Working Draft, May 3, 2009
Not for citation in this form.

Constitutional Courts and the Boundaries of Democracy

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Beginning roughly with the fall of the Soviet Union, the "third wave" of democratization has swept across the globe. There are more governments that would be termed "democratic" in place today than at any point in human history, and it is likely that a broader percentage of humanity has a democratic say in the elections of its governors than at any time in the past.

The most significant development in this period is the creation of democratic states from the detritus of the Soviet empire. The largest number of democracies is clustered within the Soviet Union itself, its satellite states in Eastern Europe, and the former Soviet republics of the land mass stretching from Asia Minor to Mongolia. But the same period saw either the emergence of democracies or the consolidation of democratic rule in South Africa, Mexico, South Korea, Thailand, and Taiwan, to mention some of the more prominent.

New democracies face characteristic challenges. Some are external, as with the likelihood that they will face military confrontation with neighbors. Most, however, are internal. Of the internal challenges there are two that are most prevalent. In fractured societies, emergent democracies confront the risk of historic enmities defined by race or religion or ethnicity being redirected to political mobilizations vying for state power. Too often, the battle for power is simply the struggle for the ability to carry out the conflicts of the past in the name of state authority. Alternatively, an unstable democracy may see its first officeholders claim the authority of political processes to ensure their continued rule, the process that Richard Pildes and I describe in the American context as a "lock-up" of democratic politics. In either case, the object (and the corresponding threat) is to prevent the entrenchment of a ruling group increasingly beyond democratic accountability.

One of the interesting developments in this third wave of democratization is the actual form that democracy takes. Almost all regimes import some notion of proportional representation in order to give broad representational opportunities to all social groups. No new democracy has adopted a Westminster-style system of parliamentary sovereignty. All new democratic

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regimes have specified many of the conditions and limitations of democratic rule in strong constitutional texts. And all the new democracies – with the exception of Estonia – have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of the constitution.

It is the last feature that is the subject of this study. An examination of the post-Soviet democracies, particularly those that seek admission to the European Union, reveals that the newly created constitutional courts are a centerpiece of the effort to comply with rule of law requirements. These constitutional courts are central actors in securing the democratic pedigree of these new democracies, a sine qua non for compliance with the Copenhagen criteria for accession to the EU.[1] These courts are established with the primary purpose of ensuring the constitutional pedigree of the actions of the new political orders, a charge that leaves them unencumbered by the American fixation with the source of the authority for judicial review and the accompanying hand-wringing over the "countermajoritarian dilemma." If we were to look at the role of these courts as a common enterprise – leaving aside for a bit the structural and political differences within the varying new democracies – the question could become one of defining the role that these courts are expected to play under the broad rubric of constitutional democracy.

In previous writing I have focused on the need for all democracies to police their boundaries. My central piece in this area, *Fragile Democracies*, is an effort to draw out the types of and justification for the suppression of antidemocratic groups seeking to use the instrumentalities of democracy to overthrow it. In this piece, I want to turn to the complementary risk of what I will term "one-partyism," the effort to centralize power so as to undermine democratic accountability. It is possible to think of *Fragile Democracies* as having addressed the threats to unstable democratic rule from without, and the new project as looking to the threats from within. In each case, I would suggest, constitutional courts may be called upon to play a limiting role to protect the vitality of democratic competition for office and the ability of the political process to dislodge incumbents.

The outlines of this project follow the contours of *Fragile Democracies* in being informed by the actual resolution of democratic challenges in defining cases from around the world in which courts have had to review claims of internal lock-holds on power. A ready example would be the Ukrainian constitutional court in 2004 derailing efforts to close off the electoral process in that country, ordering a revote, and allowing for election of the opposition candidate, Viktor Yushchenko. While subsequent develop-

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[1] One of the three governing Copenhagen criteria requires: "political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Available at http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm.

ments in Ukraine have shown the vulnerability of democratic gains,[2] the role of an independent tribunal in at least providing the space for democratic challenge was critical. A similar example, not quite through the courts, would involve the role of independent election authorities with a constitutional mandate creating the pathways for the ultimately successful termination of decades of one-party rule by the PRI in Mexico.[3] I will then attempt to generalize from the historical examples and to develop a normative framework for assessing the justification for and role of constitutional courts in checking the threats of the first holders of power being the last.

My goal in this project is not to explore the world of judicial review as such, or to reexamine the debates on constitutional constraints on democratic politics. Both are important considerations. Without the organizing role of structural constitutional limitations on majority processes, democracy threatens to consume itself. Similarly, without some form of independent arbiter of those constitutional limits, democratic politics may fail to protect minorities or allow for political competition. The historic judgment of the third wave of democratization is that the role of independent arbiter is best played by courts, and generally by specialist courts devoted exclusively to constitutional matters.

In this paper, I am interested in two distinct issues. First are the sorts of cases that are presented to constitutional courts concerning either executive unilateral exertions of power or attempts to constrict the political process to proscribe electoral challenge to incumbent power. Here what I hope to explore is the circumstances under which courts face these "political questions" and the jurisprudential tools they use to resolve them. As may be expected, I will examine these approaches from the vantage point of the need to preserve the political accountability of the ruling elites.

Let me give just two examples of the scope of such powers. It is hard to imagine a more central political issue in the life of a country than the possible removal from office of the president by the legislature. In older constitutional arrangements, as in the U.S., the judiciary is given no formal role in the decisionmaking process, save for the ceremonial role of presiding over the actual impeachment session. But, in a number of more recent democracies, the constitution explicitly gives the constitutional court (or analogous body) the authority to render final judgment by way of appellate review of the parliamentary decision to impeach. This is true in Hungary and the

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2 Steven Lee Myers, *Stalled by Conflict, Ukraine's Democracy Gasps for Air*, N.Y. TIMES, June 1, 2007.

3 *See* JULIA PRESTON & SAMUEL DILLON, OPENING MEXICO: THE MAKING OF A DEMOCRACY 496–99 (2004); Jamin Raskin, *A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 564 (2004) (describing key role of independent electoral commission in making political change possible).

Czech Republic,[4] as well as in South Korea, where this power was dramatically used in 2004.[5] At issue in Korea was the increasing antagonism between President Roh Moo-Hyun and the National Assembly, which finally voted to impeach Roh by a vote of 193-2, with Roh's supporters either abstaining or being barred from the vote. The Constitutional Court of Korea found that Roh had indeed violated the law in three of the ways alleged by the National Assembly,[6] but that when weighed against the consequences of removing him from office, the impeachment should be dismissed and he should be reinstated as President.[7] The costs of removal, as determined by the court, included prematurely ending the term of a democratically elected official and the political chaos that would be caused by requiring the election of a new president. The court held that "[t]he acts of the President violating the laws were not grave in terms of the protection of the Constitution to the extent that it would require the protection of the Constitution and the restoration of the impaired constitutional order by a decision to remove the President from office."[8]

Alternatively, and more customarily, courts have had to deal with the mechanics of the election system. Perhaps following the lead of the German Constitutional Court in directing attention to electoral opportunity, this has been a fertile area of judicial engagement. Even among the active Eastern European constitutional courts, the leader is probably the Hungarian Constitutional Court, which has also been among the most receptive to emerging international standards of democratic intervention.[9] The Hungarian Court was one of the first to begin work and has been handing down important decisions since the early 1990s.[10] And, having had an early start, it has been unusually successful in gaining widespread legitimacy, despite (or perhaps as a result of) striking down one third of all legislation passed between 1989 and 1995, according to one estimate.[11] The Court has policed

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4 Apparently, this is quite common in the post-soviet states. *See* Tom Ginsburg. "Ancillary Powers of Constitutional Courts" Institutions and Public Law: Comparative Perspectives. Ed. Tom Ginsburg and Robert A. Kagan. New York: Peter Lang Publishing, 2004. 225-244.

5 Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403, 407 (2005).

6 Roh transgressed the law in the following ways: 1) violating a statute that required the political neutrality of officials during elections (Roh publicly stated his preference for the newly formed Uri Party prior to the parliamentary election), 2) not demonstrating proper respect for the Constitution and constitutional bodies by challenging the National Election Commission's ruling that he had violated political neutrality and illegally called a national referendum, and 3) illegally calling a national referendum to assess the nation's confidence in his leadership.

7 2004 HunNa 1 (May 14, 2004), *available in English translation at* http://english.ccourt.go.kr/.

8 *Id.*

9 *See See* CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS 13-16 (2003).

10 *See* Vicki Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1266 (2008).

11 *See* Kim Lane Scheppele, *Democracy by Judiciary*, Working Paper for Conference on Constitutional Courts, Washington University, November 1–3, 2001, at 2; *see also* Istvan Pogany, *Constitutional Re-*

eligibility for office, striking down for example a proposed amendment to the electoral law which stated that elected representatives of the "social security self-governments" could not be put forward as candidates at the parliamentary elections.[12] For democracies emerging from extended periods of authoritarian rule – the Soviet example dominates, but it is not significantly different from post-Nazi Germany or post-apartheid South Africa or even post-Saddam Iraq – coming to terms with the monopoly of technical expertise by those compromised by association with the prior regime is invariably a dominant social and political issue. The difficult line between accountability and revenge is all too often policed by the newly created constitutional courts, as presented in Romania,[13] Ukraine,[14] Macedonia,[15] and perhaps most notably, Poland[16] – an example I will return to subsequently. Even more troubling is the prospect that lustration laws take a form that sweeps in an ethnic group compromised by association with the old regime, but now subject to recriminations by resurgent ethnic claims, as in Moldova[17] or the Baltics.[18] Particularly in the Baltics, the presence of a Russian population associated with Soviet occupation provided an almost irresistible target for xenophobic retribution, even though the Russian population by the end of the Soviet era had had a generations-long presence there.

The second area, more broadly defined, is the conception of the institutional prerequisites for democratic competition to exist or survive. Almost all new democracies emerge from a civil law system that to greater or lesser extents reject the common law role of precedent. In the transition to a constitutional regime premised on judicial review, these countries turned to constitutional courts, in part so as not to empower the normal judicial structure with common law authority, including the right of constitutional re-

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form in Central and Eastern Europe: Hungary's Transition to Democracy, 42 INT'L & COMP. L.Q. 332, 341 (1993) (describing Hungary's court as pursuing its mission with "remarkable vigour").

12 *See* Decision no. 16/1994 of 25 March 1994, *East Europ. Case Rep.* 1 (1994): 245-46.

13 WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 156 (Springer 2005) (reviewing decision of constitutional court upholding time limited exclusion of prefects and other police officials from presenting themselves as candidates in first post-communist election)..

14 Decision nos. 03/3600-97, 03-3808-97, 1-12/98 of 26 January 1998, summarized in *Bull. Constit. Case Law* 1998 (1): 146-48 (constitutional court invalidation of categorical ban on persons from candidacy because of former role as judges, public prosecutors or state employees).

15 Decision no. 16/97 of 12 March 1997, http://www.cecl.gr/RigasNetwork/databank /Jurisprudence/FYROM /Jur_fyrom.htm (Constitutional Court invalidation of exclusion from election to local councils or mayoral office of members of armed forces, police and intelligence officers).

16 Judgment No. K. 2/07, May 11, 2007 (translated into English and excerpted by the Court), at 20 (striking down sweeping disqualification of former "collaborators" as being of such scope as to render"the principle of the sovereignty of the Polish people . . . illusory").

17 *See, e.g.*, Michael Wines, *History Course Ignites a Volatile Tug of War in Moldova*, N.Y. TIMES, Feb. 25, 2002, at A3; Agence France-Presse, *Moldova: Setback for Russian Language*, N.Y. TIMES, Feb. 22, 2002, at A6.

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view. The result, paradoxically, is often a more interventionist form of judicial review by courts not empowered with limiting tools,[19] such as the American doctrine of not reaching a constitutional question in a case that can be decided on statutory grounds.[20]

A particularly striking example is found in Mongolia, where a newly created Constitutional Court weighed into the very heart of the political thicket in the first election that successfully displaced the embedded Mongolian People's Revolutionary Party, the longstanding communist rulers. The Court in 1996 interpreted the new constitutional order ruled that Members of Parliament could not hold cabinet positions in the new coalition government.[21] The question before the Court was in fact framed by a first-order dispute as to whether Mongolia was a presidential or parliamentary system. Perhaps surprisingly (then again, perhaps not), this question had apparently not been specified in the multiparty and broadly participatory Mongolian constitutional design. In order to strike down the proposed dual role of ministers, the Court had to first decide that Mongolia was constitutionally obligated to a presidential system, and then conclude that a division of functions between members of parliament and members of the executive was necessary to maintain both separation of powers and political competition between the branches.

More common are cases confronting minimum thresholds for parliamentary office under proportional representation elections. The issue of exclusion thresholds has a rich history drawing, most notably, from Germany's Federal Constitutional Court (Bundesverfassungsgericht). The German court has pursued a functional balance in this area, recognizing that high thresholds can be a barrier to political choice, while also recognizing that low thresholds risk governance as representation is fractured among minor parties. The Court repeatedly upheld challenges to thresholds of five percent by recognizing that there was a compelling governmental interest in effect governing bodies and that this in turn required avoiding the splintering of parties "which would make it more difficult or even impossible to form a majority."[22] It has also been vigilant in overturning partisan capture of the political process. Most interestingly, the Court struck down the same five percent threshold after German reunification, on the grounds that it could not guarantee a sufficient level of representation for the former East Ger-

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

20 Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

21 The account that follows is based on TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 158-205 (2003).

22 Donald P. Kommers, The Constitutional Jurisprudence of the Republic of Germany 187 (2d ed. 1997) translated from Bavarian Party Case, 6 BVerfGE 84, 92-93 (1957)).

many, whose nascent political actors were unlikely to forge sufficiently strong national lists for the first post-unification elections.[23] The Bundestag then amended the election law in accordance with the Court's suggestions, and in the ensuing elections some groups from the former East Germany did manage to achieve representation.[24]

Following the German lead, the constitutional courts of the Czech Republic and Romania similarly upheld five percent thresholds for election against constitutional challenges. In each case, the claim was that the threshold violated a constitutional commitment to proportional representation and to a minimum access to electoral office.[25] In each case, the Court weighed the claimed right of representation against the "excessive splintering of the political process"[26] and the need for efficient political decision-making.[27]

This second part of the paper develops the main normative thesis. In the new democracies of the third wave, the most typical scenario is an ethnically-riven society emerging from the collapse of authoritarianism, or less frequently a post-conflict society with the same defining characteristic of a gaping social divide. In these circumstances, a constitution needs to be drafted to bridge the divide to democratic rule. The problem is that the constitutional negotiations take place against the backdrop that one party to the negotiations will hold power over the other. Further, under the press of time, uncertainty, and distrust, the parties are poorly positioned to work out all the details of the constitutional compact – even leaving aside the strategic obstacles always attendant to such enterprises.

In such circumstances, the parties have to get the basic blueprint of governance in place, understanding that many of the critical terms – including the explosive issue of the exercise of emergency powers – will likely be impossible to specify. Viewed in this light, constitutions emerge as a species of underspecified contracts, something for which mature societies have an interest in facilitating the realization of the basic contours of the parties' intent and aspirations. The argument therefore is that the turn to constitutional courts takes the pressure off the parties of specifying all the restraints on the exercise of majoritarian political power following the first democratic election. The corresponding move is to insist that courts approach such constitutional cases with a commitment to this fundamental undertaking.

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23 See id. at 188-89 (translation of the National Unity Election Case, 82 BVerfGE 322 (1990)).
24 *Id.* at 191.
25 *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 154-55 (Springer 2005).
26 Decision Pl. US 25/96, translated in *E. Europ. Case Reporter* 5 (1998): 159-75, *see also* http://www.concourt.cz/angl_verze/doc/p-25-96.html (Czech).
27 *See* Decision 2/1992 of 30 June 1992, translated in *E. Europ. Case Reporter* 2 (1995): 229-36 (Romania).

I. A Critical Example: South Africa

Although I will elaborate on a model for transitional constitutionalism in the next section, let me give some general outlines before turning to the specific example of South Africa. The basic proposition is that countries emerging from conflict or authoritarian rule are likely to have to formalize a transition to a new order long before any conditions of trust or solidarity will carry them through the formal processes of creating a stable constitutional order. At the same time, such countries desperately need to establish political institutions that can mediate power and provide some legitimacy to the new governmental order. The need for political stability is unlikely to be met through any plebiscitary elections, since this will likely reproduce the divisions of old across a direct (and likely final) struggle for state power. Democracy needs the ascent of the people, but – as we note in opening our casebook on the Law of Democracy – there is "no 'We the People' independent of the way the law constructs democracy."[28] The paradox, of course, is that there needs to be some legitimacy for the institutions that will then claim popular assent as their source of legitimacy. The result is that, as Kapstein and Converse conclude their study of nascent democracies, "when effective checks and balances are missing from institutional arrangements, even rapid economic growth may not save a democracy from reversal."[29]

South Africa provides a wonderful example of the process of constitutional formation, and then perhaps a sobering cautionary note. In the first instance, nowhere was the question of limitations on state power through constitutional compromise more directly posed than in South Africa. The accords that paved the way for the transition from apartheid were the product of a long, multiparty negotiation. The central issue was how to provide for a transition to democratic governance with power no doubt exercised by the black majority, while providing some assurance that what would follow would not be retribution against the former white rulers.

The process of a negotiated transition from a repressive regime included two steps, largely innovative, that shape the discussion here. First, the negotiations would yield only an interim constitution with fixed representation for the various political groups, but with a mandate to use the ensuing legislative arena to negotiate a permanent constitution. Despite the inability to create a full constitutional order in the transition period, the negotiations did yield an immutable set of thirty-four Principles that were required to form

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[28] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL REGULATION OF THE POLITICAL PROCESS 2 (3d ed. 2007).

[29] Ethan B. Kapstein & Nathan Converse, The Fate of Young Democracies xvi (2008).

the basis for a final constitution.[30] Under the negotiated provisions of the Interim Constitution, the final Constitution could not be adopted unless it faithfully adhered in its implementation to the negotiated general principles set out in the Interim Constitution.[31] Most novel was that the task of ensuring compliance was given in its entirety to the Constitutional Court. Thus, the Constitutional Court was created not to interpret a constitutional text – most evidently, since none was in existence – but to guarantee that the structures and limits of democratic rule would be honored. In accordance with that mandate, in July 1996, the proposed permanent constitution was submitted for review to the Constitutional Court, which rendered its decision two months later.[32]

The ruling in what is known as the *Certification Decision* is highly instuctive. The South African Constitutional Court was particularly attentive to structural restraints on the centralization of power, reaffirming limitations on government and striking down provisions that may be termed an excess of majoritarianism. Specifically, the Court reaffirmed the importance of checks and balances across the branches of government,[33] and strictly enforced the commitment in the Principles to federalism ensuring that the national government would not encroach on the powers of the provinces.[34] The Court also strictly construed the requirement of "special procedures involving special majorities" for constitutional amendments.[35] According to the Court, the purpose of this provision was to secure the Constitution "against political agendas of ordinary majorities in the national Parlia-

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30 The thirty-four Principles contained a number of antimajoritarian protections. As a general matter, these take three forms: 1) an elaborate set of rights guarantees that extends to the confiscation of property, 2) limitations on the exercise of government power through a balancing of powers within the national government and principles of federalism, and 3) protections provided by the supermajority processes needed to amend the Constitution that require not only a two-thirds vote in the upper house of the national Parliament but approval by a majority of provincial legislatures. For a more thorough discussion of these provisions, see Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1875-76 (2004).

31 SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 199 (1997).

32 *In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) at 744 (S. Afr.).

33 *Id.* at 776, 788. The Court pointed specifically to the creation of an upper house (the National Council of Provinces) that would not be based on equipopulational voting, but on the election of ten representatives from each of the nine provinces. *Id.* at 865-66. This has great practical significance because one of the provinces is majority Zulu (hence outside the political orbit of the ANC) and two others have large concentrations of white and coloured voters. *See* GLOPPEN, *supra* note ___, at 204, 222-23.

34 S. AFR. CONST. of 1993 sched. 4, Principle XXII. The Court found unconstitutional those provisions that failed to provide the required "framework for LG [local government] structures," as well as the failure to ensure the fiscal integrity of political subdivisions. *In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744, 861,911 (CC) (S. Aft.). For the Court, the South African Constitution should provide only those powers to the national government "where national uniformity is required," and only economic matters and issues of foreign policy met this restrictive definition. *See id.* at 845-46, 849.

35 S. AFR. CONST.. of 1993 sched. 4, Principle XV

ment."[36] Various provisions of the proposed constitution requiring supermajoritarian action were nevertheless struck down for failing to create special procedures outside the framework of ordinary legislation.[37] For example, the Court found that allowing the Bill of Rights to be amended by a two-thirds majority of the lower House failed the "entrenchment" requirement of Principle II,[38] which, the Court ruled, required "some 'entrenching' mechanism ... [to give] the Bill of Rights greater protection than the ordinary provisions of the [Constitution]."[39] The Court also found that the rejection of judicial review for certain categories of statutes violated the commitment to constitutional supremacy and the jurisdictional guarantees for judicial power contained in the Principles.[40] The Constitutional Assembly then revised the constitutional draft to meet the Court's concerns in October of 1996, and following a second round of judicial scrutiny, the new Constitution was signed and implemented by President Nelson Mandela in December of 1996.[41]

Of particular concern for this project, however, is the Court's broad interpretation of constitutional protections for minority parties, a check even in the early days of post-apartheid governance against the possibility of one-party domination. I want to focus here on a relatively secondary provision among party protections, one that has caught my eye before, but is nonetheless particularly significant here. As part of the *Certification Decision*, the Court had to address various constitutional provisions protecting minority parties. Beyond the protections of proportional representation, the Constitution contained an "anti-defection" principle in which a member of Parliament would have to resign if he or she attempted to switch parties.[42] The provision was an express subject of negotiations in the transition from apartheid, reflecting fears that the likely parliamentary majority of the African National Congress could be used to woo minority legislators and over-concentrate political power. South Africa joined other countries that formalized such anti-defection concerns through legal prohibitions on what is known as "floor walking."[43]

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36 *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA at 821.

37 *See, e.g.*, In re *Certification*, 1996 (4) SA at 822 (striking down a provision which required approval of a two-thirds majority of the lower House for any constitutional amendment for failing to dictate "special procedures" for ratification in addition to supermajoritarian assent).

38 S. AFR. CONST.. of 1993 sched. 4, Principle II.

39 In re *Certification*, 1996 (4) SA at 822-23.

40 *Id.* at 820.

41 Associated Press, *Constitution Signed*, WINNIPEG FREE PRESS, Dec. 11, 1996, at B1, *available at* 1996 WL 17258872.

42 *See id.*at 829 n.136 and accompanying text (considering whether the antidefection principle was unconstittional).

43 New Zealand similarly prohibited party-switching by members of parliament in the Electoral (Integrity) Amendment Act, 2001, but the prohibition was statutory and sun-setted in 2005. *See* Mathew S. R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons From an Unwritten Constitution* 54 AM. J. COMP. L. 587, 610 n.64 (2006).

Although such provisions may restrict expression of beliefs by legislators, there is an overriding concern that minority legislators could be induced to sway from their constituents' interests to support majoritarian policies. Since by definition there are fewer minority than majority representatives, any single minority defection would have a more severe impact on the representation of the minority population than the defection of a majority legislator would have on the representation of the majority. Such defection to the majority is not only more costly, but also more likely. Minority caucuses are unlikely to be able to offer the same sort of inducements in terms of personal advancement or choice legislative programs as is the majority. In rejecting the civil liberties challenge to the antidefection clause, the Court noted that antidefection clauses were found in the constitutions of Namibia and India and were therefore entirely consistent with democratic governance.[44]

But that did not end the debate over floorwalking in the South African Parliament. Once in office and once its political power was consolidated, however, the ANC used its legislative supermajority to repeal the anti-defection provision. Under the new law, defection was permitted so long as the defecting group constituted at least 10 percent of the party's legislative delegation. This did little to placate critics, since this would pose a very large hurdle to defections from the ANC, but would leave defection an individual choice for any party with less than 10 members of parliament.

The constitutional amendment prompted a second constitutional challenge, this time a claim that the amendment would violate the principles of party integrity and separation of powers inherent in the entire constitutional structure.[45] Though not an issue of overriding historical significance, the anti-defection question nonetheless challenged the Constitutional Court's role in guaranteeing the structures of democracy. The *Certification Decision* had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power, something that was certainly in the air in the immediate aftermath of the South African negotiations. The question was whether the Court would continue to use the de-

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[44] *Id.* at 790-91. The minority party protections through the antidefection mechanism were subsequently repealed by constitutional amendment. The repeal is troubling for three reasons. First, the antidefection principle was a significant subject of debate and compromise in the creation of the overall constitutional framework. *See* Spitz & Chaskalson [Full Cite] at 110-12 (discussing the origins of the anti-defection clause). Second, the proponent of the repeal was the ANC, clearly the majority party least at risk to suffer defection. Third, on my reading of the *Certification* decision, the structural minority protections provided the central analytic framework for compliance with the interim principles. Although troubled, the Constitutional Court held the repeal to apply only to the procedural requirements of constitutional amendment. The Court did not attempt to impose a doctrine of structural integrity of minority protections to prevent the amendment, which perhaps signifies a retreat from the role the Court assumed in the *Certification* decision. *United Democratic Movement v. The President of the Republic of South Africa*, 2003 (1) SALR 495, 532 (CC) (S. Afr.).

[45] U*nited Democratic Movement v. The President of the Republic of South Africa* 2003 (1) SA 495 (CC).

mocracy-promoting metric as the analytic foundation for evaluating efforts by the ANC to consolidate power.

Viewed after the passage of apartheid, and after the first generation of leadership left office, the anti-defection question could have been a watershed moment in the history of South Africa under the ANC. The robust political exchange at the time of transition assumed that there would be black majority rule, assumed that the ANC would emerge as the dominant political actor, and further assumed that constitutional guarantees would serve as a bulwark against the over-centralization of power. The political shakeout of post-apartheid politics had not yet occurred and even the ascension of the ANC into increasing political hegemony was tempered by the calibrated leadership of Nelson Mandela. As the founding generation moved off the historic stage, however, and as less broad-minded functionaries took the reins of power, the heroic ANC emerged as heads of an increasingly one-party state, with all the attendant capacity for antidemocratic abuse. From this perspective, the question of the day is whether the ANC will turn into the PRI, the Mexican Institutional Revolutionary Party that was similarly the inheritor of a romantic revolutionary struggle, but which then imposed one-party rule to suffocate Mexico for almost the entirety of the 20th century.[46]

Translated into the context of constitutional adjudication, the anti-defection issue offered the Court the ability to reassert the structural underpinnings of the *Certification Decision.* Instead, the Court retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights. Thus, the Court rejected the challenge both on the procedural ground that the mechanisms of constitutional amendment had been adhered to, and on the grounds that no individual voter could claim a right of faithful representation after the election:

> The rights entrenched under section 19 [of the Constitution] are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.[47]

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46 I am indebted to Pablo de Grieff for the analogy to the PRI.
47 *Id.* at 49.

The Court perhaps could have drawn deeper structural authority not only from the negotiated history of South Africa's transition from apartheid, but from the text of the South African constitution. The South African constitution contains a unique provision guaranteeing some form of effective minority party participation consistent with the aims of democracy. As set out in the Constitution, the rules and orders of the National Assembly must provide for "the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy."[48] Within the sections establishing the structure of the legislative bodies, at the various levels of the federal system, parallel language requires that the rules for the National Assembly, the National Council of Provinces,[49] and the provincial legislatures provide for minority party participation "in a manner consistent with democracy."[50] These provisions provide a potential structural lever for evaluating the effect of party controls. The Constitutional Court recognized this potential tacitly in identifying these provisions are constitutional obligations, subject to judicial control, in the *Certification Decision*.[51]

[Review of High Court decision subsequent to Constitutional Court decision addressing as applied challenges to floorwalking contests, and criticizing the Constitutional Court. Forthcoming.]

II. A Framework for Constitutional Courts

The wave of newly constituted democracies allows reflection on the dynamics of the process of creating a constitutional pact.[52] If we generalize across the many national settings in which new democracies have emerged, certain common features do stand out, even if the fit may be imperfect to any particular national events. First, the new democracies tend to emerge in countries bearing the deep fractures of prior divisions, often violent divisions. These can take the more familiar form of racial/ethnic/religious

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48 S. AFR. CONST. 1996 § 57(2)(b).

49 S. AFR. CONST. 1996 § 70(2)(c). The rules and orders of the National Council of Provinces (NCOP) must provide for "the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy…." In addition, the allocation of delegates to the NCOP "must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy." S. AFR. CONST. 1996 § 61(3).

50 S . AFR. CONST. 1996 § 116(2)(b). The rules and orders of a provincial legislature must provide for "the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy."

51 *In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) at __ (S. Afr.).

52 Milada Anna Vachudova, Europe Undivided: Democracy, Leverage and Integration After Communism.

strife, ranging from post-apartheid South Africa to the explosive divisions in Iraq, to the smoldering hatreds in Moldova and the Balkans. But these divisions emerge even in the seemingly more homogeneous populations of the Baltics, where the presence of a generations-old Russian population who now have to be integrated into a post-occupation role in a functioning democracy.

Second, the process of constitutional negotiation – and here again South Africa yields the richest example because of the duration and careful chronicling of the actual give and take of institutional design – is unlikely to yield a completely realized set of agreements. The romantic view of constitutional design assumes a Rawlsian baseline of dispassionate founders, deeply immersed in the political theory of the day. But constitution-making, the act of actually getting a political accord that will provide the foundations of a democratic state, is more likely a rhapsodic event. The precommitment process of constraining future actors to an elaborated political design – termed Peter sober binding Peter drunk[53] – may very well get one critical detail quite wrong. Reviewing the political tensions and accompanying forms of social release that accompany actual constitutional negotiations, Jon Elster provocatively claimed the precommitment to be Peter drunk binding Peter sober.[54]

Even Elster's less enobling account fails to give full force to the modern constitutional settings. In less divided societies, it is possible to ratify a constitution through relatively unrepresentative proceedings, or even by fiat, as with the American imposition of a new constitutional order on militarily defeated Japan. But a constitution is fundamentally a social compact, one that has long been recognized as a political resolution of the competing claims for power in the particular society:

> Politics has to consider which sort of constitution suits which sort of civic body. The attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not only to what is the absolute best, but also to what is the best in relation to actual conditions.[55]

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53 STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 135 (1995); *see also* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 176-77 (2001) (focusing on intertemporal cooling-off as central to constitutional order)

54 *See* Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 Tex. L. Rev. 1751, 1768 & n. 51 (2003); *see also* JON ELSTER, ULYSSES UNBOUND 159 (2000) (reciting historic examples of constitutions drafted against backdrop of social disruptions).

55 ARISTOTLE, THE POLITICS 181 (Ernest Barker trans., Oxford Univ. Press 2d ed. 1948).

The fractured settings for the newly emergent democracies require a process of negotiation that can create an enduring form of governance, but must do so through accommodation reached by parties or groups with oftentimes longstanding historic grievances against each other. This generally means two things. First, the process will take time, what Ruti Teitel terms the "fits and starts" of constitutional negotiation.[56] As a result, any rush to "premature constitutionalization" threatens the ability to form a political consensus over what can be agreed to, and just as centrally, what the parties are not able to agree to.[57] Here again the two-stage process of constitutional negotiation in South Africa provides a helpful model. And, second – again as in South Africa – the resulting agreement is likely to leave critical issues unresolved.[58] Vicki Jackson refers to the resulting process as yielding either incremental constitutionalism or even an interim constitution.[59] In either case, the immediate task of the constitutional process is to signal a clear break from the prior regime, even if the precise terms of the new constitutional order are left to another day, or another actor.

Unfortunately, the incompleteness of the constitutional commitment can have fatal consequences for nascent democracies. Some 40 percent of proto-democracies in post-conflict countries revert to violence within a decade,[60] suggesting the fragility of these accords. In such circumstances it is hard to avoid the conclusion of Paul Collier that the press for elections to consolidate democratic rule actually exacerbates the risk of violence, as competing factions see the election as simply a way to continue the civil war with the authority of state power. To give but one example, the early election in Burundi in 2005 resulted in victory by the Hutu forces, with a return to political repression almost immediately, including the expulsion of UN peacekeepers.[61]

Here we may suggest that when viewed as a complex, cross-temporal compact, the incompleteness of constitutional accords and the need for institutions to fill the gaps in the underlying accords is not surprising. Indeed, this conception of constitutionalism shares much in common with conventional accounts of gap-filling in private contracts, and with the use of courts as independent institutions tasked with honoring the generalized but incomplete intentions of the parties.

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[56] RUTI G. TEITEL, TRANSITIONAL JUSTICE 196 (2000)

[57] Noah Feldman, *Imposed Constitutionalism*, 37 Conn. L. Rev. 857, 870-72 (2004-2005)(chronicling risks associated with imposed constitutional timetables and conditions in context of multilateral Iraqi negotiations).

[58] An older example is the inability of the Israeli founding generation to agree of formal terms on such questions as the extent of religious influence in the new state. *See* GARY J. JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 102-03 (1993).

[59] Jackson, *supra* note ___, at 1265-68.

[60] Paul Collier, Wars, Guns & Votes 75 (2009).

[61] *Id.* at 78.

But if constitutions are anticipated to be incompletely realized agreements, then courts are unlikely to find fully satisfactory guidance within the four corners of the text. This places a distinct institutional pressure on constitutional courts in new democracies to act as common law rather than civil law institutions, ones attendant to the incremental realization of constitutional arrangements through the accretion of decisional law. For jurists largely trained in the civil law tradition of close-quartered exposition of textual commands, the transition is challenging. The divide between the common law demands of constitutional adjudication and the civil law tradition for non-constitutional cases reproduces the divide in the European Union. There too a largely common law set of practices has emerged in the European Court of Justice and the European Court of Human Rights, which in turn have to be translated into national law by national courts limited to the civil law tradition.

Viewed in this light, there is an inevitable tension in the role to be assumed by constitutional courts. Since the ultimate authority of these courts comes from the fact of a constitutional accord, courts will likely succeed in helping forge a constitutional order to the extent that they honor the intentions of the parties. And the intention to be bound by the agreement is best revealed by definiteness of terms, in constitutions as in ordinary contracts.[62] But contract law teaches that for a variety of reasons, including imperfect knowledge of future conditions and strategic withholding of private information, parties to a contract frequently fail to specify all of the relevant terms, leaving the contract incomplete.[63] Modern contract law has generally abandoned formalist rules that rendered contract unenforceable when significant gaps in material terms existed in favor of a more liberal rule that permits courts to serve a gap-filling role.[64] The Uniform Commercial Code, for instance, expressly accepts as enforceable a "contract with open terms" that allows gap filling with reasonable or average terms.[65] Similarly, the Restatement (Second) of Contracts also favors liberal application of incomplete contracts when it is clear that the parties intended to be bound by the agreement.[66]

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[62] *See, e.g.*, E. ALLEN FARNSWORTH, CONTRACTS § 3.1 (4th ed. 2004).

[63] *See, e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821-22 (1992).

[64] *See, e.g.*, Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 389 (2004). While there has been a general shift toward a lax application of the indefiniteness doctrine, the common law rule has not completely fallen by the wayside. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 Colum. L. Rev. 1641 (2003).

[65] U.C.C. § 2-204(3) (2002) ("Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

[66] RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

There are at least two arguments for gap filling sounding primarily in efficiency,[67] each of which has some implication for the role of courts addressing constitutional compacts The first theory is based on the idea that it inefficient for parties to invest in discovering and negotiating all of the details and contingencies that might arise in their agreement. If the transaction costs of forming a full contract exceed the benefits, it makes sense for some terms to remain open and to allow a court to fill in the gaps as the necessity arises. In these situations, the commonly accepted remedy is for the court to fill in the missing terms as they believe the parties would do themselves under costless bargaining.[68] This method of gap filling is described as "majoritarian," as it seeks to provide terms that most parties would have endorsed under the circumstances.[69]

The second theory for efficient gap-filling is based on informational asymmetries or other strategic obstacles to full disclosure between the parties that prevent the optimal contract from being formed.[70] "Information-forcing" default rules can induce the contracting parties to reveal private information by providing terms that would be unfavorable to the better-informed party.[71] So, for instance, if one party values performance more than would be ordinarily assumed by the other party, it is efficient for this information to be communicated to the other party so that he might take the necessary precautions to ensure performance. If the default rule sets damages at the average or ordinary cost of non-performance, the party with the idiosyncratically high valuation will have the incentive to reveal his private information during bargaining.[72] Further, the knowledge that courts will enforce incompletely realized agreements itself provides incentives for the parties to negotiate as many terms as they can, knowing they may be held to a less desirable outcome by an independent adjudicator.

Translated to the context of constitutional bargaining, constitutional courts may facilitate the transition to democracy in two ways. The first is

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[67] Ian Ayres, Default Rules for Incomplete Contracts, in 1 The New Palgrave Dictionary for Economics and the Law 585 (Peter Newman ed., 1998).

[68] *Id.*; Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 397-98 (2004).

[69] Ian Ayres, *Default Rules for Incomplete Contracts*, *in* 1 The New Palgrave Dictionary for Economics and the Law 585 (Peter Newman ed., 1998).

[70] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989). *See also*, Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284, 286 (1991).

[71] These "penalty" default rules have been shown to produce more economically efficient outcomes than the alternatives. *See*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989).

[72] This example comes from *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 101 (1989); Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284, 284-85 (1991).

by permitting the parties a quick transition to basic democratic governance before they are capable full agreement. The second has more to do with the specifics of constitutional compromise, recognizing in the spirit of John Marshall that "it is a Constitution we are expounding."[73] Unlike parties in conventional contracts, the harm in constitutional breach is not retrospective but prospective. Parties to a constitutional compact do not so much fear that their expectations at the time of contracting will not be realized as they fear that the powers they are creating will be used prospectively against them. At the heart of any constitutional compromise lies the brutish fact that some of the parties to the pact will soon hold state power over their erstwhile fellow negotiators.

From this perspective, constitutional courts play the role of an "insurance policy," against forms of power grabs that cannot be specified or negotiated about at the outset of the constitutional process. The term is from Professor Ginsburg, who attributes to the courts the power both to cement the terms of the bargain and to provide for an acceptable response to conditions subsequent to the negotiations:

> [U]ncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty, it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect from the possibility of reversal after future electoral change.[74]

This argument may be pushed even further, perhaps by extension of Richard Pildes's caution against excessive rigidity in initial constitutional design,[75] to say that the prospect of active superintendence of the constitutional pact by courts may allow for greater experimentation and flexibility in the initial institutional design under the constitution.

While American constitutional law remains excessively focused on the powers of judicial review, the prevalence of constitutional courts indicates at least a tacit recognition that court review may indeed be indispensible to the establishment of a functioning constitutional democracy. Indeed, the creation of these constitutional courts is typically accompanied by what may be termed "ancillary powers" beyond simply the ability to submit legislation to judicial oversight.[76] Most common among these additional functions are

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[73] *McCulloch v. Maryland*, 4 Wheat. 316, 407, 415, 4 L.Ed. 579 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding" that must "endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs").

[74] GINSBURG, *supra*, note ___, at 30-31.

[75] Richard H. Pildes, *Ethnic Identity and the Design of Democratic Institutions: A Dynamic Perspective*, in CONSTITUTIONALISM IN DIVIDED SOCIETIES (S. Choudry ed. 2008) (Oxford University Press).

[76] Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, ____ Texas L. Rev. ___ (forthcoming 2009).

some form of oversight over the electoral process itself, reaching in many cases to election administration, the subject matters of elections, the eligibility of parties to compete in the elections, and electoral challenges. Indeed, 55 percent of constitutional courts hold specific powers or either administration or appellate review over the election process.[77]

The combination of constitutional review of legislation affecting the political process and administrative oversight or elections appears particularly fortuitous. Both afford constitutional courts the ability to check efforts to close the political process to challenge. More centrally, both correspond to a vision of strong constitutional courts as a necessary check on excessive concentration of political power under conditions that are unforeseeable at the time of constitutional ratification or whose terms cannot be specified under the strategic uncertainties of the installation of democracy.

Here an American example may be helpful. In a fascinating critical account of the process of Iraqi constitutional formation, Ambassador Feisal Amin Rasoul Istrabadi[78], recalls how the American constitution was forged in the face of the Framers inability to resolve the fundamental question of slavery. Whether explicit (as in the recognition of a time-limit for the slave trade) or implicit (as with the absence of federal involvement in the internal political affairs of the states), much of the constitutional structure was delicately balanced around a recognition that to address the question of slavery was to call the Union into issue. Moreover, once the Supreme Court removed the capacity for further political accommodations of the slave issue,[79] an explosive Civil War ensued. The question for new constitutional regimes is whether the sources of political accommodation not available at the founding may be developed over time.

III. Courts in the Breach

[This part of the project is still in its early stages. The basic idea (at least at this point) is to follow two tracks, one descriptive and one normative. The descriptive component is to show how understood in this light, constitutional courts repeatedly confront issues addressing the democratic integrity of the new regime. Common issues range from lustration to electoral administration to requirements for office. These will be tied back to the threat on one-partyism in new democracies. The normative or more analytic part is to assess the tools used to resolve questions of incompletely realized constitutional bargains. Here I will assess the extent to which such constitutional courts look to a theory of

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[77] *Id.*

[78] Feisal Amin Rasoul Istrabadi, *Memorializing a "National Charter" or Irreconcilable Differences?: Reflections on Iraq's Failed Constitutional Processes* (manuscript on file with author).

[79] *Dred Scott* v. Sandford, [1] 60 U.S. (19 How.) 393 (1857).

protecting democratic competition for office as a critical value underlying the constitutional design.]

IV. Can Court Constitutionalism Succeed?

[This will be an overall assessment of the mixed results of constitutional courts overseeing incomplete constitutional accords. Looking at the post-Soviet experience, for example, reveals a mixed track record. In some countries, the courts have continued to be active and have helped shore up democracy. In others, they quickly became irrelevant as political power consolidated in the hands of new strongmen. As a general matter, the most significant difference between the first and second group is how likely the country was to be seeking admission to the EU. So long as rule of law features had to be obeyed, and so long as there was oversight through the EU and the ECHR, there was a strong external compulsion to have the national constitutional courts exercise independent authority. Absent such compulsion, court quickly became "the least dangerous branch." As a policy matter, it is worth contemplating what external authorities, treaty based or otherwise, may be utilized to reinforce constitutional courts in precarious democracies.]