Losing the Battle to Win the War: Judicial Self-Empowerment Through Maxi-Minimalism

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[Editor's note: This is one of our biweekly I-CONnect columns. For more information about our four columnists for 2020, please click here.]

On September 26, 2020, President Donald Trump announced Judge Amy Coney Barrett as his nominee to the United States Supreme Court to fill the seat occupied by Justice Ruth Bader Ginsburg until her death the week before.[2] The President's nomination of a Supreme Court justice—the third of his presidency—thirty-eight days before the presidential election on November 3, set off a deeply divisive partisan battle over her confirmation. Democrats and Republicans have already begun to spar over Judge Barrett's judicial philosophy and the confirmation process. Senate Majority Leader Mitch McConnell's plan to move forward with the confirmation process this close to the presidential election has particularly incensed Democrats in light of the refusal of the Republican-controlled Senate in 2016 to allow a vote on President Barack Obama's nominee, Judge Merrick Garland.[3] Republicans have vowed to push ahead with confirming Trump's Supreme Court nominee, despite the recent White House coronavirus outbreak that infected the President and a number Republican senators.[4] But this battle over the Court is not simply about Judge Barrett; nor is it even just about the process

of this particular confirmation. With Judge Barrett's confirmation likely to cement a solid conservative majority on the Supreme Court, those on either side of the political divide are treating the stakes of this confirmation as no less than a fight for the soul of the United States Supreme Court for decades to come.[5]

All of this reflects a broader fact about the role of the Supreme Court in the American constitutional system. The United States Supreme Court today occupies a position of judicial supremacy. Writing half a century ago, Alexander Bickel declared that the least dangerous branch of the American government had become "the most extraordinarily powerful court the world has ever known."[6] That wasn't always the case. The Court has come a long way since Chief Justice Marshall sat at the helm of a fragile court, and, facing the real possibility of immediate attack if the court ruled against the newly elected President, strategically asserted the authority of judicial review in *Marbury v. Madison*.[7] One hundred and fifty years later, a unanimous Supreme Court would declare in *Cooper v. Aaron* that "the federal judiciary is supreme in the exposition of the law of the Constitution."[8]

Marbury has come to be seen as a classic illustration of judicial self-empowerment, which set in place the constitutional tradition of judicial review that has led to the Supreme Court—and each individual justice—holding immense power over American public life. The United States Supreme Court is hardly alone today, though, as an example of strong judicial power. Around the world, many apex courts are also experiencing their own *Marbury* moments. Yet many of these courts operate in systems

without a longstanding history of judicial review over powerful political actors. How do courts in these contexts manage to establish and enhance their own institutional authority?

Judicial strategy and statesmanship matters. In an ongoing project, I explore the use of judicial strategy by courts around the world toward their own self-

empowerment.[9] Courts in different situations employ diverse strategies to increase judicial authority and strengthen their institutional position.

One tactic that courts may use is a strategy of *maxi-minimalism*. A court may issue a *Marbury-style* decision featuring broad, maximalist reasoning expanding judicial power, even as it results in a narrow holding. Judges may defer or delay certain constitutional questions to avoid frontal confrontations with powerful governing actors.[10] By issuing a ruling with minimal consequences for the case at hand, the court mitigates the immediate impact of its assertiveness and the threat of political attack. At the same time, while issuing such decisions, perceptive judges employ maximalist reasoning to set the foundation for doctrinal mechanisms that expands the court's power and can be used in the future to assert authority over the political branches.

Consider the Pakistani Supreme Court's *Marbury*-style decision in the 2015 case of *District Bar Association, Rawalpindi and others v. Federation of Pakistan*.[11] Within Pakistan's fragile democracy, which has regularly vacillated between military and civilian rule, the Supreme Court has long held a precarious position. Yet in 2015, a majority of the Supreme Court of Pakistan issued one of its clearest endorsements of a doctrine of substantive limits on Parliament's amending power.[12] Thirteen out of seventeen justices agreed that the judiciary could review the substance of constitutional amendments to protect the Constitution's inviolable core, thus endorsing the court's power to strike down procedurally valid constitutional amendments passed by Parliament.

Still, Pakistan's Supreme Court refrained from exercising the broad power it had laid out for itself. The majority did not seek to actually invalidate the two challenged constitutional amendments in that case: one authorizing military trials for terrorism suspects and the other on the judicial appointments process. By upholding the constitutional amendments, the Court mitigated any potential public hostility and backlash from the governing regime. Thus,

the Supreme Court of Pakistan managed to establish a remarkably expansive judicial power to review constitutional amendments, even as it delivered a narrow ruling that left the challenged constitutional amendments intact, avoiding immediate political or public backlash.

It's worth noting that although the *Rawalpindi* decision appears to bring Pakistan's constitutional jurisprudence in line with its immediate South Asian neighbors,[13] the Pakistani Supreme Court's judgment was crafted as an appeal to local constitutional values. The Pakistani court insisted that the notion of implicit unamendability it advanced was distinct from the "basic structure" doctrine famously introduced by the Indian Supreme Court,[14] and which has also been adopted in Bangladesh.[15] The *Rawalpindi* plurality opinion joined by eight justices firmly located the doctrine in the "salient features" of Pakistan's Constitution, which they said includes democracy, a parliamentary form of government, and the independence of the judiciary.[16] Justice Khawaja was even more explicit: his separate opinion dismissed the "basic structure doctrine" as a project that "took root in an alien soil under a distinctly different constitution,"[17] arguing that Pakistan's Constitution and preamble, read as a whole, provides for judicially enforceable limits on Parliament's amending power.[18] The Pakistan Supreme Court's rejection of any perceived transnational borrowing of the Indian basic structure doctrine

and insistence on a locally constructed account of judicially implied limits on constitutional amendments reveals a court mindful of the salience of constitutional narrative in popular discourse.[19]

Pakistan presents the experience of a court in an unstable democracy at a nascent stage of establishing a doctrinal tool to declare constitutional features immutable. Still, it can be accomplished. We see another illustration of the use of a maxi-minimalist judicial strategy in Malaysia, a fragile democracy where a dominant political coalition has historically held control.

The Malaysian Federal Court, through a carefully staged process, managed to establish the power to review unconstitutional constitutional amendments

in the face of dominant political power. In two decisions delivered in 2017 and 2018, the apex court strategically carved out a power for courts to nullify constitutional amendments passed by Parliament that would undermine the constitution's foundational structure.

Begin with the 2017 decision of *Semenyih Jaya*,[20] where a unanimous Federal Court struck down a land acquisition statutory provision as unconstitutional—the first time in twenty years it had struck down a federal statute—for infringing the judicial power and separation of powers. At issue was the judicial power provision under Article 121(1) of Malaysia's Federal Constitution—long the site of tension between the judiciary and the government. In 1988, the Malaysian Parliament had amended Article 121(1) to remove the provision that "the judicial power…shall be vested" in the courts so that the provision now reads that courts "shall have such jurisdiction and powers as may be conferred by or under federal law." Repudiating the 1988 constitutional amendment, the Court declared that "the judicial power of the court resides in the Judiciary and no other." [21] It declared that Parliament does not have power to amend the Malaysian Constitution to the effect of undermining the separation of powers and the independence of the judiciary, which the Court described as "critical" and "sacrosanct" to the constitutional framework. [22]

Strikingly, the Malaysian Federal Court did not expressly invalidate the 1988 constitutional amendment; instead, it stated that the amendment had no effect on the judicial power of the courts. Another curious feature of the decision lies in its remedy: the Court replaced the provision with an immensely detailed set of procedural guidelines, but stated that its decision would only have prospective effect.[23] Yet even as it issued a ruling that mitigated the immediate impact of its decision and helped insulate the court from any immediate political ramifications, the Malaysian apex court managed to embed the seeds for a broad doctrine of judicial authority over the core structure of the constitution.

And then, the following year, the Malaysian court built on the foundations it had laid earlier to firmly entrench the doctrine of protecting the constitution's basic structure.[24] This time, in the 2018 case of *Indira Gandhi*, the Court asserted itself in a highly charged area of Malaysian law and politics: the authority of civil courts vis-à-vis religious courts. In a unanimous decision, the Malaysian court relied on the basic structure doctrine it had articulated in *Semenyih* to nullify a constitutional amendment on the basis that the amendment undermined the civil courts' power of judicial review.[25]

The *Indira Gandhi* Court declared that powers of judicial review and constitutional interpretation are "part of the basic structure of the constitution," which "cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation."[26] The Federal Court's decision was a resounding affirmation that judicial power lies solely with the *civil* courts.

Thus, the Malaysian Court built on the foundations it had carefully laid earlier in *Semenyih Jaya* to assert its judicial power in *Indira Gandhi*, this time with a highly charged issue at stake. In a two-stage process, it entrenched and expanded a constitutional basic structure doctrine empowering courts to review constitutional amendments.

When a court in a fragile democracy seeks to assert power, it must do so carefully. In these recent decisions, the Pakistani and Malaysian judiciaries laid the foundation for a doctrinal tool that courts would be able to apply expansively in the future, while minimizing the impact of the ruling in the case at hand. A strategy of maxi-minimalism may aid a court in delaying or avoiding public or political assaults—of particular consequence for newer courts faced with powerful governing regimes.

In contrast to a maxi-minimalist approach, courts can use an inverse strategy: what I call a strategy of *mini-maximalism.* In my next column, I will discuss how courts may downplay or minimize their adoption of self-empowering legal doctrines as entirely orthodox, while delivering an

expansive ruling of major immediate impact. In June 2020, for example, the Malawi judiciary issued an extraordinary decision that annulled the outcome of the presidential election and ordered fresh elections.[27] And we see this mini-maximalist approach manifest, too, in the United Kingdom Supreme Court's decision last September, ruling that Prime Minister Boris Johnson's prorogation of Parliament was unlawful.[28]

Yet sometimes, as one of Pakistan's Supreme Court justices in *Rawalpindi* observed, "judicial statesmanship requires that the Court lose the battle to win the war."[29] What seems clear is that in constitutional judging, as in constitutional politics, strategy matters.

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[1] Yvonne Tew is the author of Constitutional Statecraft in Asian Courts (OUP, 2020), available now from OUP or Amazon.

[2] Sam Grinlas, *Trump Announces Amy Coney Barrett As His Supreme Court Nominee*, NPR (Sept. 26, 2020), https://www.npr.org/sections/supreme-court-nomination/2020/09/26/916921211/trump-set-to-formally-announce-his-supreme-court-nominee.

[3] *See* Adam Liptak and Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight,* N.Y. Times (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html; Matthew Daly, *Who's a hypocrite? GOP, Dems debate past comments on court*, Associated Press (Sept. 22, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-merrick-garland-elections-us-supreme-court-

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[4] Natalie Andrews & Lindsay Wise, *McConnell Says He Will Push Ahead With Supreme Court Hearings Despite Coronavirus Threat*, Wall St. J. (Oct. 2, 2020), https://www.wsj.com/articles/senate-republicans-say-coronavirus-wont-delay-supreme-court-nomination-11601649999.

[5] *See WTAS: Support for President Donald J. Trump's Nomination of Judge Amy Coney Barrett to the Supreme Court,* White House(Sept. 27, 2020), https://www.whitehouse.gov/briefings-statements/wtas-support

2020), https://www.whitehouse.gov/briefings-statements/wtas-support-president-donald-j-trumps-nomination-judge-amy-coney-barrett-supreme-court/ *cf.* Paul Waldman, *Nightmare ahead: Imagine the damage a 6-3 conservative Supreme Court could do,* Wash. Post (Sept. 21, 2020),https://www.washingtonpost.com/opinions/2020/09/21/nightmare-ahead-imagine-damage-6-3-conservative-supreme-court-could-do/.

[6] Alexander Bickel, The Least Dangerous Branch 1 (1962).

[7] Marbury v. Madison, 5 U.S. 137 (1803).

[8] Cooper v. Aaron, 35 U.S. 1, 18 (1958) ("In 1803, Chief Justice Marshall, speaking for a unanimous Court...declared in the notable case of *Marbury v. Madison* that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.")

[9] Yvonne Tew, *Strategic Judicial Empowerment* (forthcoming article).

[10] *See* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 4 Wis. L. Rev. 685, 687 (2016); *see also* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L. J. 1 (2016).

[11] District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (2015) PLD (SC) 401 (hereinafter *Rawalpindi*).

[12] *See Rawalpindi* (opinion ofJustice Sheikh Azmat Saeed, joined by Justices Anwar Zaheer Jamali, Amir Hani Muslim, Umar Ata Bandial, Sarmad Jalal Osmany, Gulzar Ahmed, Justice Mushir Alam). *See also Rawalpindi* (opinion of Jawwad S. Khawaja, joined by Justices Qazi Faez Isa, Ejaz Afzal Khan, Ijaz Ahmed Chaudhry and Dost Muhammad Khan).

[13] *See* Po Jen Yap & Rehan Abeyratne, *Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia*, Int'l J. of Const. L. (forthcoming).

[14] *See* Kesavananda Bharati v. Kerala(2015) PLD (SC) 401 (India).

[15] *See* Anwar Hussain Chowdhury v. Bangladesh 41 DLR 1989 App. Div. 165 (Bangladesh).

[16] *Rawalpindi.* at [180(a)-(d)] (opinion of Saeed, J.).

[17] *Id.* at [51] (opinion of Khawaja, J.).

[18] *Id.* at [40]-[41], [51]-[55].

[19] *See* Rosalind Dixon, *Strong Courts: Judicial Statecraft in aid of Constitutional Change,* Colum. J. of Transnat'l. L. (forthcoming 2021).

[20] Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat [2017] 3 Malayan L.J. 561.

[21] *Id.* at [74], [86].

[22] *Id.* at [76], [90].

[23] *Id.* at [126].

[24] *Indira Gandhi* (F.C.), [2018] 1 Malayan L.J. 545.

[25] *Id.*

[26] *Id.* at [48].

[27] Gregory Gondwe, *Opposition wins historic rerun of Malawi's presidential election in historic first*, Associated Press (June 27, 2020), https://apnews.com/3453811a0e1e2cdc3124decfd334e858.

[28] Owen Bowcott, Ben Quinn & Severin Carrell. *Johnson's suspension of parliament unlawful, supreme court rules*, The Guardian (Sept. 24, 2019), https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue.

[29] *Rawalpindi*, (2015) PLD (SC) 401(Mian Sqauib Nisar, J.), at [82].