WHAT MAKES FOR MORE OR LESS POWERFUL CONSTITUTIONAL COURTS?

STEPHEN GARDBAUM*

It is sometimes suggested that one or another constitutional or supreme court (for example, the U.S., Indian, or German) is the "most powerful in the world." And yet it is often far from clear what the measure of power is or should be, what the sources of judicial power are under the given measure, and what explains why some courts are more powerful than others. Is strength mostly a function of formal powers, so that, for example, a court with the authority to invalidate a constitutional amendment on substantive grounds is ipso facto more powerful than one that may only invalidate statutes, which in turn is more powerful than a court that can do neither? Yet, both the U.S. and Japanese supreme courts are in this middle category; indeed they have roughly similar sets of legal powers overall, but while the former is often considered among the most powerful courts in the world, the latter is often considered among the weakest. Thus, it seems clear that formal powers do not tell the whole story, but what part do they play, if any, and what else helps to fill in the picture? Although looking to how courts actually use their legal powers is obviously also relevant, it too falls short. For what we are additionally in search of are factors that help to explain why, for example, the U.S. and Japanese courts use their powers in such different ways.

This Article seeks to shed light on all three parts of the uncertainty: the measure; sources; and explanation of judicial power. It begins by proposing that the proper measure of the power of a constitutional court is its consequential nature as an institutional actor in terms of affecting the outcomes of important constitutional and political issues. Although more diffuse and harder to quantify, this conception of judicial power is more

* MacArthur Foundation Professor of International Justice & Human Rights, UCLA School of Law. Earlier versions of this article were presented at the International Society of Public Law's 2017 Annual Conference in Copenhagen, the Universidad Externado de Colombia, and the Colombian Constitutional Court. Many thanks to ICON-S co-panelists Rosalind Dixon, Aileen Kavanagh, and Mark Tushnet, to Justice Carlos Bernal Pulido, as well as to audience members, for extremely helpful comments and questions.

inclusive and realistically nuanced than commonly employed uni-dimensional alternatives, such as international influence or strike-down rate. The Article next argues that the consequential nature of a constitutional court is a function of three broad variables: formal rules and powers, legal and judicial practice, and the immediate electoral and political context in which it operates. Through a process of mutual interaction, each of these three helps to shape and constitute the more specific components of a court's institutional power, which include the nature, scope, and content of the constitution it enforces, the jurisdictional and remedial powers it has and employs, the ease or difficulty of constitutional amendment, and its composition and tenure. Moving from measuring to explaining the strength or weakness of constitutional courts, the Article next identifies and discusses three explanatory variables: deliberate constitutional design choices, legal culture, and general or structural political context. The Article concludes with case studies of the supreme courts of India and Japan that illustrate the role and interaction of these multidimensional evidentiary and explanatory factors.

I. INTRODUCTION

It is sometimes suggested that one or another constitutional or supreme court—for example, the Indian,[1] U.S.,[2] or German[3]—is the "most powerful in the world." And yet it is far from clear (a) what such power or "strength" of courts consists in; i.e., what measure, metric, criterion, conception, test, or indicia of power or strength is (usually implicitly) employed,[4] (b) what the sources or components of judicial power are under the given measure, and (c) what explains why some courts are more powerful than others. Is strength exclusively or mostly a function of formal legal powers, so that, for example, a court with the authority to invalidate a constitutional amendment on substantive grounds is ipso facto more powerful than one that may only invalidate statutes, which in turn is more powerful than a court that can do neither? Yet, both the U.S. and Japanese supreme courts are in this middle category; indeed they have roughly similar sets of legal powers overall, but while the former is often considered among the most powerful courts in the world, the latter is often considered among the weakest.[5] Thus, it seems clear that formal powers do not tell the whole story, but what part do they play, if any, and what else helps to fill in the picture? Although looking to *how* courts actually use their legal powers is obviously also relevant, it too falls short of fully completing the picture. For what we are additionally in search of are factors that help to explain *why*, for example, the U.S. and Japanese courts use their powers in such different ways.

This Article seeks to shed light on all three uncertainties surrounding claims as to the overall strength or weakness of constitutional courts: the

---

1. Clark D. Cunningham, *The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the Hussainara Khatoon Prisoners Case*, *in* LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83–96 (S.P. Sathe ed., 2003); S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29, 87 (2001) ("The Supreme Court of India has become the most powerful apex court in the world.").

2. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (2d ed. 1962) ("The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.").

3. Peter E. Quint, *The Most Extraordinarily Powerful Court of Law the World has Ever Known? – Judicial Review in the United States and Germany*, 65 MD. L. REV. 152, 153 (2006) ("[T]he contemporary observer might well ask whether the German Constitutional Court has surpassed the American Supreme Court — as well as other possible contenders — to become 'the most extraordinarily powerful court of law the world has ever known.'").

4. *See, e.g.*, Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. L. 296, 321 (2017) ("[T]here is no consensus on the concept or the measure of judicial power."); Tom Ginsburg et al., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 3 NTU L. REV. 143 (2008).

5. *See, e.g.,* David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, *in* PUBLIC LAW IN EAST ASIA (Albert H.Y. Chen & Tom Ginsburg eds., 2013); Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

measure; components; and explanation of judicial power. The first two of these in combination address the question of whether, for example, the Supreme Court of India has become more powerful since the 1980s and, if so, the third addresses why this is the case. What accounts for this increase? In other words, this first question looks to evidentiary factors and the second to explanatory ones.

The Article begins (in Part II) by canvassing various possible criteria, measures or tests of judicial power, suggesting that the consequential nature of a constitutional court in terms of affecting the outcomes of important constitutional and political disputes is the most plausible one, and ironing out a few wrinkles to try and get the most out of it. Part III argues that the consequential nature of a constitutional court is a function of three broad categories or types of variables: (1) formal rules and powers; (2) legal and judicial practice; and (3) the immediate political and electoral context in which it operates. As we shall see, the second and third categories can and do both increase and reduce judicial power relative to the first. Through a process of mutual interaction, each of these three helps to shape and constitute the more specific components of a court's institutional power, which include the nature, scope, and content of the constitution it enforces, the jurisdictional and remedial powers it has and employs, the ease or difficulty of constitutional amendment, and its composition and tenure.

In Part IV, the Article moves from measuring to explaining the strength or weakness of constitutional courts. Unlike in Parts II and III, here we are looking not for evidence of power or strength, but rather for explanations of the evidence found; not (to reuse the above example) to see whether the U.S. and Japanese courts use their powers in very different ways, but why. The explanatory variables identified and discussed are: (1) deliberate constitutional design choices; (2) legal culture; and (3) the more general political structure within which a court operates. In both Parts III and IV, it will be argued it is the *interaction* of the various factors that does most of the evidentiary and explanatory work. Moreover, because these factors are not fixed but change over time, so too does the relative power of the courts they help to identify and explain. In Part V, the Article provides case studies of the Supreme Courts of India and Japan that illustrate the role and interaction of these multidimensional evidentiary and explanatory factors.

II. MEASURES OF THE STRENGTH OR WEAKNESS OF CONSTITUTIONAL COURTS

When commentators claim that one or another court is among the most powerful in the world, they typically rely—implicitly or explicitly—on one or more indicia of strength that it will be useful to separate. The first of these

is international influence, as evidenced by, inter alia, the borrowing of its constitutional work product by other apex courts, discussion or citation of its judgments by courts, policymakers, and scholars, and/or their reproduction in comparative constitutional textbooks and other materials. For example, by this measure, a good case can be made for the strength of the German Federal Constitutional Court, given in particular the adoption of both its proportionality analysis and doctrine of the indirect horizontal effect of constitutional rights by many national and international courts around the world in recent decades.[6] By contrast, the influence of the U.S. Supreme Court abroad has declined significantly since the end of the Warren Court era,[7] when Bickel made his well-known claim.[8] Yet it is far from clear that, overall, the modern U.S. court is any less powerful than its predecessor. In other words, this measure is too externally focused to serve as a reliable or accurate sole criterion.

A second measure of strength is "judicial activism," in this context referring to the number, frequency, or percentage of cases in which constitutional courts exercise their powers of judicial review against the government of the day, especially where this involves invalidating legislation.[9] For example, during the 1990s the new Hungarian Constitutional Court was estimated to have struck down approximately one-third of all statutes that it reviewed,[10] leading to it being considered a particularly powerful court,[11] at least before "its wings were clipped"[12] by Prime Minister Viktor Orban, first at the end of that decade by his replacement of its chief justice and more comprehensively after he returned to power with a supermajority in 2010. The French Conseil constitutionnel

6. On the spread of proportionality analysis from Germany, *see* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008). On indirect horizontal effect, *see e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 196 (2008) ("The German Constitutional Court's decision in the case of Erich Lüth [establishing the doctrine of indirect horizontal effect] has been enormously influential.").

7. David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 768 (2012).

8. *See* BICKEL, *supra* note 2.

9. On the complexities of defining and comparing "judicial activism," *see* Nuno Garoupa, *Comparing Judicial Activism – Can we Say that the US Supreme Court is more Activist than the German Constitutional Court?*, 72 REVISTA PORTUGUESA DE FILOSOFIA 1089 (2016).

10. *See* Kim Lane Scheppele, *Democracy by Judiciary (Or, why Courts Can be More Democratic than Parliaments)*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 44 (Adam Czarnota et al. eds., 2005).

11. *See* Jon Elster, *On Majoritarianism and Rights*, 1 E. EUR. CONST. REV. 19, 22 (1992) (characterizing the Court as "the most powerful constitutional court in the world").

12. Kim Lane Scheppele, *The New Hungarian Constitutional Court*, 8 E. EUR. CONST. REV. 81, 87 (1999).

had an even higher rate of finding challenged legislation unconstitutional in whole or part even before 2010,[13] when its jurisdictional limitations might otherwise have made it seem weaker than most other modern constitutional courts.[14] Using the same metric but on the other side of the ledger, the "weakness" or "conservatism" of the Japanese Supreme Court is standardly evidenced by citing the statistic that since 1947 it has only found eight statutes unconstitutional, in whole or in part.[15] Similarly with Scandinavian supreme courts.[16] By contrast, courts often perceived as among the most powerful in the world have far lower invalidation rates than the Hungarian court of the 1990s or the French Conseil—on average approximately one federal statute every two years by the U.S. Supreme Court, five per year in the first 17 years of the South African Court, and nine per year by the German Court since its inception in 1951.[17] Accordingly, such activism appears to be neither a necessary nor a sufficient measure of power.

A third criterion is a more nuanced and broader-gauged, but less easily quantified, conception of the power of a constitutional courts that focuses on how consequential an actor it is in terms of affecting the outcomes of important constitutional and political issues; that is, its actual impact on social and political outputs.[18] This criterion takes into account the various roles that constitutional courts play and the concrete differences their decisions make, as well as their gravitational pull on other political actors and processes even without their overt intervention.[19] So, for example, by

13. *See* VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 84 (2009) (reporting that "around half its decisions have found the challenged provisions to be totally or partially unconstitutional"); Louis Favoreu, *The Constitutional Council and Parliament in France*, *in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 95 (Christine Landfried ed., 1988) ("the proportion of nullification compared to the total number of cases decided is undoubtedly higher in France than in other countries").

14. Prior to the constitutional amendment in 2010, the *Conseil* had no "concrete review" jurisdiction from other courts and could only exercise "abstract review" prior to the promulgation of a statute.

15. *See, e.g.,* Law, *supra* note 5, at 1547; Matsui *supra* note 5, at 1388. *See also* SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 147 (2011).

16. *See, e.g.*, Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9 INT'L J. CONST. L. 449, 450–51 (2011) (citing, inter alia, the fact that the Danish Supreme Court has invalidated statutes only once in 160 years as evidence that "the Nordic model of judicial review . . . is the true, genuine weak-form judicial review").

17. Aileen Kavanagh, Situating the Strike-Down 3–4 (unpublished manuscript) (on file with author).

18. *See* COMPARATIVE CONSTITUTIONAL LAW AND POLICY, CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013) (taking this general approach). *See also* Brinks & Blass, *supra* note 4, at 297–98.

19. *See, e.g.*, Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY (D. Jackson & C.N. Tate eds., 1992) (focusing on the interaction between courts and political institutions in establishing policy).

this measure the extraordinary role that the Colombian Constitutional Court has played in that country's peace process and agreement is a manifestation of its institutional power,[20] regardless of how this is viewed elsewhere or whether it upholds or invalidates the resulting document.

Overall, it seems appropriate that in identifying the indicia of power among constitutional courts, we should employ more or less the same ones that apply to the other political actors in a system; in the first instance it is their power *relative to these actors* that is being assessed, and only then is the power of courts being compared inter se. For when we say that Court A is more powerful than Court B, what we mean (or should mean), I think, is that Court A is more powerful within its constitutional system than Court B is in its own. It is also unclear why power should be conceptualized differently if, or just because, we are focusing on courts rather than, for example, executives or legislatures. Accordingly, this general political science conception of power or strength seems to be the proper starting point, and perhaps also reflects the intuitive or implicit measure underlying certain common ascriptions of strength (such as the U.S. Supreme Court) better than the other two measures previously considered.

One aspect of this conception, however, arguably needs to be refined to the extent it insists that political power is the ability to impose one's will on other actors and institutions.[21] For insofar as political scientists and others have persuasively argued that courts have, in some contexts and for various reasons, been empowered by the other political branches themselves,[22] it seems perverse to claim that where politicians are happy, and prefer, to delegate constitutional issues to courts, this cannot be said to increase judicial power. For example, it is widely understood that one key factor in the rise of modern executives at the expense of legislatures around the world has been the delegation of lawmaking authority to the former by the latter

20. *See* MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 226–40 (2017). Most recently, the court upheld the constitutional amendments incorporating the peace agreement into the constitution and prohibiting any change to the agreement for three presidential cycles, or 12 years.

21. This is Robert Dahl's influential conception. *See* Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201 (1957).

22. *See, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 65–66 (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 38–49 (2004); KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY xi–xii (2007); *infra* note 119.

for various reasons.[23] And yet, we do not thereby conclude that this cannot be said to increase the political power of executives.

One criterion that is *not* a test of the overall power or strength or weakness of a constitutional court is the distinction between "strong-form" and "weak-form" judicial review.[24] This distinction refers primarily to a narrower and more particular constitutional design choice in institutionalizing judicial review—whether or not legislatures are legally empowered to respond to specific judicial review decisions within the existing constitution (i.e., without amending it)—and is not claimed or intended to provide a single metric for the overall or all-things-considered strength or weakness of courts.[25] These are simply two distinct issues, notwithstanding that both make use of the terms "strong" and "weak."[26] As I shall explain in the next part, this design choice may be one factor among many that can affect the overall power or weakness of a constitutional court; but it is not—and was never claimed to be—the only or major criterion.

III. MEASURING HOW CONSEQUENTIAL CONSTITUTIONAL COURTS ARE

If we accept that the best or most useful conception of a constitutional court's overall power or strength is not its international influence or the percentage of its judgments that find against the government of the day, but rather its more diffuse status as a consequential political actor within a (domestic or transnational) constitutional order, then the key question

23. *See, e.g.*, B. Dan Wood, *Congress and the Executive Branch: Delegation and Presidential Dominance*, *in* THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS (George C. Edwards III, Frances E. Lee & Eric Schickler eds., 2011) (highlighting the increase of executive action due to the organizational structures of the executive branch, the rise of the administrative state, the power of agenda setting, and lack of technical skills by Congress).

24. *See* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2802 (2003) (introducing the terminology of "weak-form" versus "strong-form" judicial review).

25. *Id.* at 2782–86. The "strong-form/weak-form" distinction does not even signify the only way that *judicial review* can be said to be strong or weak, much less the overall institutional power of a constitutional court more generally. On the "multidimensional" factors determining the strength or weakness of judicial review, *see* TAMAS GYORFI, AGAINST THE NEW CONSTITUTIONALISM 216–51 (2016) (identifying the scope and intensity of judicial review, in addition to its finality).

26. A third distinct issue in the literature utilizing the language of strength and weakness is the character of particular exercises of judicial review, particularly with respect to remedies. Thus, choosing to employ the remedy of a suspended, rather than an immediate, declaration of invalidity is sometimes said to be a "weaker" or more "dialogical" exercise of a court's powers, although this characterization has been contested. *See* Robert Leckey, *The Harms of Remedial Discretion*, 14 INT'L J. CONST. L. 584, 584–86 (2016). Similarly, the original 1954 Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("*Brown I*"), declaring the unconstitutionality of racially segregated schools, has been contrasted with the "weaker" decision a year later in *Brown v. Board of Education*, 349 U.S. 753, 757 (1955) ("*Brown II*"), giving states significant remedial discretion by requiring them to desegregate "with all deliberate speed."

becomes: what determines this status? What are the sources and components of judicial power that make some constitutional courts strong or significant institutional actors relative to the other branches within their system of government, and others weak, with far less impact on constitutionally relevant policy outcomes? The answer, I suggest, is a function of three broad variables: (1) formal rules and powers, (2) legal and judicial practice, and (3) the immediate political and electoral context in which the court operates. In arguing for the importance, and interaction, of all three, I am self-consciously resisting the twin perspectives that formal powers determine everything and nothing about inter-branch relations and constitutional politics.

In a recent article, Daniel Brinks and Abby Blass have proposed that judicial power is properly measured by the interaction of three formal institutional design choices: (1) the extent of a court's "*ex ante* autonomy," or freedom from external control before the judges are seated, which is a function of the number of actors involved in the formal process of judicial appointment; (2) its "*ex post* autonomy" or freedom from means of punishing or rewarding judges after appointment; and (3) the scope of its authority in terms of jurisdiction, accessibility, and remedial powers.[27] Thus, courts granted greater combined formal autonomy and authority will be more powerful than courts with less. As a way of conceptualizing and measuring judicial power, this strikes me as a very helpful contribution, especially in terms of breaking down the diffuse idea of a consequential court into its more concrete constitutive parts. But, as the authors readily concede, "actual judicial power is not simply a function of institutional design"[28] and "whether and how courts use their formal power is contingent upon several variables"[29] beyond the scope of their analysis. So, by looking to the role of legal practice and political context in filling in this more complete picture, albeit in a schematic way, I aim to suggest and illustrate the most important other variables. However, seemingly *contra* Brinks and Blass, these other factors do not only play a role in whether, when, and to what extent courts choose to exercise their measure of power. This is because the autonomy and authority of constitutional courts themselves are partly *constituted* by legal practice and political context, and are not exclusively a matter of formal institutional design. For example, as we will see, neither the impartiality/independence of the judicial appointments process nor the

27. Brinks & Blass, *supra* note 4, at 299. For Brinks & Blass, *ex post* autonomy is a function of the number of veto players in the removal process, the length of judicial tenure, and whether there is constitutional protection against court-packing, jurisdiction stripping, and monetary pressures on the court. *Id*. at 307–11.

28. *Id*. at 304.

29. *Id*.

jurisdiction, accessibility, and powers of constitutional courts are necessarily fixed by initial design choices but can and do vary with context and over time without changes in formal authority. Moreover, autonomy and authority are sometimes *taken* by constitutional courts in the course of their practice rather than granted by institutional designers. Accordingly, the following tripartite division does not neatly or simply map onto a distinction between the possession and use of a formal legal power. In other words, with autonomy and authority, as with so much else, there is a gap between form and substance.

A. Formal Powers

Among the important questions of legal or formal authority affecting the overall institutional role and political power of the courts in any system are the following:

(1) Does the country have a written or codified constitution, or a bill of rights with constitutional status, that one or more courts are empowered to enforce in a non-minimal way? As Tocqueville was perhaps the first to state explicitly, judicial review of legislation is, in and of itself, a significant political power of the courts.[30]

(2) What is the scope of such a constitution? Does it regulate a wide range of actors and activities in that society (at the extreme, a so-called "total constitution"[31]) or a relatively narrow range, perhaps limited to creating the governing institutions and ground rules of political engagement, and a handful of defensive or negative rights against the state? Is the constitution in question a transformative one, thereby tasking all public officials, including the judiciary, with bringing about fundamental change in the political society?[32]

---

30. "So an American judge is exactly like the magistrates of other countries. Nevertheless, he is invested with immense political power. How does this come about? . . . The reason lies in this one fact: the Americans have given their judges the right to base their decisions on the *Constitution* rather than on the *laws*. In other words, they allow them not to apply laws which they consider unconstitutional." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–01 (J.P. Mayer ed., Harper & Row 1969) (1835). As Aileen Kavanagh has urged, one should not, as perhaps Tocqueville did, overstate the importance of the "strike down" power relative to other remedial powers of constitutional review, including the power to modify incompatible statutes through interpretation; but (as she also urges) one should not underestimate it either. *See* Kavanagh, *supra* note 17, at 17.

31. Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law,* 7 GERMAN L.J. 341 (2006).

32. *See* Dirk Kotzé, *Constitutionalism and Democratic Transitions: Lessons from South Africa*, *in* CONSTITUTIONALISM AND DEMOCRATIC TRANSITIONS: LESSONS FROM SOUTH AFRICA 81, 83 (Veronica Federico & Carlo Fusaro eds., 2006) ("The Constitution therefore clearly visualizes itself as a transitional and transformational instrument: one involved in political and social engineering."); *see also* Micheala Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2017).

(3) How specific or general are its provisions; i.e., how much scope for judicial interpretation does it contain? At the extreme, a self-interpreting constitution would mostly be self-enforcing. At the same time, the more detail a constitution contains (for example, concerning the legislative process and/or constitutional obligations), the greater license it may provide for legitimate judicial intervention.[33]

(4) Are courts granted strong or weak-form powers of judicial review?[34] Although undoubtedly courts with strong-form powers may be weak political actors overall and vice-versa,[35] because this is only one factor among the many that are relevant, it is probably not purely coincidental that the courts most frequently perceived as among the most powerful all have strong-form powers; i.e., legislatures in these countries are not legally empowered to respond to constitutional court decisions by ordinary majority vote.

(5) What remedial powers do the courts possess? Whether constitutional courts have been empowered to invalidate statutes that are incompatible with the constitution, to issue suspended declarations of invalidity, advisory opinions, and/or non-legally binding declarations of incompatibility, to modify/reinterpret incompatible statutes and to what extent, and/or to order damages for, or enjoin, constitutional violations are important variables in the nature and type of interbranch relations that exist and are possible on constitutional issues.[36]

(6) How onerous or flexible are the formal constitutional amendment rules? This is one factor, although to be sure not the only one,[37] in determining how easy or difficult it is in practice to overrule a constitutional

33. For example, I have argued that a recent series of extraordinary interventions by the South African Constitutional Court reviewing internal legislative proceedings (as distinct from legislative acts) is to be explained in part by the comparatively detailed and extensive textual provisions in the Constitution dealing with the legislature's functions, processes, and especially obligations. *See* Stephen Gardbaum, *Judicial Review of Legislative Procedures in South Africa* 11–14 (unpublished manuscript) (on file with author).

34. *See supra* text accompanying notes 24–25.

35. *See* Mark Tushnet & Rosalind Dixon, *Weak-Form Review and its Constitutional Relatives: An Asian Perspective*, *in* ROSALIND DIXON & TOM GINSBURG, COMPARATIVE CONSTITUTIONAL LAW IN ASIA 113–14 (2014); Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008, 1030–36 (2015); Kavanagh, *supra* note 17, at 16–17.

36. *See* ROBERT LECKEY, BILLS OF RIGHTS IN THE COMMON LAW 30–31 (2015) (emphasizing the general importance of focusing on the various remedial powers of constitutional courts).

37. *See* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 699 (2015).

court by constitutional amendment;[38] the easier it is, *ceteris paribus*, the less powerful a constitutional court is likely to be.

(7) Are courts empowered to review not only statutes and administrative actions for constitutionality, but also the substance of constitutional amendments? Where they are, things are not *ceteris paribus*, and this adds a further layer of complexity, as we shall see in more detail in the Indian case study. The judicial power to declare constitutional amendments substantively unconstitutional has been referred to as "super-strong" judicial review[39] and the basis for a "truly supreme" judiciary."[40]

(8) What is the jurisdiction of the constitutional/supreme court, what types of claims can it hear, and can the political branches reduce it? Is the power of judicial review centralized in a specialist constitutional court, which may have incentives to exercise its only (or major) function more robustly than a multi-functional or generalist apex court in a decentralized system?[41]

(9) In terms of "standing" rules, how accessible is the court? May ordinary citizens petition it? Do politicians have relatively easy or difficult access? The harder it is to get through its door, the less opportunity a court has to exercise its power and jurisdiction.

(10) How are constitutional judges appointed? Is their appointment controlled by existing members of the judiciary (for example, the "collegium" system in India), by an independent commission, by voters via election,[42] by the executive or legislature alone, or is the approval of both branches required? What is the voting rule for appointment to the court on the part of the appointing body: a simple majority of members or a supermajority? *Ceteris paribus*, a supermajority requirement is likely to result in the appointment of different, more consensual, selections.[43] How many judicial vacancies arise at the same time and how frequently they arise are also likely to affect the constitutional politics of selection.[44]

---

38. *See* Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 95, 95–97 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

39. *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 611 (2015).

40. Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. 181, 182–83 (2017).

41. *See* Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1730–31 (2004).

42. As currently in Bolivia.

43. *See* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1702 (2004).

44. *Id.*

(11) What is their tenure? Are constitutional court judges appointed for life, with or without a mandatory retirement age, or for a renewable or nonrenewable fixed term? How long is that term? Do judges have to worry about reappointment or their post-judicial employment prospects?

(12) Relatedly, where they do have reason to worry, are the judgments of the court required to be anonymous and unattributable, or individualized? Are concurrences or dissents permitted?

Apart from a completely sham constitutional system in which formal powers bear no or very little relation to political realities, it is hard to imagine that if a constitutional system were to answer these twelve questions[45] by granting the maximalist legal powers to its constitutional court, these would not convert into the currency of "actual political power" vis-à-vis the other political institutions in that system. Similarly, a judiciary with few formal powers, such as that in China, is highly unlikely to have much political power in practice. In between these poles, more typically, legal powers will be an important but often not sufficient factor by which to ascribe or predict strength. Two courts might have broadly similar formal powers across many or all of these factors, as for example the U.S. and Japanese supreme courts, and yet be very different in terms of actual or de facto judicial power. At the very least, the differences in judicial power may be far greater than, and not closely correspond with, any differences in formal powers. Similarly, a single constitutional court might become significantly more or less powerful over time or in a given time period without changes in its formal powers, as the examples of the U.S. and Indian supreme courts suggest.

B. Legal and Judicial Practice

The second broad category of factors that must be taken into account as a source and component of the power of a constitutional court is legal and judicial practice. Obviously whether, how, and when the different substantive and remedial legal powers of the judiciary canvassed in the previous section (as well as any responsive powers of the political branches) are actually used will be highly relevant to measuring the actual overall strength or weakness of courts in the respective jurisdictions. A court that never uses its formal powers or invariably practices deference towards the decisions it is reviewing cannot be considered a strong or powerful court and is likely to be less so than a court that more robustly employs the lesser or

45. Of these twelve questions, the first part of number ten corresponds with Brinks and Blass' factor of *ex ante* autonomy, number eleven with *ex post* autonomy, and (I believe) numbers five, eight and nine with their third factor of "authority." *See* Brinks & Blass, *supra* note 27 and accompanying text. In addition, numbers one, two, and six overlap in part with Gyorfi's factor of the "scope of judicial review" and number four with its "finality." *See* GYORFI, *supra* note 25.

fewer formal powers at its disposal. Formal authority in the abstract or on paper is presumably not what we are interested in measuring. Similarly, a court whose decisions/orders are regularly disobeyed, ignored, subjected to legislative override—where this exists[46]—or also perhaps reversed by constitutional amendment, is, *ceteris paribus*, less likely to be considered strong or powerful than one that is not.

In addition to its general importance in this way, there are a number of more specific areas in which actual practice beyond the formal rules is partly constitutive of judicial power itself. One of these is judicial appointments. It may be recalled that for Brinks and Blass, a court's "*ex ante* autonomy" is a function of the number of actors involved in the formal process of judicial appointments.[47] But whatever the number involved or the particular process chosen by the drafters and built into the textual provisions, a practice and norm of judicial appointments made (a) without any reference to political affiliation at all (as mostly, for example, in Canada, India, and the UK), versus (b) a practice of political appointments but of people with independent professional stature and experience (as mostly, for example, in the U.S. and Germany) or (c) the appointment of party loyalists with personal obligations to the appointer, will likely affect the *ex ante* autonomy of the court.[48] All three possibilities can and do exist even where a single actor or institution has the formal power of appointment.[49]

Similarly, the practices and norms surrounding the age (above the textually-specified minimum) at which constitutional court judges are appointed, in combination with the formal tenure provision, may affect a court's *ex ante* autonomy in only slightly more subtle ways. Thus the growing practice of appointing relatively younger Supreme Court justices (as well as more partisan ones) in the United States, when combined with the life tenure guaranteed by Article III of the U.S. Constitution, not only potentially increases the appointing president's "dead hand control" into the future, but creates greater judicial autonomy vis-à-vis future presidents and gives individual justices decades in which to construct their "legacies" and

46. As typically under weak-form judicial review. *See* Tushnet, *supra* notes 24–25 and accompanying text.

47. *See supra* text accompanying note 27.

48. Very occasionally textual provisions prohibit the judicial appointment of members of a political party. One example is South Africa. *See infra* text accompanying note 96.

49. Thus, in Canada and the UK, the traditional appointments process until recently was by the executive alone: the prime minister made appointments on the recommendation of the Minister of Justice/Lord Chancellor, who is a member of the cabinet. In Germany, half of the Constitutional Court is appointed by the lower house of the legislature (the Bundestag) alone, and half by the upper house (the Bundesrat) alone. In Japan, where the Supreme Court consists mostly of party loyalists, the prime minister appoints its members, conventionally after receiving a recommendation from the Chief Justice. *See infra* text accompanying notes 163–164.

play "the long game." By contrast, a practice of appointing older judges relatively close to a mandatory retirement age detracts from judicial autonomy and the stability and coherence of a court.

One feature of judicial practice that potentially affects the *ex post* autonomy of constitutional courts is the norms surrounding the issuing of individualized or attributable opinions by judges who lack life tenure. The civil law tradition of anonymous and unattributable judgments, which functions as a shield to protect the independence of constitutional court judges who are anticipating reappointment or post-judicial employment, has been reformed (typically through legislation) to permit concurrences and dissents in many places in recent years.[50] Even where this has happened, the development of a judicial norm of concurring or dissenting only in exceptional circumstances, as in Germany, permits courts to maintain a veil of ignorance between its members and government re-appointers or potential employers in most cases.

In terms of the scope of a constitutional court's authority, practice plays a large role in determining its full extent. Starting with jurisdiction, perhaps the most famous instance in all of constitutional law is the U.S. Supreme Court's implication of its own power of judicial review in *Marbury v. Madison*.[51] On the other hand, the same court's practice of giving a fairly narrow reading of the standing rules for federal courts—a reading, for example, that limits the ability of federal political actors to sue for alleged "separation of powers" violations by other branches, and asserts a "political question" limitation on its jurisdiction—reduces the scope of its authority in ways not clearly given or mandated by the text. Two other prominent examples come from the Colombian Constitutional Court. First, it took a broad view of its jurisdiction, and hence authority, in dealing with a series of cases in which it attempted to resolve the mortgage and internal displaced person crises in the country by holding "legislative-style" informational and policy hearings, issuing a series of structural orders, and maintaining control to monitor compliance.[52] Second, in developing its "substitution of the constitution" doctrine, the Court declared it has the power to invalidate constitutional amendments that seek to alter fundamental principles of the existing text, which amount to replacements rather than amendments, absent

50. *See, e.g.*, Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GER. L.J. 1345, 1345 (2013).

51. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

52. *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 358–62 (2010). In the context of displaced persons, the Court developed the "unconstitutional state of affairs" doctrine to support and justify its broad evidentiary and remedial measures.

the calling of a constituent assembly.[53] Similarly to the Colombian Court, the German Constitutional Court essentially gave itself jurisdiction over claims to minimum social welfare benefits, despite no clear granting of such power or (in the German case) such constitutional rights in the text.[54] The *accessibility* of constitutional courts is also affected by such deeply practical issues as geographic location, cost, formalities, and the need for a lawyer. The *sua sponte* decision of the Indian Supreme Court to accept a so-called "epistolary jurisdiction," by which it may take a case based on a letter written to one of its judges, has been an important symbol of its accessibility role and public identity.[55]

The remedial powers of constitutional courts, especially more innovative ones, have frequently been the product of judicial practice rather than formal constitutional design. For example, the Canadian Supreme Court began using the suspended declaration of invalidity, by which legislatures are given a deadline for amending or repealing an unconstitutional statute themselves, in the early 1990s.[56] Although it is contested whether this is more or less respectful of legislative privileges,[57] and thus more or less appropriate, than the text-based immediate declaration of invalidity, it is not contested that this remedial power was self-granted. Similarly, in adjudicating and applying the New Zealand Bill of Rights Act 1990, the New Zealand Court of Appeals (at the time the highest court in New Zealand) created a public law damages remedy for violations by the executive that was not contained in the text.[58] Most recently, the Supreme Court of New Zealand has agreed to hear a case on appeal in which the lower court implied a power to issue a declaration of inconsistency between a statute and the Bill of Rights Act, despite the absence of such a formal power in the text.[59] On the other hand, it has taken a narrower approach to the scope of its power to interpret statutes consistently with the bill of rights than the United Kingdom Supreme Court, a power that is in effect remedial, despite very similar textual provisions. Thus, the UK Court has taken a more

53. *See* Decisions C-140 of 2005 and C-1041 of 2010 *in* ESPINOSA & LANDAU, *supra* note 20, at 342–60.

54. *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Feb. 9, 2010 1 BvL 1/09 (Ger.) (leading to Hartz IV and V benefit reform). The textual provisions of the Basic Law on which the FCC has relied are the inviolability of human dignity in Article 1 and the description of the federal republic as a "democratic and social federal state" in Article 20.

55. *See, e.g.*, Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 MERCER L. REV. 611, 624 (1993).

56. The first such case was Schachter v. Canada [1992] 2 S.C.R. 679.

57. *See* Leckey, *supra* note 26.

58. Simpson v. Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA).

59. Attorney-General v. Taylor [2017] NZCA 215 at [3].

"adventurous" approach that amounts to judicial modification of statutes,[60] an approach the New Zealand Court has rejected and described as "unreasonable."[61] The Colombian Constitutional Court's development of the "state of unconstitutional affairs" doctrine has been the basis for some of its broadest remedial orders.[62]

Finally, although to be sure not unconnected to several other listed factors, the quality of a constitutional court's judicial reasoning tends to add or detract from its authority, both generally and in specific cases. A court that issues weak, badly reasoned, or transparently instrumental judgments is less likely to be, and be seen as, a consequential institutional actor than one that does the opposite. Recent decisions of the Venezuelan Supreme Court are an extreme example of this point.[63] By contrast, the generally well-reasoned and comprehensive judgments of the Colombian Court have added to its authority and prestige.[64] At the level of specific, rather than general, authority, the widely-held view that the U.S. Supreme Court's judicial reasoning in support of a constitutional right to abortion in *Roe v. Wade*[65] was fairly weak affected the way the decision was received and added to its vulnerability.[66] By contrast, the generally better and more fully reasoned opinion in *Planned Parenthood v. Casey*[67] appears to have somewhat greater authority and has perhaps enabled the "essential holding of *Roe*" to withstand a multi-decade political crusade to overturn it. Similarly, whether *Griswold v. Connecticut*,[68] *Roe*'s foundation and precursor, would have survived on

60. *See* AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 309 (2009).

61. R v. Hansen [2007] 3 NZLR 1.

62. *See* CEPEDA ESPINOSA & LANDAU, *supra* note 20, at 178–90.

63. *See, e.g.*, Pedro Rosas, *How Venezuela's Supreme Court Triggered One of the Biggest Political Crises in the Country's History*, VOX (May 1, 2017), at https://www.vox.com/world/2017/5/1/15408828/venezuela-protests-maduro-parliament-supreme-court-crisis.

64. *See, e.g.*, Inter.-Am. Comm'n H.R., *Third Report on the Human Rights Situation in Colombia* para. 17, at 36–37, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (February 26, 1999) (stating that, "The Commission has observed that the Constitutional Court, which only began to function in 1992, has attained a high level of respectability and prestige through its independent and objective treatment of issues of great importance for the exercise of human rights and the rule of law in Colombia. The Court has issued well-reasoned decisions on issues ranging from the constitutionality of amnesties for political crimes, legislation relating to the rights of women in the work force, declared states of emergency, etc.").

65. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

66. *See, e.g.,* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933–36 (1973); Daniel A. Farber, *Did* Roe v. Wade *Pass the Arbitrary and Capricious Test?*, 70 MO. L. REV. 1231, 1231–33 (2005).

67. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

68. Griswold v. Connecticut, 381 U.S. 479 (1965).

the highly questionable authority of the majority opinion alone,[69] without the support of the concurrences (and especially that of Justice Harlan), is anyone's guess.

C. Specific or Immediate Political and Electoral Context

The autonomy and authority of constitutional courts is, however, not only a function of formal powers and (sometimes) evolving legal/judicial practice but also of the more rapidly changing contingencies of political context. As a result, where a given constitutional court stands on the metric of power is not always fixed, or even relatively stable, but can fluctuate significantly with shifts in the political winds. Specifically with respect to the other constitutive components of judicial power, different alignments of political and electoral forces can have a marked impact.

For example, regarding the *ex ante* autonomy of constitutional courts vis-à-vis the other institutions of a polity, the consequences of a two-thirds legislative voting rule for judicial appointments will vary depending on the results of the previous election and the voting system used. So, for example, whereas in the political context of Germany's complex proportional representation voting system that essentially ensures (a) no single party will have a majority of legislators and (b) a coalition government, the result of a two-thirds supermajority requirement for appointment to the constitutional court is to promote consensus candidates who can attract cross-party support.[70] Combined with the rolling twelve-year term and resulting multiple vacancies at a time, which ensures a division of spoils among the major parties, the German court is typically staffed with centrist judges from more than one party.[71] By contrast, the same two-thirds judicial appointment rule in Hungary, combined with a voting system that has permitted Viktor Orban's Fidesz party to win two-thirds of the seats in the unicameral legislature with 52%, 45%, and 49% of the vote respectively in 2010, 2014, and 2018 has enabled Fidesz to pack the constitutional court with party loyalists and largely destroy its autonomy.[72]

---

69. *See, e.g.*, Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 722 (2010) ("'Penumbras and emanations' has become an in-joke around the law schools as shorthand for activist constitutional adjudication, an invitation for the Court 'to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.'") (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 99 (1991)).

70. *See* Ferejohn & Pasquino, *supra* note 43, at 1681, 1702.

71. *Id*. at 2004.

72. *See* Kim Lane Scheppele, *Hungary's Attacks on the Rule of Law and Why They Matter for Business*, FIN. TIMES, Feb. 5, 2014, https://www.ft.com/content/6c538e70-168f-3d1e-ba92-8a80790a6247.

In terms of *ex post* autonomy, a non-life tenured constitutional court judge who can reasonably expect a change of government through electoral or other means by the time she/he may be seeking either re-appointment or post-judicial public employment, might have somewhat different incentives than one who cannot. To the extent that the prospect or reality of being overruled by constitutional amendment impacts the power of a court (especially absent the power to invalidate it), the likelihood of such amendment is similarly a function not only of the formal amendment rule, but also of the immediate, practical political context of whether the necessary votes are there. For example, while Fidesz in Hungary was able not only to amend but to replace the entire constitution under the pre-existing two-thirds amendment rule shortly after winning a supermajority of legislative seats in 2010, proposed constitutional amendments in the United States almost never get past the same two-thirds rule needed to send them to the states for ratification.[73] This is due not simply to the extreme rarity of such a supermajority for one party but also to the hyperpolarized nature of modern party politics in the United States that enhances all the veto points in the system.[74] By contrast, less polarized political systems are more often able to reach the cross-party consensus necessary for constitutional amendments absent a single party/bloc legislative supermajority.

Another source of judicial power that can broadly be categorized as part of the immediate political context in which constitutional courts operate are public opinion polls. Thus, to the extent that in certain countries, constitutional courts regularly receive higher approval ratings from the public than the other political institutions and actors, this provides a supplementary source of both autonomy and authority, as well as legitimacy that may embolden them to act in ways they might otherwise not do. Indeed, there is an increasing tendency on the part of such courts to actually refer to their higher public support as a basis for the legitimacy of their actions and role.[75]

IV. FROM MEASURING TO EXPLAINING JUDICIAL POWER

The previous Part attempted to identify the factors that combine to determine how consequential and powerful a given constitutional court is.

---

73. Of course, in the United States, both houses of Congress must pass the proposed amendment by a two-thirds vote.

74. *See generally*, Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

75. For the role that modern public opinion polls have had in changing the way that courts justify their power and use of it, see Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 CONSTELLATIONS 573 (2016).

As we saw, legal and judicial practices can and do expand or reduce a court's power relative to its formal autonomy and authority, as is also true of the concrete and immediate electoral/political context in which it operates. All three factors must be taken into account in order to properly and accurately measure the power of a constitutional court, although they are neither fixed over time nor hermetically sealed from each other. To the contrary, through a process of mutual interaction, each of the three helps to shape and constitute the more specific components of a court's institutional power, which include the jurisdictional and remedial powers it has and employs, the ease or difficulty of constitutional amendment, and its composition and tenure.

Armed with this minimally refined way of measuring the power of constitutional courts, we can apply it to postulate *that* Court A is more powerful than Court B, even in situations where Court A and Court B appear to have similar formal powers. What we cannot yet do, at least satisfactorily, is explain *why* Court A is more powerful than Court B; not in the sense of re-stating the measure, but of accounting for it. Why is it able to expand its power through judicial practice? Or, why does Court C rarely use its formal powers, or why has Court D grown more (or less) powerful over time? What beyond the factors that measure and determine judicial power helps to explain individual measurements? This is the burden to be taken up in this part. The three broad explanatory factors suggested are (1) deliberate constitutional design choices; (2) legal culture; and (3) general political and social context, understood in a more systematic or structural and less immediate, numerical, or electoral sense than in the previous part.

A. Deliberate Constitutional Design Choices

As a general starting point, the grant of formal legal powers will ordinarily reflect and express the deliberate design choices of constitutional drafters as to how powerful a court they wish to create.[76] For example, in deciding to give the new Federal Constitutional Court extensive formal jurisdiction and powers, including banning political parties as well as multiple heads of constitutional review, the members of the Parliamentary Council drafting the 1949 German Basic Law were deliberately creating a more powerful judicial "guardian of the constitution" and the rule of law than

76. *See, e.g.*, Brinks & Blass, *supra* note 4, at 299. It should be noted that these include not only the substantive choices listed in Part III.A above but also the "meta" ones concerning, for example, how much room to leave for judicial interpretation and the scope of the constitution.

under the Weimar Constitution.[77] The "third wave" of democratization since 1989 has generally been characterized by the intentional creation on the part of constituent assemblies and drafters of either brand new or more powerful constitutional courts than before,[78] especially in Asia and Latin America. For example, the Colombian Constitutional Court, created by the constituent assembly as a key part of the 1991 Constitution, was designed to be a consequential actor in the new constitutional order that could, among other things, serve as both a protector of rights and a counterweight to the recent history of powerful executives.[79] Not only was it given the old constitutional powers of the existing Supreme Court, which had exercised them in a mostly formalistic and deferential manner, but a series of important new ones. These included the key *tutela* jurisdiction, permitting ordinary citizens to petition the courts for violations of their fundamental rights for the first time.[80]

By contrast, the drafters of the French Conseil constitutionnel intended to create a less powerful, narrowly focused institution, the major task of which was not to serve as the general reviewer of legislation—including for rights violations—it subsequently became, but rather to keep the legislature from encroaching on the Fifth Republic's new executive lawmaking powers.[81] This was reflected in the narrow formal jurisdiction given to the *Conseil*. Originally only the Presidents of the Republic, the National Assembly, and the Senate could petition it, and only before the legislation was promulgated. Similarly, drafters of the new bills of rights in New Zealand and the United Kingdom deliberately sought to limit the growth of judicial power under them in order to preserve the fundamental constitutional principle of "parliamentary sovereignty" in these countries.[82] So although both bills of rights granted new and enhanced judicial powers for the protection of rights, they institutionalized what has been referred to as "weak-form judicial review" as distinct from the more standard "strong-form."[83] Whether this initial attempt to design less powerful constitutional

77. *See* JUSTIN COLLINGS, DEMOCRACY'S GUARDIAN: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT xxvi (2015) (referring to the Basic Law's "staggering conferral of judicial authority").

78. *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES 191 (2015).

79. *See* CEPEDA ESPINOSA & LANDAU, *supra* note 20, at 10.

80. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA Jul. 4, 1991, art. 86.

81. *See* Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69, 80 (2007). Unusually in a unitary state, Article 34 of the constitution creates an enumerated list of legislative lawmaking powers, with the remainder held by the executive.

82. *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 7–8 (2013).

83. *See* Tushnet, *supra* note 24, at 2785–86.

courts by limiting their formal powers has been overtaken by the other factors of legal practice and political context and, if so, why this has happened is the subject of scholarly disagreement.[84]

As some of these examples indicate, the deliberate design choices of constitutional framers are usually an important, but often not a sufficient, explanatory factor. They sometimes cannot explain, for example, why certain courts are able to enhance their powers beyond those originally bestowed, why others rarely use those formally granted, or why the power of some courts increases over time without changes in the framers' text.

B. Legal Culture

Legal culture can help to fill the explanatory gap. Three general variables that may enhance or detract from the ability of courts to increase their own power are (1) the status of judges, (2) their historical degree of independence, and (3) cultural adherence to rule of law norms within a system, although the three are frequently linked. Thus, where all three are high, as for example generally within the common law tradition, then *ceteris paribus* the actual and potential future decisions of judges granted the power of constitutional review are more likely to be treated seriously and with respect—as consequential—by other political actors in the constitutional order, because the political costs of failing to do so are likely to be higher than in a system where some or all are not the case. It is in significant part for this reason that, with the notable exceptions of the United States, Ireland, and India, until recently most other common law countries expressly denied the power of judicial review of legislation to their high status, independent judges, in favor of the central constitutional principle of parliamentary sovereignty.[85] This principle imposed a fairly clear limit on the accretion of political and public law-making power in the courts that was considered a requirement of representative democracy. Where the status and relative independence of ordinary judges is lower, as mostly in the civil law tradition,[86] the creation of new and specialized constitutional courts with different personnel and appointments processes was often deemed necessary

84. *See* Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, *supra* note 35; *see also* Stephen Gardbaum, *What's So Weak About "Weak-Form Review": A Reply to Aileen Kavanagh*, 13 INT'L J. CONST. L. 1040 (2015).

85. This reason also perhaps helps to explain why "weak-form judicial review" might be somewhat less weak in practice in such jurisdictions than in others.

86. Because there are typically far more judges than in common law countries and because the judiciary is an entry-level, civil service career in which promotion depends significantly on peer review by more senior judges.

to bolster the effectiveness and power of the judicial review function.[87] By contrast, where judicial review remains "decentralized" and exercised by an ordinary, lower status career judiciary in the broadly civil law tradition, one might expect such courts to be relatively weak, as in Scandinavia.

Relatedly, as Theunis Roux has argued in the context of democratic transitions, the nature of a legal culture as strongly or weakly institutionalized, or relatively formalistic versus substantive in what is expected of judicial decisionmaking, can significantly affect the agency and power of constitutional courts.[88] Thus, where the legitimacy of a court's decision is taken to require a relatively legalistic mode of reasoning that respects the law/politics distinction, this acts as a constraint compared to a legal culture more skeptical of the distinction in which courts are freer to take substantive and normative considerations into account.[89] Indeed, cultural adherence to legalism is a second way (in addition, or as an alternative, to the historical resistance to judicial review) in which many common law countries have attempted to limit the role of courts in their constitutional orders. On the other hand, where a legal culture is strongly institutionalized and/or relatively formalistic but combines this with a high regard for judicial status and independence, this can serve to insulate constitutional courts from political attack.[90]

A more specific instance of the role of general legal culture in helping to explain the degree or extent of judicial power is the set of beliefs surrounding a country's constitution and its impact on the likelihood of constitutional amendment. As we have seen, the all-things-considered ease or difficulty of constitutional amendment is an important ingredient of judicial power: the easier it is in practice to amend a constitution to effectively overrule a constitutional court, the less consequential its rulings are likely to be. But over and above both the formal rules and the immediate political context that helps to determine whether the formal standard can be met, norms and cultures surrounding the resort to constitutional amendment may range from the inviolable and "sacred" nature of the existing text to the disposable/pragmatic. Despite the fact that the U.S. Supreme Court (most likely) lacks the power to review the substantive constitutionality of amendments, the near-sacred character in which the Constitution is held

87. *See* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 49–51 (1989).

88. *See* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 72–111 (2013); Theunis Roux, *The South African Constitutional Court's Democratic Rights Jurisprudence*, 5 CONST. CT, REV. 33, 54–61 (2015) (hereinafter *Democratic Rights Jurisprudence*).

89. *Democratic Rights Jurisprudence*, *supra* note 88, at 46–47.

90. *Id*.

further adds to the difficulty, and helps to explain the infrequency, of formal constitutional amendment such that in practice this does not significantly affect its overall power. Moreover, as the widely perceived primary or distinctive "guardian" of the near-sacred Constitution, the Supreme Court gains added cultural prestige and legitimacy relative to the other institutions of government. By contrast, the relative frequency of successful amendment suggests there is no significant cultural barrier to changing (as distinct from replacing) the German Basic Law, including to effectively overrule the Constitutional Court. Accordingly, even though the Court is equally viewed as the guardian of the Basic Law and appears to enjoy a high level of public support for its work, it lacks this additional source of cultural capital.

C. General Political Context

The third broad category of factors that helps to explain relative strength or weakness is the general political context in which a constitutional court operates.[91] The breadth of this category ranges all the way from basic structural or macro-political variables, such as the general democratic or authoritarian nature of the regime, to increasingly more detailed, specific or micro-political variations. Only short-term alignments of political forces are excluded here, because they are considered in Part II.C above, as interacting with formal rules and powers in the constitution of judicial autonomy and authority. Starting at the more macro-level, the political space available for more independent, robust, and consequential constitutional courts is in significant part a function of the general political regime in which it operates.[92] Some very interesting and cutting edge comparative constitutional scholarship has recently focused on both non-liberal versions of constitutionalism and the strategic political reasons that even fully authoritarian regimes may have to empower or permit a certain degree of autonomy and/or authority among one or more of their courts.[93] This scholarship demonstrates the necessity of the qualification "in significant part" above, as with such regimes too, the particular context matters.

---

91. *See* KAPISZEWSKI ET AL., *supra* note 18, at 22 (discussing "major domestic political regime features" as one of the relatively enduring structural factors that influence the role constitutional courts play).

92. For an insightful demonstration of this point, as it applies in Asia, see PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA (2017).

93. *See, e.g.*, TOM GINSBURG & ALBERTO SIMPSER EDS., CONSTITUTIONS IN AUTHORITARIAN REGIMES (2014) (exploring mechanisms by which authoritarian regimes utilize constitutions to consolidate their power and establish norms, especially during moments of internal conflict); Li-Ann Thio, *Constitutionalism in Illiberal Polities in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133 (Michel Rosenfeld & András Sajo eds., 2012) (creating a typology of constitutionalism in different authoritarian regimes); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015) (examining characteristics of authoritarian constitutionalism in Singapore).

With this important caveat in mind, let me suggest that for current purposes there are five general regime types which help to explain the political space available for, and hence the overall strength or weakness of, constitutional or supreme courts operating within them.[94] The first two are variations of liberal democracy: (1) competitive party liberal democracies and (2) dominant party liberal democracies, such as Japan, pre-2000 Mexico, and South Africa. The relevant difference between them, due to the latter's absence of rotation in office, is the respective degree of concentration or dispersal of political power other than in the very short-term (i.e., as the result of a single, given election), and the opportunities such concentration provides for influencing, inter alia, the composition of the courts and/or the reception that court decisions might receive from political elites. Thus, in Japan, the dominance of the Liberal Democratic Party (LDP) combined with the legal power of the prime minister to appoint judges to the Supreme Court, has resulted in a court packed mostly with its party loyalists.[95] In South Africa, where party or government members are prohibited from serving on the constitutional court and the constitution establishes an independent Judicial Service Commission to screen candidates for final presidential selection,[96] the dominant status of the African National Congress (ANC) means that its actions (or omissions) are inevitably and uniformly the object of judicial review. This, in turn, means that the Court cannot help but be conscious of the reception of, and potential backlash against, its decisions, which tend to have no natural, major party support or defenders,[97] unlike in competitive party democracies. While this has not prevented the Court from exercising greater independence than the Japanese or pre-2000 Mexican supreme courts, especially more recently as the ANC's dominance has been in decline, it is nonetheless "constrained" and must tread carefully.[98] Within dominant party democracies, whether a constitutional court is effectively the only independent institution or exists alongside others, as well as a robust

94. General regime type usually helps to set the outer parameters of judicial power, but it does not always explain where within the parameters it falls. So, there may be significant variations in the strength and weakness of constitutional courts within each category, e.g., among competitive party liberal democracies.

95. *See* Tushnet & Dixon, *supra* note 35, at 113–14. Again, such packing is not simply the result of judicial appointment by a single actor, but of its combination with a dominant political party and a norm/practice of appointing party loyalists. Absent both of the latter factors, there would be greater judicial pluralism on the court. *See supra* text accompanying notes 48–49.

96. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, § 174.

97. Although this may be changing with the electoral decline of the ANC and the rise of the opposition Democratic Alliance.

98. *See* Roux, *Democratic Rights Jurisprudence*, *supra* note 88, at 70–72 (explaining how the ANC's consolidation of power affected democratic rights jurisprudence of the Court).

media and civil society, also impacts its room for maneuver and ability to protect both itself and the constitutional order against democratic erosion.[99]

By contrast, (3) "illiberal democracies," such as contemporary Hungary, Poland, Turkey, and (until the last year or so) Venezuela, are characterized by a competitive party system and reasonably free and fair elections, but also a reduction or erosion of democracy to essentially majority rule. This is accomplished by the concentration of power in the governing (typically, populist/nationalist) party, and usually its leader, *not* as a natural political consequence of electoral dominance over time (as with dominant party liberal democracies) but of affirmative steps following electoral victory to maximize on and entrench its position, and curb the independence of any institution it does not control.[100] This typically includes the constitutional court, as all four examples illustrate; although once it controls the judiciary, the target might become the legislature with the court acting as the government's agent, as recently occurred in Venezuela.[101] Such affirmative and deliberate steps go well beyond influencing the composition of the court over time through the pre-existing rules of appointment, instead changing these rules in its favor, increasing or reducing the size of the court, reducing its powers and jurisdiction, firing "opposition" members, and even physical threats.[102]

Arguably distinct are (4) authoritarian constitutionalist regimes, such as Singapore, which also have reasonably free and fair elections and are not liberal democracies, but tend to have a truly—i.e., long established—dominant political party that affords some degree of independence to their courts and certain rights to all citizens.[103] While this degree of independence

99. *See* Stu Woolman, *A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President*, 8 CONST. CT. REV. (forthcoming 2018) (manuscript on file with author) (showing how holding former President Zuma accountable for his corruption was a team effort between the Constitutional Court, the independent Public Prosecutor, opposition political parties, the media, and civil society groups).

100. For a recent case study, see Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* 10–14 (Sydney Law Sch., Legal Studies Research Paper No. 18/01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491. Where these steps include amending or replacing a constitution for such ends, it has been termed "abusive constitutionalism." David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013).

101. The constitutional court initially took over the legislature's functions until essentially ordered by the president to change its mind, in the face of massive international and domestic denunciation.

102. As, for example, in Hungary since 2010 and Poland since 2015. *See* Scheppele, *supra* note 72 (Hungary); Sadurski, *supra* note 100, at 41–42 (Poland).

103. *See* Tushnet, *supra* note 93, at 413–15. Either or both "illiberal democracy" and "authoritarian constitutionalism" may overlap with a new, post-Cold War intermediate regime type between democracy and full authoritarianism that has been termed "competitive authoritarianism." *See* STEVEN LEVITSKY &

is likely to be fairly stable and not under severe, short-term attack, it is typically more circumscribed in terms of both composition and concern about reception of its decisions by political elites than in either type of liberal democracy, especially on constitutional issues.[104]

Finally, (5) fully authoritarian regimes come in several forms, including one party states like China, multiparty presidential republics like El-Sisi's Egypt, or absolute monarchies like Saudi Arabia. Clearly, boundary problems exist (has Venezuela moved all the way from competitive party liberal democracy to fully authoritarian regime in two decades?) as do the distinct issues raised by "fragile" or "weak" democracies, but the role, space, and independence—and therefore the power—of constitutional courts is significantly explicable by this primary filter of political regime type, even among courts sharing the same formal powers. Other things being equal, the greatest space exists where political power is least concentrated and most contested. As we saw above, to the significant extent that voting systems affect this—in Hungary, the mixed majoritarian system gave Orban the crucial supermajority of seats without a supermajority of votes, whereas in South Africa, the constitutionally-required PR system has mostly prevented the ANC from obtaining the two-thirds of seats needed to amend the constitution by itself—they are also an important variable shaping and explaining judicial power.[105]

Of course, since general regime type tends to set the outer parameters of judicial power, other structural factors help to explain the fact that not all competitive party liberal democracies have constitutional courts of equal consequence.Apart from the long-understood fact that there is a close historical and functional connection between judicial review and federalism in terms of umpiring institutional disputes concerning allocation of powers between the two levels of government,[106] federalism may also increase "the demand" for judicial intervention on *rights* issues and thereby create greater opportunities for courts. The 2015 decision of the U.S. Supreme Court in *Obergefell v. Hodges*[107] might be seen as the Court imposing its will on the nation, but it can also be viewed as imposing the nation's will on recalcitrant

---

LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 3–5 (2010).

104. *See* YAP, *supra* note 92, at 3 (describing courts' challenges to government in dominant-party democracies as compared to competitive party systems).

105. *See* Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, 65 AM. J. COMP. L. 229, 242 (2017).

106. *See, e.g.*, JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 327 (Henry Regnery Company 1962) (1861).

107. Obergefell v. Hodges, 135 S. Ct. 2584.

states, acknowledging the social change that had recently taken place.[108] Moreover, the role of partisan federalism[109] in creating a forum in which opposition party state officials can seek judicial review of federal executive actions during periods of unified party government at the national level has been highlighted in the first year of the Trump administration. Here, the short-term alignment of political forces affects the role and opportunities for consequential decision-making by courts in ways that might not otherwise occur under more divided national government.[110]

While there appears to be no general relationship between the overall strength or weakness of constitutional courts and form of government (presidential, parliamentary, or semi-presidential), in that, for example, perennial candidates for *both* most and least powerful courts come from countries with parliamentary systems, there may be more particular ones. Thus, "separation of powers" issues between the independent legislative and executive branches within a presidential system may create more "business" for a constitutional court as an impartial umpire along similar functional lines as with federalism, especially during times of divided government.[111] On the other hand, one significant structural factor in—and explanation of—the recent growth of judicial review in mature, Westminster-style parliamentary democracies has been the perceived over-concentration of power in the executive, given its typical control of the legislature through the modern system of party discipline.[112]

Another important structural political factor affecting and explaining the power of courts is how functional or dysfunctional the other branches of government are. Two well-known examples of constitutional courts that increased their power by stepping in to plug the gap in governance caused by weaknesses in their political systems are the Supreme Court of India (SCI)

---

108. *See, e.g.*, Pew Research Center, *Support for Same-Sex Marriage Grows, Even Among Groups that Had Been Skeptical* 1 (2017), http://www.people-press.org/wp-content/uploads/sites/4/2017/06/06-26-17-Same-sex-marriage-release.pdf (showing 2011 as the first year in which more Americans favored same-sex marriage than disfavored it).

109. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

110. For example, the series of federal court decisions on President Trump's "travel bans." *See, e.g.*, Int'l Refugee Assistance Project v. Trump 857 F.3d 554 (4th Cir. 2017); Hawaii v. Trump 859 F.3d 741 (9th Cir. 2017); Washington v. Trump 858 F.3d 1168 (9th Cir. 2017).

111. *See*, *e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (holding that Congress' "for cause" restriction on the President's removal power violates the separation of powers). But note, such issues may also be litigated in parliamentary systems. *See, e.g.*, R v. Sec'y of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583 (appeal taken from Eng. and N. Ir.).

112. *See* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 638 (2014) (describing the increased role of judicial review of substance of administrative actions in the UK).

and the Colombian Constitutional Court. The growth of public interest litigation in the former, whereby the SCI has largely assumed managerial and governance functions in areas such as environmental protection, disaster relief, and sexual harassment, was a response to the deep and pervasive sense of government failure, inefficiency, and corruption in these areas.[113] Similarly, the Colombian Court's attempts to solve certain major structural problems resulting in widespread rights violations through investigative hearings, managerial orders, and continuing oversight of government agencies for compliance has been ascribed to the dysfunctionality of the legislature, given the weakly institutionalized party system.[114] A third example is South Africa, where the repeated failures of the national legislature to hold President Zuma accountable for using public money to improve his private home, as determined by the country's Public Protector, prompted the Constitutional Court's increasingly bold interventions, especially after the electoral evidence of declining support for the ANC was clear.[115] Such dysfunctionalities often also in turn help to explain the comparatively higher public support for the courts than for the other state institutions that is sometimes recorded in opinion polls, which then becomes a new source of judicial power.[116] By contrast, where the other branches of government are broadly functional, as arguably for example in Scandinavia, there is less need for courts to play such unorthodox roles so that this particular reason for, or spur to, judicial power does not exist.

If this factor is one of several that involve the taking of power by courts, several recent influential accounts of the growth of judicial review have identified a different set of strategic political factors that involve the *empowering* of courts by other political actors and institutions. These are that constitutional courts can act as "insurance policies" to political actors in transitioning authoritarian regimes newly faced with the uncertainties of future election results,[117] as the last best hope of those who have lost their

113. HANS DEMBOWSKI, TAKING THE STATE TO COURT: PUBLIC INTEREST LITIGATION AND THE PUBLIC SPHERE IN METROPOLITAN INDIA 56–61 (2001). It was also a response to The Emergency of 1975–77. *See infra* text accompanying note 148.

114. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L. L.J. 319, 319–22 (2010).

115. Woolman, *supra* note 99, at 1–6.

116. *See* Bassok, *supra* note 75, at 573 (discussing public opinion polls as an "independent source of evidence" of public support of the U.S. Supreme Court).

117. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 24–25 (2003).

"hegemonic" political position,[118] or as mediating or "hedging" the transition to democracy by offering resistance to reversion to one-party rule.[119]

Even within liberal democracies, the general political culture of a country (either alone or combined with some of the other factors discussed) may support a more robust or minimal role for courts—whether or not this culture is manifested in the relevant sets of formal legal powers. Thus, for a long time different political cultures and histories in, say, the United States and Canada, or in Germany and the Netherlands, helped to explain their different constitutional arrangements with respect to courts and judicial review. Today, political cultures that have changed at significantly differential rates concerning the continuing appeal of "parliamentary sovereignty" help to explain the different ways that courts and legislatures have exercised broadly similar "weak-form" powers under recent bills of rights in Canada, the UK, Australia and New Zealand.[120]

Beyond purely political factors, the broader socio-economic context also undoubtedly plays a role in explaining the extent and scope of judicial power. So, on the one hand, the widespread existence of extreme poverty may force itself onto the judicial agenda, especially where there is a transformational constitution and/or the other branches of government are viewed as dysfunctional or corrupt. But on the other, a constitutional court in a wealthy advanced industrial society like Germany has options in terms of how social and welfare rights are judicially enforced that its counterpart in a far poorer country such as South Africa does not have.[121]

V. CASE STUDIES

In this section, I apply the somewhat abstracted, multidimensional evidentiary and explanatory factors listed above to two concrete case studies. Indeed, in so doing I hope to show that the Indian and Japanese supreme courts are particularly good examples of how the overall strength or weakness of a court is a function of all three broad categories of factors.

---

118. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 49 (2004).

119. Sam Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011).

120. The differences have also been explained by the legal form that the bills of rights have taken: constitutional or statutory. *See* Rivka Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, 62 AM. J. COMP. L. 127, 128–133 (2014).

121. Here, I'm referring to the German Constitutional Court's well-known position that implied social rights guarantee a minimum level of substantive state support, whereas the South African Constitutional Court has interpreted express social rights as not doing so but rather imposing a duty on the state to take reasonable measures in the relevant areas.

They also illustrate the role that political context in particular plays in explaining the extent of judicial power.

A. The Indian Supreme Court

The SCI is often viewed as one of the most powerful constitutional courts in the world.[122] In the past three years alone it has issued a series of extraordinary and eye-catching rulings that bespeak a large and significant role in Indian society. For example, in August 2017, a nine-judge bench unanimously declared a broad, fundamental right to privacy—ranging from gay sex to data mining—as an implication of the substantive rights to "life" and "personal liberty" that the Court has interpreted Article 21 to protect.[123] In January 2017, the SCI held that it was unconstitutional for political candidates to campaign on the basis of religion, caste, or ethnicity.[124] In another case the same month, it forced the ouster of the head of the national cricket board, replacing him with former judges on an interim basis.[125] In December 2016, the SCI mandated the playing of the national anthem in movie theaters under Article 51.[126] In October 2015, it struck down a constitutional amendment establishing a judicial appointments commission to replace the collegium system for making senior appointments.[127]

In many ways the SCI has powers that other constitutional courts can only dream about. In addition to the standard power of judicial review of legislation granted by the text of the constitution,[128] the SCI has essentially given itself at least three important and distinctive powers over the past forty years or so, relative to other constitutional courts. This again reflects the constitutive importance of legal/judicial practice. The first is the power to review the substance of constitutional amendments under the well-known basic structure doctrine.[129] The subsequent "borrowing" of this doctrine in several countries, both elsewhere in South Asia and further afield,[130] is a testament to its regional and international influence. The second is the power

122. *See* sources cited *supra* note 1.

123. Justice K.S. Puttaswamy v. Union of India, Writ Petition (Civil) No 494 of 2012 (2018) 1 SCC 809 (India).

124. Abhiram Singh v CD Commachen (2014) 14 SCC 382 (India).

125. *See* Board of Control for Cricket in India v. Cricket Association of Bilhar (2015) 3 SCC 251 (India).

126. Shyam Narayan Chouksey v. Union of India (2016) 12 SCALE 404 (India).

127. Supreme Court Advocates-on-Record Association v. Union of India (2015) 11 SCALE 1 (India).

128. INDIA CONST. art. 13, 132–35.

129. *See* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (India) (first announcing and applying this power); Minerva Mills v. Union of India, AIR 1981 SCR 206 (India) (subsequently strongly reaffirming this power).

130. Arguably including, for example, Colombia. *See* cases cited *supra* note 53.

to appoint its own members and that of the other higher courts under the collegium system, as determined by the SCI to be a requirement of judicial independence in the "Three Judges Cases" of 1982–1998 and affirmed in a 2013 decision dismissing a case challenging it.[131] Such a system of almost complete *ex ante* autonomy is rare for a constitutional court as compared with the global norm of either political appointments of various sorts or an independent, but not judicially-dominated, commission.[132] In 2015, the SCI used the first power to prevent a change to this second, exemplifying how the basic structure doctrine can be used to prevent the normal possibility of overruling a constitutional court by constitutional amendment, and so entrenching its decisions.[133] The third is the power to adjudicate public interest litigation (PIL), which has greatly enhanced public access to courts by essentially abolishing standing requirements and led to unorthodox judicial remedies overseeing and managing specific policymaking areas—including pollution control and the environment, disaster relief, child employment, and sexual harassment. In the latter, the SCI actually "made" the interim law by judicial order until Parliament acted.[134] In this context, the SCI has been said to have effectively become an institution of governance. In these three ways, the SCI has substantially enhanced both its autonomy and authority relative to its textually granted powers.

On the other hand, the Indian Constitution also contains certain formal powers that reduce the power of the SCI relative to some other constitutional courts. First, a relatively flexible constitutional amendment rule of two-thirds of both houses of legislature,[135] which has been triggered on 101 occasions since 1950. This is high by comparative standards, and the fact that many of these amendments were adopted to overrule decisions of the SCI prior to the 1980s was the primary reason the SCI responded by developing the basic structure doctrine. Second, the Ninth Schedule to the Constitution, created by the very first such amendment ("the First Amendment") in 1951, is an interesting and unusual constitutional provision that is functionally similar to the better-known Section 33 of the Canadian

131. *See* S.P. Gupta v. Union of India, AIR 1982 SC 149 (India); Supreme Courts Advocates-on-Record Association v. Union of India, AIR 1994 SC 268 (India); In re Special Reference 1, AIR 1999 SC 1 (India); Suraz India Trust v. Union of India, (2012) 13 SCC 497 (India).

132. It is slightly less rare for ordinary, nonconstitutional courts.

133. *See* Landau & Dixon, *supra* note 39 at 611 (referring to this power as "super-strong judicial review").

134. *See* Vishaka & Others v. State of Rajasthan, AIR 1997 SC 3011 (India).

135. INDIA CONST. art. 368 ("An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President . . .").

Charter of Rights and Freedoms,[136] in that it was designed to immunize specific pieces of legislation from judicial review. Unlike Section 33, however, it has been fairly frequently used (there are currently 284 Acts in the Ninth Schedule), but not since 1991. Also unlike Section 33, its use (a) has been held by the SCI to be subject to substantive review under the basic structure doctrine, as per a landmark 2007 decision,[137] and (b) requires the same two-thirds vote as a general constitutional amendment. Third, the constitutional text mandates a judicial retirement age of 65.[138] The practical bite of this provision depends on the typical age of appointment; but unlike, say, with political appointments in the US in which younger appointments are increasingly being made, the collegium system in which seniority plays a major role, ensures that younger judges are almost never appointed. This combination of formal provision and legal practice affects the working of the SCI as a whole through its impact on individual justices. As a result, there is fairly frequent turnover of both chief and associate justices, and less time and scope to develop either individual legacies or consistent collective positions.

Another related aspect of legal practice that arguably reduces the power of the SCI relative to what it otherwise might be is the growing size of the court—from the original 8 members in 1950 to 31 today, making it one of the largest in the world—and the increasing tendency for it to sit in smaller and smaller panels—now typically of two or three justices—even in significant constitutional cases.[139] Although both are a function of its increased jurisdiction and caseload with the effective abolition of standing requirements under PIL, and so reflect its greater role and authority, the diminishing panel size has caused concerns to be expressed about the Court's doctrinal coherence and consistency.[140] To the extent that the precedential effect of SCI decisions is weakened or questioned as a result, their consequential nature and its political power are reduced.

136. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11 (U.K.) ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.").

137. I.R. Coehlo v. State of Tamil Nadu, AIR 2007 SC 861 (India); *cf.* Ford v. Quebec (Attorney General), [1988] 2 S.C.R 712, 727 (Can.) (no substantive judicial review of use of section 33).

138. INDIA CONST. art. 124(2).

139. This is unusual in the common law world where supreme courts tend to sit in plenary sessions.

140. *See* Madhav Khosla, *The Problem*, 642 SEMINAR 12, 13 (2013) (arguing that small bench decisions threaten the doctrine of precedent and the rule of law); *see also* Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 62 AM. J. COMP. L. 173, 182–92 (2013).

Finally, any realistic assessment of the consequential nature of the SCI must take into account the general socio-economic context of India. This means that despite its extensive powers, jurisdiction, and governance role, as with other branches of government in the country, it is often extremely difficult to translate institutional power and prestige into meaningful and tangible policy impact. The sources of this deep structural recalcitrance are several. First and foremost is the country's massive population living at pre-modern poverty levels, which in turn contributes enormously to a very low tax base and a hugely underfunded state.[141] For example, these factors explain the absence of free, compulsory elementary education in India until 2009: political opposition to compulsory education on the part of the mass of poor farmers who rely on their children as a source of free labor, and the lack of state funding to pay for it.[142] If enacting the law was difficult enough, enforcing it—including through the courts—is even harder. Bureaucratic inertia and corruption add a different dimension to the problem, as does the gap between the legal elite/system and the mass of the population,[143] both manifested and compounded by the fact that the higher courts operate in a language (English) that most citizens do not understand.

In terms of explanatory factors, it seems clear from both their debates and final text that the initial design choice of the Constituent Assembly, which sat from 1946 to 1949, was to create a somewhat more consequential constitutional court than was typical in the inherited English common law tradition at that time. On the other hand, it also seems clear that the SCI has become more powerful in recent decades,[144] in significant part through the addition and exercise of the three self-granted powers described above that were not envisaged or bestowed by the framers, so that deliberate design choice alone cannot explain its modern position. Two features of general legal culture are, I believe, a necessary part of the story. First, the status of judges in India is extraordinarily high, even by normal common law standards. Again, *ceteris paribus*, this not only enhances the likelihood that courts will be consequential actors in the constitutional order, but also that power will accrete to them over time. Second, and relatedly, even before the collegium system displaced prime ministerial appointment in 1993, there

141. *See, e.g.*, Kiran Stacey, *India Shows Neighbours the Way Out of Tax Trap*, FINANCIAL TIMES (May 18, 2018), https://www.ft.com/content/d3134d5a-4d17-11e8-8a8e-22951a2d8493.

142. *See, e.g.*, Krishna Kumat, *Where Knowledge is Poor*, THE HINDU (October 13, 2016), at http://www.thehindu.com/opinion/lead/Where-knowledge-is-poor/article11801428.ece.

143. *See* Manoj Mate, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*, 28 TEMPLE INT'L & COMP. L. J. 361, 364–65 (2014) (referring to this gap as "elite institutionalism").

144. Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. L. REV. 169, 170 (2015).

was a strong culture and practice of non-political judicial appointments (with the notable exception of the Indira Ghandi era), which helped to establish the independence of the SCI as a political actor from the outset.

But general political context plays perhaps the major role in explaining the changing contours of judicial power. Indeed, India provides a paradigmatic example of the *interplay* of legal powers and political realities that both shape and explain the empirical power of constitutional courts. For a key variable in the position of the SCI over the course of Indian constitutional history has been the presence or absence of a dominant political party within its parliamentary system of government. During the first three and a half decades of Indian independence, the Congress Party was the dominant political force and its longstanding commitment to land reform and redistribution in favor of the poor resulted in near-continuous skirmishes with the courts' defense of private property rights under the fundamental rights provisions of the Constitution.[145] Although the SCI frequently ruled that land reform legislation was unconstitutional as providing insufficient compensation to owners, successive Congress Party governments were relatively easily able to respond by amending the Constitution, first by creating (and filling) the Ninth Schedule and later by removing the right to property,[146] given the combination of the formal amendment rule of two-thirds of both houses of the legislature and their political dominance at the time. The SCI's initial, albeit somewhat tentative, creation of the basic structure doctrine in 1973 was itself a response to this constitutional landscape. It is certainly no coincidence that the perceived growth of judicial power in India coincided with the end of Congress Party dominance, as manifested in the rise of both PIL and the collegium system, as well as the Court's strong and unanimous affirmation of the basic structure doctrine in 1980.[147] All three were also "political" responses of a court determined to regain its prestige in the eyes of the public after the low point of judicial power during the "Emergency" of 1975–77, when the SCI was widely perceived as having capitulated to the government's assaults on

145. The clash between the SCI and successive Congress Party governments over land reform and property rights was the most frequent and prominent source of friction, but not the only one. The First Amendment itself also overruled SCI judgements protecting freedom of speech and holding that caste quotas in government-supported medical and engineering schools violated the constitutional right to equality.

146. By the 44th Amendment to the Constitution of 1978, the rights to property contained in Articles 19(1)(f) and 31 were removed from the category of Fundamental Rights in Part III and a diluted provision stating that "no person shall be deprived of his property save by authority of law" was inserted as Art. 300A.

147. Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789, 1811 (India).

constitutional liberties.[148] Moreover, since the end of the Congress Party dominance and (thus far) the absence of a replacement, both constitutional amendment and use of the Ninth Schedule have become practically more difficult and relatively more rare; in response, the SCI has only infrequently employed its basic structure power, notwithstanding the recent instance.

B. The Japanese Supreme Court

By contrast with the SCI, the Japanese Supreme Court (SCJ) is widely seen as the paradigm of a weak or "conservative" court.[149] The evidence usually given is that it has held statutes unconstitutional, in whole or part, only eight times in its history, although as suggested above in discussing both measures of power and alternative remedies, this figure does not necessarily tell the whole story and the SCJ has on a few other occasions protected rights by employing the technique of narrowly construing legislative provisions.[150] More than the numbers alone, however, it is clear that the SCJ plays a relatively small role in the Japanese constitutional order, which is mostly enforced politically, rather than judicially. For example, in all the discussions and controversies over the legitimacy and constitutionality of the Abe government's July 2014 "reinterpretation" of Article 9, the "pacifist clause" of the constitution,[151] to permit "collective self-defense" abroad in support of Japan's allies for the first time, the almost complete silence concerning the role and potential future position of the SCJ on the issue speaks volumes. No one appears to be waiting for, or expects, the SCJ to "resolve" the issue in the way, for example, almost everyone was in the United States on the question of same-sex marriage. The question is why? What factors explain its low profile?

The answer surely isn't legal powers, for the SCJ was largely modeled on the U.S. Supreme Court and broadly shares its formal authority, starting with the almost identical wording from Article III that "the whole judicial power" is vested in "a Supreme Court and in such inferior courts as are

148. *See, e.g.*, Mate, *supra* note 144, at 171 (discussing the reactionary nature of PIL to previous Supreme Court of India decisions).

149. *See generally* Matsui, *supra* note 5.

150. Matsui, *supra* note 15, at 149; Frank Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1496 (2011).

151. *See generally* Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427 (2017); Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 74 U.N.S.W. L. RES. SERIES (Jan. 1, 2017) (unpublished manuscript) (on file with author); Stephen Gardbaum, *Constitutional Interpretation and Reinterpretation in Japan: The Case of Article 9* (2016) (unpublished manuscript) (on file with author).

established by law."[152] Indeed, unlike the U.S. court, the SCJ's powers of judicial review, which are also broadly similar to the contemporary norm for decentralized systems, are expressly contained in the text.[153] Moreover, although the Japanese Constitution contains a more flexible formal amendment rule than the U.S. of two-thirds of both legislative chambers plus a simple majority in a popular referendum,[154] it has *never* successfully been used. Thus, a strong argument can be made that practically it is more difficult to amend; indeed one of the most difficult in the world. Like the U.S. Constitution, it appears to have acquired semi-sacred status. Accordingly, the SCJ faces less prospect of being overruled via constitutional amendment than almost all other constitutional courts, including the U.S. (four such occasions in history) and German (several), and certainly the SCI, basic structure doctrine aside. Although it is true that the life tenure provision of Article III was not adopted, in favor of a mandatory retirement age,[155] the fact that none of the non-US candidates for "most powerful constitutional court in the world" have life tenure strongly suggests it is not an essential ingredient.

Two features of legal practice, in addition to the extremely infrequent use of its invalidation power and generally quite deferential posture towards the government acts it reviews, reduce the SCJ's autonomy and authority relative to its formal powers. First, more important than the age of mandatory retirement (seventy) is the (discretionary) age of appointment. Although the Judiciary Act sets a minimum age of 40, the practice has long been to appoint SCJ justices at the age of 64 or 65, which leaves them with relatively little time to grow into the job, develop their jurisprudence, or create a "legacy," and obviously creates a high turnover rate with relatively little stability.[156] *Ceteris paribus*, this practice undermines the autonomy and effectiveness of the SCJ as a coherent and consequential collective institution. The second practice is the SCJ's narrow interpretation of its own jurisdiction, in marked contrast to the SCI. Thus, it has expressed a fairly broad understanding of "political questions" that deny it jurisdiction[157] and a narrow reading of its standing rules even by U.S. standards, especially in suits against administrative agencies.[158]

---

152. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76, para. 1 (Japan).

153. *Id*. art. 81.

154. *Id*. art. 96, para. 1.

155. *See* Law, *supra* note 5, at 1559.

156. *See id*. (discussing the importance of age in selecting judges).

157. *See*, *e.g.*, Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, Sho 34 (a) no. 710, 13 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3225 (Japan) (discussing the constitutionality of the Japan-U.S. Security Treaty and the violation of Article 9 with the stationing of U.S. troops in Japan).

158. Matsui, *supra* note 5, at 1413–14.

Initial design choices do not appear to do much by way of explanation, as the SCJ is seemingly weaker than the legal powers granted to it by the constitutional drafters and approvers would suggest they intended.[159] With respect to legal culture, it is well-known that Japan is close to the opposite end of the spectrum from the United States and Germany in terms of litigiousness and the use of law to resolve disputes, although whether this fact is best explained culturally, institutionally (for example, is the low number of lawyers per capita compared to the United States cause or effect?), or politically has been much debated.[160] More importantly, and superimposed on this characteristic, as a predominantly civil law system, ordinary judges in Japan are career officials with relatively low status, and yet unlike most civil law countries it has adopted decentralized judicial review rather than centralizing the function in a specialist constitutional court with a separate appointments process.[161] This relatively rare combination of decentralized judicial review and civil service, career judges—as distinct from either (1) decentralized review with a high status, second career judiciary or (2) centralized review with different appointments processes and outcomes—is a recipe for weakness/deference. The Nordic countries are among the few to share it.

The key feature of political context that both shapes and helps to explain judicial power, is the long-dominant position of the LDP, which has only twice been out of power since 1946 and only then for short periods.[162] This dominance means that the LDP has appointed almost all members of the SCJ. Moreover, because (unlike in India) there is no longstanding practice of non-political appointments, prime ministers have complete discretion on whom to appoint and have mostly exercised it in favor of party loyalists, typically either from the hierarchical, civil service judiciary or the ranks of senior government lawyers.[163] Although there is a convention for the Chief Justice

159. These were the Supreme Commander for the Allied Powers (SCAP) (i.e., General MacArthur) and the two houses of the Japanese Diet.

160. *See generally* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur Von Mehrem ed., 1963) (classic cultural explanation); John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) (institutional explanation); Mark J. Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988) (institutional explanation); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 L. & SOC'Y REV. 651 (1990) (political explanation).

161. Saikō Saibansho [Sup. Ct.] Feb. 1, 1950, Sho 23 (re) no. 141, 4-2 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 73 (Japan) (holding that not only the Supreme Court but all lower courts have the power of judicial review); *see* Matsui, *supra* note 5, at 1379 (discussing limited judicial review).

162. Since its foundation in 1955, the LDP has been in power continuously, except for 1993–94 and 2009–12.

163. *See* Tushnet & Dixon, *supra* note 35, at 113–14 (for another account that also emphasizes the

to recommend replacements, the recommendations—if accepted—are usually of those not expected to be a source of concern or independent-minded action.[164] As noted above, by appointing justices at a relatively advanced age, usually only five or six years before their mandatory retirement, LDP prime ministers have further enhanced their political control and manipulation of the SCJ. To the extent the system seeks independent-mindedness on legal/constitutional issues, it is mostly conducted within the executive branch by the Cabinet Legislation Bureau (CLB), an expert source of legal counsel broadly modeled on the *Conseil d'État* in France.[165] The CLB has largely displaced the SCJ as the primary interpreter of the Constitution, for the SCJ usually defers to its view, perhaps reflecting a larger political/legal cultural preference for bureaucratic professionalism rather than judicial power.

In sum, on paper, the textual provisions establishing and empowering the SCJ provide little basis for predicting its actual position in the Japanese constitutional system. Although its conservatism can be exaggerated, neither its own judicial practice nor constitutional practice more broadly afford it a particularly consequential role in the resolution of significant issues. This overall weakness of the SCJ stems from the juxtaposition of the relatively low status of the ordinary judiciary with decentralized judicial review, and especially from the political context of a dominant party without constitutional or other effective protection for impartial judicial appointments, rather than lack of legal powers or deliberate design choice.

VI. CONCLUSION

This Article has argued that the proper measure of the power of a constitutional court is its consequential nature as an institutional actor in terms of constitutional and policy outcomes, relative to the other institutional actors in that polity. Although more diffuse and harder to quantify, this conception of judicial power is more inclusive and realistically nuanced than commonly employed uni-dimensional alternatives such as international influence or strike-down rate. The consequential nature of a constitutional court is a function of three broad categories or types of variable: formal rules and powers; legal and judicial practice; and the immediate political context in which it operates. Through a process of mutual interaction, each of these

importance of the dominant position of the LDP in understanding—functionally—"weak-form" judicial review in Japan).

164. *See* Law, *supra* note 5, at 1550–51 (discussing recommendations by the Chief Justice).

165. Sometimes the government does not seek an independent view, as when it essentially bypassed the CLB in order to "reinterpret" Article 9 as permitting collective self-defense by Cabinet resolution in July 2014.

three helps to shape and constitute the more specific components of a court's institutional power, which include the nature, scope, and content of the constitution it enforces, the jurisdictional and remedial powers it has and employs, the ease or difficulty of constitutional amendment, and its composition and tenure. As we have seen, following Brinks and Blass,[166] these multiple components of judicial power can usefully (although somewhat underinclusively) be grouped into autonomy and authority, but the extent of a constitutional court's autonomy and authority is the product of all three broad categories.

Sometimes a particular factor that helps to shape the extent of a constitutional court's autonomy or authority—and hence its power—also helps to explain it. For example, the LDP's ability as a dominant party to control appointments to the SCJ both reduces its autonomy and partly explains its weakness as a constitutional court. Here, political context overlaps as both an evidentiary and an explanatory factor, so there is certainly no watertight, mutually exclusive division between the two. But, as we have seen, legal culture also contributes a separate, more wholly explanatory reason for the weakness of the court and the infrequent use of its powers. Moreover, the role of politics is not always as direct and immediate, so as to enhance or reduce the power of a court, but is frequently more genuinely contextual and explanatory in terms of creating or limiting opportunities and political space for a constitutional court. Measurement and explanation are more fully and uniformly distinct tasks when we ask, not about why a constitutional court fails to use or rarely uses its granted powers (as this also implicates the extent of its autonomy/authority and whether it can be considered a powerful court), but such questions as, for example, why a given court's power has changed over time. The broad categories of explanatory factors suggested are deliberate constitutional design choices, legal culture, and more general political context.

This Article has the fundamentally second-order goal of helping to advance and refine a framework for thinking about the cluster of issues that involve or engage with notions of the power or strength of constitutional courts. As such, and notwithstanding its two case studies, it necessarily paints with a broad brush. If it succeeds in moving the ball forward at all, this will be through future fine-grained studies that, by telling us more about either particular (evidentiary or explanatory) factors or particular courts, fill in more of the details of the picture sketched here.

166. *See* Brinks & Blass, *supra* note 4, at 296 (describing their three-dimensional framework of ex ante autonomy, ex post autonomy, and authority).