizing some issues of legislative procedure. When the legislature fails to debate a key issue at all stages of debate, for example because a provision is added as part of an amendment very late in the legislative process, the Court will strike down the resulting law.[413]

A textbook example of the Court's attempts to „fix" the Congress come out of a critically-important 2003 case where the Court examined the constitutionality of a legislative amendment that formed part of then-President Uribe's signature program on national security.[414] The

[406] See CONST. COL., arts. 249-50 (Prosecutor); art. 267 (Comptroller); arts. 275-76 (Attorney General).

[407] See, e.g., Kim Lane Scheppele, Parliamentary Supplements (or Why Democracies Need More than Parliaments), 89 B.U. L. REV. 795, 824 (giving examples of a number of different types of cleansing institutions).

[408] See Claudia Lopez & Oscar Sevillano, Balance politico de la parapolitica, Corporation Nuevo Arco Iris, Dec. 2008, available at http://www.ideaspaz.org/tools/download/54297.

[409] See William Newman, Mayor Ousted in Colombia After Claims of Bungling, N.Y. Times, Dec. 9, 2013, at A6, available at http://www.nytimes.com/2013/12/10/world/americas/mayor-ousted-in-colombia- after-claims-of-bungling.html.

[410] See id. (nothing that the core allegation was that Petro had made "serious mistakes in his handling of the botched transfer of garbage collection from private contractors to a government-run service).

[411] See Ordonez, el hombre mas poderoso de Colombia?, SEMANA, Dec. 10, 2013, available at http://www.semana.com/nacion/articulo/ordonez-es-el-hombre-mas- poderoso-de-colombia/367790-3.

[412] The core tool here is a requirement that delegations be relatively precise. See, e.g., Decision C-097 of 2003, available at http://www.corteconstitucional.gov.co/relatoria/2003/c-097-03.htm.

[413] This is called the "elusion of debate" doctrine. See, e.g., Decision C-754 of 2004 (striking down parts of an important bill reducing pension payouts), available at http://www.corteconstitucional.gov.co/relatoria/2004/c-754-04.htm

[414] See Decision C-816 of 2004, available at http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm; see also Gonzalo A. Ramirez-Cleves, El control material de las reformas constitucionales mediante acto legislativo a partir de la jurisprudencia establecida en la Sentencia C-551 de 2003, 18 REVISTA DERECHO DEL ESTADO 3, 17-18 (2006) (analyzing the case and its context in detail), available at http://dialnet.unirioja.es/descarga/articulo/3405301.pdf.

amendment would have allowed Uribe to enact sweeping anti-guerrilla measures. The Court struck the amendment down on procedural grounds, holding that its passage through the Congress had been improper. It focused on the fact that the President appeared to have interfered in the congressional procedure for passage of the law. The Court noted that the amendment was about to fail a key vote, but the presiding officer in Congress (an Uribe ally), after trying to keep the time for voting open an extraordinary length of time, closed the legislative session on grounds that there was a disturbance on the house floor and refused to certify that a vote had been held.[415] After a one-day delay, the Congress held a new vote without any additional deliberation, and fourteen legislators changed their votes.[416] The obvious inference was that the president intervened in the congressional deliberations and used his control over state patronage to secure the necessary votes. The Court held that these irregularities were improper because they had „distorted the popular will" and violated the principle that the Congress „should be" a „space of public reason."[417]

At other times the Court has focused on limiting the powerful Colombian presidency more directly. For example, a key line of cases attempts to rein in the unilateral presidential use of emergency powers, requiring that most initiatives be undertaken through the ordinary lawmaking process.[418] In particular, the Court has held that „chronic," long-term problems may not be dealt with through emergency mechanisms, which instead are limited to truly unforeseen events like earthquakes and other natural disasters.[419] As a result, most important policy problems can no longer be dealt with by the president unilaterally, a striking change from only a few decades early when the country was nearly always under some kind of state of emergency.[420]

The Court has also stepped in to mediate the relationship between president and voters. In another key case during President Uribe's term, the Court struck down a series of referendum questions involving a package of constitutional reforms on the grounds that the questions were misleading and/or packaged in a way that they were likely to deceive voters. For example, the questions included introductory notes that explained a given measure to criminalize drug possession as designed „to protect Colombian society, particularly its infants and young people…."[421] Further, the Court held that voters could not be allowed to vote on all question as a block because that would turn the referendum into a „plebiscite" on the president rather than a consideration of a diverse set of

[415] Decision C-816 at §§ VI.32-34.

[416] See id. at § VI.61.

[417] Id. at §§VI.109, VI.138.

[418] For an overview of the relevant caselaw, see Uprimny, supra note 79.

[419] See, e.g., Decision C-252 of 2010, § VI.5.a (striking down an attempt to declare a state of Economic, Social, and Ecological emergency to deal with long-running fiscal and administrative issues in the healthcare sector, because "a jurisprudential tradition … has considered the employment of states of exception improper in order to improve chronic or structural problems"), available at http://www.corteconstitucional.gov.co/relatoria/2010/c-252-10.htm.

[420] In particular, the country spent 82 percent of the time under some sort of state of emergency or state of siege in the 1970s and 1980s, but only 17.5 percent of the time under such a state between 1991 and 2002. See Uprimny, supra note 79, at 65 tbl.3.

[421] See Decision C-551 of 2003, § VI.139, available at http://www.corteconstitucional.gov.co/relatoria/2003/c-551-03.htm. Similarly, a question on pension reform was introduced by asking whether voters would approve "a measure designed to reduce social inequalities and control public spending." See id. § VI.138.

questions.[422] The Court thus struck down parts of the proposed referendum while allowing other pieces to go to the voters.[423]

Finally, the Court at times has sought to prop up other control institutions in order to make them more effective in their tasks of checking the executive. In comparative terms, this seems to be a common and important – but overlooked – function of judicial review: courts can improve the position of their allied institutions rather than working directly against institutions that pose a threat to democracy.[424] The Colombian Court, for example, has drafted institutions like the national ombudsman and Attorney General's office into 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.[425] These kinds of measures help to give institutions other than the Court itself leverage over the bureaucracy, arguably increasing accountability.

2. South Africa and the Problem of Dominant Parties

As many commentators have noted, courts working in a dominant party system like the one in South Africa face particular challenges. The African National Congress (ANC), as the party that led the country's transition out of apartheid, holds a firm grip on political institutions.[426] It is not a monolithic entity, but it is a powerful force that is in no danger of losing national elections.[427] These dominant-party systems pose special risks to democratization. The absence of political competition may weaken the quality of political institutions, and groups who do not form part of the dominant coalition may find themselves permanently frozen out of power.[428]

As various commentators have noted, the South African Court is a constrained actor – the very existence of a dominant party at the center of South African puts strict limits on what the Court can do.[429]

[422] See id. § VI.197-98.

[423] Of the 15 questions allowed to go to voters, only one was approved by the requisite number of voters. See Mauricio Hoyos & T. Christian Miller, Uribe Dealt Setbacks in Vote, L.A. TIMES, Oct. 27, 2003, available at http://articles.latimes.com/2003/oct/27/world/fg-colombia27.

[424] 96 See infra text accompanying notes 111-112 (showing the same strategy in South Africa); Kim Lane Scheppele, How to Evade the Constitution: The Case of the Hungarian Constitutional Court's Decision on the Judicial Retirement Age, Eutopia Law, Aug. 8, 2012, available at http://eutopialaw.com/2012/08/08/how-to-evade-the-constitution-the-case-of-the-hungarian-constitutional-courts-decision-on-the-judicial-retirement-age/ (describing a Hungarian Constitutional Court decision attempting to defend the independence of the ordinary judiciary).

[425] See, e.g., Decision T-025 of 2004 (requiring that the authorities submit monthly reports to the national Ombudsman and national Attorney General on compliance with a structural decision involving internally displaced persons), available at http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm.

[426] See, e.g., Hermann Giliomee et al., Dominant Party Rule, Opposition Parties and Minorities in South Africa, 8 DEMOCRATIZATION 161 (2001) (describing the South African system as a dominant party system).

[427] See id. at 172-73 (noting that the ANC is a factionalized party with important intra-party factions).

[428] See Hermann Giliomee & Charles Simkins, The Dominant Party Regimes of South Africa, Mexico, Taiwan, & Malaysia: A Comparative Perspective, in THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY 1, 40-41 (Hermann Giliomee & Charles Simkins et al., eds., 1999).

[429] See Samuel Issacharoff, Constitutional Courts and Democratic Hedging, 99 GEO. L.J. 961, 998-99 (2011) (noting the constraints that the dominant party system in South Africa puts on the constitutional court); Theunis Roux, Principle and Pragmatism on the Constitutional Court of South Africa, 7 INT'L J. CONST. L. 106, 111 (2009) (noting that the Court concentrates on managing its relationship with the dominant ANC and the political branches, rather than seeking to build direct public support).

As Roux has noted, the Court's jurisprudence for the benefit of the political rights of opposition members stands as an exception to the Court's broader independence from the dominant ANC.[430] For example, in the *New National Party* case, the Court declined to strike down registration rules that had the effect of barring many members of opposition parties from voting, because it held that these measures were incidental to a proper regulatory program rather than being aimed at excluding voters.[431]

Still, away from core issues of political rights, one does discern some program of the Court to improve the quality of democratic institutions by working on some of the characteristic problems with dominant party systems. At times, the Court has been able to exploit intra-party splits within the ANC, helping to strengthen the voice of groups that might otherwise have been marginalized.[432] The famous socioeconomic rights case *Treatment Action Campaign* might be explicable on these terms: after a faction of the ANC (including the incumbent President) came out against the availability of drugs that had complete effectiveness at preventing the spread of HIV in pregnant women from parent to child, the Court handed down a decision requiring that they be made widely available.[433] The decision helped to empower leftist factions within the ANC who had been marginalized by the president and who supported the broader availability of the drugs.[434]

Second, as in the case of Colombia, the Court has at times taken actions to prop up other institutions that are needed to provide accountability.[435] For example, in a pair of recent decisions, the Court imposed limits on the ANC's ability to assert control over an independent institution, the National Prosecution Authority, charged with investigating cases of political corruption. In one case the Court struck down the president's attempt to appoint a candidate himself tainted with prior charges, holding that the president had not rationally considered all relevant factors.[436] In another case the Court struck down reforms that would have given many of the National Prosecution Authority's powers to the police.[437] As Issacharoff points out, both

[430] See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT 1995-2005, at 334-35 (2013) (arguing that because of the presence of the ANC, "the role of constitutional courts in opening up the democratic system to marginalized groups, which is the role that seems most easily justifiable in a mature democracy, is precisely the role that the … Court found hardest to perform.").

[431] See New National Party of South Africa v. Government of the Republic of South Africa and Others, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), pp.10-17. This was one of several early cases where the Court declined opportunities to help open up the political system and make it more competitive. For example, in a second important case the Court upheld a set of constitutional and statutory reforms that amended the constitution to allow national, provincial, and local legislators to change parties during certain periods. (The original legal framework had banned such efforts at "floor-crossing" or "shirt-changing."). The Court upheld the reforms, which weakened smaller parties once elected by allowing the ANC to use patronage resources and other devices to pry them away from their initial parties. See United Democratic Movement v. President of the Republic of South Africa and Others (No. 1), 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC),21

[432] See Gilomee et al., supra note 100, at 172-73 (noting that some factions within their party use their power to repress other factions).

[433] See Minister of Health and Others v. Treatment Action Campaign and Others (No. 2), 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), p. 135.

[434] See ROUX, supra note 104, at 298-99.

[435] See supra text accompanying note 99.

[436] See Democratic Alliance v President of South Africa and Others, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC), p. 86.

[437] See Glenister v President of the Republic of South Africa and Others, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC). The Court focused on the argument that the Constitution must be read in light of international agreements requiring that an "independent" anti-corruption regime be set up within domestic legal orders. See id. p.189.

of these cases were issued without the court directly taking on core constitutional principles or issuing head-on challenges to the incumbents.[438] In other words, the Court relied largely on sub-constitutional principles to put limits on that party's power.

C. Working around Democratic Institutions

In contrast to the „insider" strategies of the previous section, where courts seek to improve democratic institutions, is a set of „outsider" strategies where courts work to build up democracy by working around those institutions. This means that courts work directly to build up civil society and to spread constitutional culture. Although these approaches have been largely ignored in the literature, they appear to be commonly used in new democracies.

The core of this strategy is that courts seek to set up alternative forums for democratic deliberation that bypass traditional democratic institutions. This may be an especially appealing strategy in environments with poorly functioning democratic institutions because it requires less direct involvement with those institutions and does not require that courts be as tethered to the slow process of institutional reform. That is, while in Charles Epp's classic formulation courts are dependent on a „support structure," including civil society support and a strong constitutional culture, to carry out their goals, the strategies explored in this section flip that narrative, demonstrating how courts can take steps to influence both variables.[439] I briefly draw on examples from India and Colombia to illustrate the point.

Both countries have experimented with structural injunctions to build up civil society groups and give these groups leverage over the state. The Colombian Constitutional Court established continuing jurisdiction over cases involving internally displaced persons or internal refugees in 2004, and did the same in a case involving the healthcare system in 2008.[440] The internally displaced persons case involved the state's failure to develop any real public policy to deal with about 3 to 4 million Colombians who had to leave their homes and relocate to different parts of the country because of Colombia's ongoing civil violence. The Court declared a „state of unconstitutional conditions" and began issuing detailed follow-up orders to the state on a range of issues as diverse as housing, access to job training, and restitution for lost property.[441] The healthcare case involved the Court's attempt to fix basic structural problems in a troubled system that is used by nearly the entire population of the country. In particular, the Court held that there were systematic problems involved in the package of benefits received by poorer Colombians and in the way the system was financed.[442]

[438] See Samuel Issacharoff, The Democratic Risk to Democratic Transitions, 5 CONST. CT. REV. 2014; Issacharoff, supra note 157 (contextualizing these two cases).

[439] See CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998) (explaining differences in the success level of courts in carrying out rights-enforcement strategies across countries).

[440] See Decision T-025 of 2004 (internally displaced persons); T-760 of 2008 (healthcare).

[441] For a detailed description of the key follow-up orders, see CESAR RODRIGUEZ GARAVITO & DIANA RODRIGUEZ FRANCO, CORTES Y CAMBIO SOCIAL: COMO LA CORTE CONSTITUCIONAL TRANSFORMO EL DESPLAZAMIENTO FORZADO EN COLOMBIA 82-90 (2010).

[442] See Katharine G. Young & Julieta Lemaitre, The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa, 26 HARV. HUM. RTS. J. 179, 191-92 (2013).

The key point here is the model used by the Court. First, the Court created civil society commissions charged with monitoring bureaucratic performance and with formulating policy ideas.[443] The commission in the internally displaced persons case is composed of groups representing displaced persons themselves, domestic and international NGOs, and other experts in law, public policy, sociology, and related disciplines.[444] Second, the Court has held regular public hearings, which are generally televised and widely covered by the media.[445] These hearings are attended by members of the civil society commissions, control institutions, members of Congress, and the state officials themselves, and force the members of the state to account for their progress (or lack thereof) in front of the commissions and institutions charged with monitoring them.

Further, the Court has retained jurisdiction and relied on a model of issuing repeated follow-up orders to deal with discrete parts of the two massive structural cases they have taken up. The Court's orders are based on feedback – in other words on an assessment of the kind of progress that the state had made in achieving the different goals set out by the Court. The civil society commissions and control institutions play a key role in monitoring state compliance and also in suggesting policy ideas and the design of particular orders to the Court. An example is the system of statistical indicators that the Court demanded be set up as a starting point for evaluating the magnitude of the problem of internally displaced persons. The state and the civil society commission each proposed a battery of indicators along a range of issues like the access of the displaced to healthcare, food, employment opportunities, etc., and the Court largely adopted the measures of the commission.[446]

The Indian Court at times has acted in a very similar way. In 2001, for example, the Court declared a structural interdict involving the right to food in India, over which it continues to retain jurisdiction. The Court found that there were sweeping problems with respect to the access of the poor to food in India, and has since issued a series of wide-ranging orders in all Indian states.[447] These orders have required, for example, the creation of programs to give grain to poor families, allowing poor workers to act in work-to-food programs, and to give schoolchildren access to lunch during the school day.[448] The Court set up a Commission to monitor compliance and to make policy recommendations, although in its case the commission more closely resembles the United States „special master" – the commissioners are a pair of legal experts rather than a confluence of civil society groups.[449] Still, the Commission itself consults widely with civil society groups, viewing them as a key source of policy and compliance information. In particular, the Commission has worked very closely with the Right to Food Campaign, a network of civil society

[443] See Cesar Rodriguez Garavito, Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, 89 TEX. L. REV. 1669, 1685-86 (2009).

[444] See id.

[445] See id. at 1669 (describing such a hearing in June 2009 on the internally displaced persons case

[446] See David Landau, The Reality of Social Rights Enforcement, 53 HARV. INT'L L. REV. 401, 439 n.201 (2012).

[447] For an overview of this sprawling case and its major orders, see Lauren Birchfield & Jessica Corsi, Between Starvation and Globalization: Realizing the Right to Food in India, 31 MICH. J. INT'L L. 691 (2009).

[448] See id. at 700.

[449] See id. at 726 (explaining that the commission is staffed by two experts)

groups that helped to launch the litigation.[450] The Campaign itself holds regular public hearings throughout the country in an effort to raise awareness about the problem.[451]

At their best, these cases may achieve two different goals. The first is strengthening civil society in contexts where they have historically been weak. The courts provide an incentive for civil society to organize by giving them a central message to organize around, an institutional structure through which they can influence policy, and a public forum in which to air their grievances. At the same time, they increase the leverage of civil society by forcing the state bureaucracy to pay attention to their policy ideas. The second goal is spreading constitutional culture, again in contexts where it has historically been weak. Courts do this chiefly by publicizing important constitutional issues (through the use of public hearings and similar devices) and by demonstrating that these issues need to be taken seriously.

Civil-society building and the spreading of constitutional culture are also achievable outside of the confines of structural cases. For example, one could consider the broader strategies of the Indian and Colombian courts to radically expand access to constitutional justice. The Indian Supreme Court deliberately undertook a campaign of public interest litigation and as part of that campaign made it extremely easy to access the Court.[452] The Court for example relaxed standing rules to allow NGOs and similar groups to sue on behalf of others when issues involved the public interest, and accepted informal petitions – like hand-written letters – as sufficient to start a dispute.[453]

The Colombian Court, similarly, has relaxed standing rules for individual constitutional complaints and allowed recourse to the Court through very informal means.[454] Moreover, the Court has engineered its substantive rules in ways that invite claims. For example, in the first decade of the Court's existence it shifted away from a position in which only very poor citizens in unusual circumstances could access the Court for socio-economic rights claims and towards a position in which the Court became a workhorse for middle-class claims seeking access to healthcare treatments or larger pensions.[455] Such claims now make up half or more of the Court's total docket.[456]

These attempts to expand access to the court might again be defended in part as „outsider" strategies: the allowance of broad standing for groups to represent

[450] See id. at 719-26 (explaining how the campaign works to establish grassroots support, publicize the issue, and to pressure different levels of the state bureaucracy).

[451] See id. at 724.

[452] See, e.g., Jamie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?, 37 AM. J. COMP. L. 495 (1989).

[453] See P.N. Bhagwati, Judicial Activism and Public Interest Litigation, 23 COLUM. J. TRANSNAT'L L. 561 (1984).

[454] See, e.g., Manuel Jose Cepeda, Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court, 3 WASH. U. GLOB. STUD. L. REV. 529, 552-54 (2004) (explaining that the Colombian individual complaint, the tutela, may be filed at any time, and by informal means like letters and telephone calls if necessary).

[455] See Pablo Rueda, Legal Language and Social Change During Colombia's Economic Crisis, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 25 (Javier A. Couso et al., eds., 2010) (tracing the shift in meaning from the Court's creation in 1991 to an economic crisis in the late 1990s).

[456] See, e.g., DEFENSORIA DEL PUEBLO, LA TUTELA Y EL DERECHO A LA SALUD 2012, at 111 tbl.2 (2013) (showing that in both 2011 and 2012, socioeconomic rights made up well more than half of all individual complaints filed in the country), available at http://www.defensoria.org.co/red/anexos/publicaciones/tutelaDerechoSalud2012.pdf.

public-interest issues, for example, might be seen as an attempt to encourage the formation and activism of civil society groups across a range of issues. The broader strategy of courts making themselves a focal point for policy-making on a range of issues could be seen as a long run strategy to increase the importance of constitutional values in everyday life. The Colombian strategy of using constitutional litigation to adjudicate mundane socioeconomic rights issues, for example, has made the Colombian individual complaint perhaps the best-known instrument in the country's legal system.[457]

As with judicial interventions designed to improve the performance of political institutions, some of the interventions catalogued here could be defended through the traditional tools of constitutional theory. But the dynamic perspective is useful in highlighting a productive set of questions. Critics of the large-scale structural interventions in India and Colombia commonly critique them as the taking on of essentially legislative tasks, or in other words as overstepping proper conceptions of judicial role.[458] The dynamic perspective suggests that the right question to be asking may be a different one: what the long-run effect of a strategy that seeks to build up alternative sources of democracy outside of elected institutions? Do these efforts tend to strengthen or weaken democratic institutions over time? I take up these questions in more depth in Part III.

III. Fitting Practice and Constitutional Theory

What is the relevance of the sociological and legal practices surveyed in Parts I and II for a constitutional theory of judicial role? This part attempts to answer that question by arguing that the most defensible theory built off of these foundations is one where judges seek to improve the functioning of democratic institutions through time. This places judicial role in new or more fragile democracies in an interesting place: it is not a wholly different enterprise from judging in established democracies, but the sense of role does have different points of emphasis noted in this Part. Further, judging under such a conception is not a free-for-all; instead, judicial action needs to be justified with reference to the implications and challenges of the theory. Finally, a cautionary note: the effort here is not one to build an optimal theory from the ground up, but instead to construct the most reasonable justification from existing practice.[459] The main hope is that such a theory, while eliding some normative questions, will be useful to the actors themselves in clarifying key issues.

A. Constitutional Theory and Democratic Dysfunction

Some recent work has contested the relevance of „northern" constitutional theory and separation of powers to

[457] See Cesar A. Rodriguez et al., Justice and Society in Colombia, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICAN & LATIN EUROPE 134, 159-62 (Lawrence M. Friedman & Rogelio Perez Perdomo, eds., 2003) (presenting data about the importance and ubiquitous nature of the Colombian individual complaint, called the tutela, in the country's legal culture).

[458] See, e.g., David Landau, Political Institutions and Judicial Role in Comparative Constitutional Law, 51 HARV. L. REV. 319, 357-58 (giving some of the critiques of the Colombian Court's structural jurisprudence).

[459] For a justification of this kind of approach to constitutional theory, see Garrick B. Pursley, Thinning Out Structural Theory (unpublished manuscript, on file with author) (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405983.

judging in the „global south."[460] Despite this, it is unlikely that existing works of constitutional theory are truly inapposite, if for no other reason than their internal diversity. There is no standard answer to questions of judicial role, but instead a series of different approaches. Similarly, theories and practices of the separation of powers have varied tremendously across time and across countries. To take an obvious example, the kind of activism that was acceptable at the height of the Warren Court's powers in the United States would be unlikely to pass muster among most federal courts today.

A more helpful approach breaks constitutional theory down into different sets of challenges and responses, as I attempt to do here in a partial survey.[461] Most work in the United States, for example, has started from some variant of the counter-majoritarian difficulty, or the problem of justifying judicial interventions in the face of electoral majorities.[462] A significant strain of this work argues that Courts are often said to lack the legitimacy and the capacity to make decisions that are better left to elected officials. In the traditional formulation by James Bradley Thayer, a court should not substitute its own judgment for that of nationally-elected officials unless he clearly believes that they are not „reasonable."[463] Modern Thayerians are often popular constitutionalists, arguing that the determination of constitutional meaning is properly left to the public or to their elected representatives, rather than to the court.[464] In the clearest and most extreme formulation of Jeremy Waldron, judicial review is unjustifiable in well-functioning democratic systems.[465]

The restraint-based vein of scholarship seems to be difficult to apply to the problematic democracies studied in this paper. In Waldron's terms, the case against judicial review requires the assumption of democratic institutions „in reasonably good working order."[466] Waldron's case for unelected judges deferring to democratic resolution of contested issues breaks down unless democratic institutions function at a reasonable level. Similarly, Mark Tushnet's case for deference by judiciaries in order to allow constitutionalism to flourish within the political system – what he calls „political constitutionalism" – depends on „a widespread commitment among the nation's citizens

[460] See David Bilchitz, Constitutionalism, the Global South, and Economic Justice, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 41 (Daniel Bonilla, ed., 2013).

[461] For a recent map of many of the positions outlined here, see Nimer Sultany, The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification, 47 HARV. C.R.-C.L. L. REV 372 (2013).

[462] For the classic formulation, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority but against it.").

[463] James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 151 (1893).

[464] See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (calling for a "populist constitutional law" outside of the courts).

[465] See Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1348 (2006) ("[J]udicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society.").

[466] Waldron, supra note 139, at 1362. Waldron is clear that the assumption of "well-functioning democratic institutions" is not an assumption of perfect institutions, nor necessarily of substantively just outcomes. See id. at 1362-63. But his case does seem to rule out substantial deviations from liberal democracy along the lines studied in this article.

to constitutional values."[467] In systems with strong constitutional cultures, it is plausible that political actors will take constitutional principles seriously, because they will otherwise be punished by the voters. But in systems without strong constitutional cultures, there is no obvious basis for the assumption that political institutions will take constitutional values seriously. Judicial restraint might still be the best prescription in these democracies, but it would need to be justified in some other way. As I suggest below, the dynamic feedback effects of judicial action on the political system may serve as a related, alternative justification for judicial restraint.

Other veins of constitutional scholarship are not necessarily inapplicable. For example, another major argument in the United States tradition seeks to justify judicial review despite the counter-majoritarian difficulty, sometimes by claiming that it is actually pro-democratic rather than anti-democratic. The best-known formulation is John Hart Ely's political process theory, which has spawned a massive follow-up literature elaborating on and critiquing his claims. Ely's core claim is that judicial review can be justified if courts help to reinforce democratic representation and increase participation, primarily by increasing access to the political system for minority groups that are systematically excluded from it.[468] Ely, of course, envisioned his theory as a justification for the decisions of the Warren Court in the United States and their impact on Africa-Americans, primarily with a view towards civil-rights era jurisprudence. But his theory has broader resonance in comparative constitutional law as a possible justification for judicial action.[469]

Finally, recent scholarship within the United States has revived an old tradition by arguing that judicial action is normally majoritarian, not counter-majoritarian, and thus that the central challenge is actually justifying majoritarian exercises of judicial review.[470] Political scientists have used empirical evidence to challenge the view that United States judicial review is in fact counter-majoritarian: they find instead that the Court has tended to support majoritarian views over the long haul.[471] Recent normative work proposes that the best way to justify a majoritarian Supreme Court might be by that the Court helps to resolve a principle-agent problem, alerting

[467] Mark Tushnet, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, 14 GERMAN L.J. 2249, 2255 (2013).

[468] See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-74 (1980) (arguing that the Warren Court was motivated by two broad goals: "clearing the channels of political change" and "correcting certain kinds of discrimination against minorities").

[469] See, e.g., THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 334-35 (applying Ely's theories to South Africa, although finding that because of the dominant-party context, the Court was largely incapable of fulfilling the goals of representation-reinforcement).

[470] See Mark A. Graber, The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order, 4 ANN. REV. L. & POL. SCI. 361 (2008) (arguing that recent work in political science has tended to underplay anti-democratic concerns with courts and find increasing concern with the behavior of electoral institutions); see also Richard Posner, The Rise and Fall of Judicial Self-Restraint, 100 CAL. L. REV. 519, 535-36 (2012) (arguing that the rise of "right answer" theories like originalism have weakened Thayerian impulses in the judiciary).

[471] See, e.g., Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333, 336-37 (1998) (challenging the view that judicial decisions are in fact counter-majoritarian and arguing that the "counter-majoritarian" difficulty as an object of study has waxed and waned in importance through United States constitutional history); see also Amanda Frost, Defending the Majoritarian Court, 2010 MICH. ST. L. REV. 757, 759 (accepting Friedman's core thesis but arguing that differences in method of appointment between the federal and state judiciary still affect judicial behavior in important ways).

and helping to coordinate resistance if the „agent" (political institutions) carry out tyrannical acts against the principle (the „people").[472] Efforts by courts to fix fundamental deficiencies in political systems – the kinds of deficiencies that may prevent political institutions from representing even majoritarian groups – could be presented in a similar light. Indeed, courts in places like Hungary and Colombia have at times been defended as representing majoritarian political forces better than political institutions.[473]

With these considerations in mind, one can consider three possible claims justifying the descriptive practices laid out in the first two parts of this article. First, some strains of practice and scholarship suggest an „institutional replacement" theory, where courts take the failure of existing democratic institutions as a mandate to replace those institutions and carry out some or all of their tasks. There are strains of such an approach, for example, in Indian, Colombian, and Hungarian constitutional practice.[474] Courts, for example, may seek links directly with the populace if they feel that legislatures are not playing this role, or they might seek to make policy directly if they feel that other institutions are not willing or capable of doing so. Judicial action under this conception would be permissible when the court steps in and carries out activity that the political branches themselves either cannot do or cannot do well. The normative justification for a replacement theory could be based on the supposed inapplicability of restraint-based theories.

The replacement approach is unattractive because of its failure to heed institutional and dynamic considerations. First, it invites judges to overstate the differences between newer democracies and more mature democracies. Virtually all democratic systems may have serious problems in their quality of representation, and the differences between systems are better referred to as differences in degree rather than in kind. Further, judiciaries lack the capacity to replace most of the core functions of well-functioning legislative or bureaucratic officials. The functional lines between courts and other political actors are malleable, but they do exist.[475] In other words, the fact that political institutions are widely perceived as incapable of carrying out certain tasks does not automatically render courts the proper forum for doing so. Institutional failure creates a vacuum, but not necessarily one that courts can legitimately fill.

Finally, the replacement theory is heedless to the dynamic effects of judicial

[472] See David Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L.J. 723, 725 (2009) (arguing that judicial review can be justified without necessarily assuming an "antagonistic" relationship between the courts and the people).

[473] See, e.g., Kim Lane Scheppele, A Realpolitik Defense of Social Rights, 82 TEX. L. REV. 1921 (2004) (arguing that due to representation problems in Hungary after the democratic transition and pressure from international organizations, courts actually did a better job of representing public will); David Landau, Political Institutions and Judicial Role in Comparative Constitutional Law, 51 HARV. INT'L L.J. 319, 355-58 (2010) (noting how the Colombian Constitutional Court effectively managed a bailout of middle-class homeowners and justified its intervention on the grounds that the Court was closer to the people than political institutions).

[474] See Robinson, supra note 55, at 16-17 (quoting the statements of some justices who implied that extreme judicial activism was justified by poor political performance); Landau, supra note 64, at 345-47 (noting some of the same tendencies on the Colombian Constitutional Court).

[475] In the socio-economic rights context, for example, few scholars deny that there are real differences in judicial versus legislative or executive capacity to make complex policy choices. See, e.g., CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221-38 (2001) (noting that socio-economic rights raise special problems of capacity and democratic legitimacy for courts); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 227-35 (2006) (same).

intervention: it would appear to abandon problematic democracies to a permanent state of dysfunction, and it would view that permanent dysfunction as a durable mandate for extraordinary judicial intervention. This view is eerily similar to one long promoted in Latin America, where the supposed absence of democratic values or well-functioning political systems was taken to allow strong presidencies to rule via emergency powers or states of siege.[476] The use of these emergency powers in turn may have helped to perpetuate abnormality by weakening the development of legislative institutions and constitutional values.[477]

A second possible focus for a theory of judicial role would be the process of constitutional transformation itself. It has become commonplace to note that constitutions in new democracies are often „transformational" rather than „preservative."[478] Transformative constitutionalism seeks to remake a country's (supposedly deficient) political and social institutions by moving them closer to the sets of principles, values, and practices found in the constitutional text. One might argue that judges in poorly-functioning political systems should focus on realizing the constitutional project. Under such a conception, judicial action would be permissible if it helped to move politics and society closer to the constitutional ideal and impermissible if it either moved politics and society further away from the constitutional ideal or was unrelated to that goal.

A constitutional transformation approach and the democracy-improving approach studied in this article share a dynamic focus. But a constitutional transformation theory is problematic because it again elides institutional considerations: it ignores the question of *which institution* is tasked with the process of constitutional transformation, or rather answers that question by assuming that the process of constitutional transformation should be judge-led. Constitutional mandates are contestable; they are open to interpretation. As Waldron argues, it is often more reasonable to have democratic processes rather than courts make determinations about constitutional meaning.[479] Waldron's objection need not fatally undermine all variants of a constitutional transformation theory. It may be that courts are on solid ground in trying to realize important constitutional mandates in cases where the political branches wholly ignore those mandates. But it does suggest that the task of constitutional transformation should be viewed as a second-best to the task of improving political institutions themselves. And since modern constitutions

[476] See, e.g., Jorge Gonzalez-Jacome, Emergency Powers and the Feeling of Backwardness in Latin American State Formation, 26 AM. U. INT'L L. REV. 1073, 1074 (2011) (noting how 19th century political thinkers relied on a perception of "backwardness" to justify extensive exercises of emergency power).

[477] See Schor, supra note 51, at 19 ("Excessive presidential power led to greater, not less, unrest as the transition from a government of men to one of laws became impossible.").

[478] Transformative constitutionalism is itself a vague concept, but has been defined as "a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." See Karl E. Klare, Legal Culture and Transformative Constitutionalism, 14 S. AFR. J. HUM. RTS. 146, 150 (1998). More broadly, we might define transformative constitutional in opposition to preservative constitutionalism: the latter takes a relatively static perspective and seeks to "maintain existing practices and ensure that society does not regress," while the former seeks substantial transformations in the status quo. See Micah Zeller, From Preservative to Transformative: Squaring Socioeconomic Rights with Liberty and the American Constitutional Framework, 88 WASH. U. L. REV.735, 743 (2011).

[479] See Waldron, supra note 139, at 1366-69.

tend to be so thick, a full embrace of a constitutional transformation model would threaten to collapse into the replacement model rejected above.

This leaves a third possibility: courts in new democracies should devote some part of their energy to improving the performance of democratic institutions through time. In other words, courts should play at least a modest role in making abnormal institutions function more normally. This simple formulation, of course, hides a potentially rich agenda and a variety of different tasks. Courts might, for example, aim to make democratic institutions more robust by protecting them from democratic erosion,[480] or they might aim to correct some of the defects inherent in non-institutionalized or dominant party systems.[481] Courts might also attempt to build up civil society where it has historically been weak, or to construct constitutional cultures in citizens where they do not initially exist.[482] Both approaches were surveyed in some depth above in Part II.

A dynamic theory makes sense of the recent trends in constitutional design, judicial behavior, and scholarship surveyed in Parts I and II. Both courts and other institutions in new democracies do make efforts to protect democratic orders, to correct for weaknesses in party systems, and to build civil society and constitutional culture. Further, recent scholarly work has emphasized the dynamic effect that courts might have in new democracies. Samuel Issacharoff, in recent work on Turkey, India, and South Africa, emphasizes the role that courts can play both in protecting democracies from erosion and in improving the performance of dominant-party systems.[483] And Katharine Young, in a comprehensive book on the enforcement of socioeconomic rights in the developing world, argues that courts should aim to play a „catalytic role," in particular focusing on empowering civil society groups in contexts where they have historically been weak.[484]

Such a theory of judicial role is related to both the political process and majoritarian strands of constitutional theory. It obviously resembles political process theory in that the justification for review is the improvement of the political system. Highly interventionist decisions in the United States – like structural cases involving school desegregation and prison conditions, or cases like *Reynolds v. Sims* working directly on the electoral system – were justified in large part in terms of the protection of „discrete and insular" minorities. The difference in the contexts studied here is thus in degree and not in kind. Most importantly, the failures in weak-party and to some extent also dominant-party systems are not just ones which afflict discrete minority groups, but also majorities. This may make the task more feasible – by opening a pathway by which courts can act aggressively and yet popularly – but also more sweeping.

Finally, a dynamic theory is flexible, consistent with a range of specific judicial

[480] See infra Part II.A.

[481] See infra Part II.B.

[482] See infra Part II.C.

[483] See Issacharoff, supra note 9 (surveying and justifying aggressive interventions in the electoral sphere within "fragile democracies" like Turkey and India); Issacharoff, supra note 44 (finding some success for the South African Constitutional Court in ameliorating the negative excesses of a dominant-party system); Samuel Issacharoff, Constitutional Courts and Consolidated Power, 62 AM. J. COMP. L., 2014.

[484] See Katharine G. Young, A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review, 8 INT'L J. CONST. L. 385 (2010) (proposing that courts enforcing socio-economic rights focus on catalyzing change by, for example, strengthening civil society and its leverage over the state).

tasks.[485] Its main value is in suggesting a somewhat different set of questions for evaluating exercises of judicial power. Take, for example, a structural injunction case involving the right to food, like the massive and ongoing case in India.[486] Constitutional theory tends to ask a stock set of questions about these interventions. For example, a key question would generally be whether the intervention is justified by extraordinary circumstances, such as if it benefitted a minority group wholly excluded from the political process.[487] But such a question may make little sense in a poorly-functioning political system, where the popular assumption is that the government serves most groups badly, including middle-class groups that would normally be expected to have a voice. Constitutional theorists would also ask whether the court is extra-limiting by taking on essentially legislative tasks, reaching beyond its capacity and legitimacy.[488] But this assumption of fixed differences between legislative and judicial roles again may make little sense to judges and citizens in many new democracies, because it suggests that courts should defer to institutions that are themselves functioning poorly.

A dynamic perspective would instead focus on a set of questions that may prove more useful, or at least that might supplement those found in conventional theory. Aggressive interventions like those involved in the Indian case might be justifiable if they help to build up the strength of civil society, the density of constitutional culture, and the capacity of the bureaucracy. On the other hand, they would be harder to justify if they tended to slow or reverse improvements in the quality of political institutions through time, perhaps by diverting citizens' attention and resources away from representative institutions and towards courts. The point is not that anything is justifiable from a dynamic perspective, but that the reasons why a given intervention might or might not make sense are somewhat different from those found in conventional constitutional theory.

A. The Challenges Posed by a Dynamic Perspective

The value of a dynamic perspective on judicial role, in other words, is in posing at least two kinds of important questions: (1) questions of plausibility, or whether it is politically feasible for judges to play a role in improving political institutions through time; and (2) questions of democratic impact, or of whether a given intervention might have a net negative impact either by undervaluing the democracy of the present or by warping the path of democratic development for the future. Both points have rich implications for the strategies that judges should utilize under a dynamic approach.

1. The Challenge of Plausibility

The South African example suggests a first challenge for a dynamic theory of judicial role that focuses on courts improving political institutions: it may be implausible because it requires courts to take actions that go against the core

[485] In particular, it does not require that one make global choices between thinner conceptions of democracy, focusing mostly on clean elections, and thicker conceptions focusing also on democratic deliberation. See, e.g., RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130-57 (2003) (defining and exploring different conceptions of democracy).

[486] See supra Part II.C.

[487] See supra text accompanying note 142 (discussing political-process theory).

[488] See, e.g., Waldron, supra note 139, at 1406 (stating that legislatures rather than courts are the best place to resolve contested issues about the interpretation of rights); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 230 (2006) (arguing that institutionally, legislatures are better at updating constitutional meaning than courts).

political interests of their own regimes. All normative theories of role are, of course, subject to pragmatic constraints, but a normative theory is of little use if it is nearly impossible for judges to carry out.

Yet in dominant party systems, particular strategies may indeed be very difficult for courts to pull off precisely because of the constraints imposed by the dominant party. The South African Constitutional Court has been particularly timid when confronted with cases involving the political rights of opposition parties and actors.[489] Roux's comprehensive history of the first South African Constitutional Court views this dimension as the Court's biggest disappointment.[490]While the Court has a relatively high amount of freedom to enforce rights in cases involving the death penalty or socioeconomic rights, it is very constrained when trying to directly open up the political regime because those cases involve core interests of the ANC. A Court overly aggressive on those questions would risk retaliation.[491] More broadly, there is some comparative evidence that a court operating in most political systems with strong parties will often have difficulty working against the core interests of those parties.[492] This is both because the justices themselves are typically of those parties and because attempts to work against the core interests of strong parties are particularly likely to provoke retaliation against a court. The legal status of third parties within United States constitutional and electoral law

[489] See supra text accompanying notes 104-105.

[490] See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 334-35 (noting that the South African jurisprudence turned traditional theory on its head because it showed the Court having difficulty fulfilling a core function of constitutional courts).

[491] See, e.g., Samuel Issacharoff, Constitutional Courts and Consolidated Power, 62 AM. J. COMP. L. 2014 (exploring the risks run by Thailand's constitutional court, which was viewed as taking a side in a political dispute and may thus have inflamed rather than calming tensions).

[492] Mexico offers a stark example. The Supreme Court of Mexico historically served as a subservient body within what was essentially a one-party dictatorship led by the PRI party, but as the country democratized in the 1990s, the Court was reformed to act as an arbitrator within an emerging three party system. The newly empowered opposition parties sought institutions that would ensure electoral fairness and guard the separation of powers within a (long-dormant) federal system. See, e.g., JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE 89-110 (2008). The Court was designed for those purposes: the reforms to the Court created a new mechanism allowing for minorities in national and state-level legislatures, as well as political parties, to challenge the constitutionality of laws and greatly strengthened an existing mechanism allowing the Court to determine conflicts between different branches or level of governments. The resulting Supreme Court has in many ways been an agent of the interests of these parties. It has for example issued important decisions to strengthen federalism and the separation of powers, while doing relatively little to enforce the rights provisions of the Constitution. See Miguel Schor, An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia, 16 IND. J. GLOB. L. STUDS. 173, 177-83 (2009). Further, it has at times acted against those left out of the party framework. In a 2005 decision, for example, the Court denied an independent candidate even the standing to challenge a law restricting him from running for political office. Ironically, it held that such standing was limited to political parties. See Suprema Corte de Justicia, Amparo en Revision 743/2005, available at http://www.poderjudicialags.gob.mx/Conferencias%20Transparencia/pdfs%5CMATERIAL% 20DE%20CONFERENCIAS%20SOBRE%20TRANSPARENCIA%20IMPARTIDAS%20POR%20LA%20SCJN%5CEJECUTORIAS/743- 2005%20AR%20PL%20VP.doc. The laws prohibiting independent candidates were not changed until well after a 2008 decision of the Inter-American Court of Justice brought by the loser, which condemned Mexico's standing laws as a violation of the Inter-American Convention on Human Rights. See Castaneda Gutman v. Mexico, Inter-American Court of Human Rights, Aug, 8, 2008 (holding that the existing legal framework violated the article 25 right to judicial protection), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf.

might be a case in point.[493] In systems with strong parties, in other words, we would expect the judiciary in some sense to act as an agent for the parties, and that may make them rather unlikely to act in a counter-system manner.

A related but subtler problem may arise in systems where political parties are very weak (see Colombia), or otherwise held in low regard (see India). Here the problem is that courts have incentives to gain political capital by attacking political institutions, rather than by building them up.[494] Where political institutions are weak or perceived as corrupt, justices can gain political support by adopting a discourse and perhaps a jurisprudence that treats them with contempt. The Colombian Court, for example, intervenes aggressively in legislative procedure because it lacks respect for the Congress, and sometimes replaces the political branches in making public policy for the same reason.[495] In one interesting example, the Court stepped in to fix a housing crisis by making a series of policy decisions; the justice who authored the key decisions defended them by quoting a historical populist politician who had stated that „the people are much more intelligent … than their leaders."[496] As explained in more detail in Section III.C below, the long-run effects of these sorts of interventions on the quality of political institutions are unclear. But there is reason to suspect that some of these actions will have negative rather than positive dynamic effects on political institutions.

The broad point here is that courts are products of their political regimes. This often makes them more likely to act in a pro-system rather than counter-system manner: in the worst case they may actually tend to exacerbate defects in their political systems rather than helping to correct them. This ought to temper our optimism for a dynamic theory of judicial role, but it is not a damning critique of the theory. The same weakness afflicts most constitutional theory. For example, studies of American constitutional history have convincingly shown that the United States Supreme Court normally acts as a majoritarian rather than counter-majoritarian institution, or at least rarely strays from the political mainstream for long.[497] This fact acts as a dose of realism for a number of theories – like political-process theory – that rely on courts taking

[493] Many scholars have pointed out that courts in the United States tend to support the entrenched two-party system rather than favoring outsiders or upstarts. See, e.g., Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockup of the Democratic Process, 50 STAN. L. REV. 643 (1998) (arguing that courts often uphold regulations that are in fact designed to entrench two-party dominance).

[494] See supra text accompanying notes 54- 56.

[495] See supra text accompanying notes 86- 91 (giving examples of relevant caselaw).

[496] The case involved a series of Constitutional Court decisions during a housing crisis that threatened several hundred thousand debtors with foreclosure, and in which the Court perceived that the political branches were not taking action. For a fuller accounting of these cases, see David Landau, The Reality of Social Rights Enforcement, 53 HARV. INT'L L.J. 401, 429-31 (2012).

[497] See, e.g., Michael Dorf, The Majoritarian Difficulty and Theories of Constitutional Decision Making, 13 U. PENN. J. CONST. L. 283, 284 (2010) (noting that "American courts, over the long run, [do not] act as strongly counter-majoritarian parties" and exploring the problems this fact poses for American constitutional theory); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (presenting evidence that the Supreme Court has rarely acted as a long-run counter-majoritarian force); KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (arguing that the U.S. Supreme Court gained political power through time through being useful to dominant political coalitions).

unpopular decisions.[498] But it does not fatally undermine those theories, because the Supreme Court has often been able to take a number of different decisions while still staying within the political mainstream.

The same point might be made in comparative terms: the shape of a party system places restrictions on a court operating within that system and thus should make our claims about judicial role more modest in scope, but this does not mean that courts are powerless in correcting the defects found within their political regimes. Even in dominant-party systems, courts can take a range of actions without outrunning their „zone of tolerance."[499] And in other political systems, particularly non-institutionalized party systems, courts have more freedom of action. These party systems may shape the incentives of courts by giving them a strategy of gaining popularity by undermining the party system, but they do not really limit their freedom of action. Indeed, in inchoate party systems, it may actually be more feasible for courts to play a „political process" role than it is in the United States, precisely because courts can gain majoritarian popularity through efforts to fix their party systems.

The constraints political systems place on judicial power may however be useful in thinking through ways in which courts might be most effective in their task. In particular, they may suggest the superiority of „outsider" strategies over „insider" strategies. The South African case again offers an interesting example. The South African Constitutional Court is highly restricted in the extent to which it can directly increase the power of opposition parties and figures, because cases involving those actors raise core interests of the ANC. Other insider strategies, like propping up the independence of control institutions or using sub-constitutional decisions to aid opposition actors under the radar, may be less constrained.[500] But the South African Court has focused less on outsider strategies, where it may face fewer constraints. The Court is not well-known or particularly popular with the public, and has often not made much effort to engage civil society. This suggests an untapped potential strategy choice, a point I return to below in Part IV.A.

In non-institutionalized party systems, outsider strategies may be better than insider strategies for a different reason: the strategy of „building up" a weak party system may be largely impossible for a court to carry out. The various efforts of the Colombian Constitutional Court and other institutions to cleanse the Colombian Congress or to make it a more deliberative body all suggest that there are limits on a court's ability to organize a disorganized party system. In those circumstances as well, it may be that outsider strategies have more of a chance to work effectively. But the broadest point is that we still know very little about the empirical effects of different strategies through time – this is an area where more empirical research is badly needed.

2. The Challenge of Democratic Impact

The dynamic theories that have been developed in comparative constitutional

[498] See Dorf, supra note 171, at 290 (noting the ways in which Friedman's majoritarian image of the Supreme Court erodes the evidence for Ely's process-based theory).

[499] See Lee Epstein et al., The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, 35 L. & SOC'Y REV. 117, 127-29 (2002) (developing a theory of when courts face retaliation and applying that theory to the Russian Constitutional Court).

[500] See supra text accompanying notes 111-112.

law and practice are necessarily based on a vision that existing political institutions are fundamentally flawed, which potentially allows for extraordinary interventions in the current democracy in the name of constructing a better one. But this conception of the theory raises two significant challenges in its relationship to democracy: First, dynamic theories of judicial role appear to be in constant danger of undervaluing the admittedly flawed democracies of the present. Second, judicial interventions may hinder rather than aid improvement in democratic institutions through time. Both of these possibilities also highlight the sheer vagueness of a dynamic approach in guiding judicial action: it is very difficult for a judge to know whether a given strategy is justified.

First, judicial actors in newer or more fragile democracies and their defenders sometimes act as though their political systems operate on wholly different logics than those in consolidated democracies.[501] But this claim is obviously untrue – all political systems have at least pockets with serious problems of representation, accountability, and capacity. Take the assumption that a Congress or parliament be „well-functioning."[502] Many legislatures around the world might be argued to fail this test, the United States Congress included.[503] The decline in the salience of party systems in most countries has been well-documented.[504] Put in this context, dynamic theories of judicial review may prove far too much – they might justify extraordinary interventions across both developing and developed democracies. Indeed, as a descriptive matter the disenchantment with electoral politics is part of the explanation for the increasing judiciarilation of politics around the world.[505]

The possibility of undervaluing the democratic present is again an important critique of the theory but not a damning one. There are differences – in degree if not in kind – between different types of democracy. The finding that some systems are particularly prone to democratic failure is real: newer democracies face risks of erosion that are more serious than those found in more-developed democracies.[506] The problems of representativeness and accountability posed by non-institutionalized or dominant-party systems are again real: both systems produce pathologies that are consistent across different countries and predictable in their results.[507] Pervasive problems of corruption afflict many countries in the developing world; whereas corruption is generally a much less serious problem in developed democracies.[508] In short, there are

[501] See supra text accompanying notes 54- 56.

[502] See supra text accompanying note 140 (making clear that the assumption is a key one in standard constitutional theory).

[503] See, e.g., Michael J. Teter, Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction, 88 N.D. L. REV. 2217, 2217 (2013) ("My central thesis…is this: congressional gridlock threatens our constitutional structure, both as originally constructed in 1789 and as it currently stands.").

[504] See, e.g., Harold D. Clarke & Marianne C. Stewart, The Decline of Parties in the Minds of Citizens, 1 ANN. REV. OF POL. SCI. 357 (1998) (summarizing the decline in rates of party affiliation across the United States, Canada, the U.K., and a range of other advanced democracies).

[505] See, e.g., Elena Martinez Barahona, Judges as Invited Actors in the Political Arena: The Cases of Costa Rica and Guatemala, 3 MEXICAN L. REV. 3 (2010) (arguing that empowerment of courts in two Central American countries is largely explained by the distrust of citizens towards their own political systems).

[506] See supra text accompanying note 11 (explaining the rise of hybrid regimes).

[507] See supra text accompanying notes 26-44.

[508] See, e.g., Transparency International, Corruption Perceptions Index, at http://cpi.transparency.org/cpi2013/results/ (showing that perceived levels of corruption are generally relatively low in Western Europe and the rest of the developed world, and higher across the rest of the world).

meaningful differences that justify a different approach in many new democracies.[509]

The more serious challenge to a theory that relies on the dynamic effects of judicial action is the disquieting possibility that judicial interventions aimed at improving democracy through time may actually have negative dynamic effects. In other words, it is possible that institutional designs and judicial decisions designed to improve and normalize democratic performance may have the opposite impact. The problem is perhaps easiest to see with institutions designed to protect against democratic erosion. Some commentators, for example, recommend institutionalizing a role for the military as a hedge against democratic erosion.[510] The theory is that military actors, if inculcated with the proper set of values, can protect democracy with resources that courts do not have.[511] Anti-democratic parties or actors may be able to ignore or pack courts, but they will have more difficulty neutralizing military actors.[512] Others recommend giving courts a predominant role, by allowing them to ban anti-democratic parties or strike down problematic constitutional amendments.[513] Turkish democracy, for example, historically combined elements of all three pieces of this model. The Turkish military was seen as a guardian of the secular democratic order and stepped in several times to protect against the threat of chaos or the threat posed by Islamist parties.[514] The Turkish Constitutional Court acted aggressively to ban parties and to strike down constitutional amendments that were seen as violating core principles of the constitution.[515]

The model views these elements as temporary devices to help buy time as the democracy matures. But it is fairly obvious that each of them also poses risks to democratic development, although in different ways and perhaps in different magnitudes. At worst case, an actor designed to protect democracy might play a directly anti-democratic role: the military could overthrow or intervene in a democratic order in order to establish a

[509] Courts do have some ability to distinguish well-functioning and poorly-functioning enclaves within their political systems, which could be a useful tool for a court seeking to avoid excessive interference with democracy. The Colombian Constitutional Court, for example, sometimes seems to build a differential assessment of the quality of legislative deliberation into its jurisprudence. The Court is often faced with questions of whether a given cutback to an existing pension scheme or other social benefit is justifiable. Compare Decision C-1064 of 2001 (upholding austerity cuts to the real value of the salaries of higher-income public workers, because the Congress and the executive had justified the need for cuts in order to preserve social spending for the poor, and the plan had prioritized lower-income workers by keeping their salaries constant), with C-776 of 2003 (striking down a decision to expand the VAT-tax base by taxing goods of primary necessity, because the decision had substantial impacts on the poor and appeared to be an "indiscriminate" decision that was made without broad legislative deliberation).

[510] See supra note 76.

[511] See Ozan Varol, The Military as the Guardian of Constitutional Democracy, 51 COLUM. J. TRANSNAT'L L. 547, 580 (2013) ("The judiciary is [unlikely] to fill the enforcement deficit in post-authoritarian societies" because courts are often controlled by authoritarian regimes and at any rate usually lack legitimacy.).

[512] See id. (noting that judicial power is unlikely without the emergence of a "competitive political marketplace").

[513] See supra Part II.A.

[514] See Varol, supra note 185, at 597-605.

[515] See Yaniv Roznai, An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision, 10 INT'L J. CONST. L. 175 (2012) (exploring the Court's use of the unconstitutional constitutional amendment power); Patrick Macklem, Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination, 4 INT'L J. CONST. L. 488 (2006) (considering the Turkish Constitutional Court's use of its party-banning power).

military dictatorship or for a number of other bad reasons.[516] More subtly, the existence of all of these crutches might have a negative rather than positive impact on the way that democratic institutions evolve. For example, it may be that if dangerous but seductive political movements are banned from the political sphere rather than being allowed to compete, the remaining parties may not work as hard at developing popular appeal, and thus may be unprepared to compete if they somebody have to stand for election against the full spectrum of political competition. Similarly, the doctrine of unconstitutional constitutional amendments may have a negative impact on legislative behavior: Legislators, knowing that the court will protect the system from deeply anti-democratic constitutional amendments, will have fewer incentives to develop internal safeguards regarding the use of the amendment process.[517]

The evidence from Turkey, although ambiguous, may support the idea that these kinds of institutions can weaken democratic development through time. While the Constitutional Court banned the large Islamic movement that would become the ruling party several times, it continued to win votes through successive elections and eventually was allowed to take office.[518] The party platform moderated somewhat with each new incarnation, but the actors and basic goals remained the same.[519] Once it took office, it neutralized the extraordinary powers previously exercised by both the Court and the military. The Constitutional Court was packed by members of the majority party, and the military had its political role largely removed.[520] The result is that Turkey has become a dominant-party regime, and perhaps is undergoing a process of democratic erosion.[521] The old secular parties, meanwhile, have not fared well within the new system.[522]

Teasing out causation is quite difficult. One might say that the extraordinary institutions – the political role of the military and the exceptional powers of the Constitutional Court – were necessarily

[516] There is a long history of this kind of anti-democratic intervention in many regions of the world, including Latin America. See, e.g., Miguel Schor, Constitutionalism Through the Looking Glass of Latin America, 41 TEX. INT'L L.J. 1, 21 (2006) (pointing out the role that Latin American militaries have played in maintaining "internal order" rather than external peace).

[517] See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57-58 (1999) (referring to this problem as "judicial overhang").

[518] See Samuel Issacharoff, Fragile Democracies, 120 HARV. L. REV. 1405, 1442-46 (2007) (tracing the history of attempts to ban the movement that would become the Justice and Development party).

[519] See id. at 1446 (arguing that the political movements moderated through time because "prospect of reintegration into Turkish politics remained present subject to a tempering of the perceived threats to continued democratic order").

[520] On the Constitutional Court, see, for example, Ozan Varol, The Origins and Limits of Originalism: A Comparative Study, 44 VAND. J. TRANSNAT'L L. 1239, 1295-96 (explaining the context in which the Court was packed in 2010, by increasing the number of justices from 11 to 17 and by giving the ruling party the power to make those appointments). The story with respect to the military is more complex: the ruling Justice and Development party has certainly taken away many of the powers the military, but scholars have argued that Europeanization and ties with the EU were a driving force in leading the military to accept the reduction of its powers. See Zeki Sarigil, Europeanization as Institutional Change: The Case of the Turkish Military, 12 MEDITERRANEAN POL. 39, 50 (2007) (arguing that the military was "rhetorically entrapped" by its stated commitment to westernization).

[521] See Ali Carkoglu, Turkey's 2011 General Elections: Towards a Dominant Party System, 13 INSIGHT TURKEY 43 (2011), available at http://file.insightturkey.com/Files/Pdf/20120903122353_insight- turkey_volume_11_number_3_-ali_carkoglu_towards-a-dominant.pdf.

[522] See id. at 47 tbl. 1.

temporary, and their defanging was part of the process of normalizing the democracy. As noted above, a theory that allows for a permanent hemming in or replacement of democracy, or that maintains it in a permanent state of abnormality, seems deeply problematic.[523] The only problem may have been the timing: the safeguard institutions were not in place long enough to have the intended effect. On the other hand, there does seem to be some evidence that the secular parties did not develop the political competitiveness or popularity needed to compete on an open playing field. This may have been inevitable, or it may have been a result of the hemming in of democratic institutions.

The Turkish case is an unusual one because the safeguards that were used in that regime placed extraordinary restrictions on democracy. But a similar argument might be made about other judicial efforts to build up democratic institutions. Take, for example, judicial efforts to work around political institutions by building up alternative spaces for democratic development. As already noted, for example, the Indian and Colombian Constitutional Courts have issued structural remedies involving food, healthcare, and other constitutional goods that seemed designed to make themselves the center of policymaking.[524] The dynamic effects of this strategy are unclear. It may be that they start a virtuous circle: a court's efforts to strengthen civil society and increase the salience of constitutional culture may spark new pressures that over time improve the quality of democratic institutions. On the other hand, such powerful judicial action may in fact sap energy from political institutions. As civil society groups and citizens come to view the court and not the political institutions as their best shot at getting responses from government institutions, they may focus on the court rather than on legislatures and executives, thus hindering the development of those institutions. Aggressive judicial assertions of power – even ones designed to improve the quality of democratic politics – may have negative effects on the development of other political institutions.[525]

The possibility again serves as an important critique and corrective on a dynamic theory of judicial review. It counsels for modesty in judicial exercises of power, because we know very little about the dynamic effects of aggressive exercises of judicial review in newer democracies. It is hard to say whether strong courts support or undermine democratic development. Second, it argues for more scholarly work in figuring out which kinds of tools are particularly likely to have negative effects on democratic development.[526] Third, it

[523] See supra Part I.C.

[524] See supra Part II.C.

[525] See TUSHNET, supra note 191, at 57-58.

[526] We may be able to construct such a theory with respect to democracy-preserving institutions. It is clear that granting the military a role in a constitutional democracy is a risky strategy – such a strategy would only be sensible as a "second best" where there were other forces leading to a substantial risk of democratic failure. See, e.g., Virginie Collombier, The Military and the Constitution: The Cases of Algeria, Pakistan, and Turkey (June 2012) (noting that military intervention raises a significant risk of fail across all of the countries at issue), available at http://www.arab-reform.net/sites/default/files/Const_Military_and_the_Constitution__V.Collombier_ May12_Final_En.pdf. Judicial party-banning and the militant democracy model raise an intermediate level of risk: a court probably poses less of a danger to democratic development than the military, but eliminating political forces – especially major forces – from the political playing field may have significant effects on democratic development. Relative to the other two models, the unconstitutional constitutional amendments doctrine seems to pose relatively modest risks to democratic development. An overly-aggressive use of the doctrine may have some effect on the behavior of political institutions – a point I return to below – but these effects are probably smaller than the effects of either institutionalizing a role for the military or prohibiting some political movements from competing.

highlights the uncertainty embedded in a dynamic theory of judicial review, because it suggests that courts and other actors may have a very difficult time figuring out whether a given strategy is justified. Finally, a consideration of the negative effects that exercises of judicial power may have on democratic development might again be helpful in trying to design improved judicial strategies. This may in part be about coming up with less damaging alternatives to existing practices. As Issacharoff suggests, it may be less harmful to ban particular manifestations of speech within elections than to ban supposedly anti-competitive parties altogether, and it may be better to prohibit parties from competing in elections rather than banning them altogether.[527]

With more complex approaches like structural injunctions, there may be ways to build up civil society without having the court run the risk of replacing the political branches as the center of policymaking. The concept of democratic experimentalism or destabilization rights might be useful here – courts can try to help organize civil society groups, and to give those groups leverage over state officials, without themselves becoming the focal point for making policy decisions.[528] This may help to ensure that courts reap the dynamic benefits of judicial activism without paying the high costs of stunting democratic institutions. Courts, in other words, might focus on ensuring that civil society groups have a voice with policymakers (through devices such as public hearings) and monitoring the development of negotiated solutions, rather than with direct exercises of setting policy.[529] The point of this section, at any rate, is not to design particular remedial strategies but to suggest that the problem of judicial activism warping democratic development is one that should shape strategy choices by judges. The next part takes these considerations further, by showing how a dynamic perspective is helpful in providing perspective on some of the most difficult contemporary problems in the field of comparative constitutional law.

IV. The Theory Applied: Two Problems in Comparative Constitutional Law

One test of a theoretical approach is whether it is useful „in action" to shed light on live debates: this section demonstrates that a dynamic perspective can provide that perspective. In particular, I apply the theory to two of the most important and unsettled questions in the field of comparative constitutional law: the debate about the forms of review or the intensity with which courts seek to review political action, and the debate about the appropriateness of a substantive doctrine of unconstitutional constitutional amendments. In both cases, I show that the approach is useful in helping to frame the questions that judges should be asking.

---

[527] See Issacharoff, supra note 192, at 1421 (developing a typology of prohibition and limitations on anti-democratic political forces, and noting how alternative devices have been used in places like India and Israel).

[528] For the foundational work on democratic experimentalism and judicial review, see Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1015 (2004). Sabel and Simon argue that modern public law litigation works by providing a set of "destabilization rights," which they define as "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability." See id. at 1020. They contrast their model from traditional command-and-control litigation, where courts come up with detailed decrees envisioning all aspects of the policy ex ante and closely monitor compliance with the defendant's compliance with the prescriptions found in that decree. See id. at 1021.

[529] For more detail on this model of judicial involvement, see infra Part IV.A.

A. The Debate between Weak-Form and Strong-Form Review

Some of the most important recent work in the field has focused on the proper means for judges to exercise judicial review, particularly for newer rights like socio-economic rights. The centerpiece of this literature is the famous South African case *Grootboom*, which a large group of commentators has lauded as inventing a new form of review and as representing a „canonical" case within the field.[530] In *Grootboom*, the South African Constitutional Court considered a challenge to South African housing policy by an impoverished woman who had been evicted from her existing housing and who had no other access.[531] She claimed that South Africa's housing policies, and particularly its failure to provide short-term solutions for people like her who were in desperate need, violated the constitutional right to housing.[532] The South African Constitutional Court agreed with the plaintiff, but refused to issue either an individualized remedy or a structural remedy covering all plaintiffs in her situation. Instead, the Court merely issued a declaration that the state was not fulfilling the constitutional rights at issue because it had no plan for people with the gravest short-term needs, and asked the Parliament and other authorities to fix that deficiency.[533]

This approach to rights-enforcement has been dubbed „weak-form" enforcement. Weak-form enforcement is a model of review where the court points out violations of rights to the political branches and to the citizenry, but then steps back rather than seeking to make policy on the right at issue. As Tushnet says, legislative actors can then „address – or deliberately refuse to address – the difficulties that courts have identified."[534] This is contrasted to standard „strong-form" review, where the Court itself makes the relevant policy determination.

Scholars including Tushnet and Cass Sunstein have praised the *Grootboom* decision, and more broadly weak-form review, as properly reconciling the enforcement of rights – particularly socioeconomic rights – with democracy.[535] They point out that socio-economic rights like the right to food, housing, and healthcare raise special concerns of democratic legitimacy and

[530] See, e.g., THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 (2013) ("Grootboom is to South African constitutional lawyers what Brown v. Board of Education is to their American counterparts."); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 242 (2008) (calling the case "celebrated"); CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 229 (2001) (noting the decision's "distinctive and novel" approach); Heinz Klug, Grootboom at Home and Abroad: Adventures in the Construction of a Global Constitutional Canon (Feb. 2012), at http://digitalcommons. law. umaryland.edu/cgi/viewcontent.cgi?article= 1149&context=schmooze_papers ("canonical");

[531] See Government of the Republic of South Africa and Others v. Grootboom and Others, 2001 (1) SA 46 CC, 2000 (11) BCLR 1169 (CC), pp. 3-4.

[532] See id. p.13.

[533] See id. p. 99 (issuing a declaratory order reading, inter alia, that "[s]ection 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing").

[534] See, e.g., Mark Tushnet, Weak-Form Judicial Review and "Core" Civil Liberties, 41 HARV. C.R.-C.L. L. REV. 1, 1 (2006) (defining weak-form review as a style of review where "judges' rulings on constitutional questions are expressly open to legislative revision in the short run"). Mark Tushnet, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, 14 GERMAN L.J. 2249, 2249 (2013).

[535] See TUSHNET, supra note 204, at 244 (noting that the order in Grootboom had "some judicially enforceable content" but "was quite limited in its effects"); SUNSTEIN, supra note 204, at 235 (praising the decision for "promoting a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life").

capacity because they may require that judges rework state priorities and make decisions involving large amounts of budgetary resources. Tushnet quotes Frank Cross's well-known argument against judicial enforcement of social rights in the United States because such enforcement either raises the specter of „judges running everything" or the much more likely view that courts will do nothing with those rights because they view them as too politically-costly to enforce.[536] While many non-socioeconomic rights cost money (take the right to a fair trial), there are real differences in degree, if not in kind, between so-called first generation rights and socioeconomic rights.[537]

Supporters of weak-form review thus view it as a way to reconcile especially troublesome kinds of rights with democracy. Courts can act to vindicate the right while making especially careful to avoid invading the proper space of political actors. In other words, these scholars see weak-form review as the solution to judicial overreaching within a standard, static conception of democratic theory. Giving this theoretical construct, Tushnet suggests in recent work that weak-form review is „the only decent institutional design" for the enforcement of socio-economic rights, and perhaps for the enforcement of a much broader set of rights as well.[538]

While the *Grootboom* decision has largely been celebrated by foreign constitutional theorists who view it as the solution to their own difficult problems of constitutional theory, it has received a very different reception in South Africa, where it is often viewed as a failure.[539] The case against *Grootboom* is that the Court's remedy – an exhortation to the political branches to take unspecified forms of action – was too weak to achieve anything.[540] Similarly, the „model" of review invented by *Grootboom* has not spread to the rest of the developing world. Others courts active in enforcing socioeconomic rights in Latin America and Asia have relied on a different set of approaches, including giving individual plaintiffs specific individual remedies and using structural injunctions.[541]

Within South Africa itself, however, *Grootboom* has important progeny: a series of follow-up cases also on the right to housing, and in which the South African Constitutional Court has tried to make weak-form review more effective. Most of these cases involved poor citizens at risk of being evicted from their homes, and

[536] See Frank B. Cross, The Error of Positive Rights, 48 UCLA L. REV. 857, 887 (2001) ("[B]oth the critics and the proponents often misconceive the likely consequences of positive rights recognition, namely that positive rights would not be aggressively enforced.").

[537] See TUSHNET, supra note 204, at 234 (noting that first-generation rights like the right to free speech imply costs but arguing that "the size of budgetary consequences matters").

[538] See Tushnet, supra note 209, at 2259.

[539] See, e.g., Rosalind Dixon, Creating Dialogue About Socioeconomic Rights: Strong v. Weak-Form Judicial Review Revisited, 5 INT'L J. CONST. L. 391, 391 (2007) (noting that South African constitutional scholars "now agree generally that the Court's intervention was — to an important degree — too limited or 'weak'"); David Bilchitz, Giving Socioeconomic Rights Teeth: The Minimum Core and its Importance, 119 S. AFR. L.J. 484 (2002) (criticizing Grootboom as having an "undesirable effect" on enforcement of the social right at issue).

[540] See, e.g., Dennis Davis, Socio-economic Rights in South Africa: The Record of the Constitutional Court After Ten Years, 5 ESR REV. 3, 5 (arguing that, in response to Grootboom, "there has been little visible change in housing policy to cater for people who find themselves in desperate and crises situations").

[541] See David Landau, The Reality of Social Rights Enforcement, 53 HARV. INT'L L.J. 189, 199 (2012) (finding that the South African approach has "not been used elsewhere").

without any other place to live.[542] The Court began issuing what it called „engagement" remedies, where it required officials to negotiate with private actors or with their civil society representatives before carrying out the eviction.[543] This allowed the Court to resolve the case without getting into a deep discussion of the underlying constitutional law issues, and without directly making policy. Sometimes, these engagements resulted in successful outcomes and serious discussions; often, they did not.[544]

In recent cases, the Court has tried to put more teeth into the engagement remedy by requiring that the state follow particular procedures in the course of the engagement. For example, the Court has required that the state consider certain issues – say the presence of adequate alternative housing – before carrying out an eviction.[545] Further, in recent decisions, the Court has shown a tendency to avoid constitutional issues if it can: it has treated arguably constitutional issues as statutory ones. In particular, it has shoe-horned many of the recent housing cases into the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, even if there was some question as to whether that framework should have applied.[546]

One way to look at the recent decisions is that the Court is slowly moving along a spectrum of weak-form and strong-form enforcement, closer to the strong-form pole.[547] In other words, that it is trying to give its initial efforts at weak-form review in cases like *Grootboom* more teeth and a higher probability of actually producing results within individual cases. In a careful way, the Court is seeking to trade off some degree of deference to the political branches for increasing effectiveness.

A dynamic theory of judicial review suggests a related but different point: the debate about weak-form review misses key dimensions of judicial role in new democracies. From a dynamic perspective, the South African Constitutional Court's series of efforts to intervene in the housing sector should be judged at least partially by whether they helped to „catalyze" civil society movements and to increase the leverage of those movements over state officials, as well as by whether they extended the importance of

[542] For a comprehensive overview of post-Grootboom housing jurisprudence up to the present, see Brian Ray, Evictions, Avoidance, and the Aspirational Impulse, 5 CONST. COURT REV. 2014.

[543] See, e.g., Occupiers of 51 Olivia Road v. City of Johannesburg, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475, pp. 9-11 (describing the process of engagement ordered by the Court in a prior decision).

[544] See Brian Ray, Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases, 2009 UTAH L. REV. 797, 837-42 (describing the failure of an engagement order in a case, Mamba v. Minister of Social Protection, involving refugee camps that were scheduled to be shut down).

[545] See Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd and Others, 2012 (2) SA 337 (CC), 2012 (4) BCLR 372 (CC), p.21 (issuing an order requiring a detailed report from the local government covering, inter alia, (1) "the particulars of the housing situation of the applicants," (2) steps it has taken on "alternative land or housing," (3) when that alternative land or housing will be provided, (4) the effects of an eviction if undertaken without alternative accommodation, and (5) whether and how the city can take steps to "alleviate" the harms to the property owner if they eviction cannot be carried out).

[546] See, e.g., Maphango v. Aengus Lifestyle Properties, 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC), ¶ 48 (deciding to use the statute even though neither party had relied heavily upon it in their submissions, because of "rule of law considerations"); see also Frank Michelman, Expropriation, Eviction, and the Gravity of the Common Law, 24 STELLENBOSCH L. REV. 245 (2013) (explaining cases like Maphango as a device of "inter-branch comity").

[547] See Ray, supra note 217 (arguing that the Court can use various devices to ratchet up the impact of its jurisprudence on housing issues).

constitutional culture within the country.[548] The line of cases could be viewed as a type of „outsider" strategy, noted above, where courts seek to work around political institutions and to instead build up alternative spaces for democratization. This should be an attractive strategy in South Africa, because the main alternative – a strategy that seeks to temper the excesses of a dominant party-system directly – is largely closed off.[549] As Roux has noted, the Court has had more space in socioeconomic rights cases, largely because it faces sympathetic factions within the dominant party itself.[550]

A dynamic perspective thus suggests a different set of tools for critiquing the work of the South African Constitutional Court. On the positive side, its engagement orders are directly aimed at giving civil society groups a voice. They force local officials to speak with groups that would otherwise be marginalized and that would otherwise have little ability to combat their evictions. The Court's use of enhanced procedural techniques is particularly interesting in this regard: by laying out the kinds of topics that need to be addressed before any eviction may occur, and by regulating the sorts of processes through which the discussion must proceed, the Court has done some work in making sure that political actors do not simply ignore the existence of civil society.[551]

But key features of the remedial design would also seem to limit the extent to which these decisions serve to increase the organization and power of civil society groups, or to extend the reach of constitutional culture. The Constitutional Court has tended to treat the engagement actions as a set of independent, atomized discussions between an individual set of local officials and an individual set of evictees. There is no institutional structure linking together the separate cases. And the Court's focus has been on resolving individual cases rather than on articulating a broader set of norms or values.[552] The Court's engagement orders generally focus on the individual cases, rather than on making broader policy changes to the housing sphere.[553] They seem calculated to have little symbolic value, because they generally avoid constitutional issues if possible and focus instead on the details of statutes.[554] This may rob the Court's decisions of the symbolic force needed to help create or hold together a movement.[555] And it may prevent the

[548] See KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 172- 73 (2012) (arguing that courts enforcing socioeconomic rights should aim to "catalyze" change by other institutional actors).

[549] See supra Part II.B.2 (noting the struggles of the South African Constitutional Court in seeking to ameliorate the effects of the country's dominant-party system).

[550] See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 37-38 (2013).

[551] See supra note 220 (describing the detailed engagement order at issue in the Golden Thread case).

[552] See Ray, supra note 217, at 11 (finding that the Court often "provid[es] concrete relief to the individual plaintiffs without tying that relief to any broader constitutional requirement").

[553] See, e.g., Golden Thread at p. 21 (issuing a detailed set of requirements for reporting within the confines of the individual plaintiffs at issue, but requiring no information beyond the confines of the specific case).

[554] See supra text accompanying note 227 (elaborating on the Court's propensity for avoiding constitutional issues in favor of statutory issues).

[555] The Court has sometimes showed more of a propensity to build up the power of civil society. In probably the Court's most effective socioeconomic intervention, for example, the Treatment Action Campaign case, the Court relied on a relatively developed set of civil society actors to bring it a case challenging the government's refusal to expand a network of highly effective drugs preventing transmission of HIV from mother to child, despite an absence of cost considerations (the drugs were being provided for free). See, e.g., William Forbath, Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign,in STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 51, 51-52 (2011). Even though the court did not issue a structural remedy or otherwise maintain supervision over the case, it did catalyze the Treatment Action Campaign by giving it a clear victory over the state. See YOUNG, supra note 223, at 262 (describing the Treatment Action Campaign's more recent attempts to pressure the state). In contrast to the eviction cases considered here, the Treatment Action Campaign case was a clear and well-publicized victory.

Court's decisions from having the kind of broader impact needed to construct and maintain a constitutional culture built around socio-economic rights.

At least some of these weaknesses could be remedied without the Court's approach necessarily collapsing into strong-form review, where the Court directly makes the policy decision at issue. The Court could work at institutionalizing a long-term role for civil society linked across different cases, perhaps by creating a Commission composed of a mix of groups of displaced persons themselves with both national and international NGOs.[556] The Court could also do more to publicize the cases over which it has taken jurisdiction, perhaps by holding televised or media-saturated hearings at which it dealt with the issues raised in the eviction petitions.[557] The Court could do more to develop the substantive constitutional principles enveloped in the right to housing that it applies through its case law. Finally, it could broaden the scope of engagement by giving civil society groups a voice not only in the individual eviction at issue, but also in the broader construction of housing policy. None of these shifts would force the judiciary to give itself the „last word" in setting housing policy. But they probably would help to ensure a more robust civil society in the housing sphere.

The weak-form review debate has been constructed to answer a particular problem stemming from mature democracies: how can rights enforcement best be structured so as to avoid invading the space of democratic actors? This is a highly relevant question within mature democracies; it may be a less relevant question in newer democracies with serious defects in their democratic institutions. A dynamic perspective suggests instead a richer debate on remedies, which would mine a set of tools existing somewhere on a spectrum between weak-form and strong-form review. And it would work towards figuring out which of those tools did the most effective job, in different kinds of contexts, at building up the strength of civil society around constitutional issues, in giving civil society a voice within the state, and in constructing a more salient constitutional culture.

B. The Unconstitutional Constitutional Amendment Doctrine

The doctrine of unconstitutional constitutional amendments stands as one of the oddest and most difficult doctrines to justify in comparative constitutional law. From the standpoint of most veins of conventional constitutional theory, the doctrine is a puzzle. As Gary Jacobsohn has written, striking down a proposed constitutional amendment on the ground that that amendment conflicts with unwritten constitutional principles is the „most extreme of counter-majoritarian acts."[558] Ordinary judicial review strikes down statutes but leaves political actors with the safety valve of passing amendments in order to override that judicial decision.[559] The unconstitutional

[556] See supra Part II.C (describing how such an approach has been used in both Colombia and India).

[557] See Cesar Rodriguez Garavito, Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, 89 TEX. L. REV. 1669, 1669 (2009) (describing such hearings held in Colombia).

[558] Gary Jeffrey Jacobsohn, The Permeability of Constitutional Borders, 82 TEX. L. REV. 1763, 1799 (2004).

[559] See, e.g., Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, in COMPARATIVE CONSTITUTIONAL LAW 96, 98 (Tom Ginsburg & Rosalind Dixon, eds., 2013) (noting that one function of constitutional amendment is in "trumping existing judicial interpretations").

constitutional amendments doctrine takes away the safety valve and removes any possibility of political and popular override of the judiciary, at least short of wholesale constitutional replacement.[560] It is no wonder that many constitutional theorists have found the doctrine difficult to justify.[561] Jacobsohn himself notes that the doctrine may justify use only in cases so extreme as to make one wonder whether applying the doctrine would have any point.[562]

Yet in comparative terms, the doctrine is one of the greatest success stories in the field, spreading across the world to include systems in Asia, Latin America, Africa, and Eastern Europe.[563] And in some countries, the doctrine is now deployed by judges relatively routinely: citing a few examples from India and Colombia might be helpful in showing the doctrine's modern scope. In Colombia, the best-known uses are the cases involving Alvaro Uribe's second and third terms, where the Court allowed a constitutional amendment allowing one reelection but blocked a constitutional amendment allowing two, in a decision heralded as potentially preventing significant democratic erosion.[564] The Court's reasoning noted that the proposed third term, under the domestic constitutional design, would give Uribe unprecedented power to appoint and influence officials staffing independent institutions that were supposed to check him.[565] Further, it pointed out after a brief comparative survey that in pure presidential systems, third-term presidencies were rarely allowed.[566]

In a series of additional cases, the Colombian Constitutional Court has either threatened to use or actually used the doctrine in less dramatic circumstances. For example, in a landmark case the Court had legalized simple drug possession, citing principles of personal autonomy.[567] When political actors passed a constitutional amendment recriminalizing drug possession but providing for treatment rather than criminal penalties, the amendment was challenged in front of the Court. The Court dismissed the petition on technical grounds, but suggested that any attempt to impose criminal penalties would have

[560] The question of whether constitutional replacement is a possibility depends on one's view of whether and how the existing constitution constrains the possibility of writing a new constitution. See generally Joel Colon-Rios, The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform, 48 OSGOODE HALL L.J. 199, 203-19 (2010) (outlining and describing a broad theory of constituent power that gives the people powers of constitutional replacement).

[561] See, e.g., Richard Albert, Nonconstitutional Amendments, CAN. J.L. & JUR. 5, 22- 23 (2009) (the doctrine is "curious); Charles H. Koch, Jr., Envisioning a Global Legal Culture, 25 MICH. J. INT'L L. 1, 58 n.268 (2004) ("extreme example of judicial activism); Jamie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?, 37 AM. J. COMP. L. 495, 501 (1989) ("highly problematic and controversial").

[562] See Gary Jeffrey Jacobsohn, An Unconstitutional Constitution?: A Comparative Perspective, 4 INT'L J. CONST. L. 460 (2006) ("[I]f ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing.").

[563] See Yaniv Roznai, Unconstitutional Constitutional Amendment: The Success and Migration of a Constitutional Idea, 61 AM. J. COMP. L. 657, 677-713 (2013) (tracing the migration of the doctrine across a large number of countries).

[564] See supra text accompanying notes

[565] See Decision C-141 of 2010, § 2.8.1, available at http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm. The Court noted for example many institutions had staggered terms or longer terms than the president, and others were insulated by having some other institution make the selection. But after twelve years in power, the President would, realistically, gain power over virtually all of these institutions. See id.

[566] See id. § 6.2.1.4.2.

[567] See Decision C-221 of 1994, available at http://www.corteconstitucional.gov.co/relatoria/1994/c-221-94.htm.

been an unconstitutional constitutional amendment, because it would have replaced core constitutional principles of individual autonomy.[568] In a second case, the Court actually struck down an attempt to evade prior Constitutional Court decisions forcing the entire bureaucracy – including incumbents – to stand for meritocratic civil service exams rather than automatically being confirmed in their posts. After the Court invalidated laws attempting to exempt some incumbent bureaucrats from civil service exams mandated by the Constitution of 1991, Congress responded by passing a constitutional amendment to the same effect. The Court invalidated the constitutional amendment, holding that it was unconstitutional because it substituted the constitutional principle of „meritocracy."[569]

In the most recent key case, the Court faced an amendment that purported to create a new constitutional principle of „fiscal sustainability."[570] The amendment also created a new mechanism for executive officials to ask courts to review and reconsider their previously-made decisions if those decisions have significant fiscal consequences.[571] The amendment was passed in reaction to the Constitutional Court's extensive jurisprudence on socio-economic rights, which many government officials thought too costly and too interventionist.[572] Under the Court's long-standing interpretation of article 1 of the Constitution, which defines Colombia as a „social state of right," socioeconomic rights are broadly judicially enforceable and the state must prioritize social spending.[573]

The amendment was challenged as a possible substitution of the constitution, and the Court upheld the amendment only after limiting its effect in important ways. The Court held that „fiscal sustainability" should be understood as a mere instrument in service of the realization of fundamental rights and principles, rather than as a fundamental principle in its own right.[574] Further, the Court held that the new mechanism for reconsideration was constitutionally acceptable only because if left the judge who made the decision with full authority over whether to reverse the prior decision or even to hear arguments on a challenge.[575] In effect, the Court applied a supra-constitutional canon of avoidance, upholding the constitutional amendment only by defanging it.

The Indian jurisprudence shows a similar although less dramatic tendency towards expansion away from a „core" set of cases. The early cases were closely tied to Indira Gandhi's emergency and aimed primarily at stopping

[568] See Decision C-574 of 2011, available at http://www.corteconstitucional.gov.co/relatoria/2011/c-574-11.htm. The technical reasons for dismissing the petition were that the actor had only challenged the piece of the amendment criminalizing drug possession, and had not also included in the demand the part of the amendment providing for "treatment" rather than punishment. See id. § VI.6.1-VI.6.15.

[569] See Decision C-588 of 2009, available at http://www.corteconstitucional.gov.co/relatoria/2009/C-588-09.htm.

[570] See Decision C-288 of 2012, available at http://www.corteconstitucional.gov.co/relatoria/2012/C-288-12.htm.

[571] See id. § II (giving the text of the amendment at issue).

[572] See id. § VI.32.

[573] This is a simplification of a complex concept. See, e.g., David Landau, The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS (Aoife Nolan, ed.,).

[574] See id. § VI.64 (stating that the principle "is not a constitutional end in its own right, but just a means for the achievement of the social and democratic state of right").

[575] See id. § 74.3.

Gandhi from insulating her actions entirely from judicial review.[576]These decisions played a modest but perhaps meaningful role at preventing an erosion of democracy. More recent cases, issued after the political system fragmented, have also focused on the insulation of activity from judicial review, but within quite different contexts. For example, in *L. Chandra Kumar* v. *Union of India*, the Indian Supreme court held that constitutional amendments shunting cases concerned with the civil service away from the ordinary judiciary and into newly created administrative tribunals were violations of the basic structure doctrine and thus unconstitutional constitutional amendments.[577] Indeed, one commentator has argued that the main thrust of the doctrine, in terms of its actual use, has been to allow the judiciary to act as a „closed shop" by cutting off other avenues of redress like special tribunals and arbitration panels.[578]

In examining these cases, the core question is the following: What explains the divergence between the expectations of standard constitutional theory and the reality of practice, under which the doctrine is regularly used? A dynamic perspective of judicial role offers the groundwork for a reasonable defense of the doctrine.[579] Descriptively, it explains why the use has become so routinized across certain countries. Usage of the doctrine is based both in a distrust of existing democratic institutions, which are seen as capable of producing flawed constitutional amendments, and concern about the effects that certain amendments might have on the democratic order.[580] Normatively, the fact that certain democracies are relatively fragile gives some justification for using the doctrine in order to defend against democratic erosion. At least some uses of the doctrine – the Uribe reelection decisions and the Indian cases during the emergency – may be justifiable in light of the fragility of their democratic orders.[581] Where judges have good reason to believe that a set of constitutional changes raises a significant risk of democratic erosion, they may be on solid

[576] See supra note. (giving cases from before, uring, and after the Emergency).

[577] L. Chandra Kumar v. Union of India, AIR 1997 SC 1125, available at http://indiankanoon.org/doc/1152518/.

[578] See Rohit De, Jurist's Prudence: The Indian Supreme Court's Response to Institutional Challenges, INT'L J. CONST. L. BLOG, Dec. 12, 2012, available at http://www.iconnectblog.com/2012/12/jurists-prudence-the-indian-supreme-courts-response-to-institutional-challenges/.

[579] In contrast, existing theories do a fairly poor job of explaining and justifying the doctrine. The leading contender is the theory of "original constituent power," under which some changes to the existing legal order are so fundamental that they are reserved to the "people" and can only be made through wholesale replacement of the existing constitution. In contrast, the "constituted powers" – the institutions of state – enjoy only a limited power of constitutional change, without any ability to alter those fundamental principles. This principle has been adopted by many of the courts using the doctrine. See Rios, supra note 235, at 219-28. But unless the constitutional text clearly limits the power of constitutional amendment (which is fairly rare), there is no reason to assume any limitation on the amendment power of the constituted powers, and perhaps even less reason to think that courts rather than the political branches should be the ones charged with discovering those limits. See Carlos Bernal-Pulido, 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, 347 (2013).

[580] See, e.g., Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court, 8 WASH. U. GLOB. STUD. L. REV. 1, 33 (2009) (noting that the Indian basic structure doctrine gains strength out of a sense of democratic distrust).

[581] See supra text accompanying notes (giving the background to both of these incidents).

ground in striking down constitutional amendments.[582]

Use beyond clear cases of democratic preservation raises more difficult issues. There are dual risks to broader use: (1) excessive distrust of current democracy and (2) possible warping of the pathway of democracy.[583] On the first point, it is surely not an accident that the doctrine has made the most headway within systems where there is a pervasive public distrust of political institutions, and where judges openly share that distrust.[584] But the fact that political institutions sometimes function badly does not imply that they always function badly. This suggests that use of the doctrine should be restrained. Invalidation of a constitutional amendment is an act that expresses much more disrespect of political institutions than ordinary exercises of judicial review.

Many – perhaps most – uses of the doctrine fail under this criterion. Many uses of the doctrine appear to be based on turf-protection: courts use their ultimate power over constitutional amendment to protect the doctrines or interests that are dear to them. There is also some evidence that the doctrine can become an ordinary tool of democracy-improvement: courts strike down amendments eluding meritocracy, or transferring cases outside of the ordinary judiciary, not because they reasonably fear a significant retrogression in the democratic order but because they perpetuate problematic aspects of the system, like bureaucratic incapacity.[585] These uses of the doctrine are difficult to justify: the ends pursued by courts may be important, but there are less problematic ways to pursue them. Exercises of ordinary judicial review should suffice.

The second risk – that use might warp democratic development – may be less serious. The doctrine of unconstitutional constitutional amendments is probably less corrosive than excluding some political forces from electoral politics, as counseled by the militant democracy model. Exclusion of major political actors plausibly weakens the development of electoral politics and may disenchant some groups of citizens with democracy.[586] Overuse of the unconstitutional constitutional amendments doctrine could cause a variant of the „judicial overhang," dampening the extent to which political actors internalize constitutional values.[587]

[582] There is a separate question lurking here – how do judges know that a given constitutional change in fact will work substantial erosion in the democratic order? One possibility is to use comparative or transnational guidance as a check on judicial over-activism, and to strike down amendments primarily when the change at issue would create an institutional design not generally seen elsewhere. See Rosalind Dixon & David Landau, Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment, 13 INT'L J. CONST. L. 2014. In the Uribe cases, for example, the Court placed great weight on the fact that two-term presidencies were common in pure presidential systems, but the allowance of additional terms beyond two terms is quite rare comparatively. See Decision C-141 of 2010, § 6.3.5.1.2, available at http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm.

[583] See supra Part III.B (discussing both of these problems as they bear on a dynamic theory of role).

[584] See supra text accompanying notes 54- 56 (giving examples of judges expressing distrust of democracy in both India and Colombia).

[585] See supra text accompanying notes 244, 252- 253 (discussing cases from India and Colombia).

[586] See, e.g., RUTH BERINS COLLIER & DAVID COLLIER: SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 487-88 (1991) (referring to the problem of the Argentine Peronist Party being prohibited from winning elections because of its repugnance to elites as an "impossible game" that destabilized the regime).

[587] See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57-58 (2000).

But this would seem to be a less serious risk to democratic development.

Further, it could be that use of the doctrine has an opposing effect, helping to spread constitutional culture in countries where it is weak or non-existent. Few decisions send a clearer signal of the importance of constitutional values than decisions striking down constitutional amendments because of their inconsistency with those values. These decisions may alert citizens that political actors are posing a substantial danger to principles that the court views as fundamental constitutional values. In practice, a judicial decision striking down a constitutional amendment will rarely act as the final word, but instead may start a dialogue about the importance of the principle in question.[588] In other words, invalidation of constitutional amendments may play a „fire alarm" function, telling the populace that something worth paying attention to is going on.[589]

If this is right, then it means that the truly hard cases are ones like the Colombian „fiscal sustainability" decision.[590] The Court has long pushed an interpretation of the constitution as prioritizing social welfare, arguing that Colombia in its first article is defined as a „social state of right" and issuing influential decisions protecting socioeconomic rights.[591] Indeed, the Court is probably best known for its aggressive enforcement of rights like the right to healthcare and housing.[592] In a mature democratic order, the choice of democratic actors to amend the constitution in order to subordinate social rights to fiscal considerations, or at least to make them weigh equally, would seem defensible as an alternative interpretation of fundamental principles. But in Colombia, there may be some value to the Court's articulation of the „social state of right" principle as a fundamental principle of Colombian constitutionalism. Such a decision might be part of the effort to create a constitutional culture in the country. And the Court's decision has not acted as the final word. The Congress has responded with a law supposedly developing the constitutional amendment but in reality giving the amendment an interpretation that gives „fiscal sustainability" much greater weight than in had in the Court's decision.[593] The resulting exchange may have started something of a political debate about the

[588] See Thomaz Pereira, Entrenchment and Constitutional Politics: Interpreting Eternity Clauses (paper presented at the Younger Comparativists Conference of the American Society of Comparative Law, Apr. 19, 2014) (finding that "eternity clauses" prohibiting constitutional change to certain articles acted as the start of dialogue rather than as the final word).

[589] See David Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L.J. 723, 731-32 (defending judicial review as a "fire alarm," or a way for citizens to get cheap information about abuses by their government, and as a coordination mechanism

[590] See supra text accompanying note 248.

[591] See, e.g., Manuel Jose Cepeda, Transcript: Social and Economic Rights and the Colombian Constitutional Court, 89 TEX. L. REV. 1699, 1699 (noting the importance of socioeconomic rights decisions to the Colombian Constitutional Court).

[592] See, e.g., Carlos Parra Dussan, Incidente de impacto fiscal, LA REPUBLICA, Jan. 31, 2014 (noting that the law includes a version of the legal action for fiscal revision that is quite demanding on the judiciary), available at http://www.larepublica.co/asuntos-legales/incidente-de-impacto-fiscal_106686.

[593] A corollary of this point is that a court will be most effective in playing this role if it issues decisions based on clear principles, and which are publicized widely. Many uses of the doctrine seem to fail this test. In the famous Indian case Raj Narain, for example, members of the Court broadly agreed that the amendment at issue, which stripped courts of jurisdiction over electoral matters, violated the basic structure doctrine. But they disagreed broadly over whether the proper principle to rely on was democracy, equality, or the separation of powers. See Indira Nehru Gandhi v. Shri Raj Narain, (1975) S.C.C. 159.

relative importance and meaning of the „social state of right" criterion in Colombian constitutionalism.

In short, the dynamic theory suggests that many uses of the doctrine are unjustifiable. However, it provides some support for at least a very limited version of the doctrine of unconstitutional constitutional amendments as a way to preserve democracy against substantial erosion. More tentatively, it may also provide support for a somewhat broader version of the doctrine as a way to identify and publicize fundamental constitutional values.[594]

V. Conclusion

Nimer Sultany has recently argued that standard constitutional theory asks a question — how to square judicial review with democracy – that it cannot answer in a coherent or satisfying way.[595] He thus posits that constitutional theorists should seek a different, and more productive, set of questions. This article is an attempt to construct a more practical and productive constitutional theory, at least for a subset of constitutional courts.

The emerging constitutional courts and constitutional orders of what scholars have called the „global south" merit analysis on their own terms. These courts face a set of institutional and social problems that often dwarf those found in more mature democracies. This paper argues that a defensible conception of judicial role in these systems is a dynamic one, which focuses on courts seeking to improve the quality of democracy over time. The main advantage of such a conception is in suggesting a more fruitful set of questions, most of which need empirical study.

We need more work on the kinds of judicial strategies that are possible in different kinds of political contexts, and also on the effects of those strategies on their political systems. We need to know whether „insider" strategies, which focus on building up political institutions directly, or „outsider" strategies, which focus on building up democratic spaces around political institutions, are more likely to be effective. And most broadly, we need research on the dynamic effects of judicial activism, within initially problematic political orders, on politics and society. To what extent can courts improve the functioning of democratic institutions, build up civil society, or spread constitutional culture? It is remarkable how little we know about the answers to those important questions. The ultimate value of a dynamic theory, then, may be in suggesting an agenda for scholars and judges.

Nota redacției: Articolul a fost publicat inițial în *Boston College Law Review*, Vol. 55, 2014, Revista Forumul Judecătorilor primind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.

[594] See Nimer Sultany, The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification, 47 HARV. C.R.-C.L. L. REV. 371 (2012).

[595] See id. at 455 ("Perhaps it is more fruitful to ask new questions.").